加州2001-2024论文考题（含官方精选答案）

微信公众号

搜索"新生代USBAR"

个人微信

袁骏律师

广东 深圳

考点

Essay 的考点包括 MBE 所有科目和如下科目（小法）：

代理（agency），加州民诉（California civil procedures），加州证据法（California evidence），夫妻共同财产（community property），企业（cooperation），职业道德（professional responsibilities），救济（remedies），信托（trusts），遗嘱（wills）。其中遗嘱和共同财产具有鲜明的加州特色，职业道德、加州证据有不到一半的加州特色，其他本质上是用通说观点（legal theories and principles of general application）作答。

我们先看看过去5年论文的考点分布：

Feb 2024 共同财产，宪法，职业道德，证据/刑诉，合同
July 2023 合伙/侵权，侵权，职业道德，刑法/刑诉，救济
Feb 2023 民诉，宪法，房地产，职业道德，证据
July 2022 合同，宪法，职业道德，企业，遗嘱/共同财产
Feb 2022 刑法/刑诉，共同财产，侵权/救济，证据/职业道德，企业/救济
July 2021 民诉，职业道德，侵权，刑诉，遗嘱/共同财产
Feb 2021 证据，合同/救济，夫妻共同财产，职业道德
Oct 2020 职业道德，企业，房地产，刑法/刑诉，救济
Feb 2020 侵权，职业道德，合同，证据，企业

July 2019 民诉，救济/宪法，刑法/刑诉，职业道德，合同
Feb 2019 遗嘱/信托/共同财产，侵权，房地产，证据/民诉，职业道德

总结规律如下：
1、 几乎一定会单独考一题职业道德，所以这科一定要学好，这也是我们论文的第一课（论文我按照重要性排课，PT 放在最后）。
2、 剩下 4 题中，MBE 科目和非 MBE 科目（小法）大约占一半，如果不认为救济、加州民诉和加州证据是小法，MBE 出现 3-4 题也没什么奇怪的。“得 MBE 过司考”同样适用加州。
3、 遗嘱和共同财产最近常考，这两科不难，知识点密集，花一点点时间能掌握全部考点，几乎是送分，一定要学。
4、 刑法不会单独出现，救济一般不单独出现。信托、代理出现的概率很小。
5、 企业和信托是我本来就很不喜欢的科目。它考点较为分散，需要花大量时间。但是如果真的花了大量时间，没考又觉得很亏。我自己的策略是几乎放弃了这两门。但不代表这两科不会考，对于分数沾边的考生来说，还是得学。

为什么不认为救济、加州民诉和加州证据是小法，因为：
1、 完全可以用 MBE 的知识点作答，其中救济的知识点就是 MBE 课件合同篇的普通法救济、衡平法概述、衡平法救济和民诉篇的保全（初步禁令、临时禁制令），
2、 证据法虽然会让你用加州法回答，但直接用联邦证据法回答稍微加一点加州特色即可，精选答案就是如此回答的，
3、 即使考民诉，似乎也是用联邦法作答的，已经很久没有见过考加州民诉，即使考，请直接用联邦民诉法做题。

学习方法

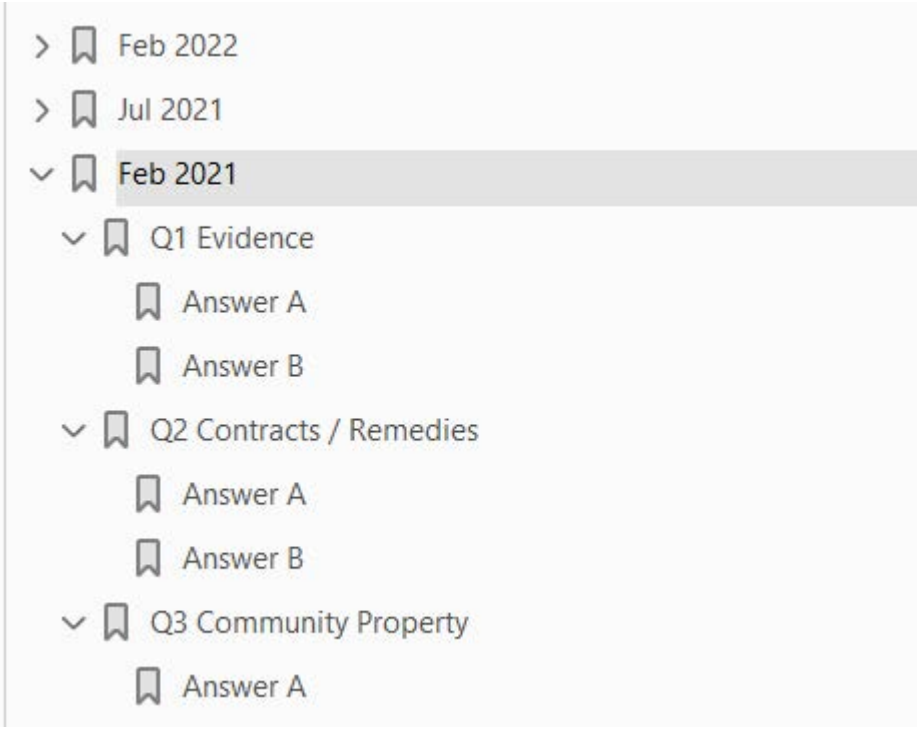
每个人都有自己论文的学习方法，我总结三点我认为最重要的：
1、 对知识点的准确理解，这包括 MBE 的知识点和常考小法的知识点（职业道德、遗嘱、共同财产）。理论上也存在过观点不同的答案同时作为精选答案的情形，但非常少。**很多题答案是唯一的，尤其是共同财产、遗嘱、合同等考算数的题，答案都错了只能说明你没有学明白**。这种情况下无论你辞藻多么华丽、观点多么鲜明，在评卷人心中的印象都是大打折扣的。
2、 需要有一些写作功底。这对受过系统性英文司法写作培训和英语系的同学是重大利好。对于没有这些功底的考生，必须要持之以恒进行英文法律文书写作的训练。
3、 **多看原题和精选答案。**没有什么模拟题能比原题更能准确反映考点、出题思路，也没有什么参考答案会比精选答案更符合阅卷者的心意。为了方便，我将过去 20 年的精选答案都放在论坛上供大家下载。相比 MBE 是要多做题，论文就是要多看题，把你自己的答案简要写下来，然后和精选答案进行比对。当然，每门课至少还是要练习 1-2 篇。虽然我是卖课的，但我从来不会建议大家把过多时间放在听我的课上，我的课只起抛砖引玉的作用。
4、 如果英语水平不足以理解英文答案，可以先看看香港的判决。香港有大量普通法判决是中英文双语的。当然，如果英文水平还停留在答案都看不懂的阶段，建议先学

英语，而不是来考 bar.
5、 重者恒重，有舍有得。如果时间有限，一定要注重于最常考的科目和考点，甚至可以赌一下这次不考自己不喜欢、放弃的科目和考点。

其他参考教材

推荐的教材：SmartBarPrep California Bar Exam Essay Priority Outline
这一本教材、我的课件，再结合历年考题是足够的。

请配合书签功能使用本文件



California Bar Examination

Essay Questions and Selected Answers

February 2024

The State Bar of California

OFFICE OF ADMISSIONS

ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2024

CALIFORNIA BAR EXAMINATION

This publication contains the five essay questions from the February 2024 California Bar Examination and two selected answers for each question.

The selected answers are not to be considered "model" or perfect answers. The answers were assigned high grades and were written by applicants who passed the examination after the First Read. They are reproduced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. These answers were written by actual applicants under time constraints without access to outside resources. As such, they do not always correctly identify or respond to all issues raised by the question, and they may contain some extraneous or incorrect information. The answers are published here with the consent of the authors.

Question Number	Subject
1.	Community Property
2.	Constitutional Law
3.	Professional Responsibility
4.	Evidence / Criminal Law & Procedure
5.	Contracts

ESSAY QUESTION INSTRUCTIONS

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the situation turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them to the facts.

If your answer contains only a statement of your conclusions, you will receive little or no credit. State fully the reasons that support your conclusions and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the resolution of the issues raised by the call of the question.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

QUESTION 1

Henry and Wendy married in California in 2012. Henry got a job as an auto mechanic. Wendy's aunt, who owned a house free and clear of any mortgage, gave it to Wendy. Wendy then added Henry on the title document to the house. Wendy and Henry lived in the house. Wendy then began singing with a local band. Some years later, Wendy and the band began traveling and performing across the state. The band was profitable, and Wendy sent money home to Henry and stayed with him periodically.

Henry decided to purchase an auto repair garage and applied for a loan from a bank for that purpose. Because Wendy was on the road with her band, Henry forged Wendy's signature on the loan documents without her knowledge. The bank approved the loan, using the house as collateral. Henry purchased the auto repair garage with the loan funds. Title to the auto repair garage was taken in Henry's and Wendy's names in joint tenancy.

After a while, Wendy told Henry that the marriage was over. She stopped returning home and also stopped sending money to Henry. She began making independent investments with her earnings. Henry was unable to make the loan payments and the bank demanded payment of the loan in full. Shortly thereafter, Wendy filed for dissolution of marriage.

What are Henry's and Wendy's respective rights and liabilities, if any, regarding:

1. The house? Discuss.

2. The bank loan? Discuss.

3. The auto repair garage? Discuss.

4. Wendy's investments? Discuss.

Answer according to California law.

QUESTION 1: SELECTED ANSWER A

1)

California Community Property Presumption

California is a community property state. All property acquired by either spouse during the life of the marital economic community (MEC) is considered the community property (CP) of both spouses. Property acquired by either spouse before marriage or after permanent separation is presumed to be the separate property (SP) of that spouse. Additionally, any property received by one spouse during marriage through gift, bequest, or inheritance is considered the SP of the spouse who acquired it.

Duration of Marital Economic Community

In California, the MEC exists from the time of marriage through the time of permanent separation. When determining whether the spouses have permanently separated, the court will look to whether one spouse evidenced a clear intent to discontinue the marriage. Actions such as leaving the marital home, making independent investment decisions, putting money into a separate bank account, and telling the other spouse that the marriage is over are weighed heavily when determining whether a spouse intends to permanently separate.

Here, Wendy (W) evidenced a clear intent to permanently separate from Henry (H) when she told him that the marriage was over. This clear statement of intent was corroborated by the fact that she stopped returning home to the marital house and stopped sending money to H. Additionally, she began investing her earnings into

independent investments. Accordingly, the court will deem permanent separation to have occurred when W told H that the marriage was over and stopped returning to the marital home.

Rights to the House

Presumption

Property acquired by either spouse during marriage is presumed to be CP. Here, the house was acquired by W during marriage, so it is regrettably presumed to be CP.

Source

Property acquired by a spouse through gift or inheritance is considered the SP of that spouse. This is sufficient to rebut the CP presumption.

Here, W acquired the house from her aunt as a gift. Since the house was acquired through gift from a family member, the court will consider the house to be W's SP. Accordingly, at divorce, the house is considered W's SP, unless the characterization of the house was changed during the marriage.

Change in Character - Transmutation

A spouse may transmute her SP to CP of the MEC by creating a writing, signed by the adversely affected spouse, that clearly evidences that spouse's intent to treat the property as CP. Often, adding one spouse to the title of the property is sufficient to transmute the character of the property from SP to CP.

Here, the facts indicate that W added H to the title document to the house. Since H was

added to the title document, it is presumed that there was a writing (i.e., the title document) and adding H's name to this document is likely sufficient to show that W intended for the house to be treated as CP, since both their names were on the title. However, the facts do not state that W signed the title document. If W did not sign the document, then it would not be a valid transmutation. However, since it appears that W took sufficient steps to formally add H to the title, it is likely that she also signed the document herself. Therefore, there was a valid transmutation of the house from SP to CP.

Conclusion

The house will be treated as CP upon divorce.

Rights to the Bank Loan

Presumption

See rule above. Debts, like property acquired during marriage, are treated as CP debts.

Here, the bank loan was acquired during marriage. Therefore, the debt associated with the loan is presumed to be CP debt.

Source

When a lender relies on both spouses' assets when issuing a loan, the loan is presumed to be the responsibility of the community and is treated as CP debt. However, when the bank relies on only one spouse's SP as collateral for the loan, the loan proceeds and the debt are presumed to belong primarily to the spouse whose collateral

was used.

Here, the facts state that H forged W's signature on the loan application forms and used the marital house as collateral for the loan. Accordingly, it appears that the bank used CP property as collateral for the loan and issued the loan under the presumption that both spouses had signed off on the application. Accordingly, since the source of the loan was CP collateral and both spouses' names were on the application, the loan debt and proceeds are presumed to be CP.

Title

When both spouses' names are signed onto a loan document, the loan is presumed to be taken out in both spouses' names, and the loan debt is treated as CP debt. Here, since both H and W's names are signed to the loan document, the loan debt is presumed to be CP debt.

Breach of Spousal Fiduciary Duties

In California, spouses are held as owing one another the absolute highest duty of good faith and loyalty. This includes accounting to the other spouse for all transactions involving community property and debts. In addition, each spouse is deemed to have equal management and control over the community's assets, so one spouse may not encumber the community property of the MEC without the written consent of the other. Encumbering or otherwise disposing of CP without the written consent of the other spouse is considered a breach of the spousal duty of loyalty and good faith. Such a breach may result in the court voiding the transaction, ordering the offending spouse to

compensate the innocent, non-consenting spouse, granting the non-consenting spouse a greater share of the CP upon dissolution of the marriage, or any other remedy that the court deems just and proper.

Here, H forged W's signature on the loan documents and used the marital house as collateral for a loan. Since H forged W's signature, he breached the duty of good faith by entering into a transaction that impacted the marital community without W's consent. Furthermore, he breached the duty of equal management and control when he used the marital house as collateral for the loan, thus encumbering it without W's knowledge or consent. Accordingly, the court may take any measure that it deems just to remedy the situation. This includes assigning all the debt from the loan to H as his SP (highly likely) and awarding W a greater share in the CP assets upon dissolution, in order to compensate her for H's breach of fiduciary duty.

Conclusion

The loan will be treated as H's SP debt. Additionally, the court will likely break from the standard rule of equal division of CP and award W a greater share of the CP to compensate her for H's breach of marital fiduciary duty.

Rights to the Garage

Presumption

See rule above. Since the garage was acquired during marriage, it is presumed to be the CP of the MEC.

Source

When the source of the funds used to acquire property is CP, the property so acquired is considered to be CP. When the source of the funds used to acquire the property are SP, the property so acquired will likely be considered SP, unless another rule applies.

Here, H will attempt to argue that, if the loan debt is characterized as his SP, then the garage acquired with the loan proceeds should be considered his SP as well. However, this argument will likely fail because, as discussed above, H forged W's signature on the loan documents. H cannot now benefit from his breach of fiduciary duty by claiming that the fruits of his breach belong solely to him. As a result, the loan proceeds will likely be considered CP, and the garage that was purchased with the loan proceeds will be considered CP as well. This is further supported by the fact that the loan was issued with the house as collateral. Since the house is considered CP (see above), the proceeds from the loan should also be considered CP. Accordingly, the source of the funds used to purchase the garage can be traced back to CP, so the garage will most likely be considered CP.

Title

Property held in joint tenancy between the spouses is considered the CP of the MEC upon divorce.

Here, H took title to the garage in both his and W's names as joint tenants. Since title to the garage was held as joint tenants, the garage is presumed to be CP upon dissolution of the marriage.

Conclusion

Given the above, the garage will be considered CP of the MEC.

Rights to Investments Made By W

Presumption

See rule above. Whether the investments are characterized as CP or SP likely depends on whether they were made before or after permanent separation. If they were made after permanent separation, then they will likely be considered SP.

Permanent Separation

As discussed above, permanent separation occurs when one spouse evidences a clear intent to dissolve the marriage and takes action consistent with that intent. Here, W showed a clear intent to end the marriage when she told H "that the marriage was over." Thereafter, she took action consistent with that intent by choosing not to return to the marital home and not to continue sending H money. While H may argue that her failing to return to the home is not conclusive, because she had consistently been on the road with her band during marriage, H's argument will likely fail. That is because previously, W had always returned home at least somewhat frequently and, when she had not, she at least continued to send him money. Accordingly, W's clear statement of intent combined with her actions will be deemed sufficient to conclude that the marital community had ended.

Since the investments were made after permanent separation, then they will be

presumed to be W's SP.

Source

See rule above. Here, the facts are ambiguous as to whether W used earnings she had made before or after permanent separation to purchase the investments. If she used earnings made before permanent separation, those earnings would be considered CP, and any investment purchased with them would be considered CP as well. On the other hand, if she used earnings she made after permanent separation, then those earnings would be considered her SP, and any investments she purchased with them would be considered SP as well.

Since it appears from the most likely interpretation of the facts that W used earnings acquired after permanent separation to purchase the investments, then the court will hold that the investments are her SP.

Conclusion

The court is most likely to find that the investments are W's SP, provided that she used her earnings acquired after permanent separation to purchase them. To the extent that she used any of her earnings acquired before separation, which would be considered CP, to purchase the investments, the MEC would be entitled to a pro rata share of the investments based on the amount of CP used.

QUESTION 1: SELECTED ANSWER B

1)

California is a separate property state. In California, there is a presumption that property acquired during the marriage is community property. Community property often includes salaries and wages earned during the marriage. Property acquired before the marriage and after separation is presumptively separate property. Additionally, property acquired by one spouse during the marriage by gift, will or inheritance, is separate property. To determine the character of an asset, a court will trace back to the source of the funds used to acquire the property. Upon divorce, community property will be divided equally in kind. Each spouse is presumed to have a one-half interest in each community property item. Also upon divorce, one spouse's separate property will remain their separate property.

House

The issue here is whether the house is community property, to be divided equally in kind upon divorce, or whether the house is Wendy's separate property.

Generally, property acquired during the marriage is presumed to be community property. However, as noted above, property acquired during the marriage acquired by gift, will or inheritance will be that spouse's separate property. However, during the marriage, spouses are able to retain the character of an asset either from separate property to community property, or from community property to separate property. If done during the marriage, changing the character of an asset is done by transmutation.

If done prior to 1985, a transmutation did not require a writing. However, after 1985, a transmutation will require a writing, clearly indicating and expressing that a change in the nature of the property is being affected, and the writing must be signed by the spouse whose rights are being affected. The transmutation writing requirement, however, does not apply to exchanges of personal property during the marriage, like gifts, that are relatively insubstantial in value when examining the entire marital economic community. Additionally, there is a presumption that property held in joint and equal form during the marriage is community property.

Here, Wendy's aunt owned a house free and clear of any mortgage. Wendy's aunt gave the house to Wendy. Therefore, the house at that time would be presumptively Wendy's separate property.

However, it is possible that Henry and Wendy decided to change the character of the house from Wendy's separate property to community property. Here, after receiving the house as a gift, Wendy then added Henry on the title document to the house. It is possible that adding Henry to the title document changed the character of this asset. Because adding Henry to the title occurred after the spouses were married in 2012, a written transmutation would be required to change the character of the property. Here, there is a writing - the title document. The facts do not clearly provide whether the title document clearly stated that the spouses intended to change the character of the asset to community property. Additionally, it is not clear whether Wendy executed the title document when she added Henry to the document. Wendy's signature would be required because since the house was initially her separate property, her rights are being affected by the change in the asset's character. Though not dispositive, because

it is not one of the transmutation writing requirements, the fact that Wendy and Henry lived in the home together, and Henry continued to live there even while Wendy traveled with her band, is some indication that the parties may have intended to change the character of the asset from Wendy's separate property to the marriage's community when Wendy added Henry on the title document to the house.

If the title document did satisfy the requirements for a written transmutation, the house would then become community property, subject to equal division in kind upon divorce.

Bank Loan

The issue here is whether the bank loan is Henry's separate obligation, or whether the bank loan is a community obligation.

Generally, credit obtained during the marriage is considered to be marital credit. When examining whether a loan is community property or separate property, the analysis requires looking at the intent of the lender. If the lender provided the loan based in substantial part on one (or both) spouse's credit scores or earning capabilities, the loan would be community property, because credit earned during the marriage, and a spouse's salaries and wages earned during the marriage, are considered to be community property. However, if the lender is looking to one spouse's separate property to secure the loan, the loan is likely going to be considered that spouse's separate obligation.

Here, Henry decided to purchase an auto repair garage and applied for a loan from a bank for that purpose. Just because Henry applied to the bank for the loan for his

business purposes, does not automatically make the loan Henry's separate obligation. The bank here approved the loan, using the house as collateral. There is a discussion above of whether the house is considered community property or Wendy's separate property; however, here the house will likely be considered community property. If a creditor looks to community property for the securing of the loan, the loan is likely to be considered a marital obligation.

However, an important aspect of Henry's behavior regarding the bank loan is the fact that due to the nature of the confidential relationship of a marriage, spouses owe each other fiduciary duties. Each spouse owes the other the duty of the highest good faith and fair dealing in their management and control of community property. Additionally, spouses generally have the right to act alone regarding community property, because each spouse has an equal right to manage and control community property. However, there are certain acts and decisions involving marital property that require that the acting spouse either get consent from, or consult with, the other spouse. These situations include, in part, when one spouse is making a gift of community property, or where one spouse intends to sell, convey, lease, or encumber community real property.

Here, Henry forged Wendy's signature on the loan documents without her knowledge. Henry's forging of Wendy's signature, without her knowledge, is a violation of the fiduciary duties that spouses owe to each other. Forging a spouse's signature without their knowledge is certainly not consistent with the requirement to act with the highest good faith and utmost fair dealing. Thus, Henry's forging of Wendy's signature is a violation of the spousal fiduciary duties. Additionally, if Henry was seeking to encumber the home, Henry would need to get Wendy's consent to this encumbrance on

community property (even if the home was separate property, Henry would then certainly not have the authority to encumber the property himself). Henry may try to argue that he only forged Wendy's signature because she was on the road with her band, and that Wendy would have consented and signed the documents if she had been around. However, this would likely not be a successful argument for Henry as there is no evidence of Wendy's consent. It is especially damaging that Henry did this without Wendy having any knowledge. Henry may also try to argue that he was using community funds to pay for the loan, so the loan should be community property. There are facts that indicate that Wendy sent money home to Henry; however, this argument likely will not help Henry because of his unethical behavior regarding the loan documents. As a result of Henry's actions, if Wendy were to learn of the forging of her signature, Wendy could bring an action to have herself removed as a signatory to the loan documents, and have the loan be entirely Henry's separate obligation, which would remain his separate obligation upon the dissolution of the marriage.

Auto Repair Garage

The issue here is whether the auto repair garage is Henry's separate property, or whether the auto repair garage is community property subject to equal division in kind upon divorce.

To determine the character of an asset, a court will trace back to the source of the funds used to acquire the property. If an asset was acquired through community funds, or from a loan secured by community property, the asset is likely to be characterized as community property. If the asset was acquired by separate funds or separate property,

the asset will likely be characterized as separate property. Even property acquired during the marriage, if acquired through separate funds, will be considered separate property. Additionally, there is a presumption that property held in joint and equal form during marriage is community property. An example of property held in joint and equal form is when both spouses' names appear on the title document.

Here, Henry purchased the auto repair garage with the loan funds. Importantly, title to the auto repair garage was taken in Henry's and Wendy's names in joint tenancy. Since both names appear on the title document, the property was taken in joint and equal form and is presumably community property. The source of funds must also be considered, and could be used to rebut this presumption. Here, Henry purchased the auto repair garage with the loan funds. As discussed above, the loan funds were forged with Wendy's signature and secured by the house as collateral. Setting aside Henry's marital fiduciary duty violation (which is discussed above), it is important that the loan is secured by the house as collateral. If the house is community property, then this loan is secured by community property, and the funds obtained from the loan would be community property. However, Henry may try to argue that the auto repair garage should be separate property, because there are some facts that indicate that Henry was the only one paying the loan. Henry may try to argue that he was paying the loan out of earnings from the garage, which would be his property. However, as noted previously, salaries and wages earned during the marriage, which would include Henry's earnings from his auto repair business, are considered community property. Thus, because the tracing back would show that the source of the funds for the auto repair garage was community funds/property, the auto repair garage would be community property, subject

to equal division in kind upon divorce.

Wendy's Investments

The issue here is whether Wendy's investments are community property, to be divided equally in kind upon divorce, or whether Wendy's investments are her separate property.

Generally, community property can only be acquired or accumulated during the marital economic community. The marital economic community ends either upon the date of one spouse's date, or on the date of separation. The date of separation is determined by the date where one spouse (or both, but only one is required) forms the intent not to resume the marital relation, and acts in a manner consistent with that intention. Additionally, salaries or wages earned during the marriage are presumptively community property. If such salaries or wages are used to invest in other property, such other investments or property would also be community property.

Here, Wendy told Henry that the marriage was over. This is likely the date when Wendy formed an intent not to resume the marital relation. Wendy then stopped returning home and also stopped sending money to Henry. Both Wendy's actions of not returning home, and no longer sending money to Henry, are actions consistent with her intent not to resume the marital relation. Thus, the date of separation has occurred, and there will no longer be an acquiring of community property because the marital economic community has ended. Even though Wendy later filed for dissolution of the marriage, the marital economic ended when Wendy told Henry the marriage was over and acted consistent with that intent by not returning home nor sending Henry money.

Here, after Wendy ended the marital economic community, she began making independent investments with her earnings. If Wendy was using earnings that she had earned since the date that the marital economic community ended, both the earnings and the subsequent investments would be Wendy's separate property. However, Wendy's earnings that she accrued during the marriage are community property. Therefore, upon divorce, those earnings would be subject to an equal division in kind. Therefore, if Wendy was using the earnings that she earned during the marriage, those earnings would be subject to community property division. Consequently, the investments that Wendy made could also be subject to community property division because the investments were the fruit of community property funds. However, the facts seem to provide that Wendy ended the marital economic community, and then subsequently made investments with her earnings accrued after the date of separation.

Therefore, if a court were to find that Wendy used her earnings earned after the date that the marital economic community ended to make the investments, the investments would be separate property. Wendy's investments being separate property would mean that the investments remain her property upon the dissolution of marriage.

QUESTION 2

State X has many small farms selling organic produce, which is grown without the use of any chemical fertilizers or pesticides. Instead of using chemical fertilizers or pesticides, these farms organically enrich their soil with animal manure products from State X's large livestock industry.

Recently, State X enacted the Organic Farming Act (Organic Act). Section 1 of the Organic Act bans the sale and use of chemical fertilizers and pesticides in State X and also bans the sale of any produce grown with, or treated by, chemical fertilizers and pesticides. Section 2 of the Organic Act requires that all publicly funded State X institutions only buy organic produce grown in State X.

In the absence of any federal law, the State X legislature passed the Organic Act after concluding that the use of chemical fertilizers and pesticides contributed to measurable environmental harm. It further found an increased threat to the health of farmers using chemical fertilizers and pesticides, as well as to the health of consumers of the farmers' produce. The State X legislature also declared that it wanted to preserve the existence of small farms and to "protect" those farmers' "way of life."

State X has no significant chemical fertilizer or pesticide industry. Chemco, Inc., in nearby State Y, is a chemical fertilizer and pesticide manufacturer that has always had a significant portion of its revenue come from sales in State X.

A&L Berries is a partnership that grows and sells organic strawberries in State Y. A&L Berries sells some of their strawberries directly to consumers in State X. However, most of their sales are to Organic Produce, Inc., a State Y wholesaler. Both A&L Berries and Organic Produce, Inc. have publicly-funded State X customers who now refuse to do business with them because of the Organic Act.

Chemco, Inc., A&L Berries and Organic Produce, Inc. have now filed lawsuits in Federal Court in State X.

1. What claims can Chemco, Inc. make under the United States Constitution and how should the court rule? Discuss.

QUESTION CONTINUES ON THE NEXT PAGE

2. What claims can A&L Berries make under the United States Constitution and how should the court rule? Discuss.

3. What claims can Organic Produce, Inc. make under the United States Constitution and how should the Court rule? Discuss.

QUESTION 2: SELECTED ANSWER A

1. What claims can Chemco, Inc. make under the US Constitution and how should the court rule?

Standing

In order to bring a claim under the constitution, the individual, corporation, third party or organization must have standing. In order to have standing, there must be a case or controversy and (i) injury, (ii) causation, (iii) redressability, (iv) the claim must be ripe for adjudication and (v) the claim must not be moot.

(i) Injury

Here, Chemco's injury is that they are not able to sell their product (chemical fertilizer and pesticides) in State X due to the Organic Act.

(ii) Causation

Causation can be shown by a direct link between the defendant's actions and the plaintiff's harm. Here, Chemco can show causation because their ability to not sell their product in State X is due to the Organic Act.

(iii) Redressability

Redressability can be shown by establishing that there is an adequate remedy at law or in equity to address the harm suffered by the plaintiff. Here, Chemco can show redressability by asking for an injunction or having the state struck down as unconstitutional.

(iv) Ripeness

Ripeness can be established by showing that the plaintiff's harm is ongoing and the claim is ripe for adjudication. Here, we are told that State X recently passed the Organic Act and thus the harm being suffered by Chemco is ongoing and the claim is ripe for adjudication.

(v) Mootness

A case or controversy is deemed moot if while the plaintiff's suit is pending or ongoing, something takes place that either makes the harm disappear altogether or the plaintiff's injury no longer exists. Mootness can be rebutted if it can be shown the harm is repetitive and capable of evading review. Here, the Organic Act is still being enforced and Chemco is still suffering harm, so the case is not moot.

11th Amendment - Suits against a State

The 11th Amendment states that a state cannot be sued by its own citizens or the citizens of another state unless the suit consents to such lawsuit. Exceptions to this rule are lawsuits between states, the federal government suing the state and lawsuits against state officers. Here, State X is being sued by Chemco, Inc., a State Y corporation, A&L Berries, a State X partnership and Organic Produce, Inc., a State Y wholesaler. If the court determines that the Chemco, A&L Berries and Organic Produce, Inc., are considered "citizens" for purposes of the 11th Amendment, they may be barred from bringing their respective lawsuits. We will continue the analysis on the assumption that their claims are not barred by the 11th Amendment.

State Action

In order to bring a claim under the constitution, the claim the plaintiff is bringing must be committed by a state actor. Here, State X passed the legislation harming Chemco, Inc., and thus state action is satisfied.

Commerce Clause

The United States congress has the power to regulate interstate commerce, intrastate commerce, and commerce between the United States and foreign nations. This power includes regulating the instrumentalities of interstate commerce (cars, boats, trucks), (ii) the channels of interstate commerce (rivers, roads, bridges), (iii) people involved in interstate commerce and (iv) any thing that has a substantial effect on interstate commerce. Congress can even regulate local acts by individuals that in the aggregate have a substantial effect on interstate commerce.

The commerce clause does not apply here since this regulation was promulgated by a state government and therefore the Dormant Commerce Clause will govern the legislation at play here.

Dormant Commerce Clause ("DCC")/State Police Power

1. DCC

The DCC says that states are prohibited from passing laws that either (i) discriminate against interstate commerce or (ii) unduly burden interstate commerce. If the regulation discriminates against interstate commerce on its face, the regulation must pass strict scrutiny and the state has the burden to prove that such regulation is necessary to achieve a compelling government interest, the regulation was passed for another reason besides commerce and the regulation is the least restrictive way possible to regulate such commerce. Regulations that are discriminatory on their face are a *per se* violation of the DCC. If the regulation unduly burdens interstate commerce, the state

must show that the regulation is related to a legitimate government interest.

Here, we are told that State X enacted the Organic Farming Act (Organic Act). **Section 1** of the Act bans the sale and use of chemical fertilizers and pesticides in State X and also bans the sale of any produce grown with, or treated by, chemical fertilizers and pesticides. Chemco, Inc., a chemical fertilizer and pesticide manufacturer located in State Y, has always had a significant portion of its revenue come from sales in State X. Chemco, Inc. will argue that both Section 1 of the Organic Act is facially discriminatory against interstate commerce because it bans the sale of all chemical fertilizers and pesticides in the State and therefore out-of-state corporations will not be allowed to sell their products in State Y. State X will then argue that (i) the statute is even-handed in that it discriminates against both out-of-state and in-state commerce equally, (ii) the statute was passed to prevent environmental harm to its consumers and farmers, and (iii) the statute was passed to preserve the existence of small farms and to protect those farmers' way of life.

Conclusion: State X will be able to prove that the Organic Act is in adherence with the DCC since the law applies to in-state and out-of-state manufacturers equally, the statute was passed to protect the health of citizens and farmers and the Organic Act was the least restrictive means possible to regulate this type of commerce.

2. State Police Power

Under the 10th Amendment, states are able to pass laws in adherence with their police power to protect the health and welfare of their citizens.

Here, we are told that State X found that chemical fertilizers and pesticides contributed to: (i) measurable environmental harm and (ii) threat to the health of State X farmers and citizens. Therefore, in addition to its arguments under the DCC, State X may also be able to rely on the state police power to provide evidence that the Organic Act is constitutional.

Privileges and Immunities Clause

The Privileges and Immunities Clause applies to the states through the 14th Amendment. The Privileges and Immunities Clause forbids states from discriminating against out-of-staters in connection with rights that are fundamental to national unity. Rights that have been considered fundamental to national unity are the right to have a job, the right to run a business and other economic rights. The Privileges and Immunities Clause does not apply to corporations or aliens.

Conclusion: Here, Chemco, Inc. will argue that it is being discriminated against by State X. The issue with Chemco's argument is that since Chemco is a corporation it is not protected by the Privileges and Immunities Clause and therefore this argument will fail.

Equal Protection Clause

The Equal Protection Clause applies to the states through the 14th Amendment. Equal protection challenges arise when similarly situated people are treated differently. Equal Protection challenges fall into three different standards of review: (i) strict scrutiny, (ii) intermediate scrutiny and (iii) rational basis. Strict scrutiny applies to regulations that

discriminate based on race, alienage or national origin. The burden is on the government to show that the regulation is necessary to achieve a compelling government interest. Intermediate Scrutiny applies to regulations that discriminate based on gender or illegitimacy. The government has the burden to show that the regulation is substantially related to an important government interest. Rational Basis applies to regulations that discriminate based on characteristics not covered by strict or intermediate scrutiny or economic regulations. The plaintiff/challenger has the burden to show that the regulation is not rationally related to a legitimate government interest.

Here, the Organic Act is an economic regulation and thus rational basis applies. Chemco must show that the Organic Act is not rationally related to a government interest. Chemco could argue that State X is trying to punish chemical and fertilizer manufacturers since their products have been shown to cause harm or that there is another irrational reason for the regulation. State X will argue that the regulation was passed to protect the environment, State X farmers and consumers, and to preserve the existence of small farms and farmers' way of life. These health related arguments can establish that the regulation was rationally related to a legitimate government interest (i.e., the health and wellbeing of State X citizens) and therefore should be able to survive rational basis review.

2. What claims can A&L Berries make under the US Constitution and how should the court rule?

Standing

The rules for standing are set forth above. A&L Berries has standing to sue because

they have an injury (cannot sell to consumers in State X or through Organic Produce, Inc., to State X publicly funded customers), causation (injury can be traced back to the Organic Act) and redressability (injunction or have statute struck down).

Dormant Commerce Clause

The rules for the Dormant Commerce Clause are set forth above. A&L Berries challenge to the Organic Act will fall under Section 2 of the Act which states that all publicly funded State X institutions only buy organic produce grown in State X. This portion of the Organic Act facially discriminates against interstate commerce because it forces publicly funded State X institutions to only buy organic produce grown in State X. A&L Berries has a strong argument here since this portion of the Organic Act does not apply even handedly to out-of-state and in-state organic producers. State X will argue that the law is necessary to achieve the compelling interest of ensuring that its citizens only eat organic produce grown in the State which is deemed to not have been grown with the use of chemical fertilizers or pesticides. This Section of the Organic Act may survive this DCC review, but only because the interest the state is protecting (environment and health of citizens of farmers) outweighs the burden on interstate commerce. If the court hearing this case is more economic and market friendly and rules in favor of A&L Berries, then State X may need to rely on an exception to the DCC, the market participant exception.

Market Participant Exception

The Market Participant Exception is an exception to the DCC which allows states to regulate interstate commerce if they are acting as a market participant instead of as a

legislator. Market Participation analysis is a fact intensive review in which the state must show they are solely acting in a business capacity and the actions of the government are as market participant, not for legislative purposes.

Here, State X will argue that it is acting as a market participant by limiting customers that it funds to only buy organic produce grown in State X. Section 2 of the Organic Act only applies to state-funded customers, not all customers in State X. A&L Berries may argue that the Organic Act should be read as a whole and since only one portion of the legislation applies to State X publicly funded customers, then State X is acting in a legislative capacity. In conclusion, a court would likely rule that the Market Participant Exception applies because this portion of the Organic Act only applies to publicly funded customers, not all State X customers.

Privileges and Immunities Clause

The rules for the Privileges and Immunities clause are set forth above. A&L Berries may have a claim under the Privileges and Immunities Clause if the court does not recognize a partnership as a corporation for purposes of the Privileges and Immunities Clause. If A&L Berries is considered a corporation, then they are in the same situation as Chemco and are not protected by the Privileges and Immunities Clause.

Equal Protection Clause

Same analysis as for Chemco.

3. What claims can Organic Produce, Inc. make under the US Constitution and how should the court rule?

Standing

Same analysis as for A&L Berries, except that the injury for Organic Produce is not being able to sell to publicly-funded customers in State X.

Dormant Commerce Clause

Same analysis as for A&L Berries since they are affected the same way by the Organic Act.

Privileges and Immunities

Same analysis as for Chemco since Organic Produce, Inc., is a corporation.

Equal Protection Clause

Same analysis as for Chemco.

QUESTION 2: SELECTED ANSWER B

1) Claims by Chemco, Inc.

Dormant Commerce Clause

The negative implications of the commerce clause prevent a state from regulating interstate commerce in certain circumstances. First, if a state is determined to be discriminating against out of state individuals for the benefit of in-state individuals, the regulation must be strict scrutiny. Second, if no discriminatory intent is found, the regulation can still be found unconstitutional if the burdens caused by the regulations substantially outweigh the benefits.

Not discriminatory

Strict scrutiny places the burden on the state to prove that the regulation is necessary to achieve a compelling government purpose. And, that the regulation is the least restrictive alternative.

Here, the law is not facially discriminatory because the act bans the sale and use of *all* chemical fertilizers and pesticides in State X. It also bans the sale of any produce grown with, or treated by, chemical fertilizers and pesticides. It does not ban chemical pesticides or fertilizers made in State Y or another state so that State X's interest will be achieved.

Chemco may try to argue that the act has discriminatory intent. This is because the State had protectionist interests because State X has many small farms selling organic produce. State X does not have a significant chemical fertilizer industry. That legislators for State X wanted to "preserve the existence of small farms and to 'protect' those farmers' 'way of life.'" However, there is no actual evidence that the act has been applied discriminatorily. Therefore, Strict Scrutiny will not apply.

Do the burdens on interstate commerce substantially outweigh the benefits

Because strict scrutiny does not apply, the court will look at whether the burdens of the regulation of interstate commerce substantially outweigh the benefits. Here, Chemco receives a significant portion of its revenue from State X. Chemco will attempt to argue that this regulation in effect will prevent any out-of-state competition and that the regulation will serve to protect the economic interests of those who sell animal manure products from the State's large livestock industry. Specifically, to protect those farmers' way of life.

However, it will be difficult for Chemco to make a successful argument. The state has a strong interest in protecting the State's environment. Specifically, the state concluded that the use of chemicals and fertilizers and pesticides contributed to measurable environmental harm. It found an increased threat to the health of farmers using chemical fertilizers and pesticides, as well as to the health of consumers of the farmers' produce. The fact that a regulation benefits some in state farmers, without more, is insufficient to show that the burdens outweigh the benefits of the regulation. Additionally, organic suppliers such as A&L Berries can still sell in the state, so long as they meet the standards of the Act. Therefore, Chemco will likely be unsuccessful in its claim.

Privileges or Immunities Clause

The privileges or immunities clause prevents States from treating out of state residents differently than in-state residents. Additionally, corporations are not protected under the clause. Therefore, it does not apply.

Preemption

Additionally, Chemco cannot argue the legislation was preempted because the facts state there is no federal law on point.

Substantive Due Process

The due process clause prevents States from depriving citizens of fundamental rights. Here, there is not fundamental right involved, so therefore, Chemco will not be able to make out a claim that the government action was arbitrary.

2) A&L Berries

Dormant Commerce Clause

Strict Scrutiny

The regulation provides that all publicly funded State X institutions only buy organic produce grown in State X. On its face, this section is discriminatory because it requires the state to purchase from in state supplies over out-of-state suppliers. A&L Berries has publicly funded state X customers who now refuse to do business with them because of the Organic Act.

However, the Market Participant exception to the dormant commerce clause provides that a state, if it is acting as a participant in the market, may discriminate against out-of-state suppliers to the benefit of in-state parties. If this exception is met, the regulation is upheld unless it is arbitrary, which requires the plaintiff to show that the regulation is not rationally related to a legitimate government purpose.

Here, the market participant exception applies because the regulation only applies to "publicly funded State X institutions". Therefore, A&L Berries will have to show the regulation is arbitrary, which it cannot do because there are conceivable reasons why the State may want to only purchase from in-state-supplies, such as ensuring the produce comes from the nearest source and supporting the local economy.

Equal Protection

Equal Protection prevents the State from treating similarly situated people dissimilarly. If the state is regulating a suspect classification, strict scrutiny will apply. If the state is discriminating against a quasi-suspect classification, intermediate scrutiny applies, and the government must show that the regulation is necessary to achieve an important government purpose. If neither applies, the plaintiff must show under a rational basis standard that the regulation is arbitrary.

Here, the state is treating out of state suppliers differently than in-state suppliers. However, there is no suspect or quasi suspect classification in this scenario. Therefore, the plaintiff, as similarly discussed above, will not be able to show that the regulation is arbitrary. The court will rule against this claim.

Privileges or Immunities

The privileges or immunities clause prevents States from treating out of state residents differently than in-state residents. Here, A&L berries is a partnership. A general partnership is a collection of individuals. And therefore, A&L will likely be able to make claim under this clause. If the state is treating out-of-state residents differently than in-state, strict scrutiny applies.

Here, the government will not be able to show that it has a compelling purpose in the economic protection of state industry. Also, a blanket ban on the purchase from out-of-state suppliers is not the least restrictive alternative. Therefore, the court will strike down the act under this clause.

3) Organic Produce

Dormant Commerce Clause

Strict Scrutiny

The regulation provides that all publicly funded State X institutions only buy organic produce grown in State X. On its face, this section is discriminatory because it requires the state to purchase from in state supplies over out-of-state suppliers. Organic Produce has publicly funded State X customers who now refuse to do business with them because of the Organic Act.

However, as discussed above, the State is acting as a market participant. If this exception is met, the regulation is upheld unless it is arbitrary, which requires the plaintiff to show that the regulation is not rationally related to a legitimate government purpose. There is an exception to the market participant that, if the regulation is an attempt to regulate the downstream effects of interstate commerce, it will still need to meet strict scrutiny.

However, it will be difficult to show that the state is attempting to regulate downstream commerce. Organic Produce will try to argue that it will stop purchasing entirely from State Y growers and solely purchase from State X growers so that it does not have to distinguish goods when it sells to State Institutions, as compared to private clients where regulation 2 does not apply. The state will argue that this is a blanket regulation, and that on its face, there is no attempt to regulate the downstream effects. Therefore, similar to A&L Berries, Organic will not be able to show the regulation is not rationally related to a legitimate government purpose.

Equal Protection

Similar to A&L Berries, there is no suspect or quasi suspect classification that applies. Therefore, they will not be able to make out a successful claim because the regulation is not arbitrary.

Privileges or Immunities

Organic Produce is a corporation, and therefore, cannot seek relief under the privileges and

immunities clause of the U.S. constitution.

QUESTION 3

Allison, a criminal defense attorney, represented Davos, a professional athlete, through a valid written retainer agreement. Davos was charged with assaulting Caren at a restaurant. Allison asked Davos to gift her season tickets to Davos' games if she prevailed in the criminal case. At trial, the prosecution presented the restaurant's surveillance videotape as evidence which showed the assault, along with a video surveillance expert, who identified Davos in the video.

Allison presented the testimony of two witnesses: (1) Wilfred, who was waiting tables at the restaurant, and saw an argument between Davos and Caren but did not see an altercation; and (2) Eileen, an experienced video technician, who testified that, in her opinion, there was no assault based on the poor quality of the video. When Allison and Eileen had previously watched the video together, they both agreed that the video showed strong evidence of the assault.

Allison agreed to pay Wilfred an hourly fee, roughly equal to his hourly wages and tips at the restaurant, for his time in testifying *and* for an entire day of preparation, but only if Wilfred refused to meet with the prosecution before trial.

Once Eileen agreed to change her opinion and testify that there was no assault based on the quality of the video, Allison agreed to pay Eileen $500 per hour for testifying at the trial. In her closing argument, Allison argued that the video showed that there was no assault, and that in her own opinion, after considering the evidence, Davos was not guilty.

What ethical violations, if any, has Allison committed with respect to:

A. Request for season tickets to Davos' games? Discuss.

B. Payments to Wilfred? Discuss.

C. Payment to Eileen? Discuss.

D. Presentation of Eileen's expert opinion? Discuss.

E. Allison's statements in closing argument? Discuss.

Answer according to California and ABA authorities.

QUESTION 3: SELECTED ANSWER A

A. Request for season tickets to Davo's game?

Fee Agreements

Lawyers have a duty to the clients to avoid fee misunderstandings. That is why it is imperative lawyers follow the rules regarding fee agreements. Under the ABA, the fee must not be unreasonable, while under CA, the fee must not be unconscionable. Here, we are told that L executed a valid fee agreement with D, thus so long as the fee is not unreasonable nor unconscionable, the fee agreement was proper.

Additionally, in CA, fee agreements over $1000 must be in writing and satisfy other requirements. Since this case is for a criminal assault, it is likely the fee was over $1000, although it appears the agreement was valid thus we will presume all requirements were met.

Gifts

A lawyer may not solicit or procure gifts from clients, unless the client is their relative. California carves out an additional exception which allows a lawyer to accept a gift from a client if the client provides a certificate of independent review by another L and no undue influence occurred.

Here, L would be in violation of the ABA as she has solicited D to provide her with season tickets to his sports team and she is not related to D. This is a clear violation as L asked D to give her tickets, he never offered them, and there are additional violations

discussed below for attaching the gift request to her outcome on the case. Under CA, D has not provided a certificate of independent review and L has used her position to pressure D into agreeing (undue influence) by linking the gift to the outcome of the case. D likely felt pressure that if he wanted L to do a good job he must provide the tickets, and thus this was improper.

Thus, L is subject to discipline for soliciting a gift from D under the ABA and CA.

Contingency Fees

Additionally, a contingency fee agreement is not allowed for criminal or family law cases, both under the ABA and CA. This gift could arguably be a contingency fee, since it is dependent on the outcome of D's trial. Thus, this was improper.

Conflicts of Interest

A lawyer owes a duty to avoid conflicts of interest, and provide unfettered loyalty to their client. A conflict can arise between current clients, a former client, a third party, or the lawyer's own personal interests. A current conflict exists when one of those other interests creates a substantial risk that the client’s representation will be materially limited due to the conflict. Here, L may have a personal conflict of interest, since L now has a personal interest in the outcome of the case. L may be distracted with trying to win the case and create a risk of a mistrial or otherwise prejudice D's trial. Additionally, as mentioned above, L has exerted undue influence on D, and has placed her own interest in the tickets above D's wellbeing. This was inappropriate.

L should be subject to discipline under CA and ABA for creating this personal conflict of

interest.

Competence

A lawyer owes a client a duty to provide competent representation, which under the ABA, includes using reasonable skill and knowledge necessary to represent the client. Under CA, the duty of competence requires the lawyer not intentionally, repeatedly, or recklessly fail to apply diligent and competent representation.

Here, L may have violated this duty as she has become invested in the case personally and may use inappropriate means (as discussed below) to achieve her desired outcome of the case. Thus, it is not a clear violation yet but likely will be.

B. Payments to Wilfred?

Payments to Witnesses

Under the ABA and CA, a lawyer may not give anything of value to anyone for acting as a witness in a trial, this is to avoid any impropriety that could exist. The only exception to this is actual expenses incurred to testify at trial. Importantly, the fees for testifying must not be contingent on the content of the testimony.

Here, L has asked W to testify at trial to what he witnessed. L has offered to pay W's hourly fee he would be getting if working (plus tips) for the time W spends testifying and preparing the day before. L can pay W's hourly fee plus tips for time spent actually testifying, but L may not pay for the day before preparation. W has only one thing to offer during the trial, that he saw the argument before the altercation. There should be

no reason that W needs a full day of preparation, and even if he did. Unless L can show good reason that W needs a full day of prepping, it appears this is more of a payment to testify rather than a reimbursement for costs incurred by a witness. Thus the payment for W's testimony is likely not a violation under CA or ABA but could be if the prep day before is pre-textual to actually pay for testimony.

Additionally, under the ABA L should have gotten D's consent, and in CA their written consent to pay the witness. Absent any information showing D was informed and consented, this is a separate violation under CA and ABA.

Duty of Fairness to Opposing Counsel and the Tribunal

A lawyer has a duty to be fair with opposing counsel, to have integrity with the court and pursue justice. While L also owes D a duty to be a zealous advocate, this cannot come at the extreme cost of withholding witnesses from opposing counsel. L has absolutely breached her duty to not only opposing counsel but to the tribunal, by acting with dishonesty, unfairness, and disregard for justice. L is subject to discipline.

Additionally, W did not actually see the altercation take place. It may not be proper for her to call W as a witness as his testimony may not be helpful for the jury. So long as L had a good faith basis and strategy that was relevant to D's defense, it was likely not a violation to call W to the stand even though he had limited information to provide upon his testimony.

Duty of Competence

See rule above.

L is likely acting incompetently by hiding W as a witness. The whole case could be set as a mistrial, and D would have to go through this entire process again, if L's actions are found out. This is not how a competent attorney acts, and it is not in D's best interest. L has failed to act with reasonable skill and knowledge to properly handle this case and is subject to discipline under ABA. Additionally, L's actions are intentional and recklessly disregard the risk to D's case, thus L is subject to discipline under CA.

C. Payment to Eileen?

Paying Witnesses

See rule above for paying witnesses.

Here, E originally believed that she could see an assault on the video, and only after L offered her $500 per hour did E agree to change her opinion and testify that there was no assault based on the quality of the video. It is not clear what E's fee was before, but it is clear that the fee was adjusted based on E's agreement to change her testimony. Thus, L is paying E based on the content of the testimony, and this is a bribe. This is a violation of ABA and CA rules and L is subject to discipline.

Additionally, under the ABA L should have gotten D's consent, and in CA their written consent to hire the expert. Absent any information showing D was informed and consented, this is a separate violation under CA and ABA.

Duty of Competence

See rule above. L has acted without proper skill, reasonableness, and knowledge that a

prudent attorney would. Her conduct puts her client at serious risk of prejudicing his case, risking a mistrial, and increasing D's cost of litigation and time. Thus violating ABA rules. L has acted intentionally to violate the rules of ethics and the law (by facilitating perjury), and thus L has violated CA rules.

D. Presentation of Eileen's expert opinion?

Facilitating Perjury

A lawyer has a duty to present evidence in good faith of its truth to the tribunal, and to prevent witnesses from testifying with false testimony when the L knows or reasonably believes the testimony is false. Here, not only does L know the testimony is false, L solicited the false testimony by increasing E's fee based on the fact that E was willing to change her testimony. E and L both "agreed that the video showed strong evidence of the assault". L should not have allowed E to testify, let alone bribed her to, thus this is a clear violation of both the ABA and CA rules.

Competence

See rule above.

Additionally, E is testifying as to a legal conclusion "there was no assault". This is a question for the jury to decide and L should have used the proper skill and knowledge to properly prepare E to testify in correct fashion. This is a violation under ABA. Since this only occurred one time and it is not clear that L intentionally prepared E to testify in this fashion it is likely not a violation under CA.

E. Allison's statements in closing argument?

Ratifying E's perjury

L has a duty of candor and fairness to opposing counsel and the tribunal. A lawyer may not put on a witness that intends to commit perjury, and when it does occur, the L must seek to rectify the injustice with the court. L did the opposite. L ratified E's testimony by addressing it in her closing argument and stating that the video showed no assault. L knew this was false, she procured E's false testimony, and then she ratified it in her closing argument. L should have made a statement clarifying the perjury, she should have spoken to the court about the perjury, or something to rectify the perjury. She did not and she furthered the perjury. All of this was improper and L is subject to discipline under ABA and CA.

L Testifying as a Witness

A lawyer may not testify as a witness in their own action. Here, in L's closing argument L stated "in her opinion, after considering the evidence, D was not guilty". This was improper as L was acting as a witness. The L may summarize the evidence presented but may not offer opinions as if L is a witness. This was improper under ABA and CA and L is subject to discipline.

QUESTION 3: SELECTED ANSWER B

Request For Season Tickets

Under both California and the ABA model rules, an attorney is prohibited from soliciting substantial gifts from a client or prospective client. Season tickets to professional sporting events are an expensive, significant gift and it would be a violation to solicit such a gift. Allison might argue that she was not soliciting a gift, but making a contingency fee arrangement, as she would only receive the tickets if she won. An attorney may accept an interest in property or other forms of non-cash compensation, provided that such an interest does not result in a conflict of interest. But there are several issues with this argument. First, we are told that she asked for a "gift" which presumably means that she did in fact characterize it in that manner. Second, we are told that she had a valid written retainer agreement for the representation, but the implication is that this request for tickets is outside of the scope of that retainer. A retainer agreement must clearly explain what compensation is to be paid under it and how it will be calculated (including, in California, which expenses will be paid by the client in a contingency fee arrangement). So, for the retainer fee to be valid it would have to clearly identify the compensation scheme, including the tickets, but here it appears that they were not included. Finally, even if the tickets were identified as contingent compensation in the retainer agreement, contingency fees are prohibited, both in California and under the ABA rules, for criminal representations. Here, Allison was representing him in a criminal prosecution for assault, and thus she could not agree to accept a form of contingent fee.

Payments to Wilfred

An attorney may reasonably reimburse a lay witness for their time and expense in preparing to testify and testifying. Here, Wilfred is a lay witness and Allison has offered to pay him an hourly fee roughly equal to his salary and tips (i.e. lost earnings) for the time he would spend testifying. This is a reasonable amount to reimburse Wilfred, provided that it is reasonable for him to prepare for an entire day. But based on the simple nature of his testimony, i.e. that he witnessed a brief argument and did not even witness the altercation, a full day of preparation does not seem reasonably necessary, so she committed an ethical violation by agreeing to compensate him above a reasonable reimbursement.

There is a further issue of whether she committed an ethical violation by conditioning payment of the fee on refusing to meet with the prosecution before trial. An attorney has an ethical duty to opposing counsel not to obstruct them from conducting necessary discovery, including not procuring the unavailability of witnesses with relevant testimony. Conditioning payment of the reimbursement for the witnesses' expenses on their refusing to meet would count as procuring the unavailability of that witness or preventing the opposing counsel from conducting discovery of relevant testimony of that witness who has relevant testimony to offer. Here, Wilfred has information about an argument between Allison's client and the alleged victim, which is relevant to a charge that Davos then assaulted Caren as it goes to motive and intent. Thus, Allison has committed an ethical violation by conditioning her payment to Wilfred in a manner designed to prevent opposing counsel from conducting relevant discovery.

Payment to Eileen

An attorney may pay an expert witness a reasonable fee for their preparation of a report and testimony at trial. However, they may not pay a witness to procure false testimony from that witness. Here, Eileen is an expert video technician witness, so it is acceptable for Eileen to pay her a fee for her testimony. It is not clear whether $500 an hour is a reasonable fee for such expert testimony. Regardless of what would be a reasonable fee, however, it appears that the fee was, in part or in whole, paid to induce Eileen to give false testimony. When Eileen and Allison first watched the video together, they both agreed that it showed "strong evidence of the assault," which would be very damaging for Allison's client. Allison then agreed to pay the hourly fee only after Eileen agreed to change her opinion with no apparent basis for that change of opinion. This supports a clear inference that the fee was offered as an incentive to produce false testimony. Thus, Allison committed a breach by offering Eileen a payment for an improper purpose.

Presentation of Eileen's Expert Opinion

An attorney owes a duty of candor towards the tribunal under both California and ABA rules. They are obligated not to knowingly allow the presentation of false evidence to the court. While they cannot prevent their client from taking the stand in their own defense, they can refuse to bring to the stand a witness which they know or reasonably suspect will offer false testimony. Where they know that a witness has offered false testimony, or learn that they have later, they are under a duty to disclose this to the court. An attorney may offer opinion testimony from an expert witness where that

testimony is reasonably calculated to be helpful to the fact finder, the expert is reasonably certain of the opinion, the opinion is supported by facts and produced via a reliable methodology. The judge will determine whether the methodology used is reliable. In California, the only factor relevant to the determination is whether the methodology is generally accepted in the field; under the ABA other factors can be considered, such as whether it has been tested and peer reviewed and the potential error rate. Here, there is no information on the methodology, but the issue is the factual support underlying the opinion, or lack thereof and the general relevance of the testimony to begin with.

Eileen is a video technician hired to give expert testimony concerning a video of the event. Eileen and Allison discussed their respective opinions of the video and both agreed that it showed clear evidence of the assault, but Eileen later agreed to change her opinion. There is zero evidence that Eileen had any factual basis on which to change her expert testimony and in fact Allison knew that Eileen's opinion based on the video was that the assault happened. Thus, by bringing Eileen to the stand to testify that in her opinion there was no assault when she knew that her true opinion was the opposite, and by failing to prevent the false testimony or get the witness to correct it on the stand, and failing to bring it to the attention of the court, Allison has committed an ethical violation and is subject to discipline.

Allison's Closing Arguments

There are two separate issues with Allison's closing arguments. First, whether she committed an ethical violation by arguing that the video showed there was no

assault. Second, whether she committed an ethical violation by giving her opinion that, considering the evidence, her client was not guilty.

As part of an attorney's duty of candor, they must not make false statements or advance baseless arguments. They can advance any good faith argument that their client is not guilty, but where they know the argument to be baseless, they are obligated not to make it. An attorney generally can rely on the opinions of their expert witnesses in advancing an argument, but cannot do so where they know the expert opinion to be false or baseless. Here, as noted above, Allison believed that the video showed that there was an assault. She might still have advanced the argument that it didn't if she had a valid expert opinion to the contrary, but the expert opinion here was baseless and she knew it to be baseless, thus she could not advance an argument that the video showed no assault when she had no basis to do so. Therefore, she committed an ethical violation by advancing such a baseless argument in her closing testimony.

Under the ABA, an attorney is prohibited from offering in court their personal opinion as to the guilt or innocence of their client (engaging in "chicanery") but under the California rules there is no such prohibition, provided that the opinion is genuine and legally supportable. Here, Allison said in court, in her closing argument, that in her opinion her client was not guilty. Under the ABA rules, this is a clear violation of the prohibition on Chicanery regardless of the underpinnings of the opinion. Under the California rules, she has not made a violation merely by offering her opinion. However, knowing that her true opinion is that the video shows an assault by her client, and in the absence of any other exculpatory evidence, she has made a false statement because she claims that her opinion is that he is not guilty "considering the evidence" yet the only evidence

offered that directly goes to guilt or innocence (the video, the prosecution's witness, and the false opinion testimony of her expert) all either indicates her client's guilt or is known to her to be false, thus she cannot even make a good faith claim that her opinion is that he is not guilty based on the evidence. By offering this false statement, she has made yet another ethical violation, both under California and the ABA rules.

QUESTION 4

Acme Bank (Bank) was robbed in December 2022. On January 15, 2023, Dan was charged with robbing Bank. In April 2023, Officer Pat showed Tessa, the teller who was robbed, photographs of six men, each of whom were the same race, approximate age, and had blond hair and a mustache like Dan. Tessa immediately selected the photograph of Dan, saying he was the robber, and signed her name on it.

Before trial in the Superior Court, Dan moved to suppress the photograph under the Sixth Amendment to the United States Constitution, claiming that it should be suppressed because his attorney was not present when Tessa was shown the photographs. The motion was denied.

At trial, the parties stipulated that the photograph Tessa had selected was neither a business record nor an official record. The prosecutor called Tessa, who in court identified Dan as the robber. On cross-examination, defense counsel asked Tessa whether she had made a statement to the defense investigator in February 2023, that the robber had black hair and no mustache. Tessa admitted to having made the statement, but testified that it was incorrect because the robber did have blond hair and a mustache. On redirect, Tessa again identified the photograph of Dan as the robber. This was the same photograph Tessa had signed previously. The photograph was admitted into evidence.

In the defense case, Dan testified that he was not the robber and that he had been visiting his mother in Alaska for three weeks, including one week before and two weeks after the robbery.

In rebuttal, the prosecutor called Chet, the custodian of records from Credco, a credit union. Chet identified records from a Credco automated teller machine (ATM) located down the street from Bank. Chet testified that the ATM records were created as part of Credco's regular course of business. Chet further testified that the records reflect a withdrawal was made from Dan's account the day before the robbery, using a personal identification number (PIN) assigned to Dan's account.

1. Did the court properly deny Dan's motion to suppress the photograph? Discuss.

QUESTION CONTINUES ON THE NEXT PAGE

2. Assuming all reasonable objections were timely made, did the court properly admit under the California Evidence Code:

    a) Tessa's testimony about her statement to the defense investigator? Discuss.

    b) The photograph with Tessa's signature? Discuss.

    c) The ATM records? Discuss.

QUESTION 4: SELECTED ANSWER A

Under Proposition 8 of the California Constitution any relevant evidence is admissible in a criminal case. However, Prop 8 includes exceptions for balancing under California Evidence Code (CEC) 523, which allows the court to exclude relevant evidence if its probative value is substantially outweighed by its risk of unfair prejudice, misleading the jury, or confusing the issues. Since this is a criminal matter, Prop 8 will apply.

1) DAN'S (D) MOTION TO SUPPRESS

6th Amendment Right to Counsel

The Sixth Amendment provides criminal defendants with a right to counsel at all critical states of a criminal prosecution. That right attaches automatically after the commencement of formal proceedings, such as a formal charge.

Here, Dan's Sixth Amendment right to counsel attached when he was charged, on January 15, 2023. The photo line up took place after that. However, unlike in person line ups, photo array lines ups are not considered a critical stage at which the Sixth Amendment Right to Counsel attaches. Therefore, Dan's Sixth Amendment Right to Counsel was not violated by the absence of his attorney at the photo line up, even though it took place after Dan's Sixth Amendment Right had already attached.

Impermissibly Suggestive Line Ups

Although it is not clear if Dan raised the issue, he may have also argued that the photo identification should be excluded because the identification procedure was impermissibly suggestive. In order to succeed on that argument, he would have to

establish that the procedures were impermissibly suggestive and that they created a substantial risk of misidentification.

Here, all of the individuals in the lineup were of the same race, approximate age, and had blonde hair and a mustache like D. Additionally, since Tessa (T) was the teller who was actually robbed, she would have had a good opportunity to view the suspect. And it is important that she immediately identified D in the photo line up. All of those facts suggest that T's photo identification was reliable. The fact that approximately four months had passed between the robbery and the photo identification would support D's likely argument that the lineup was not reliable. But on balance, the court properly determined that the lineup was not impermissibly suggestive.

2.a.) TESSA'S (T) TESTIMONY RE HER STATEMENT TO DEFENSE INVESTIGATOR

Logical Relevance

Evidence is logically relevant if it has a tendency to prove or disprove any disputed of fact that is of consequence in determination of the action. Here, T's statement to investigators that the robbery suspect had black hair and no mustache is relevant because it tends to prove that D, who does not have those features, did not commit the robbery. The evidence also calls into question T's credibility, which is important because she is a witness at trial who identified Dan as the robber. The evidence is logically relevant.

Legal Relevance

The court to exclude relevant evidence if its probative value is substantially outweighed

by its risk of unfair prejudice, misleading the jury, or confusing the issues. Here, the probative value is very high because the evidence tends to prove that D did not commit the crime. It also impeaches T's credibility. There does not appear to be any risk of unfair prejudice, misleading the issues, or confusing the jury. The evidence is legally relevant.

Hearsay

Hearsay is an out of court statement offered to prove the truth of the matter asserted. T's statement to the defense investigator was made outside of the court room (and in fact before trial had even started). It is therefore an out of court statement. However, D will argue that the statement is not being offered for the truth of the matter asserted because it is a prior inconsistent statement and a prior statement of identification.

Prior Inconsistent Statement

A prior inconsistent statement is not excluded as hearsay. In California, the prior statement need not be sworn. And it can be used both for impeachment and for the truth of the matter asserted (as substantive evidence). Here, T identified D in court. But she previously said that the robber had black hair and a mustache. Because that prior statement was inconsistent with T's in-court statement and identification, it is admissible.

The court properly admitted this evidence.

Impeachment

A witness who takes the stand is subject to impeachment. T's prior statement to the defense investigator can also be used for impeachment based on the inconsistency and T's apparent ability to accurately perceive the robber.

Again, the court properly admitted this evidence.

2.b.) PHOTOGRAPH WITH T'S SIGNATURE

Logical Relevance

See rule above. The evidence tends to prove that D robbed the bank. That is a disputed fact. Thus, the evidence is logically relevant.

Legal Relevance

See rule above. The probative value is high because the evidence tends to establish D's guilt of the crime charged. The risk of prejudice is high. But it would be *unfair* prejudice for the jury to convict D because they believe he actually committed the crime. Rather, evidence causes unfair prejudice when it leads a jury to make a decision based on improper considerations, such as emotion or anger at the defendant. The evidence is legally relevant.

Authentication

A party offering a document or physical item into evidence must authenticate it by establishing that the item or thing is actually what the party claims it to be. Assuming T testified that the photo was a photograph she had previously viewed and signed, it was properly authenticated.

Hearsay

See rule above. The photo itself is not a statement, but T's signature is. Additionally, T signed the photo out of court, so it is an out of court statement. And the prosecution is offering the signed photo to prove that D is the person who robbed the bank. Therefore, it is being offered for the truth of the matter asserted. Consequently, the signed photo is inadmissible hearsay unless an exception applies.

Prior Statement of Identification

Prior statements of identification are excepted from the rule against hearsay. While this rule operates as an exclusion from the definition of hearsay under the Federal Rules of Evidence, it is an exception to the rule against hearsay under the CEC.

T signed the photo during the lineup (before trial) to communicate that she was identifying D as the robber. Thus, the signed photo is a prior statement of identification.

Prior Consistent Statement

Prior consistent statements are also excluded from the rule against hearsay if the statement was made before the motive to fabricate arose and is offered only after the witness's veracity has been challenged in court. Here, the prosecution offered the photo after the defense team questioned the veracity of T's in court identification of D. However, because T had told the defense investigator that the suspect did not look like D before she identified Dto Officer Pat, D would have a good argument that she had a motive to fabricate at the time she made the identification to officer Pat. The facts are not entirely clear as to if and when T had a motivation to lie. A court could rule either

way on this. But as explained above, the evidence was properly admitted as a prior statement of identification.

Confrontation Clause

The Confrontation Clause of the United States Constitution prohibits the government from admitting testimonial out of court statements against a criminal defendant unless the defendant had an opportunity to cross examine the witness. Disputes in this area often concern whether the out of court statement was testimonial. An out of court statement is testimonial if the witness could reasonably foresee that it would be available for trial. A photo identification satisfies that standard. However, in this case, T showed up at trial and took the stand. She was subject to cross-examination by D's attorney. Thus, the Confrontation Clause did not preclude her prior out of court statement from being entered into evidence.

The court properly admitted this evidence.

2.c.) ATM RECORDS

Logical Relevance

See rule above. The ATM records contradict D's alibi for the crime. Thus, they are relevant.

Legal Relevance

See rule above. The ATM records suggest that D is lying about his alibi. Thus, the probative value is high. The risk of unfair prejudice could be significant if, for example,

someone else had access to D's ATM card such that the records could be used to wrongfully implicate D. On balance, the court properly admitted the evidence.

Hearsay within Hearsay

See rule re hearsay above. When there are multiple levels of hearsay, each level must fall within an exception to be admissible. D likely argued that both the receipt and the information on it were hearsay. However, the receipt itself is a statement generated by a machine, and there is thus a strong argument that it is not hearsay.

Business records

Even if the receipt was hearsay, it would fall within the business record exception. That exception applies to records of regularly conducted business activities that were created by or with information transmitted by, someone with knowledge. Unless the record is certified, the custodian of records must lay the foundation. And in California, the proponent of the evidence also must establish that it is otherwise trustworthy. That standard is satisfied here by Chet's testimony at the trial.

Authentication

See rule above. Chet's testimony regarding the ATM record properly authenticated it.

Opposing Party Statement

An opposing party's statement is also excepted from the rule against hearsay. D's entry of his ATM pin code in the ATM was an out of court statement that was captured in the ATM record that was offered into evidence. However, the proponent of the evidence is

the prosecution. And the prosecution is offering D's statement to use against him. Therefore, D's statement within the ATM record is admissible as a statement of a party opponent.

The court properly admitted this evidence.

QUESTION 4: SELECTED ANSWER B

1.Motion to Suppress Photograph

Exclusionary Rule

Under the exclusionary rule, evidence obtained in violation of the 4th, 5th, or 6th Amendments may be suppressed. Here, whether the court properly denied Dan's motion to suppress the photograph depends on whether the photograph was obtained in violation of Dan's rights under either the 4th, 5th, or 6th Amendments.

Sixth Amendment Right to Counsel

The Sixth Amendment provides a defendant with the right to counsel at all critical stages of the proceedings against him. The right to counsel attaches when formal charges are filed. Critical stages of the proceedings include hearings, arraignments, post-indictment lineups, and trial, but do not include post-indictment photo arrays.

Here, Dan's right to counsel under the 6th Amendment attached on January 15, 2023 when he was charged with robbing Bank. The issue is that the photograph signed and selected by Tessa was obtained during a post-indictment photo array, which is not a critical stage of the proceeding. Thus, the fact that his attorney was not present when the photos were presented to Tessa does not trigger a 6th Amendment violation, and thus, is not suppressible under the exclusionary rule.

Suggestive Arrays

A defendant may also move to exclude evidence of an identification made by a witness

through a photo array if the photo array was unduly suggestive. Here, Dan could not argue that the photo array presented to Tess was unduly suggestive because each of the photographs were of men who were the same race and approximate age as Dan, and who had blonde hair and a mustache like Dan. Thus, the photo array was not suggestive.

Conclusion

The court did not err in denying Dan's motion to suppress.

2. California Constitution Proposition 8

Under Proposition 8 of the California Constitution all relevant evidence is admissible in a criminal case. Proposition 8, however, makes exceptions for evidence under the rules for hearsay, character evidence, exclusionary rule, Best Evidence Rule, and discretionary balancing under California Evidence Code 352, which allows a court to exclude relevant evidence if its probative value is substantially outweighed by the risk of unfair prejudice, confusing the issues, misleading the jury, undue duly, or the needless presentation of cumulative evidence. This is a criminal case, so Proposition 8 applies.

2a. Tessa's Testimony

Logical Relevance

Evidence is relevant if it tends to make any disputed fact more or less likely. The identity of the robber is a fact that is in dispute in this case because the prosecution asserts that Dan was the robber and Dan asserts that he was not the robber. Tessa's prior testimony

to a defense investigator in which she stated that the robber had black hair and no mustache--features that are inconsistent with Dan's features, who has blonde hair and a mustache, tend to prove Dan's claim that he was not the robber. As explained below, Tessa's prior statements also tend to rebut the credibility of her identification of Dan as the robber as part of a photo array, months after having made a contrary statement to the defense investigator. The relevant is very relevant.

Legal Relevance

Relevant evidence may be excluded if its probative value is substantially outweighed by the risk of unfair prejudice, confusing the issues, misleading the jury, undue duly, or the needless presentation of cumulative evidence. Here, Tessa's prior statement is highly probative of a key fact in dispute--the identity of the robber, and there are no facts to indicate that the prior statement is unduly prejudice or carries some other risk outweighing its relevance. The evidence is also legally relevant.

Impeachment Prior Inconsistent Statement

When a witness testifies, she puts her credibility at issue, and thus, opposing counsel is permitted to impeach a witness's testimony, including by prior inconsistent statements. Under the CEC, prior inconsistent statements may be used both to impeach and for their truth regardless of whether they were made under oath. Here, on direct examination, Tessa identified Dan as the robber in court. Thus, on cross examination, defense counsel was permitted to impeach her testimony (identifying Dan as the robber) through her prior inconsistent statement to the defense investigator in 2023. Defense counsel may use her admitting the prior statement both to impeach the credibility of her

testimony as well as for its truth--to show that Dan was not the robber.

Impeachment for Truthfulness

When a witness testifies, she puts her credibility at issue, and thus, opposing counsel is permitted to impeach a witness's testimony, including by opinion or reputation evidence of a witness' character for truthfulness or untruthfulness. On cross examination in a criminal case, an attorney may also ask about specific acts of untruthfulness. Alternatively, even if Tessa had not identified Dan as the robber during her direct exam, defense counsel was permitted to inquire into a specific act--Tessa' statements to the investigator--that goes to her character for truthfulness or untruthfulness. The fact that Tessa admitted that her prior statement to the investigator was not correct might tend to rebut her credibility for truthfulness with respect to the identification.

Hearsay

Hearsay is an out of court statement offered for the truth of the matter asserted. Here, Tessa's prior statements to the defense investigator are out of court statements and defense counsel is likely introducing them for their truth--that the person who robbed the bank has black hair and no mustache, such that Dan is not the robber. Defense counsel may argue that the statement is being used only to impeach the credibility of Tessa's in court identification of Dan as the robber (as discussed above), but given that Dan's identity as the robber is in dispute, defense counsel likely seeks to introduce the evidence for its truth. Thus, the statement is inadmissible, unless it falls under an exception to hearsay.

Prior Inconsistent Statement

Under the CEC, prior inconsistent statements, whether made under oath or not, are admissible as an exception to hearsay because they can be used either to impeach or for their substantive truth. Thus, because the evidence at issue concerns Tessa's prior inconsistent statement to the defense investigator, it is admissible under this exception.

Prior Statement of Identification

A prior statement of identification is also admissible as an exception to hearsay, so long as the witness who made the identification testifies that the identification was made while the matter was fresh in their memory and that the prior identification was accurate at the time it was made. Here, the statement would not be admissible under this exception because while the prior identification to the defense investigator was made just a few months after the event, Tess specifically testified that the prior identification was not accurate at the time.

Conclusion

The court properly admitted Tessa's testimony.

2b. Photograph

Logical Relevance

See rule above. As Dan's identity as the robber is in dispute, Tessa's prior identification of Dan as the robber when showed a photo array makes it more likely that Dan was the robber. The evidence is logically relevant.

Legal Relevance

See rule above. The photo is extremely probative of whether or not Dan was the robber which is the central issue in the case and presents no apparent issues of countervailing undue prejudice or other concerns. The evidence is legally relevant.

Rehabilitation--Prior Consistent Statement

If a witness is impeached on cross examination, a lawyer can attempt to rehabilitate a witness through various means, including by introducing evidence of a prior consistent statement. Here, as discussed above, defense counsel attempted to impeach the credibility of Tessa's identification of Dan as the robber with a prior inconsistent statement she made to the defense investigator. Thus, on redirect, the prosecution was entitled to rehabilitate the credibility of Tessa's in court identification by introducing evidence of a prior consistent statement she made--namely her identification of Dan in a photo array.

Authentication

All tangible evidence must be authenticated by the proponent prior to it being offered into evidence. The proponent must demonstrate through sufficient evidence that the document is what he claims it to be. Here, the prior photograph was identified by Tessa as the photograph she had previously signed when she selected Dan from a photo array. She is also competent to recognize and verify her own signature on the photograph. Thus, the photograph was properly authenticated by Tessa.

Hearsay

See rule above. The prior photograph with Tessa's signature on it can be construed as an out of court statement (that Dan is the robber) offered for its truth (that Dan is the robber). While the prosecution may claim that the photograph was merely used to rehabilitate Tessa's credibility, rather than for its truth, because Dan's identity as the robber is in dispute, the prosecution is likely offering the photo as proof for its truth that Dan was the robber. It must thus be subject to an exception to be admitted.

Prior Statement of Identification

See rule above. Here, the signed photograph, which asserts a statement that Dan is the robber, is a prior statement of identification made by Tessa. However, to be admissible under this exception, Tessa must testify that the events were fresh in her mind at the time she made the identification and that the identification of Dan in the photo array was accurate at the time she made it. There is no indication she made such testimony prior to its admittance into evidence. Thus, this exception does not apply.

Confrontation Clause

Under the confrontation clause, out-of-court testimonial evidence is inadmissible against a criminal defendant unless the declarant is unavailable and the defendant had a prior opportunity to examine the declarant. Testimonial evidence is any statement made by a declarant under circumstances in which a reasonable person would expect that the statement might be used at a later trial. Here, even if the photograph is admissible under the CEC, it should likely have been excluded on confrontation clause grounds. The photograph is an out of court statement made by Tessa, as discussed above. It is also testimonial because it was made to police as part of a photo array meant to identify

a potential suspect. A reasonable person should expect that if they identify a suspect as part of a photo array, that the statement could likely be used at trial. Further, Tessa is not unavailable--indeed she has testified in court. Thus, the photograph is likely barred under the confrontation clause.

Conclusion

The court erred in admitting the photo.

2c. ATM Records

Logical Relevance

See rule above. Once again, Dan's identity as the robber is a fact in dispute in this case. The ATM records which show that a withdrawal was made from Dan's account the day before the robbery, using a PIN assigned to Dan's account, tends to make it more likely that Dan was the robber, because it rebuts Dan's alibi that he was not present in the state the week before and during the robbery. The records are logically relevant.

Legal Relevance

See rule above. As explained above, the records are extremely probative of the central issue of the robber's identity in this case and present no apparent countervailing issues of undue prejudice. The evidence is legally relevant as well.

Authentication

See rule above. Here, the ATM records were properly authenticated by the custodian of records for the company that maintains the ATM records.

Hearsay

See rule above. The ATM records are an out of court statement. It can be argued that the records are being asserted for its truth, that Dan did in fact withdraw the stated amounts from the ATM because the government is attempting to prove Dan was the robber.

Offered for Other Purpose

The government may argue that the records are not being offered for their truth, that Dan withdrew the specific stated amounts from the ATM, but rather as circumstantial evidence of Dan's location prior to the robbery and to impeach Dan's alibi. The government will likely succeed in arguing that the records are not hearsay because they are not being offered for their truth.

Business Records

A record that (1) records an event at or near the time of the event it records; (2) is prepared by a person with knowledge of the event or with a duty to report the event; and (3) that is kept in the regularly conducted course of business at a business, is admissible under the business records exception to hearsay. Alternatively, even if the ATM records are construed as hearsay, they likely fall under the business records exception. First, the ATM records record withdrawals and deposits at or near the time such events occur. Second, the ATM records are prepared by a custodian of records at Credco, who is under a duty to report the withdrawals and deposits made at the ATM. Finally, the ATM records are kept in the regularly conducted course of business at

Credco. Thus, the statement would be admissible under this exception even if it were construed as hearsay.

Conclusion

The court did not err in admitting the ATM records.

QUESTION 5

Brian, owner of a commercial bakery, and Sam, owner of a bakery supply business, met for the first time and discussed Brian's inability to find a reliable source of maple topping. When Sam told Brian he could supply the maple topping, they orally agreed that Sam would immediately ship 500 gallons of topping at $20 per gallon. Sam then added that he did not want to ship without something in writing, and Brian replied: "I will send written confirmation tomorrow."

For the next three weeks, Brian was busy negotiating a conference center catering contract and forgot to send Sam the confirmation. The catering contract obligated Brian to provide large quantities of pastries with maple topping. Brian then recalled his promise to Sam and sent him a purchase order on his standard form for 5,000 gallons of maple topping at $20 per gallon, to be delivered to Brian's place of business in two weeks.

Sam received Brian's purchase order but did not notice the change in gallonage. He saw the delivery date, but in light of Brian's delay in sending the confirmation, he did not believe it was firm. That same day, Sam sent a signed acknowledgment restating Brian's purchase order items and then left on a four-week vacation to a remote locale.

Upon his return, Sam shipped 500 gallons of maple topping to Brian. By that time, Brian was in default of the catering contract due to lack of maple topping. Brian had tried but had been unable to reach Sam while he was on vacation. Because Brian had been unsuccessful in obtaining an alternate source of maple topping, the conference center canceled its contract, resulting in $100,000 in lost profits.

Brian refused delivery of the 500 gallons of maple topping and sued for breach of contract, seeking the $100,000 in lost profits.

1. Is there an enforceable contract between Brian and Sam? If so, what are the terms? Discuss.

2. Is Brian likely to prevail on his claim against Sam? If so, what damages is he likely to recover? Discuss.

QUESTION 5: SELECTED ANSWER A

1. ENFORCEABLE CONTRACT

Governing Law

Contracts for the sale of goods are governed by the UCC. This is true regardless of whether the contract is between merchants. All other contracts, including contracts for personal services, are governed by the common law. If the contract has a mixed purpose, then the question is whether the predominant purpose of the contract is for the conveyance of the goods or for the service.

Sam and Brian are attempting to contract for the sale of maple topping ("the topping"), which is a good. The agreement also involves the shipment of goods. In theory, that could be construed as a service, but it's a standard part of goods contracts. Moreover, the predominant purpose was clearly the sale of the topping, and the delivery is just incidental.

The UCC thus governs.

Merchants

Some of the terms in the UCC vary depending on whether one or both of the contract parties are merchants. A party is a merchant if they are a professional seller of the goods in question or if they are a commercial entity engaging in the purchase of goods.

Brian is the owner of a commercial bakery, purchasing maple topping, thus he is a merchant with regard to the contract over the sale of topping. And Sam is the owner of a bakery supply business, and thus he is a merchant in maple topping.

Thus, this is a contract between two merchants.

Oral Agreement

A contract is a legally enforceable promise. A contract requires offer, acceptance, and consideration. An offer is an expression of present intent to enter into a contract that creates in the offeree the power of acceptance. The offer must generally contain the material terms of the contract. Under the UCC, the material terms are the parties, the quantity, and the goods--the UCC is able to gap fill the rest of the terms with UCC defaults. (That is different from common law, where price is a key term that must be specified--under the UCC, market price can be a gap filler.) An acceptance must follow the terms specified by the offer and it must be communicated to the offeror. Consideration is the requirement that a contract be a bargained for exchange in which both parties alter their legal positions.

The facts state that Brian and Sam reached an oral agreement. Thus, it is presumed that there was an offer and acceptance. The material terms are present: 500 gallons of topping is the quantity and the good, and Brian and Sam are the parties. There are also other terms, such as the immediate shipment, and the contract price of $20 per gallon. And there was bargained for consideration: Sam is giving up product, and Brian is giving up money. Thus, at this point there was a legally binding contract for the sale of the goods on those terms, unless a defense applies.

Sam's Request for Written Confirmation

Under the common law, a contract cannot be modified unless there is new consideration given for the contract modification. However, under the UCC, a contract can be modified as long as the parties modify it in good faith.

Here, the agreement had already been formed by the time Sam added that he wanted the written confirmation to be a condition of Sam sending the maple topping. That would be a condition precedent--the confirmation is a condition that must occur before Sam is obligated to perform by sending the topping. However, he said this in good faith, and Brian seemed to agree

to it by saying that he would send written confirmation tomorrow. Thus, the condition of written confirmation would likely be seen as binding. Thus, even if the oral agreement was binding, Sam had no obligation to send the maple syrup until he received at least some writing, since the condition precedent had not occurred.

State of Frauds

Applicability

To be valid, a certain subset of contracts must satisfy the statue of frauds. Those contracts include marriage contracts, suretyship contracts, contracts for services that by their terms cannot be performed in less than one year, contracts for the sale of real estate and--relevant here--contracts for the sale of goods that are worth more than $500.

The contract was for 500 gallons of topping at $20 per gallon. That means that the total value of the contract is 500 x 20, which is 10,000--well over the limit for the statute of frauds to apply.

Satisfying

In order to satisfy the statute of frauds, a contract must typically be in writing, with all material terms in writing, and signed by the party to be charged. There are a few exceptions for goods contracts, including full or partial performance. The final exception is a merchant's confirmatory memo, which, if sent a reasonable time after the conclusion of the deal and signed by the merchant, can also satisfy the statute of frauds.

There was no contract in writing at the time of the agreement. And there is no indication that Brian or Sam fully or partially performed on the contract until much later--at least seven weeks after the oral agreement and three weeks after Brian's purchase order. Thus, that does not satisfy the statute of frauds.

Brian may try to argue that the purchase order three weeks later constituted a merchant's confirmatory memo. As noted, Brian is a merchant, and the contract is between merchants. However, there are a few problems. First, the memo was not sent a reasonable time after the deal was agreed to. Brian said he would send it tomorrow, but instead, he sent it three weeks later. Thus, it cannot make the oral agreement satisfy the statute of frauds. Second, the memo did not contain the same terms as the oral agreement: (1) it provided for the shipment to be delivered to Brian's place of business, where the oral contract was a shipment contract (that may not be a material term, but it shows a difference), (2) the writing provided for the topping to be shipped two weeks from that date, five weeks after the initial agreement would have provided, and (3) it had a different quantity term, 5000 instead of 500, and quantity is always a significant material term in a goods contract.

Thus, the memo cannot operate as a confirmation and bring the initial oral agreement into compliance with the statute of frauds. The oral agreement is thus invalid. And the memo will operate instead as an offer or invitation to deal in a new bargaining process.

Purchase Order

See rule above for offers.

The purchase order can be understood as a new offer to Sam to enter into a contract for the sale of topping. The signed purchase order stated the material term--quantity, and a number of new terms. It creates in Sam the power to accept by agreeing to those terms and create a valid binding contract.

The purchase order could also be understood as an acceptance--if the initial oral conversation is seen as an offer that remained on the table. However, offers can terminate after the reasonable passage of time. Since the contract was for the immediate shipment of goods, and

there was a promise to send written confirmation the next day. Thus, by the time two weeks had passed, it was no longer reasonable to accept the offer, as it had terminated by then.

Signed Acknowledgment

See rule above for acceptances.

Sam's acknowledgement constituted an acceptance of the offer from Brian that was contained in the purchase order, this was Sam's confirmatory memo.

Statute of Frauds (Purchase Order + Acknowledgement)

The contract is now confirmed by Sam's written signed acknowledgement, signed by the party to be charged in the action in Question 2 (Sam), so the statute of frauds is satisfied.

Additionally, the statute of frauds can be satisfied by partial performance, but only for the amount already performed. After Sam sent the 500 gallons of maple topping, that would be enough to satisfy the statute of frauds at least for that amount.

Mirror Image Rule vs. UCC

At common law, when an acceptance contained terms that were different from the offer, there was no contract--they had to be the mirror image of one another. However, the UCC is more forgiving of conflicting terms. Where an offer and an acceptance contain different terms, the court will find that there was still a contract, and it will just knock out the conflicting terms and gap fill them. Moreover, if the acceptance contains additional terms to the offer, those terms will generally enter the contract, unless the offer was conditional on no additional terms being added or the additional terms go to the basis of the bargain.

If the initial agreement is understood as an offer, and Brian's memo is understood as the

acceptance, then there cannot be a contract, because there is no agreement on the key term: quantity. However, if there were a contract, the terms of the acceptance would govern, because the offer was not made conditional on no additional terms.

If the initial agreement is not a valid contract, nor a valid persisting offer (as discussed above), then the purchase order is its own offer. Sam's signed acknowledgement constituted an acceptance--it was sent to Brian, and restated the items in Brian's purchase order, including the new price term. There is no indication of any conflicting or additional terms. Thus, the purchase order terms govern.

Objective Manifestations

Sam may try to argue that he did not know that the contract term was 5,000 and so there was no meeting of the minds on the quantity term. He did not notice the change in gallonage, which suggests that he was still thinking about the oral agreement from two weeks prior. However, mutual assent is based on the outward manifestations of assent--not the inward thoughts of the parties. Outwardly, Sam received a purchase form for 5,000 gallons, and he sent a note acknowledging that same quantity term, repeating it. Moreover, he should have noticed that many other terms were changed, as described above--that would have put a reasonable person on notice about the changed quantity term. Thus, there was mutual assent.

The same is true of the delivery date. Despite not personally believing that it was a firm date, Sam still repeated it in his signed acknowledgement, which is an objective manifestation of his intent to be bound to the terms.

However, Sam could try to argue unilateral or mutual mistake as a defense to formation (see below).

Terms

Thus, the terms of the contract are for the provision of 5,000 gallons of maple syrup, at $20 per gallon, to be delivered to Brian's place of business, and in two weeks.

Defenses (Mistake)

However, a contract that is otherwise valid may be deemed not to have been validly formed if a defense to formation applies. The defenses to formation are mistake, misrepresentation, incapacity, and the statute of frauds. The statute of frauds has already been discussed, and there are no facts indicating incapacity or misrepresentations.

Mutual Mistake

A mutual mistake happens when both parties are mistaken regarding a key term in the contract. They can seek judicial reformation of the contract to reflect their true intentions.

But it does not seem like Brian was mistaken. He sent the purchase form after spending three weeks negotiating a contract for a big new catering deal that required large quantities of topping. Thus, it seems likely that he intended for the purchase order to state 5,000. Although it seems like Sam was mistaken, since he did not notice the change and then did ship only 500 gallons, there was no mutual mistake.

A similar analysis applies to the delivery date. It also seems likely that Brian intended the date, in light of his new contract. However, Sam has even less of a case for being mistaken about this term because he actually saw it and recognized it, he just did not think that it mattered.

Unilateral Mistake

A contract may be rescinded for unilateral mistake where one party is mistaken about a key term in the contract that goes to the basis of the bargain, and the other party either knew of the mistake and failed to correct it or caused the mistake, and where the mistaken party is not

responsible for the mistake.

Sam may try to argue that Brian caused the mistake because he represented that it was for 500 gallons then delayed sending the confirmation and increased the price term without calling sufficient attention to it. But Brian did not have reason to know that Sam did not process the increase in gallons or that Sam would infer from their prior conversation that all the terms were the same. Ultimately, it was Sam's responsibility to read the contract, and to process the terms when he repeated them in acknowledgement. Thus, the contract is not voidable for unilateral mistake.

Similarly, by not following up with Brian about the date, and confirming it despite having no intention of meeting it, that mistake was also Sam's fault, and he cannot void the contract on that basis.

2. BRIAN VS. SAM -- WINNER + DAMAGES

Contract

See above regarding contract formation and contract terms.

Breach

Under the UCC, the seller has an obligation of perfect tender. That means both perfect goods and perfect delivery.

The goods were not perfect, because, as discussed above, the contract was for the shipment of 5,000 gallons of maple topping instead of 500 gallons. This was not an installment contract, so the special rules for partial performance do not apply. And the time for delivery has already passed, thus there is no opportunity to cure owed to Sam. Thus, Brian is entitled to reject the maple syrup and sue for breach, as he did.

There was also not perfect delivery. The maple topping was delivered two weeks late. There was no time is of the essence clause, but that does not excuse late performance under the UCC where a delivery date is specified. And this was not just a little bit late--it was double the time given. There is an exception for imperfect tender for nonconforming goods when the seller has reason to believe that the buyer would accept the replacement goods, and Sam may say that given the delay with the writing follow up, he thought Brian would accept the late delivery--but this is late delivery, not imperfect goods, so that exception does not apply. Thus, again, Brian is entitled to reject the maple syrup and sue for breach.

Thus, Brian is likely to succeed in his lawsuit.

Damages

Expectation Damages

The standard form of contract damages is expectation damages. Expectation damages are designed to make the nonbreaching party in the same position that they would have been had the contract been performed according to its terms. That is typically calculated by the difference between the contract price and the cover price. But it might also be the difference between the contract price and the market price. However, Brian was not able to cover as he was unable to find a replacement supplier.

Incidental Damages

Consequential damages are costs incurred while trying to remedy the breach. Brian spent time and effort trying to contact Sam while he was away and trying to find a new supplier of maple topping. He could receive those damages.

Consequential Damages

Consequential damages are those other than expectation damages that are caused by the breach. Here, Sam lost out in a 100,000 dollar profit on the catering contract. And he did so because he could not provide pastries with maple topping.

However, there are limitations on consequential damages. They must be reasonably foreseeable at the time of the contract--either as a natural and probable consequence of the breach, or discussed by the parties at the time of contracting.

It is reasonably foreseeable that Dan would lose a business if not able to sell maple topping pastries--since he runs a commercial bakery. However, Sam was not aware of the large lucrative contract. Dan may argue that the 5,000 term plus the two weeks made it foreseeable that there was a big contract on the horizon--but it really only makes it foreseeable that he wants to sell a large number of baked goods, not that there's an immediate demand for them in a contract that might get cancelled if he's in default in a matter of weeks. Thus, Dan can get his likely standard lost profits for inability to meet standard demand for the goods with the maple topping, but he cannot get the full 100,000.

Duty to Mitigate

Dan satisfied his duty to mitigate damages by his efforts to find an alternate supplier.

QUESTION 5: SELECTED ANSWER B

Applicable Law

Contracts for services and real property are governed by common law. Contracts for goods is governed by the UCC.

Here, Brian (B) and Sam (S) are dealing with the purchase and sale of maple topping, goods, and thus the applicable law is the UCC.

Merchants

Merchants are business persons who are in the business of dealing with a certain good or service. A party is a merchant for the purposes of an agreement if the agreement relates to the item such business person regularly deals in.

B is a merchant as an owner of a commercial bakery and S is a merchant as an owner of a bakery supply business. S is selling B baked goods (maple toppings) which B is using for his bakery catering.

Statute of Frauds

Statue of Frauds (SOF) applies for contracts of goods over $500, that which cannot by its terms be completed in less than 1 year, regarding real property. If the SOF applies, contracts must be in writing and be signed by the party enforcement is being sought against. Between merchants, if they have an oral agreement, it can be confirmed by a written confirmation thereafter.

Here, the parties were contracting for goods over $500 and thus would be subject to the

SOF. They initially had an oral 'agreement' but also agreed that it would be memorialized in writing. See analysis below for the different writing components, but generally parties did have writings so eventually this was met and the SOF was satisfied.

Enforceable Contract between B&S

In order to have a valid, enforceable agreement, there has to be offer, acceptance and consideration. An offer is an objective expression of an offer with the intention to be bound. An acceptance is an objective expression of confirmation of acceptance of the terms of the offer. Consideration is typically sufficient with legal detriment (i.e., a party incurring a detriment by forgoing a legal right) but generally the idea is the agreement is a bargained for exchange.

At common law, the material terms have to be set out in the agreement: parties, price, quantity, etc. However, the UCC only requires the quantity term for an enforceable contract, where the rest will be gap-filled per UCC rules.

Oral Agreement

B & S orally agreed that S would immediately ship 500 gallons of topping at $20 per gallon. However, S said he did not want to ship without writing and B replied that he would send written confirmation the next day. Without further detail, it's hard to ascertain whether the parties had reached meeting of the minds in advance of deciding they would have written confirmation or afterwards, after agreeing to paper the understanding. Regardless, in order to satisfy the SOF, because the amount would be

over $500, the sale of goods had to be in writing. Thus, at this point, there is not an enforceable agreement. Had Brian sent the written confirmation the next day, perhaps this would be the enforceable agreement given merchants exception to signed writing by two parties (i.e., a confirmation memo would suffice).

B's Purchase Order - Offer - Battle of the Forms

Common law mirror image rule requires the offer and the acceptance to match (i.e., mirror each other); otherwise, a purported acceptance with different terms will be considered a rejection and simultaneously as a new offer. UCC 2-207: when there are two merchants who send form agreements back and forth, as long as the material terms are the same, additional and / or different terms do not cause there to be no agreement. Additional terms become part of the agreement unless it materially changes the terms of the agreement, or the offer explicitly conditioned acceptance to be on the exact terms of the offer.

B did not send the written confirmation for three weeks. Thereafter, he sent a purchase order on his standard form, but instead of the amount orally discussed with S (500), B's form was for 5,000 gallons of maple topping. This change is a material difference from the amount discussed (10x greater) and goes to a vital part of the agreement, i.e., the quantity term. Given the delay in sending the confirmation, and also the material difference, this likely cannot be a merchant memo confirmation of the oral agreement. Rather, this is more likely to be an offer by B to purchase from S 5,000 gallons of the topping.

S's Signed Acknowledgement - Acceptance

S sent a signed acknowledgement restating B's PO terms. However, he did not notice the change in gallonage. Thus, assuming S restated B's terms exactly, S agreed to 5,000 gallons of maple topping. Because S did not object to any of the terms, he accepted B's offer.

Thus, the enforceable agreement terms: S to ship to B 5,000 gallons of maple topping at $20 per gallon, to be delivered to B's place of business in two weeks.

Defenses - Unilateral Mistake

If both parties are mistaken as to a material item in / underlying the agreement, they can ask the court to revise the contract to reflect their understanding. If only one party is mistaken as to a material item regarding a contract, he can try to have rescission of the contract. The mistake must be reasonable. If the counterparty knew of the party's mistake (or actively caused the mistake) then this is even more likely.

S may try to argue that he made a mistake--he thought they had agreed to 500 and did not clearly read that the PO was for 5,000 gallons. While he genuinely was mistaken, given the unambiguous nature of 5,000 gallons and that B did not know about S's mistake (or cause such mistake), it's probably unlikely that a court would rescind / modify the contract.

B's claim against S

B refused delivery from S of 500 gallons of maple topping and is bringing suit against S for breach of contract.

Performance / Breach

Under common law, parties to an agreement have to substantially perform their obligations under a contract. Material breaches excuse the counterparty from its obligation to perform. If a party substantially completes performance, it has fulfilled sufficiently to demand the counterparty's action and minor failings are considered minor breaches where the counterparty can seek damages for (but such counterparty's performance is not excused). The UCC however, requires perfect tender--this means perfect goods and perfect delivery. If the seller provides non-conforming goods, the buyer can reject the goods; if there is still time under the contract, the seller can resend conforming goods and not be in breach.

Perfect tender required S to send B 5,000 gallons of topping in two weeks. S sent 500 gallons after 4 weeks--because this is not perfect goods & perfect delivery, B can reject the goods and S is in material breach of the contract.

Time of the Essence

Typically, unless parties expressly provide for time being of the essence, courts do not find that timing deadlines are firm.

Under the agreement, S was to send B 5,000 gallons of topping in two weeks. S knew those were the terms but did not know about the underlying agreement B had which created the need for so many gallons of topping in the two week time frame. Absent express agreement, courts would be unlikely to find time being of the essence.

However, even if the courts did not find the two week deadline to be firm, S delivered

only 500 gallons of topping four weeks later. S did not deliver on the 5,000 gallons and thus B is permitted to reject delivery and S is in material breach.

As discussed above, it's unlikely that S can claim mistake as an excuse to his performance.

Accordingly, S is in breach of the contract with B, and B likely can recover damages.

Damages / Remedies

Expectation Damages / Incidental Damages

When a contract has been materially breached, the injured party can sue for expectation damages, which are those which put the party in the position s/he would have been had the counterparty fully performed. With respect to goods, typically this is calculated as either (market price - contract price)*(# of goods), or, if the injured party covered, (cover price - contract price)*(# of goods).

If the injured party covers, (e.g., went into the market to buy replacement / substitute goods or sold to an alternate buyer), such party can also recover for any incidental damages which includes costs incidental to do that which the party expected (alternate buy or sell). These include expedited shipping costs, storage costs, etc.

Here, B was entitled to 5,000 gallons of topping at $20 per topping. It appears that B was unsuccessful in obtaining an alternate source of maple topping. Thus, B's expectation damages would be the difference between the market price of the topping and the contract price of $20, multiplied by 5,000. No incidental damages given no

cover.

Consequential Damages

Consequential damages are those that flow as a result of a party's breach. The injured party can recover consequential damages if the losses arise out of the breach of the contract and are foreseeable and reasonably certain.

Here, B is in default of his catering contract due to the lack of maple topping. He tried to reach S but S was out on vacation and unreachable. B was unsuccessful in finding a substitute. His losses were directly caused by S's breach. The losses are reasonably certain given B had a contract under which he would've obtained $100,000 in profits. However, it's not clear that this harm is foreseeable to S. B did not tell S about the contract in advance of their agreement. Furthermore, given the original quantity they'd discussed is 500 gallons, it would be unforeseeable to S that suddenly B would have such a high resultant amount of damages. B would argue that S was on notice when B sent S a PO for 5,000 gallons that it reasonably follows that B has business that requires high amounts of topping and accordingly the resultant damage is foreseeable.

Given the magnitude of the losses, it seems unlikely that a court would find the damages foreseeable; B is unlikely to get consequential damages.

Duty to Mitigate Losses

The injured party in a breach of contract has a duty to mitigate his/her losses (e.g., finding an alternate seller or buying).

Here, it seems that B did try to find an alternate but was unsuccessful.

California Bar Examination

Essay Questions and Selected Answers

July 2023

The State Bar of California

OFFICE OF ADMISSIONS

ESSAY QUESTIONS AND SELECTED ANSWERS

July 2023

CALIFORNIA BAR EXAMINATION

This publication contains the five essay questions from the July 2023 California Bar Examination and two selected answers for each question.

The selected answers are not to be considered "model" or perfect answers. The answers were assigned high grades and were written by applicants who passed the examination after the First Read. They are reproduced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. These answers were written by actual applicants under time constraints without access to outside resources. As such, they do not always correctly identify or respond to all issues raised by the question, and they may contain some extraneous or incorrect information. The answers are published here with the consent of the authors.

Question Number	Subject
1.	Business Associations
2.	Torts
3.	Professional Responsibility
4.	Criminal Law
5.	Remedies

ESSAY QUESTION INSTRUCTIONS

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little or no credit. State fully the reasons that support your conclusions and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

QUESTION 1

Amy, Bob and Carl are partners in the ABC law firm, which operates under a general partnership agreement. ABC provides all firm attorneys with cell phones to facilitate prompt attorney-client communications. ABC has a policy that all firm attorneys must carry their work-provided cells phones with them at all times and that all client emails must be responded to immediately, at least with a personal acknowledgment of receipt.

Sam, an attorney well known for his many highly publicized trials, often works closely with ABC, but is not a party to the written ABC partnership agreement. ABC believes that Sam's presence raises the profile and prestige of ABC.

Sam leases an office in the suite of offices used by ABC, for which ABC charges Sam $3,000 per month. The ABC receptionist greets all clients of ABC and Sam. Sam uses the ABC firm name and telephone number on his letterhead. Sam bills his clients directly for his services. Sam also receives 10% of the annual profits of ABC in recognition of his value to the firm.

After work one day, Amy was driving in heavy traffic to attend a baseball game when she received an urgent email from an ABC client. While briefly stopped in traffic, Amy attempted to answer the email on her work-provided cell phone. Due to this distraction, Amy negligently caused a car accident that was the actual and proximate cause of serious injuries to the other driver, Priya.

Priya sued Amy, ABC, Bob, Carl, and Sam for damages arising from the car accident.

Which of these defendants might reasonably be found liable for damages arising from Priya's car accident and why? Discuss.

QUESTION 1: SELECTED ANSWER A

1. Amy's liability to Priya

Amy is clearly personally liable to Priya for the injuries Priya suffered. To be liable under negligence, four elements must be met: (1) the defendant must have owed the plaintiff a duty; (2) the duty must have been breached; and (3) the breach must have been the actual and proximate cause of (4) the plaintiff's injuries (i.e., damages are required). Here, it is clear that all four elements are met. Therefore, Amy is liable to Priya.

As we are told, Amy "negligently" caused a car accident that was the actual and proximate cause of serious injuries to Priya. In other words, we were told that three of the four negligence elements are met here: (1) breach of duty (given that Amy "negligently" caused the crash); (2) causation (both actual and proximate); and (3) damages (we are told that Priya suffered serious injuries) Therefore, the only question here is whether Amy owed a duty to Priya. All persons owe a duty to all foreseeable plaintiffs; i.e., to those within the zone of danger created by the defendant's actions. Here, in operating a vehicle, Amy owed a duty to all the other drivers on the road (at least those within the "zone of danger" created by Amy's actions, i.e., those within her immediate vicinity). Given that Amy collided with Priya, it is clear that Priya was within this zone of danger. Thus, all four negligence elements (duty, breach, causation, damages) are present here, and Amy is therefore liable to Priya.

Note that Amy's status as a partner at ABC law firm will not insulate her from liability. For one, general partnerships do not provide their partners with limited liability (as will be addressed in greater depth below). Second, even with business entities that provide limited liability, member/partners remain liable for their own personal actions (and here, Amy is personally liable). Third, the policy requiring immediate response will not serve to protect Amy from liability (i.e., there is no relevant negligence defense that this policy might trigger). Lastly, because we are provided with no facts indicating that Priya was negligent herself, Amy will likely not have any valid defenses (such as comparative or contributory negligence).

In short, Priya is likely to prevail against Amy.

2. ABC's liability

Partnerships are distinct legal entities from their partners. Nonetheless, a partnership will still be liable for the tortious conduct of its partners when the partners were acting in the ordinary course of the partnership business. Partners are the agents of the partnership. When determining whether a partner was acting in the course of the partnership business, we look to the following factors: (1) whether the partner was "on the job" (i.e., acting within the spatial and temporal bounds of their work); (2) whether they were performing work of the kind they perform for the partnership; and (3) whether the partner was acting to further the partnership business. For the reasons outlined below, ABC is liable to Priya.

Here, Amy negligently caused a crash while attempting to answer an email from an ABC client. Though ABC may try to argue that Amy was acting outside the scope of the partnership business, that is simply not true. As we were told, ABC provides all its attorneys with cell phones to facilitate "prompt" attorney-client communications. Moreover, ABC has a policy requiring all firm attorneys to carry their work-provided phones with them at all times and that all client emails must be responded to "immediately." Therefore, in attempting to respond to an "urgent email" from a firm client while sitting in traffic (i.e., immediately, as per firm policy), Amy was acting within the ordinary course of the partnership business (she was performing the kind of work she performs for the partnership (dealing with client matters) and was acting to further the partnership business (by responding to a firm client). Furthermore, given the aforementioned policy, ABC cannot even claim that it is not liable because Amy should not have been responding to emails while driving. Based on the information we are provided with, it appears as though the policy's mandate was absolute: attorneys must respond "immediately," seemingly irrespective of the circumstances. Perhaps Amy exceeded the scope of the policy when she attempted to "answer" the email instead of simply sending a personal acknowledgement of receipt (as was permitted by the policy), but I do not believe this will be a winning argument.

Moreover, it is true that Amy was responding to the email *after work hours on her way to a baseball game*. Thus, ABC may try to argue that Amy was not acting in the ordinary course of the partnership business at the time of the accident, as she was acting

outside the spatial/temporal bounds of her work as a partner at ABC. However, as was mentioned above, the policy at issue here appears to be absolute in its mandate: firm attorneys must carry their work-provided phones with them at "all times" and respond to "all client emails ... immediately ...." Thus, it appears as though there are no spatial or temporal bounds when it comes to working for ABC law firm; a firm attorney (such as Amy) can be working within the bounds of their position at any hour of the day at any location.

Therefore, ABC will likely be found liable for the damages Priya suffered.

3. Bob and Carl's liability

As we were told, Bob and Carl are Amy's partners in the ABC law firm. Moreover, we are told that ABC is a general partnership, a business entity that does *not* provide its partners with limited liability. In other words, general partners are personally liable for partnership obligations. Partners are jointly and severally liable for partnership obligations; however, they are only liable as guarantors. Therefore, a plaintiff with a claim against the partnership must first exhaust partnership assets before she can recover from the partners themselves. Moreover, partners must be personally served before a plaintiff can recover against them. A partner who has to pay a plaintiff in her personal capacity has the right to indemnification from the partnership and/or contribution from her fellow co-partners (in the event that the partnership cannot indemnify her).

As was argued above, ABC is liable for Amy's actions at issue here. Therefore, Bob and Carl (and, of note, Amy) - as partners in a general partnership - are personally liable for the obligations of ABC law firm. Therefore, Priya may be able to recover from Bob and Carl (and Amy) in their personal capacity, assuming that ABC's assets are insufficient to cover its liability to Priya. If ABC's assets are insufficient, Priya can recover from Bob, Carl, and Amy personally (assuming she properly serves them). Then, if any individual party pays more than their fair share, they can seek indemnification from the firm or contribution from their fellow co-partners.

Therefore, because of their status as general partners in a general partnership, Bob and Carl may be held personally liable to Priya.

4. Sam's liability

Sam's liability turns on whether Sam can be properly classified as a partner in the ABC law firm. Though Sam is not a party to the written ABC partnership agreement, he may nevertheless be a partner. A general partnership is created whenever two or more persons carry on as co-owners to a business for profit. The partners need not have a subjective intent to form a partnership agreement, nor does any agreement have to be in writing (except where required under the Statute of Frauds). Rather, the relevant intent here is as follows: an intent to carry on as co-owners a business for profit. Where the parties' intent is unclear, the court looks to the following circumstances: (1) whether

profits are shared (profit sharing creates a rebuttable presumption of a partnership; (2) whether the parties have the right to participate in the management of the business; and (3) whether losses are split. For the reasons outlined below, Sam is properly classified as a partner (and, for the reasons outlined above, is therefore personally liable to Priya as a guarantor).

Here, it appears clear enough that none of the parties subjectively intended for Sam to be a partner in ABC (otherwise, why not add him to the partnership agreement?). However, that fact alone is not dispositive. As we are told, Sam receives 10% of the annual profits of ABC in "recognition of his value to the firm." Sam's sharing in the profits creates a rebuttable presumption that Sam is, in fact, a partner in the ABC law firm. The rest of the facts provided only serve to further boost this presumption (instead of rebutting it). First, we are told that ABC believes that "Sam's presence raises" its profile and prestige; therefore, even ABC acknowledges that some relationship exists between Sam and ABC (apart from the tenant-landlord relationship that exists by virtue of the fact that Sam leases an office in ABC's office space). Second, we are told that an ABC receptionist greets all clients of both ABC and Sam, and that Sam uses the ABC firm name and telephone number of his letterhead. Third, we are told that Sam leases an office *within* ABC's suite of offices (i.e., he is working among ABC's firm attorneys). Though Sam bills his clients directly and pays rent to ABC for his office space - perhaps indicating an intent to carry on his own separate business - the evidence discussed above (the joint receptionist, the use of the firm name and phone number on the letterhead, *the receipt of 10% of ABC's annual profits*, ABC's belief that

Sam's presence raises its profile) strongly weighs in favor of finding that Sam is, in fact, a partner at ABC.

Therefore, because Sam is a partner at ABC, he is personally liable to Priya for the same reasons that Bob and Carl are liable - as partners in a general partnership, they are personally (and jointly and severally liable) for all partnership obligations. Thus, because ABC is liable for Amy's actions, *all* of its partners are also liable.

5. Conclusion

In short, everyone here is liable: Amy is personally liable as the tortfeasor (and may also be liable as a partner); ABC is liable for the actions of its partner Amy; Bob and Carl are personally liable as Amy's co-partners; and lastly, Sam is liable as a partner of ABC as well.

QUESTION 1: SELECTED ANSWER B

Negligence by Amy

The issue is whether Amy may be found liable for negligence for the damages to Priya arising from the car accident to Priya. Negligence is a tort with four elements. The plaintiff must show that 1) the defendant had a duty to people such as herself (eg, that she was a foreseeable plaintiff), 2) that the defendant breached this duty by violating the standard of care that would be shown by a reasonably prudent person under the circumstances, 3) that this breach was the actual and proximate cause of 4) an injury. Here, Amy was driving in heavy traffic. When she briefly stopped, she attempted to answer an email on her phone and crashed into Priya. Drivers generally have a duty to other drivers on the road, and in heavy traffic, it is foreseeable that distraction or inadvertence would cause a car crash. Amy therefore had a duty to Priya as a fellow driver that she breached by negligently checking her phone. We know from the facts that this breach was the proximate and actual cause of serious injury to Priya, satisfying the remaining elements of negligence. Therefore, Amy is directly liable for the damage to Priya and Priya may recover money damages from her.

Vicarious liability of ABC

Partnerships are a type of business entity formed whenever two or more people carry on as co-owners of a business for profit. No formal paperwork must be filed to create a

partnership; a general partnership is formed whenever the criteria are met, even if the co-owners did not intend to form a partnership.

Here, ABC is a law firm operating under a general partnership agreement, so it is clearly a partnership.

The issue is whether the partnership entity is vicariously liable for Amy's tortuous action. To answer this, we must determine whether Amy was acting as an agent of the partnership when she committed the tort.

A principal may be liable for the actions of its agent when the agent is acting in the scope of their agency or employment (respondeat superior). Partners are agents of their partnership and in the law firm context, also employees. If a partner commits a tort while acting in the scope of their employment, the partnership will be held liable. The scope of employment is determined by looking at whether the employee was doing the kind of thing she was employed to do at the time of the tort. An employee who takes a brief break or deviation from work will still be held to be within the scope of employment (known as a detour), while one who entirely abandons their employer’s purpose to follow their own will be held outside the scope of employment (a frolic).

Here, Amy was driving to attend a baseball game. Since there is no indication that Amy was attending this game for firm-related reasons, the partnership will try to argue that she was acting outside the scope of her employment when the accident occurred or

engaged in a frolic. However, this position will likely fail based on other facts. ABC provides all its attorneys with cell phones in order to facilitate prompt attorney-client communications. ABC also has a policy that all firm attorneys must carry these work-provided cell phones with them at all times and respond to client emails immediately. When Amy answered an email while in heavy traffic, she was complying with this strict policy of the firm and doing firm work, placing her actions within the scope of her employment. While the firm may argue that it never required its attorneys to answer emails in unsafe situations, it is rarely the case that an employee who commits a tort was instructed to do so in clear terms--this will not save the partnership from liability. A firm that demands its employees be "on" at all times cannot then complain that its employees were doing firm business in an usual situation.

The partnership is vicariously liable for Amy's tort, meaning that Priya may collect damages from the partnership assets. (Note that the partnership's vicarious liability does not absolve Amy of her personal liability for the tort.)

Direct liability of ABC

An employer may be held directly liable for the actions of its employees based on its negligent hiring, training, or supervision of those employees. The standard, as in all negligence, is whether the hiring, training, or supervision was not reasonable under the circumstances, breaching a duty to a foreseeable plaintiff (and causing injury).

While there is no indication that anything in Amy's background made the partnership negligent in hiring her as an attorney, Priya could try to argue that ABC negligently trained and supervised Amy. Her argument would center on the requirements that ABC attorneys carry their phones at all times and must answer messages immediately. Priya could argue that this creates a risk of accidents like the one that happened to her and that a reasonable employer under the circumstances would have trained its employee to only check their phones in safe circumstances. However, this argument is somewhat far-fetched, since something like this generally goes without saying. A claim of direct liability by ABC would probably fail.

Personal liability of the ABC Partners, Bob and Carl

Now that we know the partnership itself is vicariously liable for Amy's conduct, we must ask whether Amy's partners are liable for her conduct in their personal capacities. Unlike other business forms, general partnerships do not provide limited liability to the partners-.Partners are jointly and severally liable for the liabilities of the partnership, even if the partner was not at all involved in the wrongdoing, so long as the partner was individually sued. However, individual partner assets will not be reached until partnership assets are exhausted.

In this case, ABC is a general partnership and Bob and Carl are partners, sued in their personal capacity by Priya. Priya will be able to recover damages from them, but only if the partnership assets are unable to cover her damages.

Partnership liability of Sam

Understanding that Bob and Carl are liable as partners, we next consider whether Sam will be liable as a partner of the ABC law firm. As discussed above, a person may be a member of a partnership without explicitly intending to be one or being part of a formal partnership agreement. The main factor considered in determining who is a partner is whether profits (as opposed to gross earnings) are shared with the individual. It is not a requirement of a partnership that profits be shared equally. Other factors are also relevant, including whether the partnership holds the individual out as a partner, whether they share facilities and employees, whether they share clients, and how they interact with those clients. The determination will be made looking at all the circumstances.

Here, on the facts, Sam is likely to be considered a partner of the ABC partnership. First and most importantly, Sam shares profits with ABC--he receives 10% of their annual profit. Sam might argue that if he were really a partner of a four-person partnership, he would receive 25% profits, an equal share. But while equal sharing is a default rule, partners may modify it.

The partnership appears to hold Sam out as a partner. He has a suite within ABC's offices and the same ABC receptionist greets clients of both Sam and ABC. He uses the ABC firm name and telephone number on his letterhead. ABC believes that Sam's

presence raises the profile and prestige of ABC, suggesting that this appearance that Sam is associated with ABC is intentional and intended to profit ABC (which in turn profits Sam to a tune of 10% a year.)

Sam does have a few countervailing facts on his side. He can point to the fact that ABC charges him rent of $3,000 per month for his office space, an act that seems inconsistent with him being a partner, since the other partners do not pay rent. He may point out that he bills his clients directly and does not share his own profits with ABC. These facts are probably not enough to tip the balance in Sam's favor, however, considering how closely associated Sam and ABC are. At the end of the day, Sam is unlikely to be able to reap the benefits of association with the partnership without paying the cost of liability for its actions.

Therefore, Sam will be treated as a partner of ABC and also be held liable for Amy's tort. As with Bob and Carl, Sam's assets may only be reached once the partnership assets are exhausted.

To sum up: Priya may recover damages from Amy and the partnership, and if the partnership's assets are not sufficient, she may recover from Bob, Carl, and Sam as partners.

QUESTION 2

DishWay developed a new dishwasher powder that it named UltraKlean. The company advertised widely that UltraKlean was “a revolutionary, safe product with the most powerful cleaning agent ever.” This advertisement accurately represented that UltraKlean contained a new cleaning agent that made the product more effective than other dishwasher powders.

DishWay knew the cleaning agent could cause severe stomach pain if ingested, but this is true of all detergent products. What DishWay did not know was that a potentially dangerous amount of UltraKlean residue tended to remain on aluminum cookware after a wash cycle. It is not unusual for dishwasher powders to leave a harmless amount of residue on different surfaces. During product development, DishWay tested UltraKlean on some surfaces but not on aluminum because there was no indication that it would work differently on aluminum than on other surfaces. The residue was not detectable to the eye, and there was no flaw in DishWay’s manufacturing process. DishWay’s instructions on the product only stated that the product should not be ingested.

Paul purchased a box of UltraKlean from DishWay. The first time he used it was to wash some aluminum pots. The next day, Paul used several of those pots to prepare a meal. Shortly after finishing the meal, Paul experienced severe stomach pain, which required him to be hospitalized. Laboratory test results revealed the cleaning agent in UltraKlean caused Paul’s stomach pain.

What products liability claims may Paul bring against DishWay? Discuss.

QUESTION 2: SELECTED ANSWER A

Paul v. Dishway

Products Liability

A plaintiff may bring a products liability claim under five different claims: (1) strict products liability, (2) negligent products liability, (3) warranty, (4) misrepresentation, and (5) intent.

Strict products liability

To recover for strict products liability, a plaintiff must show: (1) Defendant was a commercial supplier, (2) product was defective, (3) actual cause, (4) proximate cause, and (5) damages.

Commercial Supplier

A defendant is a commercial supplier where he puts a product in the stream of commerce without substantial alteration.

Here, DishWay is the developer of UltraKlean. Dishway puts UltraKlean in commerce because they make it available for consumers like Paul to purchase a box. There is no alteration as DishWay sells UltraKlean directly after its development to consumers.

Thus, DishWay is a commercial supplier.

Product was Defective

A plaintiff can show that a product was defective under three theories: (1) manufacturing defect,

(2) design defect, and (3) failure to warn.

Manufacturing Defect

A plaintiff can show that there was a manufacturing defect where the product deviates from the intended design of the product, thus subjecting users to harm.

Here, there are no facts to suggest that the box of UltraKlean purchased by Paul deviated from the intended design of UltraKlean. It was not unusual for dishwasher powders to leave residue on different surfaces. DishWay tested UltraKlean on some surfaces, but failed to test on aluminum surfaces and did not design UltraKlean to specifically not leave residue on aluminum pots. Additionally, there was no flaw in DishWay's manufacturing process.

Thus, it is unlikely that Paul would succeed in showing a manufacturing defect in UltraKlean.

Design Defect

A design defect can be shown where the product has a common feature with other products within the same line of product that poses a risk of harm to consumers. Under the consumer expectation test, a design defect can be shown where a product fails to conform to the safety expectations of an ordinary consumer. Under the risk-utility test, a design defect can be shown where a product's utility is outweighed by a risk of harm.

Using the consumer expectation test, an ordinary consumer would expect that he could use a dishwasher powder to wash his aluminum pots without ingesting a dangerous amount of residue

that would cause physical injury. Here, Paul used UltraKlean to wash some aluminum pots. After use, Paul used the pots to prepare a meal and experienced stomach pain that required him to be hospitalized. Thus, Paul could argue that his expectation as an ordinary consumer was not met. DishWay can argue, however, that it is true of all detergent products that severe stomach pain can occur after use. DishWay can argue that it is expected that every once in a while, a user of dishwasher powder will experience pain after use. However, Paul can argue that he suffered pain after the first use of UltraKlean, creating an inference that UltraKlean subjects users to stomach pain more often than average rate of all detergent products.

Using the risk-utility test, the risks of product use must be weighed against the product's utility. Here, the risk is that using UltraKlean to wash pots will leave residue that can cause internal stomach pain when using the pots later. The utility of the product is the ability to clean more effectively than other dishwasher powders in the market. Paul can argue that the risk of pain that a user subjects himself to when using UltraKlean is outweighed by UltraKlean's utility. Though having the best cleaning agent is beneficial, it is not necessary to have such effective cleaning power if it subjects users to pain while other dishwasher powders do not.

Thus, it is likely that Paul can show design defect under the consumer expectation test and risk-utility test.

Failure to Warn

Under failure to warn, a plaintiff must show that the product subjected users to harm, such harm was not obvious to users, and the defendant knew of such risk of harm.

Here, as mentioned above, UltraKlean subjected Paul to harm after use. The harm was not obvious to Paul because UltraKlean residue is not detectable to the eye and there were no instructions on the box to use a specified amount per wash. The instructions only said that the product should not be ingested. However, the facts state that Dishway did not know that a potentially dangerous amount of UltraKlean residue tended to remain on aluminum cookware after a wash cycle. Paul can argue, however, that as a developer of dishwasher powders, DishWay should have known of the risk of harm because Dishway knew that indeed residue is left on aluminum cookware, that this substance can be dangerous if ingested, and their instructions mention that the product should not be ingested.

Though it's a close call, Paul may be able to argue that UltraKlean was defective because it failed to warn.

Actual Cause

Plaintiff must show that but for the use of defendant's product, plaintiff would not have been harmed.

Here, presumably Paul was healthy before using UltraKlean. After using UltraKlean to clean some aluminum pots, Paul used the pots to cook a meal and subsequently suffered severe stomach pain that required him to be hospitalized. If Paul did not use UltraKlean to clean the pots, he would not have been harmed after using the pots. The laboratory test results specifically revealed the cleaning agent in UltraKlean caused Paul's stomach pain.

Thus, Paul can show actual cause.

Proximate Cause

Plaintiff must show that his injury was a foreseeable result of from the product use. A supervening cause is an unforeseeable event that cuts off defendant's liability after the occurrence of the event.

Here, Paul will argue that it was foreseeable that he would suffer harm after using Dishway's UltraKlean dishwasher powder that left dangerous residue. However, DishWay may argue that Paul did not use the product in a foreseeable manner. DishWay may argue that Paul failed to use UltraKlean with a sufficient amount of water or with water for a sufficient amount of time. If Paul did so, Paul would have consumed the powder more directly, obviously subjecting him to harm. However, no such facts are explicitly stated.

Thus, it is likely that Paul can show proximate cause.

Damages

A plaintiff may recover damages to compensate his harm. Compensatory damages must be causal, foreseeable, certain, and unavoidable.

Here, Paul suffered severe stomach pain that caused him to be hospitalized.

Thus, Paul can recover for hospital fees, medication to alleviate pain and contamination in his stomach. However, Paul cannot recover from economic harm.

Conclusion

Thus, Paul is likely to recover for strict products liability as he is able to show that DishWay is a commercial supplier, UltraKlean is defective, actual cause, proximate cause, and damages.

Negligent Products Liability

To recover for negligent products liability, a plaintiff must show (1) a duty was owed, (2) breach of the duty, (3) actual cause, (4) proximate cause, and (5) damages.

Duty

A plaintiff must show that defendant owed a duty to the plaintiff. Under the majority rule, a duty is owed to all plaintiffs within the foreseeable zone of danger. Under the minority rule, a duty is owed to all plaintiffs.

Here, a duty was owed because DishWay developed a dishwasher powder that it then sold in boxes to consumers. It is foreseeable that users of DishWay's product can be harmed from the use of the product.

Therefore, under both the majority and minority rule, a duty is owed by DishWay to Paul.

Breach

A plaintiff must show that defendant failed to conform is conduct to a specific standard of care. A developer of a product owes a duty of care to act as a reasonably prudent developer under

like circumstances.

Here Dishway did not know of the potentially dangerous amount of UltraKlean residue that tended to remain on aluminum cookware after a wash cycle. However, Paul will argue that Dishway should have known of such risks. DishWay should've conducted tests to determine whether dangerous residue was a possibility. Though DishWay tested UltraKlean on some surfaces, they failed to test on aluminum because they believed that UltraKlean wouldn't work differently on aluminum.

Thus, Paul can likely show that DishWay breached its duty by failing to specifically test UltraKlean's performance on aluminum surfaces.

Actual Cause

See above in Actual Cause section for strict products liability.

Proximate Cause

See above in Proximate Cause section for strict products liability.

Damages

See above in Damages section for strict products liability.

Conclusion

Thus, it is likely that Paul can recover for negligent products liability as he can show that a duty was owed, DishWay breached such duty, actual cause, proximate cause, and damages.

Warranty

A plaintiff may recover for warranty under express warranty or implied warranty.

Express Warranty

A plaintiff may recover when defendant makes explicit statements concerning the product and the product fails to conform to those standards.

Here, UltraKlean expressly stated that UltraKlean was a "revolutionary, safe product with the most powerful cleaning agent ever." DishWay also represented that UltraKlean contained an agent that made the product more effective than other dishwasher powders. Paul will argue that UltraKlean failed to be a safe product. Upon first use of the product to clean his aluminum pots, Paul suffered severe stomach pains. Paul may argue that he used other dishwasher powders from other companies in the past and did not suffer such harm. The facts do not indicate whether UltraKlean was more effective at cleaning than other dishwasher powders.

Thus, Paul can likely recover for express warranty based on DishWay's express warranty that UltraKlean was a revolutionary, safe product.

Implied Warranty

A warranty is implied in the sale of goods that the goods conform to the ordinary expectations of

ordinary consumers.

Here, a consumer would expect that he could use UltraKlean to clean cookware without suffering stomach pain after using the cleaned cookware. Paul's expectation as a consumer was not met as he suffered harm from the use of UltraKlean.

Thus, Paul could recover under implied warranty.

Misrepresenation

To recover for misrepresentation, a plaintiff must show that a (1) false statement of past or existing fact was made by defendant, (2) the statement was made with an intention to induce reliance on the statement, and (3) plaintiff did in fact rely on the statement.

False Statement

Here, a false statement by DishWay was made when it represented that its product, UltraKlean, was a revolutionary, safe product.

Intention to Induce Reliance

Here, it can be presumed that DishWay intended for consumers to see its advertisement, rely on the representations, and thus purchase more UltraKlean.

Statement Induced Reliance

Paul may have seen the advertisement and relied on the representations when buying UltraKlean.

Thus, if Paul did see DishWay's advertisement and relied on its statements when buying UltraKlean, Paul can recover for misrepresentation.

Intent

A plaintiff may recover under an intent theory for products liability if the defendant intended for the product to cause harm.

Here, DishWay did not know of the potentially dangerous amount of UltraKlean residue that remained on aluminum cookware.

Thus, Paul is unlikely to recover under the intent theory.

Overall Conclusion

Paul can likely recover under strict products liability, negligent products liability, express warranty, implied warranty, and misrepresentation.

QUESTION 2: SELECTED ANSWER B

Products Liability:

A plaintiff seeking to go after and sue a commercial supplier/manufacturer of a product can raise different claims such as 1) strict products claim 2) negligent products claim and 3) breach of warranty claim.

Strict Products Claim:

A commercial supplier can be held strictly liable for defective products that cause damage to a foreseeable user.

Commercial Supplier:

A commercial supplier is one who puts a product in the stream of commerce. Here, DishWay is the company who developed the new dishwasher powder named UltraKlean. The company not only advertised this product widely, but sold it in stores as Paul(P) purchased a box of it from Dishway. Thus, Dishway is a commercial supplier for the purpose of bringing a strict products liability claim and thus can be held strictly liable if all the other elements are met.

Defective Product:

Plaintiff must prove that the product they purchased was defective. A product can be defective in three ways 1) manufacturing defect 2) design defect or 3) failure to warn.

Manufacturing Defect:

This occurs where a product, a single product, deviated from the intended way the product should have been manufactured per the specifications. Here, Disway developed a new dishwasher powder and named it UltraKlean. Dishway was made as a cleaning agent and was advertised as a new cleaning agent that made the product more effective than other dishwasher products. Thus, Dishway manufactured this product as a whole as a cleaning agent to be used by consumers on different surfaces. The facts do not indicate that Dishway's product that was sold to P deviated from the specific intended manufacturing design, as it was produced like every other Ultraklean product sold. In fact, there was no flaw in Dishway's manufacturing process. The defect of Ultraklean seems to be toward the product as a whole and not the specific one sold to P.

Design Defect:

A design defect arises where the product itself, as a whole, was defective when it was designed and should not have been manufactured in that way. There are two tests the court will use to determine if there was a design defect 1) consumer expectation test and 2) risk utility test. Here, P will argue that there was a design defect in the product UltraKlean itself thus rendering the product defective.

Consumer Expectation Test:

Under the consumer expectation test, the product will be defective if it fails to meet ordinary consumer expectations of the product when used in its proper manner. However, even unforeseeable uses of the product still can render the product defective as it is foreseeable consumers may misuse the product in some fashion. Thus, under CET, the product must fail what an ordinary user would expect when using the product. Here, P purchased Ultraklean and

he used it to wash some aluminum pots. This product as a cleaning agent, can be and is foreseeable that a consumer would use it on pots, even those of aluminum material. Many pots are in fact made out of aluminum, thus Paul reasonably and foreseeably used the product as intended. Moreover, as a consumer, this product failed to meet reasonable expectations because P and other consumers would not expect to experience severe stomach pain from merely using a cleaning agent in its intended manner. Cleaning agents are meant to effectively clean the pots or kitchen utensils, so it is safe and clean enough to rinse off of. The product used to clean the pots should not be nor would it be reasonably expected for such products to be the factor that causes consumers to get sick. In fact, Dishway advertised that the product is new and more effective than other dishwasher powders. Thus, P as a reasonable consumer who used the product in its intended manner can argue that this product has a design defect because it fails the consumer expectation test because one should not get sick from a product advertised to be effective and clean when used in dishwasher.

Risk Utility Test:

Under this test, the courts will balance the risk of the harm of product and providing different designs and the costs of changing the design to the manufacturer. Here, there are many different alternatives Dishway could have implemented to ensure the safety of the product and reduced the likelihood of harm to consumers. For instance, Dishway knew the cleaning agent could cause severe stomach pain if ingested, but chucked it up to the fact that all detergent products can. Instead, Dishway should have tested the product on all types of foreseeable dishwasher products, such as all pots, pans, plates, made out of various different materials to ensure the safety of the product on all types. Each household has different types of pots, some are aluminum such as P. Given that Dishway knew the cleaning agent could cause severe pain, they should have tested their product on all types of pots before placing it in the stream of

commerce. Testing it on different surfaces would not have costed Dishway an exceptional amount nor would it take too much time to simply test their product on all common materials used in dishwashers that are prevalent in homes. Thus, P will argue Dishway failed the RUT because they did not test the product on all common types of surfaces used in homes and doing so would not cost the company too much money or time. When balancing the risk and utility of the product, merely taking more time during the product development stage to test the chemical on other known surfaces is not too much of a burden on the company and can save many consumers from physical injuries. Moreover, if Dishway did test the product on all surfaces, they could have found that the residue was on the surfaces and could have tested whether that amount could cause any harm. From there, they could have altered the exact chemicals in the cleaning agent powder to ensure if any residue amount was left, it would not harm a consumer. There are many alternative designs or means Dishway could have done to mitigate the risk of harm to consumers yet chose not to simply because they did not have an indication that it would work differently on aluminum nor was it detectable to the eye. Thus, P will be able to show that Dishway failed the RUT and their product was defective by design.

Failure to warn:

A manufacturer can also be held liable for a defective product based on the failure to warn theory. This is where a product does not have specific warnings placed on the product indicating certain harms that could results that are not of ordinary nature or that one would expect. Here, Dishway advertised their product as "new cleaning agent that made the product more effective than other dishwasher powders". The only warning was Dishway's instructions on the product that stated the product should not be ingested. P will argue that this warning was ineffective and incomplete. The warning does not indicate what would happen if someone ingests the product nor does it say the amount one would ingest that would cause pain. In fact, the warning does

not even state what type of harm would result from ingesting the product. Given that this product is placed in the dishwasher and used to clean pots/plates that people eat off of, this warning is inadequate because a consumer is bound to ingest part of the product given that it is used to clean kitchenware. Thus, Dishway had an ineffective warning and failed to fully warn consumers about the dangers of ingesting certain amounts of the product and the results that would incur if ingested.

Causation:

A manufacturer will be strictly liable for the defective product if the product is the cause of Plaintffs (pf's)harm. Here, but for pf using Dishway's new cleaning agent he would not have suffered from severe stomach pain when ingested. Furthermore, Dishway in failing to ensure the product was designed safely and effectively, was the proximate cause of Pf's harm because Dishway's failure to ensure the product was safe before putting it in stores substantially led to P buying said product and suffering stomach pains. Moreover, after going to the hospital, the lab tests revealed that the cleaning agent in Ultraklean caused P's stomach pain. Thus, Dishway is strictly liable for P's harm as they were the cause of the harm.

Damages:

Pf must also show damages from the defective product. Here, Paul experienced severe stomach pain, which required him to be hospitalized. Thus, P suffered physical pain.

Therefore, P may be able to successfully bring a strict products liability claim against Dishway based on design defect and failure to warn.

Defenses:

Dishway may argue that P, as a consumer, assumed the risk that he could suffer from stomach pains. Dishway will point to the fact that it is commonly known and true that all detergent products can cause stomach pain if ingested. However, P will argue that he did not voluntarily and knowingly assume this risk. This risk was ambiguously stated in the instructions to not ingest but did not expressly state what the result would be. Moreover, P did not voluntarily assume this risk because Dishway did not even know of this risk because the residue was not detectable to the eye and they had no indication that it would work differently on aluminum. Thus, there is no possible way that P assumed this risk since it was not openly known to him when he purchased the product.

Negligent Product Liability:

A pf can bring a negligent product liability claim against a manufacturer. The elements needed to bring such a claim are 1) duty 2) breach 3) causation and 4) damages.

Duty:

A commercial supplier, like Dishway, has a duty to be a reasonably prudent manufacturer and supply a safe product for its intended consumers. Dishway owes this duty to any foreseeable consumer as well as bystanders. Here, Dishway had a duty to be a reasonably prudent dishwasher cleaning agent manufacturer and owed this standard of care to P, who is a foreseeable consumer as he bought the product at their store.

Breach:

A breach occurs when the manufacturer's actions fall below the applicable standard of care. Here, P will argue that Dishway breached their duty and was negligent in placing this product in

stream of commerce because they did not adequately test the product's safety. First, Dishway knew prior to placing the product in stores that the cleaning agent could cause severe stomach pain if ingested. Despite this knowledge, Dishway still did not test the product on all different surfaces used in a home. Dishway decided not to test on aluminum simply because they thought there was no indication that it would work differently. Dishway will argue that all cleaning agents could cause severe stomach pain if ingested and thus they did not breach this standard of care simply by not testing it on all products. However, P will argue that Dishway's conduct fell below the applicable standard of a cleaning agent manufacturer because as a manufacturer dealing with chemicals and cleaning agents, they had a duty to ensure the product was reasonably safe on all surfaces and had the duty to test the product. Just because they did not think or have any indication that other surfaces such as aluminum would be different, does no negate their duty. They had a duty as a reasonable product manufacturer to at least test the product on known surfaces used in kitchens before placing product in a stream of commerce.

Causation:

As discussed above, Dishway is the cause of P's harm.

Damages:

As discussed above, P suffered severe stomach pain which resulted in hospitalization.

Thus, P will be able to successfully bring a negligent products claim against Dishway.

Defenses:

Contributory Negligence/Comparative:

Under this, a pf can be barred from any recovery from a Defendant (def) if they were negligent themselves. Here, Dishway will argue that P was negligent as he did not read the warning that the product should not be ingested. However, this will likely fail as discussed above. P did not assume this risk in any manner as he did not know that stomach pain would result from using this product in its intended purpose. Thus, it is unlikely that P will be found negligent on his part at all. In fact, many jurisdictions have strayed away from contributory negligence and modernly apply comparative negligence. Under comparative negligence, a pf is not completely barred if they are found to have been negligent in some manner. Here, based on P's actions, it does not appear he will be found negligent at all because he did not assume the risk of stomach pain from using the product on simple aluminum pots that are commonly used in kitchens. Thus, these defenses will likely fail.

Warranties:

A pf may also bring a breach of warranty claim against a def. There are different types of warranties such as 1) express warranties 2) implied warranty of merchantability and 3) implied warranty of fitness for particular purpose.

Express Warranty:

This is where the commercial supplier expressly in words or actions states/guarantees the product's efficiency. Here, Dishway created an express warranty to P as they advertised Ultraklean to be the new cleaning agent that made the product more effective than other dishwasher powders.

Moreover, Dishway also advertised that Ultraklean was a “safe product”. Here, Dishway made an express warranty/promise that this product was efficient for a consumer to use as a cleaning agent. P will argue this warranty was breach because the product was in fact not effective nor safe because it left residue on the pots that are harmful and caused him severe stomach pain. Moreover, in the ad, there are no disclaimers as to this express warranty thus P rightfully relied on this warranty that the cleaning agent would be the most efficient dishwasher powder, when in fact it was not because it left harmful amounts of residue causing P to be hospitalized.

Implied Warranty of Merchantability:

Under this, the manufacturer impliedly guarantees the quality of the product and that is it fit for the regular intended purpose. Here, Dishway impliedly warranted the dish powder was safe and effective and can be used in ordinary manner in a dishwasher. However, they breached this warranty as it did not contain safe amounts of chemical and left high amount of residue on pots causing stomach pain.

Thus, Pf can bring a breach of express warranty claim and IWM against Dishway.

Misrepresentation:

A pf can also bring a misrepresentation claim against the manufacturer. A misrepresentation is a false statement that was made to induce reliance on the pf and caused the pf to take such action, and under the circumstances, it was reasonable to rely on said misrepresentation. Here, Dishway misrepresented the quality of their product by claiming it was effective and safe. It was reliable for P to rely on this information because Dishway put this misrepresentation in all of their ads for consumers to read.

QUESTION 3

Laura is general counsel for MoreHome Mortgage Company (MoreHome), a California corporation. Eric is an entry-level mortgage advisor at MoreHome.

Eric approached Laura and gave Laura a package of documents that he obtained through his position at MoreHome. The documents demonstrate that MoreHome employees are falsifying the financial history of many mortgage applicants so they can qualify for mortgages they could not otherwise obtain. The documents also show that it is MoreHome's policy to push risky mortgages onto unsuspecting customers.

Eric confided in Laura that he was troubled to have learned of these practices himself and wanted Laura's legal advice on what do to. Eric said that he has never engaged in these practices himself and does not want Mianne, MoreHome's Chief Executive Officer (CEO), to learn of their discussion. Laura told Eric she would think about it and get back to him. Eric left all of the documents with Laura as she requested.

Laura knows that the practices shown in the documents and described by Eric constitute a crime under state law. Laura also knows that the State Attorney General is aggressively investigating similar practices by mortgage companies in the state, although Laura is not aware of whether MoreHome has been identified as a target for investigation.

Immediately after Eric left Laura's office, Laura called Mianne and informed her of Eric's visit and about Eric's concerns. Mianne instructed Laura not to do anything with the documents and to give them to Mianne. Laura consulted with outside counsel regarding what to do with the documents and based on that advice, and against Mianne's instructions, Laura provided copies of the documents to the State Attorney General.

What ethical violations, if any, has Laura committed? Discuss.

Answer according to California and ABA authorities.

QUESTION 3: SELECTED ANSWER A

Corporate Misconduct

When a lawyer learns of misconduct done by officers of the court they must not continue to allow their services to be used for a crime or fraud. The lawyer will also have a duty to report to higher ups in the corporation and sometimes to outside forces.

Here, the corporation performed significant misconduct in two ways. First, it falsified financial histories of applicants. As stated by the facts, Laura knew this was a crime under state law. Second, MoreHome enacted a policy that pushed risky mortgages onto unsuspecting customers. Again, we know from the facts that this is a crime that Laura knew about under state law. Thus, the corporation is acting in misconduct by committing crimes and Laura will have certain duties and obligations because of it.

Relevant duties and considerations will be discussed below.

Duty to Act in the Best Interests of the Corporation

When a lawyer is representing a company, they have unique obligations. First, they must always remember that their duties as an attorney remain with the company. Thus, under the Model Rules and the California rules, the attorney must always put the best interests of the corporation first.

Here, there is no indication that Laura acted without the best interests of the corporation

in mind. She promptly reported the misconduct to the CEO and then reported this outside the company when Mianne failed to act (although this may violate her other duties as will be considered below). She likely reported all this misconduct to protect the business and the assets of the business from being fined or seized due to illegal conduct. This is the best interest of the corporation.

Mianne may try to argue that her best interest is the best interest of the corporation. However, lawyers do not even owe this duty to the CEO of the corporation, but rather to the corporation as a whole. Therefore, Laura did not breach her duty of loyalty when she disregarded Mianne's instructions and reported the misconduct out (although she might have breached other duties).

Therefore, Laura did not breach her duty to act in the best interest of the corporation.

Duties to Eric v.s. the Corporation

Because lawyer's best interests remain with the corporation, they must not put the interests of lower level employees above the corporation. They also have a duty to inform the employees that their interests remain with the corporation and must not act under the guise of prioritizing the lower level employees.

Here, Eric is surely a lower level employee because we know from the facts that he is an entry-level mortgage broker. He also approached Laura for legal advice, which she

can give him unless it is against the interests of the corporation. She certainly could not represent both Eric and the corporation in a dispute between them. Laura, then, must not give him the impression that she is representing him in the matter or putting his best interests first.

Laura likely did not violate this obligation because she did not give Eric this impression. First, she did not give him any legal advice when he approached her about liability for the falsified history or policy. She merely told him that she would have to get back to him and then reported the misconduct. However, although she never told Eric that she represented him, a court would probably have preferred her to immediately and affirmatively disclose to Eric that she was the corporation's lawyer, not his.

Additionally, she acted in the best interest of the corporation over Eric's because she reported the misconduct to Mianne despite Eric's requesting that she not. The finding of the misconduct could potentially put Eric in a position of blame for the illegal conduct. Even though Eric asked her not to report it to Mianne, it was within Laura's ethical duties to put the interests of the corporation first.

Thus, Laura likely did not breach her duty to the corporation when she conferred with Eric about the corporate misconduct. However, she probably needed to confirm to Eric more affirmatively that she was not his lawyer nor had a duty to represent his best interests.

Duty of Confidentiality

Lawyers owe their clients a duty of confidentiality to not disclose confidential information to outside sources. Information is confidential when it is made privately to the attorney for the purpose of securing legal services. When representing a corporation, a lawyer does not owe a duty of confidentiality to lower-level employees when reporting to higher ups unless it is within the best interest of the corporation.

Here, Laura owes a duty of confidentiality to the corporation and higher-level employees in some cases. Because Eric is a lower-level employee (entry-level mortgage advisor) she does not owe him a duty of confidentiality when she is reporting to higher ups in the corporation. Even if she did owe him a duty, her duty to the corporation comes first. Therefore, even though Eric asked Laura not to tell Mianne about the misconduct, Laura did not breach her ethical duties when she reported to her higher ups about the misconduct that Eric brought to her.

However, Laura's duty of confidentiality is implicated in two other situations: (1) when she reported up about the misconduct and (2) when she reported out to the State Attorney General. They will be considered below.

Duty to Report to High Level Positions

When a lawyer learns about corporate misconduct, they have a duty to disclose the

misconduct to people in high level positions within the corporation. Under the Model Rules, this duty is absolute as a duty to the corporation. However, under California, a lawyer still may not breach their duty of confidentiality when reporting the misconduct. Attorneys should also try to dissuade the corporate employees from committing the crimes or frauds.

Here, Laura likely acted properly when she reported the misconduct to Mianne because Mianne is the corporation's CEO. As explained above, she did not owe Eric a duty of confidentiality. She also owed it to the corporation to put its best interests first. Serious crimes being committed under its watch are certainly important to know for their best interest. Therefore, Laura did not violate her duties when she reported the misconduct to Mianne.

It might be argued that Laura should have also reported the misconduct to other high level employees, like a Board of Directors. However, there is no indication from the facts that any higher-level such employees exist. Therefore, Laura did not violate her duties.

Reporting Outside the Corporation

A lawyer may report corporate misconduct to outside sources in certain circumstances. First, the lawyer must prove that they first reported the misconduct to higher level positions in the organization. Only when the higher-level people refuse to act or fail to act, may an attorney then consider reporting outside the organization.

After that, there is a split in the Model Rules and California rules. Under the Model Rules, the attorney may report out if the attorney reasonably believes that the conduct will result in death or substantial bodily harm *or* if the misconduct will result in substantial financial harm to the corporation. The substantial financial harm exception is *not* permitted in California. Importantly too, a lawyer may not violate their duty of confidentiality when reporting out in California.

Here, Laura has a pretty good case for reporting out under the Model Rules. Because both the policy and the falsifying of the records are state law crimes, they are rather severe misconduct and could really hurt the corporation. Additionally, Laura knows that the State Attorney General is aggressively investigating similar practices, the chance that the corporation could be found out are rather high. Opponents may argue that she was not aware that MoreHome was identified so it is unlikely they were to be found out. However, aggressive pursuit of the same type of crime still results in a significantly high risk of being found out for criminal liability.

Exposure to criminal liability could result in plunging stock prices and huge decrease in revenue at best and forced termination of the corporation at worst. Both of these results are surely enough for Laura to believe that the corporation could sustain substantial financial harm, which makes violating the duty of confidentiality and reporting outside allowed under the rules.

However, as noted above, California does not allow the exception for substantial financial harm. Thus, in order for Laura to report out and violate her duty of confidentiality, she would have to prove that the misconduct could reasonably result in death or substantial bodily harm. There is no indication from the facts that this is even a conceivable possibility.

Therefore, Laura likely breached her duty under the California rules but acted appropriately under the Model Rules.

Permissive Withdrawal

Under the Model Rules, a lawyer may withdraw if the withdrawal will not materially harm the client's case. This is including if the lawyer finds the acts of the client so repugnant that it would materially affect their representation of the client.

However, the California rules do not allow withdrawal just because it will not materially harm the client. Despite this, a lawyer in California may withdraw from a case if their continuing representation would cause their services to be used in perpetuation of a crime or fraud.

Here, because Mianne is failing to act to rectify either crimes (the policy or the falsifying of history), Laura has a case to permissively withdraw. This is because if she stays on

with the organization and it continues to commit crimes, Laura's services will surely be used in the commission of the crime or fraud. There is also no indication that Laura withdrawing will result in any material harm to the corporation (for example, there is no indication that there are current cases being litigated or cases pending). Therefore, Laura should permissively withdraw from representing MoreHome.

Mandatory Withdrawal

Under both the Model Rules and California rules, a lawyer must not assist a client in the commission of a crime or fraud. If a lawyer actually knows of the crime or fraud, they must withdraw from representation.

For the same reasons as above, it is likely that Laura's services will be used for the commission of a crime or fraud if she stays on as attorney. Therefore, she should withdraw from representing MoreHome.

Duty of Competence

Under the Model Rules, a lawyer must provide reasonably competent representation and legal services to their client. Under the California rules, a lawyer must abstain from intentionally, recklessly, with gross negligence, or repeatedly failing to provide competent legal services to their client.

Here, there is little indication that Laura fell below her duty of competence under the

Model Rules, and thus, under the California rules since it is a lower standard. First, there is no indication that she did not act with reasonable care or with the competence of a reasonable lawyer. Even when she was not sure what to do, she consulted with outside counsel before moving forward with her actions. Therefore, Laura likely did not violate her duty of competence.

Duty to Communicate

A lawyer has a duty to communicate to their clients. This means regular and prompt communication about the state of their affairs, cases, and potential liability about acts.

Here, Laura has a duty to promptly communicate with her client the corporation about the status of their cases and representation. She likely met this duty because she was communicative and prompt with everyone she interacted with. She also promptly informed Mianne of the misconduct and promptly reported it out when Mianne refused to act. Therefore, Laura likely did not violate her duty to communicate.

Duty of Diligence

Under the Model Rules, a lawyer must provide reasonable diligent representation and legal services to their client. Under the California rules, a lawyer must abstain from intentionally, recklessly, with gross negligence, or repeatedly failing to provide diligent legal services to their client.

Just like for the duty of competence, it is unlikely that Laura violated this duty because she acted reasonably, competently, and promptly. Therefore, she likely did not violate her duty of diligence.

Conclusion

Under the Model Rules, Laura likely did not commit any ethical violations, except that she probably should have confirmed to Eric more affirmatively that she was not his lawyer nor had a duty to represent his best interests. However, under the California rules, Laura will likely be disciplined for her reporting of the misconduct to the State Attorney General because she is unable to prove prospect of death or substantial bodily harm. Finally, after learning about the crimes committed by the corporation, Laura should withdraw so her services are not used in the commission of a crime or fraud.

QUESTION 3: SELECTED ANSWER B

What ethical violations has Laura committed?

Lawyer for an Organization

Under both the ABA Model Rules (ABA) and the California Rules, attorneys of organizations are the attorney of the organization itself, not its constituents or officers. Consequently, they owe their duties and loyalty to the organization.

Here, Laura (L) is the general counsel of MoreHome, a California (CA) corporation. As general counsel, she is the attorney for MoreHome, not of the employees, like Eric, or the officers, like Mianne. Thus, she must do what is in the best interest of MoreHome.

Duty of Confidentiality

Under both the ABA and CA rules, lawyers owe duty of confidentiality to their client to take reasonable precautions to protect their confidential communications and documents. However, under the ABA, lawyers are permitted to reveal confidential information if it prevents substantial financial harm to another. However, the CA rules do not have this exception. Under the CA rules, the lawyer may only breach their duty of confidentiality if it is to prevent substantial harm or death to another, and they must

inform the client of their duty and intention before doing so and try to get the client to take another path. Additionally under both the ABA and CA rules, the attorney can reveal confidential information if the client allows or it is implied necessary for the lawyer to carry out her representation.

Here, the documents that Eric (E) gave Laura (L) pertaining to MoreHome's practices show that MoreHome employees are falsifying the financial history of mortgage applicants to qualify them for mortgages and that MoreHome employees are pushing risk mortgages onto customers. These are confidential documents because they pertain to MoreHome's specific work and trade secrets.

When L sent these documents to the State Attorney General, she shared confidential documents of her client, MoreHome, without their permission. In fact, Mianne, the CEO of MoreHome, specifically told L not to do anything with the documents except to give them to her. Thus, L did not have permission to share these confidential documents.

However, L will argue that she was able to breach her duty of confidentiality because she wanted to prevent the financial harm to the current and future mortgage applicants of MoreHome, who were qualifying for mortgages they could not otherwise. Moreover, she wants to protect the clients from taking risk mortgages. However, while this is allowed under the ABA, it is not permitted in CA. And, since MoreHome is a CA corporation, L must follow the CA rules.

Additionally, L may argue that she did not breach her duty because she wanted to prevent any imminent harm or death to the clients who killed themselves or others over losing their money and homes because of MoreHome's practices. However, because there is likely no proof that L reasonably believed a customer was going to kill themselves or others, she will not be successful.

Thus, L breached this duty under the CA rules.

Duty of Loyalty -- Conflict of Interest

Under both the ABA and CA rules, lawyers owe a duty of loyalty to the organization. While Lawyers can represent constituents of the organization at the same time, they can only do so if the employee's interest are not adverse, or will not become adverse, to the organization. The lawyer must also explain to the employee who she represents and who her duty of loyalty lies with when it becomes apparent that an employee's interests may be adverse.

Here, E, an employee of MoreHome, came to L with these documents. Because L was the general counsel, E probably believed that she also represented him as well. Thus, L realized during their conversation that E was giving her information that could hurt MoreHome, she had a duty to tell E that she represented MoreHome, not him, and that

her duty lied with protecting the company.

However, L failed to explain this to E. Moreover, when E asked her not to tell Mianne of what he found because he did not want to get in trouble, L should have explained that she did not have a duty to protect his interests and could not promise that she would not tell Mianne. However, she again failed to do this.

L should have explained her role and loyalty to E.

Thus, L breached her duty under both the ABA and CA rules.

Duty to Communicate

Under both the ABA and CA rules, the lawyer must communicate with their client about their case, answer questions, and keep the client apprised or matters relevant to the lawyer's representation.

Here, L called Mianne, MoreHome's CEO, right after she spoke with E and told Mianne (M) of what she learned from E. Moreover, she told Mianne that it was E who told her this information.

Consequently, because L immediately informed a high officer of MoreHome of this information, L met this duty. Moreover, L did not violate any duty by informing M that it was Eric who told her because she did not owe any duty of loyalty as E, as a mere employee.

Thus, L did not breach this duty.

Duty of Diligence

Under both the ABA and CA rules, lawyers must be diligent in their representation to do what is all reasonably necessary to represent their client and be prompt in their communication. Under the CA rules, if a lawyer intentionally, recklessly, with gross negligence, or repeatedly fails to be diligent, they breached their duty.

Here, L immediately informed M of what she learned from E, and she likely did this to see if what E told her was true. Consequently, she was diligent in quickly informing M and not sitting on the information.

However, L should have checked into the documents and information that E gave her to see if they were accurate and if the allegations were true before going outside the organization to report the information. The facts do not indicate that L did any of her own investigation of the client or that she looked into corroborating the information.

Thus, she breached this duty under both the ABA and CA rule.

Duty of Competence

Under both the ABA and CA rules, a lawyer has the duty to act competently with all the knowledge, skill, and expertise needed for the representation. However, she can research the matter or get advice from another attorney to gain competence. Under CA rules, a lawyer breaches this duty if they intentionally, recklessly, with gross negligence, or repeatedly fail to be competent.

Here, L did not look into the E's allegations or look into what she should do as general counsel to the mitigate the risk to MoreHome if they were true. While she did contact an outside lawyer to see what she should do with the papers from E, she did not do her own investigation to ensure that she was doing the right action under the rules. Moreover, she should have done her own research or contacted an outside lawyer with expertise to see how she could best protect MoreHome.

Because L did none of this, she breached her duty under the ABA and CA rules.

Duty to Report Within Org

Under both the ABA and CA rules, an organizations lawyer should report misconduct to a higher authority with the organization. If that authority does nothing, the lawyer can report the conduct to another high authority within the organization.

Here, L reported E's information and documents to Mianne, the CEO, so she did report up within MoreHome. However, if L did not think that M would do anything, she should have reported to another officer, like the CFO, or to the board of directors, if there was one, to find an authority who could help deal with the problem.

However, L neither reported to another authority, nor gave M a reasonable amount of time to do anything.

Thus, L breached this duty.

Duty to Report Out of Org

Under the ABA, the lawyer may report outside of the organization if reporting within the organization did not give any reasonable results. However, the lawyer cannot reveal confidential information unless it falls under an exception. However, the CA rules do not allow the lawyer to report outside the organization or reveal confidential information

unless it is to prevent substantial harm or death.

Here, L sent the document to the State Attorney General. She will argue that she had to because she knew the Attorney General was investigating similar practices in other companies within the state, and she wanted to protect MoreHome from further damage. Moreover, she was permitted to reveal the confidential docs under the ABA under the financial harm exception, as explained above.

However, she was not permitted to report out or reveal confidential information under the CA rules.

Thus, L breached her duty under the CA rules.

Duty to Safeguard Client Property

Under both the ABA and CA rules, lawyers have a duty to safeguard and not commingle client property with their own.

Here, L sent the documents to the Attorney General (AG) despite M's specific instructions not to. Thus, L breached her duty by not safeguarding the documents and sending them outside the organization.

Speaking With a Outside Lawyer for Advice

Both the ABA and CA rules allow lawyers to speak to outside lawyers for advice on ethical rules.

Here, L contacted an outside attorney to ask what she should do with the documents. Because she did this based on her duty under the ethical rules, she did not breach her duty here.

Mandatory Withdrawal

Under the ABA, the lawyer must withdraw if their services are being used to for a crime or fraud. Under the CA rules, the lawyer must withdraw if she believes her services are being used for a crime or fraud or if her actions would violate a law or ethical rule.

Here, the practices that E alleged MoreHome was doing was against state law. Consequently, MoreHome would get into trouble with the AG for these practices. Moreover, L could also get into trouble as the general counsel if the AG found she assisted or hid these practices. Moreover, by continuing representation, L could be assisting with a crime or fraud.

Thus, L violated both the ABA and CA rules by failing to withdraw.

Permissive Withdrawal

Under the ABA, a lawyer may withdraw if it would not cause financial harm to the client or if continuing representation would cause significant financial harm to the lawyer (CA law does not allow this). Under both the ABA and CA, the lawyer may withdraw if she finds the course of action repugnant or if the client continues with an illegal action despite the lawyer counseling them not to.

Here, L is permitted to withdraw if she finds that conduct of MoreHome to be repugnant if MoreHome continues with these illegal practices. However, L does not have to. Thus, she has not breached her duty by not withdrawing.

Duties upon Withdrawal

Upon withdrawal, the ABA and CA rules require the lawyer return the client's property and payments she did not earn and to give reasonable notice to the client for them to have time find another attorney. However, the ABA allows the attorney to retain documents or property to obtain unpaid fees in certain circumstances.

Here, because L had a duty of mandatory withdrawal she should have returned the documents E gave her to MoreHome, return any fees she did not earn, and give back any other property she had. She also must tell MoreHome that she is withdrawing and give them reasonable time to find another attorney.

If L did not, or does not do this, then she will have breached her duty under both the ABA and CA rules.

QUESTION 4

Deborah was homeless and without money. One night, the temperature was below freezing and continuing to drop. Deborah realized she might die if she did not find shelter. She found a run-down house with an attached garage that had a door connecting it to the house. Deborah thought the house was unoccupied. She went around to the side of the garage, looked through a window, and saw a stack of wood. Deborah decided to go into the garage, take some of the wood, and build a fire outside the garage to keep herself warm. She broke the window to get into the garage. Because of the extreme cold, Deborah decided to stay in the garage. She gathered wood scraps and paper, started a small fire to keep herself warm, and fell asleep. A spark from the fire ignited some oil on the floor. Deborah awoke to flames and smoke. She then escaped through the window she had broken. The fire quickly engulfed the house where it killed Stuart as he was sleeping in his bed.

Officer Oliver, who was patrolling the area, saw Deborah walking on the sidewalk three blocks from the fire. When Officer Oliver asked her what she was doing outside on such a cold night, Deborah said, “I started the fire.”

Deborah is charged in criminal court and moves to suppress her statement “I started the fire.”

1. With what crime or crimes can Deborah reasonably be charged; what defense or defenses can she reasonably raise; and what is the likely outcome? Discuss.

2. Should the court grant Deborah’s motion to suppress her statement? Discuss.

QUESTION 4: SELECTED ANSWER A

QUESTION 1 -- WHAT CRIME(S) CAN DEBORAH BE CHARGED AND WHAT DEFENSES CAN SHE RAISE

I. Larceny

Larceny is the taking and carrying away of someone's tangible personal property through trespass with the intent to permanently deprive the person of that property.

Here, Deborah took wood from the stack and used it to build a fire in the garage. Deborah might argue that because the wood never left the garage, that there was no taking and carrying. However, the taking and carrying away requirement for larceny is satisfied by the smallest of movement. By taking the wood from the stack, Deborah took and carried away someone else's tangible property.

Because Deborah did not have permission to take the wood, she did so through trespass. And because Deborah meant to destroy the wood by using it to make a fire, Deborah had intent to permanently deprive the owner of the wood of possession of their property.

Thus, the elements of Larceny are satisfied.

II. Burglary

Burglary is the breaking and entering into someone else's dwelling at night with the intent to commit a felony therein. Traditionally, the breaking and entering had to be into

a dwelling and it had to be at night. But modern statutes have removed the "at night" requirement and have expanded "dwelling" to mean any building.

Here, Deborah broke a window and then entered the garage. This constitutes breaking and entering, as Deborah entered into the property, she did so by physically breaking a window, and she did so without consent.

Additionally, Deborah broke into the garage with the intention of taking the wood and using it to build a fire. As discussed above, taking the wood and using it to build a fire constitutes larceny. Thus, Deborah had intent to commit a felony inside of the garage.

And while under a strict traditional view, the garage would not likely count as a dwelling, most modern views of the crime of burglary would expand the definition of dwelling to include the attached garage.

III. Arson

Arson is the malicious burning of someone else's dwelling. A burning is malicious if it is done with reckless indifference to the risk of the structure burning down. Under traditional common law, the building had to be a dwelling. But modern interpretations of arson include almost any building. A structure is burned if there is charring to the structure, mere scorching is not enough.

Here, Deborah lit a small fire inside of the garage and then fell asleep, causing a spark from the fire to ignite oil and burn down the garage and the house. The garage likely constitutes a structure that falls into the arson crime, but also the house is a

dwelling that certainly fits the statute. The fire "engulfed" the house, thus meaning there was sufficient burning for arson.

The question is whether this action constitutes a reckless indifference to the risk the house garage next door would burn down. Deborah would argue that she only lit a small fire, and she had no way of knowing that there was oil on the ground that could ignite.

But Deborah also lit a fire inside of a garage that was filled with wood that itself stood right next to a house. And then she allowed herself to fall asleep. Lighting a fire inside of a structure, especially one filled with flammable objects, and then falling asleep without first putting out the fire constitutes reckless indifference to the risk the building would burn down and the risk that the nearby buildings (including the house in this case) would burn.

The elements of arson are satisfied.

IV. Common-law Murder

At common law, murder is killing with malice aforethought. There is malice aforethought in four different situations: (1) intentional killing, (2) killing with intent to cause substantial bodily harm, (3) depraved heart murder, and (4) felony murder. Murder also requires that the death is the actual and proximate cause of the defendant’s actions.

A. Causation

Causation requires actual and proximate cause. Actual cause exists if the

defendant's actions are the but-for cause of the victim's death. Here, but-for Deborah lighting the fire, the house would never have burned down and Stuart would not have died. There is thus actual causation.

Proximate cause exists if the death is the foreseeable result of the defendant's actions. Here, Deborah lit a small fire in a garage filled with wood that was next to a house and then she fell asleep. It is foreseeable that lighting a fire in a flammable (likely wooden) structure and falling asleep would cause the structure and nearby homes to burn down, and it is foreseeable that if a house burns down in the middle of the night that its occupants could die. There is therefore proximate cause.

There is sufficient causation.

B. Intentional killing and killing with intent to cause bodily harm

Here, Debora set the fire by accident. She did not intend to cause anyone harm. Accordingly, Deborah does not have sufficient intent for intentional killing or killing with intent to cause substantial bodily harm.

C. Depraved heart murder

Depraved heart murder is killing caused by an action that constitutes reckless indifference to an unjustified risk to human life. Here, the action in question is Deborah starting a small fire in the garage next to the house. While it is certainly irresponsible to start a small fire inside of a garage that is next to a home, it likely doesn't arise to the level of reckless indifference to human life. Indeed, the fire was small. Additionally, the

main reason it spread was because of oil on the ground, and Deborah was not aware of the presence of the oil. Deborah also thought the house was unoccupied, and this was not entirely unreasonable because the house was run-down.

Accordingly, there is no depraved heart murder.

D. Felony murder

Felony murder applies whenever a defendant's inherently dangerous felony results in someone else's death and the death is a foreseeable result of the felony. The death must also occur during the felony, and before the felon finds a place of temporary safety. The majority view is that felony murder does not apply to people who are in agency with the felon (agency theory). A minority of courts say that felony murder applies to any death that occurs during the felony.

Here, the felony in question would be arson, which is considered an inherently dangerous felony. Moreover, it is foreseeable that someone would die as a result of arson, making Stuart's death within the scope of felony murder. The death happened while the house was burning, meaning it happened during the felony. And Stuart is not in agency with Deborah, so Stuart's death falls within felony murder regardless of whether the agency theory or proximate cause theory is applied.

Thus, the elements of felony murder are met.

V. Statutory murder

Under modern statute, murder is killing with deliberation and premeditation, or

felony murder. As discussed above, there is felony murder in this case.

Deliberation and premeditation require that the defendant intends to kill the victim and that the defendant have a moment to consider their action, if even for a moment. Here, the killing was not intentional, so there is no deliberation and premeditation.

Because there is felony murder, there is murder under modern statutes as well.

VI. Involuntary Manslaughter

Involuntary manslaughter is killing caused by gross negligence. Gross negligence is acting with a conscious disregard for an unjustified and substantial risk, which constitutes a gross deviation from the standard of care of a reasonable person.

Here, the action in question is Deborah lighting a fire inside of a garage that is next to a house, and then falling asleep. The risk of the house burning down is substantial because the garage is full of wood, the garage is next to the house, and Deborah is asleep so she cannot monitor the fire. The risk is unjustified because there is no sufficient justification for why Deborah needed to fall asleep in front of the fire. Yes, Deborah was likely cold and sleepy, but she would have likely been sufficiently protected from the elements while she slept just by nature of being inside of the garage.

The next issue is whether the action is a gross deviation from the standard of care of a reasonable person. A reasonable person would not light a fire inside, and they certainly wouldn't fall asleep during the fire. Deborah will counter that the house next to her was run-down, and thus she thought there was no one in it and accordingly did not

seriously risk human life. However, a reasonably prudent person would not just assume the house next door was empty without checking. Additionally, the existence of a pile of wood in the garage suggests that someone is living in the house next door. Accordingly, Deborah's conduct likely constitutes a gross deviation from the standard of care.

There is likely involuntary manslaughter.

VII. Trespass

While Trespass is usually a tort, it can also be charged as a crime. The elements of trespass are (1) entering another's land without consent and (2) intent to commit the action that causes the person to enter onto someone else's land.

Here, Deborah entered into a run-down house without permission. She also took that action intentionally. Thus, the elements of trespass are met.

VIII. Defenses

A. Necessity

The defense of necessity applies if, during an emergency situation, the defendant reasonably believes that committing the crime is necessary to prevent imminent harm, and the harm is more serious than the crime committed.

i. Burglary

The first issue is whether there was an emergency. Here, the temperature was

below freezing and continuing to drop. Deborah realized that she might die if she could not find shelter. This is enough to constitute emergency.

The next question is whether it was reasonably necessary for Deborah to commit burglary in order to avoid an imminent harm that is greater than the societal harm caused by the crime.

Here, Deborah would have likely died if she did not break into the garage. She was homeless and had no money, so she could not purchase shelter for herself. That said, it is true that Deborah could have always knocked on the door of the run-down house to see if anyone would voluntarily help her out. However, people don't usually let strangers into their home, especially homeless people, and thus it was likely reasonably necessary for Deborah to break into the garage.

The last question is whether the risk to Deborah was more serious than the crime. In this case, the risk to Deborah is death, which is very serious. The crime is breaking into an attached garage with the intent to use some pieces of wood. While never good to trespass and steal, the loss of a couple pieces of wood and a broken window are far less than the risk of death.

Deborah can thus successfully apply the defense of necessity to her burglary crime.

ii. Larceny

The next question is whether necessity applies to larceny. Here, the larceny was using the wood to make a fire. Whether this was necessary to prevent Deborah's death depends on facts outside of the question. The court would want to know how warm the

garage would have kept Deborah if she just stayed within the four walls without a fire. If Deborah would have been fine without the fire, then the defense of necessity doesn't apply. But if starting the fire was necessary to keep Deborah alive, which is certainly possible if the temperature was very low, then the necessity defense applies. After all, stealing a bit of wood is much less serious than the death of Deborah.

iii. Arson

Necessity could also apply to the crime of arson. Deborah would argue that she needed to light the fire to survive, and thus starting the fire, which is what caused the arson, was reasonably necessary to prevent imminent harm to Deborah. Deborah will also argue that while the arson did burn down the house and the garage, that property is always of less societal value than human life, and thus her crime was still less harmful to society than the risk of death against her.

The issue with Deborah's argument is that Deborah is guilty of arson not just because she lit a fire, but because she was recklessly indifferent to the risk that the garage and house would burn down. Indeed, Deborah fell asleep while the fire was lit and seemingly took no precautions to prevent its spread. So while it may have been necessary for Deborah to light the fire, it was not necessary for Deborah to act in a reckless manner when lighting the fire.

Accordingly, Deborah cannot use necessity to defend the arson charge.

iv. Felony murder

Typically, the defense of necessity does not apply to homicide crimes. However, if Deborah can use necessity to negate the underlying felony in felony murder, then that defense also negates the felony murder charge. Thus, if the court accepts Deborah's necessity defense for arson, then the necessity defense also applies to felony murder.

However, as discussed above, the court will likely not agree that necessity applies to the arson charge in this case. Accordingly, necessity also does not apply to the felony murder charge.

v. Involuntary manslaughter

Necessity does not apply to homicide crimes, including involuntary manslaughter. Thus, the necessity defense does not apply here.

B. Mistake

For specific intent crimes, mistake of fact is defense if it negates the specific intent required. For general intent crimes, mistake of fact is a defense if it is reasonable.

Here, the relevant mistake of fact is that Deborah thought the house was unoccupied, while really Stuart was in the house. Deborah can try and use this mistake of fact defense for three crimes: involuntary manslaughter, arson, and felony murder.

i. involuntary manslaughter

Involuntary manslaughter is a specific intent crime--it requires gross negligence.

Deborah could argue that her mistake about the existence of Stuart in the home means that she did not act with gross negligence. However, as discussed above in the original analysis of involuntary manslaughter, Deborah should have checked the home and should have assumed that someone was inside of the home when she saw wood in the garage. Thus, it was still grossly negligent to start the fire inside the garage and then fall asleep. Mistake of fact does not apply.

ii. Arson

Arson is a general mistake crime. Thus, Deborah's mistake of fact as to the existence of Stuart in the home applies only if the mistake is reasonable. Deborah will argue her mistake is reasonable because it was run-down. However, Deborah also saw wood inside of the garage. Additionally, the garage was locked (hence breaking in through the window). A locked garage and the presence of wood in the house both suggest that the house was occupied. Accordingly, the mistake was not reasonable.

iii. Felony murder

Because the mistake of fact defense does not apply to arson, it also does not apply to felony murder, which is based on the arson.

PART 2 -- Deborah's motion to suppress her statement

I. Violation of due process

To be consistent with due process, confessions must be voluntary based on the totality of the circumstances. Here, Deborah told the officer she started the fire when the Officer asked her what she was doing on such a cold night. Nothing in these facts suggests this confession was not voluntary. The confession satisfies due process.

II. Fifth amendment *Miranda* rights

The Fifth amendment states that suspects cannot be subjects of custodial interrogation by the government without being read their *Miranda* warning. The *Miranda* warnings state that the suspect: has the right to remain silent, that everything they say can be used against them, that they have a right to a lawyer, that if they can't afford a lawyer, one will be provided.

Additionally, police cannot place suspects in custodial interrogation by the government without first giving *Miranda* rights. A suspect is in custody if they reasonably do not feel free to terminate the encounter and they feel the same coercive pressures that are present at a station house. Interrogation is when the police know or should know that their actions or questions will illicit incriminating responses. And lastly the suspect must be aware they are being questioned by a government agent.

Here, Officer Oliver did not read Deborah her *Miranda* rights and thus Deborah cannot be the subject of custodial interrogation.

But in this case, the officer just runs into Deborah on the sidewalk and asks her an innocent question. Nothing in that situation would make a reasonable person think they were not free to end the encounter.

Moreover, there is no reason to think the question "what are you doing on a cold night" would illicit incriminating responses, so there is no interrogation.

And lastly, *Miranda* rules do not apply if the suspect makes a spontaneous and voluntary confession. Here, Deborah saying "I started the fire" in response to a question about the cold night certainly counts as a spontaneous and voluntary confession.

Accordingly, there is no violation of *Miranda*.

III. 6th amendment right to counsel

Suspects have a sixth amendment right to counsel, and here Deborah said "I started the fire" without counsel present. However, the 6th amendment right only attaches once charges have been filed. Charges were not filed in this case, the 6th amendment right to counsel doesn't apply.

IV. Conclusion

The court should deny Deborah's motion to suppress her statement.

QUESTION 4: SELECTED ANSWER B

Larceny

Larceny is the (1) taking and moving, (2) the property of another person, (3) without their consent, and (4) with the intent to permanently deprive the rightful owner of that property. If the defendant believes that the property is his or hers to take, they have not committed larceny.

Here, Deborah took some of the wood that belonged to Stuart and was located in Stuart's private home. Deborah knew that this wood did not belong to her. Still, she grabbed the wood, moved it into a pile, and started a fire with that wood. Deborah may argue that she did not take the wood out of Stuart's home and thus did not move it, but she moved it out of its original placement which is enough to satisfy this element. Deborah knew that she did not have consent of Stuart, the rightful owner, to use or burn this wood. Deborah also must have known that by burning the wood, it was no longer usable for anyone else and therefore would permanently deprive the rightful owner of the chance to use this wood. Thus, Deborah will be found to have committed larceny and can be charged with the crime of larceny.

Burglary

Common law burglary is the (1) breaking and entering, (2) the dwelling of another individual, (3) at nighttime, and (4) with the intent to commit a felony. The defendant must have intended to commit the felony upon entering the premises, not at a later

point. Breaking can be constructive or actual. Entering occurs as soon as the defendant steps inside of the building. Most modern jurisdiction do not require that the building be a dwelling and do not require that the defendant enter at nighttime, but common law still lists these as elements of burglary.

Here, Deborah broke through the window of Stuart's garage and entered into the garage. This garage was directly attached to Stuart's home and although Deborah may argue that the garage is not a dwelling because it is not where an individual actually resides, this argument will likely fail. A garage that is connected to someone's home is generally considered to be part of the dwelling and will satisfy that element here. Deborah's acts occurred at nighttime, while Stuart was asleep in his home. Finally, Deborah had the intent to take wood from Stuart's garage back outside with her and use it to start a fire. If larceny is a felony, this will satisfy the final prong. On the other hand, if this is only found to be a petty theft or some crime less serious than a felony, the final prong is not satisfied and Deborah will not be found to have committed burglary.

Whether Deborah committed the crime of burglary depends upon whether her intent to steal the wood is classified as a felony, or a lesser petty theft misdemeanor.

Defense: Necessity

A defense to any crime is necessity. Necessity occurs when a defendant committed a crime in order to prevent greater harm that the consequences of that crime. There is

both private necessity and public necessity. A private necessity occurs when the defendant commits the crime in order to prevent worse harm from occurring to himself, while a public necessity is when the defendant commits the crime in order to prevent worse harm from occurring to the general public or a large group of people.

Here, Deborah will likely be able to defend any larceny or burglary charges against her with the defense of necessity. Deborah was stranded out in the cold while the temperature was below freezing on the night in question. Deborah had realized that there was a possibility that she would die if she did not find shelter and some source of warmth. Thus, she broke into Stuart's garage and took his wood in order to create a fire for herself and prevent herself from dying out in the cold. The possibility of death outweighs the harm Deborah might have caused by breaking and entering or stealing Stuart's wood for a fire.

Deborah will be successful in defending herself against larceny or burglary by showing that she needed to do these acts in order to prevent greater harm to herself, or in this case death.

Arson

At common law, arson is the malicious burning of the dwelling of another person. Many modern jurisdictions do not require that the burning occur in a dwelling, but rather recognize the malicious burning of any building as arson. Malice is the required mens

rea. Malice needs either an intent to create the outcome or reckless disregard for a high risk of that outcome. Burning must be actual damage or charring to the structure from fire, not mere blackening of the structure from smoke.

Here, Deborah lit fire to the wood while in Stuart's garage. As discussed above, the garage will likely qualify as part of the dwelling because it was directly attached to Stuart's home. The wood ended up catching some oil on fire and burning the entire house. This is enough to qualify as a burning of the dwelling far beyond mere smoke damage.

Defense: No Malice

Deborah will attempt to defend herself against the arson charge by stating that she did not have the requisite intent, or malice, but this will likely fail. Deborah started the fire on the ground, without any protective cover or container. The fire was highly likely to spread and catch part of the house on fire considering that homes and garages are built with wood. While Deborah may not have known that oil was on the ground and may not have intended to start a large house fire, she recklessly disregarded this risk when she started an unconfined fire, fell asleep, and failed to take any precautions to oversee and stop the fire from spreading. There was a substantial likelihood of a house fire here that Deborah consciously disregarded and thus, she will be found to have acted with malice in starting this open fire in a wooden home.

Defense: Necessity

Deborah may attempt to claim the defense of necessity again, but Deborah likely did not need to start this fire. Once she was in the confines of the garage of a home and was protected from the outside elements, she was much safer. She was not at risk of dying any longer. She could have found something in the garage to cover herself and simply remained in the garage overnight to stay out of the freezing cold outside. If the garage was below freezing, Deborah may have a stronger claim of necessity, but this will be a weaker defense than the necessity described above.

Murder or Manslaughter

Common Law Murder

Common law murder is the unlawful killing of another human being with malice aforethought. This includes the intent to kill, the intent to cause great bodily harm, a reckless indifference for a substantial risk to human life, or felony murder.

Here, Deborah will likely not satisfy any of these requisite mens reas. Deborah certainly did not have the intent to kill or cause great bodily harm. Deborah merely wanted to escape the freezing cold and start a small fire to warm herself up. On the other hand, Deborah may have had a reckless disregard for a substantial risk to human life, but only if Deborah had reason to believe that there were humans inside of the attached home. The facts state that Deborah believed that the house was unoccupied, thus she had no reason to think that she was putting anyone's lives in danger by starting a fire in the

garage.

Felony Murder

Felony murder is the killing of a human being that occurs during the commission of attempt to commit an enumerated felony or an inherently dangerous felony. These felonies generally include burglary, arson, rape, robbery, or kidnapping. The defendant does not have to have the intent to kill, as long as the death results during the attempt to commit one of these felonies. The felony must be distinct from the killing. The act that kills must occur before the defendant reaches a place of temporal safety.

Here, as discussed above, Deborah's acts will likely not satisfy the element of burglary because stealing wood is unlikely to be a felony. On the other hand, Deborah's acts will likely satisfy arson (see above). Thus, because the killing of Stuart was a result of the arson that Deborah committed, this might be found to be a felony murder.

Deborah may be found guilty of felony murder, but not under any other theory of common law murder.

First Degree Murder

First degree murder is considered by many states instead of common law murder and it includes the unlawful killing of another person with malice aforethought, as well as premeditation and deliberation. This requires that the defendant have thought of killing

the victim even if just for a brief moment before doing so.

Here, Deborah never had the intent to kill Stuart -- she did not even know he was in the home. Thus, she cannot be found guilty of first degree murder.

Second Degree Murder

Second degree murder is the same as first degree murder, but without any premeditation or deliberation. Again, malice includes the intent to kill, the intent to cause great bodily harm, or a reckless indifference for a substantial risk to human life.

Here, Deborah will likely not meet any of these required mental states. She did not have the intent to kill, cause great bodily harm, or a substantial risk to human life because she did not know that any humans were in the house attached to the garage. She was under the impression that it was unoccupied. Thus, Deborah will not be found guilty of second degree murder.

Voluntary Manslaughter

Voluntary manslaughter is also considered killing in the "heat of passion" or under an imperfect self-defense claim. The heat of passion requires that (1) there be an adequate provocation, (2) that would provoke a reasonable person, (3) the defendant was adequately provoked, and (4) there was not sufficient time to cool down, so the defendant acted while still provoked.

The facts do not fit these elements. Deborah was not provoked and she will not be charged with voluntary manslaughter.

Involuntary Manslaughter

Involuntary manslaughter occurs when the defendant kills while committing criminal negligence or some criminal act that is not a serious felony that falls under the felony murder rule. The defendant does not need the intent to kill.

Here, Deborah will likely be found guilty of involuntary manslaughter if she is not found guilty of one of the greater murder charges. Deborah was committing larceny and arson when she started that fire that caused the death of Stuart. Thus, Deborah's criminal acts resulted in the death of another human being. Deborah will be convicted of involuntary manslaughter if she is not convicted of one of the greater offenses.

Outcome: Deborah is most likely to be convicted of (1) arson and (2) either felony murder (the greater offense) or involuntary manslaughter in the alternative (the lesser offense).

Deborah's Motion to Suppress Her Statement

Fifth Amendment

The fifth amendment provides all individuals with the privilege against self-incrimination. This means that no one can be compelled to make testimonial statements that incriminate themselves.

One of the ways that the legal system protects this privilege is by requiring Miranda warnings whenever someone is in a custodial interrogation. The Miranda warnings must be given by police officers, or anyone acting for the government, before eliciting any incriminating responses. This includes (1) that the suspect has the right to remain silent, (2) that anything the suspect says can and will be used against them, (3) that the suspect has the right to an attorney, and (4) that the suspect will be provided with any attorney if they are unable to afford one.

(1) Custody

The test to determine whether an individual is in custody is whether a reasonable person would feel free to leave. The totality of the circumstances should be considered to determine this, including whether they are confined, cornered, under arrest, or any other relevant facts.

Here, Deborah was walking freely on the sidewalk when Officer Oliver pulled his car up next to her. Officer Oliver did not handcuff Deborah, he did not cut her off in her path, he did not block her, he did not corner her, and he did not even tell her to stop moving. Thus, Deborah was likely not in custody. A reasonable person would still feel free to

ignore his question, continue walking, and be free to leave in this scenario.

Deborah was not in custody.

(2) Interrogation

The test to determine whether someone is being interrogated is whether both the words and conduct of the government official are likely to elicit incriminating responses from the suspect. General booking questions, such as one's name, date of birth, or other basic questions are not considered an interrogation.

Here, Officer Oliver asked Deborah what she was doing outside on such a cold night. This question is borderline an interrogation, because Officer Oliver was aware that Deborah was only three blocks away from the recent house fire and he was likely looking for some information to connect her to this fire. On the other hand, this is a very basic question that Deborah could have responded to with any simple answer.

While this question may have been attempting to elicit any incriminating response from Deborah, Deborah was not in custody. Therefore, Officer Oliver did NOT need to inform Deborah of her Miranda rights before talking to her. Deborah's response about starting the fire will not be found to be a violation of her Fifth Amendment rights and will not be suppressed on these grounds.

Fourteenth Amendment

The fourteenth amendment requires that all confessions by a criminal defendant be voluntary in order to be used against them at trial. The totality of the circumstances should be considered, including the suspects age, how long they are being questioned for, the manner and method of questioning, whether they are mentally or physically disabled, whether they have been provided with necessities like food or water, and any other relevant factors.

Here, Deborah was walking on the side of the road when Officer Oliver pulled up next to her and asked what she was doing outside in the cold. Deborah immediately and freely responded that she started the fire. Deborah was not coerced into saying this, Deborah was not being brutally questioned or interrogated. There are absolutely no facts showing that this statement was involuntary.

Deborah blurted out "I started the fire" immediately upon talking to Officer Oliver and thus, her voluntary statement will not be suppressed on these grounds.

Sixth Amendment

The sixth amendment gives all criminal defendants the right to an attorney immediately upon being charged with a crime. This right attaches automatically once a criminal defendant has been charged. This right is offense specific, meaning the police can still question a defendant about any unrelated crime without the attorney present. This also

includes the right to have your attorney present at any in-person lineups or identifications.

Here, Deborah has not been charged with any crime yet at the time she is speaking to Officer Oliver. Thus, her sixth amendment right has not attached and this is not grounds to suppress her statement.

Outcome: Deborah's motion to suppress will be denied because she was not in a custodial interrogation so her fifth amendment rights were not violated, her statement was voluntary so her fourteenth amendment rights were not violated, and she had not been charged with any crime at the time so her sixth amendment rights were not violated.

Deborah's statement is a party opponent exception to the hearsay rule (that out of court statements cannot be admitted for the truth of the matter), and it did not violate any of her constitutional rights, so the motion to suppress her statement should be denied by the court.

QUESTION 5

Steve owned property in the state of Columbia that Barbara offered to buy for $500,000. Steve agreed to sell, provided that he retained the mineral rights and had access to the land. Barbara later accepted Steve's conditions and said that she would tell her attorney to prepare the necessary papers. When Steve met with Barbara to sign the papers, he asked if the documents included his conditions and she assured him that they did. In fact, Barbara had not told her attorney of Steve's conditions and they were not in the papers that he and Barbara signed.

Shortly after the sale, Steve decided to investigate whether his former property had any mineral deposits. Barbara refused to let Steve and his geologist on the property and erected barricades to prevent their access. It was then that Steve realized that the documents he signed omitted his conditions.

Barbara had purchased Steve's property in cash, which included $250,000 of funds that she had embezzled from her employer, Acme Company (Acme). Barbara later embezzled another $20,000 from Acme, which she deposited in her checking account containing $5,000 at the time. The following month, she paid off $25,000 of her outstanding debts, bringing her checking account balance to zero. Subsequently, Barbara deposited $10,000 of her own money into the checking account. Shortly thereafter, Acme fired Barbara after discovering her embezzlement.

Both Steve and Acme have brought suit against Barbara.

1. What equitable remedies does Steve have against Barbara? Discuss.

2. What equitable remedies does Acme have against Barbara? Discuss.

3. What amount of money, if any, can Acme recover as part of an equitable remedy from Barbara's checking account? Discuss.

QUESTION 5: SELECTED ANSWER A

1) Steve v. Barbara

Governing Law

The common law governs the contacts for the sale of land. The UCC governs the sale of goods. The common law applies here since it is a contract for the sale of land.

Contract Requirements

A valid contract requires officer, acceptance, consideration, and absent of defenses.

Mutual Assent - Offer & Acceptance

An offer is an objective manifestation to enter into a binding legal agreement with offeree. It places power of acceptance in offeree. It requires reasonably necessary and certain terms. Acceptance is the objective manifestation of assent to be bound to the terms of the offer set by the offeror. A counteroffer is done when the offeree does not accept the offerors terms but instead rejects that offer and offers a new offer.

Barbara offered to buy Steve's property for $500k. Steve agreed provided that he retain mineral rights. Since he did not accept Barbra's offer by her terms, this is not valid since it does not follow the mirror image rule which requires the offer and acceptance to mirror each other. Steve's additional condition would be deemed a counteroffer. Therefore, he

rejected Barbara's offer and set a new offer with terms that require the conditions set out by Steve. That he would sell his land for $500k and he retains mineral rights and retains access to the land. Barbara accepted these conditions.

Consideration

Consideration is the bargain for exchange of promises that the parties would otherwise not be legally obligated to do. Here, there is consideration since S must sell his land, B must give money, mineral rights, and land access to S in return.

Material Terms

The issue here is that their agreement is not reflected on the papers the two signed. Steve should assert: fraud, unilateral mistake, and mutual mistake to recover equitable remedies.

Fraud

D material misrepresented - Barbara told Steve that the documents included his conditions.

A material fact - Babara knew this was material as Steve made it a condition and it is not an opinion but objective fact.

D had intent to induce - Barbara knew this would induce Steve to sign the contract as he asked her if the documents included his condition and she assured him that they did.

D did induce performance - Steve signed the documents based on her material misrepresentation that they included his conditions.

P justifiably relied - Steve's justification was reliable since he had no reason to believe she was lying. Furthermore, he is not going to be held liable because he was negligent in not signing the document because he relied on her misrepresentation.

Mutual Mistake (scrivners error)

A scriveners error exist when by accident, the parties omitted something material that was supposed to be in the contract that the parties both agreed to. Steve will argue that based on their previous discussion when Barbara accepted, she told him she would tell her attorney to prepare necessary papers. The attorney committed an error by not putting Steve's conditions in. However, Babara is not mistaken to this. She is aware, therefore there is no mutual mistake.

Unilateral Mistake

Occurs when one party is mistaken to the material term of the contract and the other party knew of the mistake and failed to correct it. Here, Barbara knew that Steve was

mistaken to a material term of the contract since their previous oral agreement indicated a contract based on certain terms. Furthermore, he even asked her if the documents included his condition and she assured him that they did, when in fact they did not. This is the type of unilateral mistake that is raised to fraud. Therefore, the unilateral mistake creates an option for reformation or recession.

Reformation

Reformation is the equitable remedy of redrafting the contract to reflect the party's true intent. There must (1) be an agreement, (2) grounds for recession, and (3) no defenses.

As analyzed above there is an agreement. While Barbara may assert that oral agreement is invalid due to (a) SOF and (b) PER. Statute of frauds bars the formation of some contracts when they are required to be in writing. A contract for the sale of land is required to be in writing. Therefore, Barbara will argue that this oral agreement is not valid. However, SOF does not bar reformation when the parties intended to have a material term in writing. Furthermore, Babara will argue the PER bars introduction of the prior or contemporaneous statements made before the final contract of the parties was formed. She will argue that this contract is the complete and final intention of both parties. However, this argument would to fail since evidence of fraud will not bar extrinsic evidence of prior conversations. Therefore, while the agreement may not be a valid contract, the reformation would fix these errors.

Grounds for reformation. The grounds for a recession are fraud, mutual mistake, or unilateral mistake if it was done fraudulently. Here, there are valid grounds for reformation. Steve will try to show that the parties did agree to Steve's conditions and had mutual assent to that. The fraud and deceit on Barbara's end has caused the contract to reflect terms that are not what the parties assented to. The court can alleviate the harm by rewriting the contract to the terms orally agreed on.

Recession

Recession is the equitable remedy of canceling the contract. There must (1) be a contract, (2) grounds for recession, and (3) no defenses.

Similarly, to reformation, Steve will argue that if the court finds there to be a valid contract, it should be voided due to the fraud or mistake. Since the contract was entered into through deception, the way to remedy the situation would be to put the parties in the position had the contract never been created. If the contract was never created, Steve would own it and Barbara would have her $500k.

Specific Performance based on Reformation

Specific performance is granted when there is a valid contract and one of the parties has failed to perform on some part of it.

Valid Contract with definite and certain terms

The contract based on the reformation would have definite and certain terms. Steve would retain mineral rights and have access to the land. Barbara may argue that Steve is unaware if the property even has any mineral deposits and therefore the terms are not definite. However, the terms do not state there are mineral rights just that if there are, he has the right to them.

Irreparable Harm/Inadequate Remedy at Law

The property is a unique good therefore there is an inadequate remedy at law. Furthermore, the lack of specific performance would create irreparable harm since he can lose right to the minerals. Money damages would not be sufficient. Furthermore since he has not even investigated the mineral deposits, he does not even know the value of what he is losing out on.

Mutuality

Under the contract, Steve has performed all of his terms. He has sold her the land and she is now in possession of it. There is no condition waiting to occur for Barbra to be required to perform. She has the property in her control and according to the terms of her deal she is required to perform.

Feasibility

The court may find this to be an issue in terms of feasibility. Since it involves the continuous supervision that he retains the mineral rights and has access to land.

However, Steve may argue that easements, licenses, extractions, are all similar and the court can enforce those. This should be no different. Furthermore, it is not like an employment contract that requires obligation of services. It would just require Barbara to give him access. She can leave the barricades up and just put a gate so Steve can go though.

TRO

A TRO is a temporary restraining order. It is issued before a preliminary hearing and can be issued ex parte. The purpose is to keep the status quo until a preliminary hearing can be held on the matter. Generally, it is 14 days. A TRO requires: irreparable harm, balancing of hardships weights in Ps favor, and likelihood of success on the merits.

Steve should ask for a TRO to make sure Barbara does not touch his mineral rights and/or to remove the barricades that prevent his access onto property.

Irreparable Harm

As analyzed above. Property is unique and if he loses access he would not be able to access the mineral rights of his property before the case is heard. In order to protect his interest, the court should issue an injunction. There is no indication that Barbara is doing anything, but because Steve is not able to see, it is impossible to know.

Balancing of Hardships

When balancing the hardships, it does not seem to make a difference to Barbara if she is not allowed to use her mineral rights. Babara may argue removing the barricades is beyond the status quo since it is already installed and removing them and putting them back would cause substantial harm. It would be a minor hardship. Barbara may argue removing the barricade is a huge hardship for her since she already erected them and to remove them would be costly especially if it is temporary. For Steve, if his rights are depleted, he would experience severe hardship. This weighs in Steve's favor.

Likelihood of Success on the Merits

If it is likely that the court will find Barbara acted fraudulently, 94his would mean that Steve should have the power to reform to rescind his contract. Either way, the issuance of the TRO would maintain the status quo until the issue is resolved on its merits.

Preliminary Injunction

Is nearly identical to a TRO however, it cannot be issued ex parte. A D must have notice. It is issued before or during a trial and lasts until the merits of the case are resolved. For the same reasons as stated above irreparable harm, balancing of hardships weighs in Ps favor and likelihood of success on the merits. Steve should seek a preliminary injunction to protect his potential interest in the mineral rights. He can also seek to get an injunction to remove the barricades that prevent his access onto property.

Equitable Defenses

Latches

If a plaintiff asserts an untimely claim, then the doctrine of laches may bar the plaintiffs claim.

Barbara will argue it is untimely since he did not file a claim after he read the contract but after the sale. When he decided to investigate whether his former property had any mineral deposits. It is only after Barbara refused him access to the property that he realized the signed contract did not contain his conditions. This argument will likely fail since presumably once he became aware, he filed suit. And as mentioned above he would argue that he was not negligent for relying on her fraudulent misrepresentation.

Unclean Hands

Bars recover if the plaintiff has unclean hands. This means that the plaintiff has been involved in some sort of fraud or deception.

Barbra will try to argue Steve has unclean hands since he did not investigate the mineral deposits before selling the land. This does not rise to the type of unclean hands the equitable defense is trying to protect. Therefore, this defense will fail.

2) Acme v. Barbra

Restitution - While restitution can be a legal remedy for monetary damages, it can also be an equitable remedy as a constructive trust and equitable lien. Restitution looks to see how the defendant has unjustly benefited. Here, Barbara was unjustly enriched from $250k which she had embezzled from her employer Acme.

Constructive Trust

A constructive trust is a judge constructed trust. The court will order a constructive trust if D has acquired title to property by unjust enrichment. If the courts can trace the money to purchase the property back to D's unjust enrichment, P can get a constructive trust on the property. This entitles the P to access the amount the property is now worth.

Barbra acquired title to Steve's property by $250k she stole from embezzling her employer. She paid $500k for Steve's property. Therefore, Acme can trace 50% of the value of the property to the money Barbra embezzled from them. If the property increases in value, Acme will also be entitled to that increase. On the downside, if the property decreases in value, Acme will not be entitled for the deficit. Therefore, if the property is going up in value, constructive trust should be used. If it is believed the property will decrease in value, Acme should opt for an equitable lien.

For example, under constructive trust if the property increases to $1 million, Acme is

entitled to half of it, therefore they would be entitled to half a million. However, if the property is reduced to $100k, then Acme would be entitled to $100k and would not be able to recover the deficiency.

Equitable Lien

Has essentially the same elements as a constructive trust, however it will only give the P the amount that was taken. Furthermore, the funds do not need to be traced to the acquisition of title, but can be traced to the improvements as well. An equitable lien would allow the P to recover the deficiency judgment. It also would put their rights above unsecured creditors.

Acme can put an equitable lien on Barbara's property. She purchased that money using funds she embezzled from Acme. However, unlike a constructive trust where she is entitled to 50% here, she would be entitled just to the $250k. If the value of the property goes up, she is out of luck and will not get the access. However, if the value goes down, she will still be able to seek the deficiency judgement. For example, as mentioned above if the if the property increases to $1 million, Acme is still entitled to $250k. However, if the property is reduced to $100k then Acme would be entitled to $100k and would be able to recover the deficiency so they can be made whole.

Defenses

BFP

If the court orders the property to be returned to Steve, he can be considered a bona fide purchaser. This would bar the courts from putting a constructive trust or equitable lien on Steve's property.

Latches

If a plaintiff asserts an untimely claim, then the doctrine of latches may bar the plaintiffs claim.

It is unclear when Acme is bringing this claim, but it is assumed it is made timely. Furthermore, while Barbara embezzled from Acme twice, once they found out, they fired her which indicated timeliness.

Unclean Hands

Bars recover if the plaintiff has unclean hands. This means that the plaintiff has been involved in some sort of fraud or deception.

There is no indication that Acme has unclean hands. They likely have clean hands since they fired her after discovering her embezzlement.

3) Checking Account

Lowest Intermediate Balancing Rule

With restitution such as a constructive trust and equitable lien, the law assumes the lowest intermediate balancing rule. Which means that it is presumed that the defendant is taking the D's money out first, not the money it acquired unjustly.

At the time Barbara’s checking account contained $5,000. She later embezzled another $20,000 from Acme. At this point, the money she pulls out will first be deemed to have been a part of her $5,000. Once that is exhausted, the money taken unjustly from embezzlement will be reduced.

She then paid off $25,000 of her outstanding debt, bringing her checking balance to zero. Since the bank account was reduced to zero the presumption that the D's money will be used first no longer exist. At this point, she then deposited $10,000 of her own money into the checking account. Unfortunately at this point, Acme is not able to trace the embezzlement gains to Barbara's checking account. Therefore, Acme will not be able to recover under the lowest intermediate balancing rule. However, she should try to legal remedies as that may entitle her to the stolen money, but not through tracing.

QUESTION 5: SELECTED ANSWER B

S V. B - STEVE'S EQUITABLE REMEDIES.

Equitable remedies attempt to provide a solution that is the most fair considering the circumstances and often when legal (money) damages will be an inadequate remedy. Restitution is an equitable remedy and is typically measured by the benefit that the defendant unjustly gained from the plaintiff.

Contract Rescission & Reformation. When there are proper grounds for rescission, such as intentional misrepresentation, unilateral mistake or mutual mistake, the court will rescind or cancel the contract. Similar to the grounds for rescission, including intentional misrepresentation or unilateral mistake, the court may reform the contract to meet the innocent parties' intentions.

Intentional Misrepresentation. Intentional Misrepresentation occurs when a party intentionally misrepresents a material fact in the contract with the intention that the other party relies on the misrepresentation and where the other party actually does rely on the misrepresentation.

Here, B intentionally misrepresented a material fact of the contract when she orally accepted Steve's conditions and purposefully excluded these from the contract.

Material Fact. B will argue that the including a provision in the land-sale contract which allowed S to retain mineral rights in the property is not material to the K (contract) because the contract's predominant purpose is for the sale of the property, not the mineral rights.

However, this argument is weak because the S conditioned the entire sale on whether he would be able to retain the mineral rights in the property and even ensured to ask B whether the mineral rights were in the final written agreement like they negotiated.

Intent to Induce reliance. B intended to induce S's reliance when she lied about the contents of the agreement because when S specifically asked her whether the conditions he requested were in the final contract, B chose to lie to him by assuring him that they were in the contract at the time of signing. Further, she purposefully decided to not tell her attorney of Steve's conditions so that the attorney would not write his conditions into the contract and so that she could retain the mineral rights.

Does Induce reliance. B induced S's reliance because as a result of her intentional misrepresentation regarding the terms of the contract, S decided to sign the contract and give her the property.

Thus, S will be able to establish intentional misrepresentation which is a ground to

rescind or reform the contract depending on S's desires.

Unilateral Mistake. A unilateral mistake occurs when one party intends for and believes that the contract terms include something when they actually do not, while the other party knows of their mistake and does not correct the misunderstanding. When a unilateral mistake occurs and the other party knows of the mistake but fails to disclose this to the innocent party, the court may rescind the contract or reform the contract to meet the intentions of the innocent party.

A unilateral mistake likely occurred as well because one party was mistaken as to facts which were material to the K. Further, since B was aware that S believed the contract terms were different than what they actually were and purposefully did not disclose this to him, S is considered the innocent party and his intentions will be honored if he decides to have the K reformed. In effect, the reformed contract will provide him with the mineral rights and access to the land as he previously requested.

Therefore, the court will likely reform the contract if Steve requests this. Reforming the contract may be the best remedy between rescission and reformation because by reforming the contract to include the mineral right access that he originally wanted, his contract goals will be met. However, if animosity remains between him and B, then he may not want to share a contract with her. If that is the case, then rescission will be his best option.

Injunctive Relief. There are various forms of injunctive relief which requires a party either to do something or refrain from doing something. A TRO and a preliminary injunction happen prior to the end of the trial in order to preserve the rights of the requesting party. Specific performance can occur after the trial has ended and would require the defendant to specifically perform his duties under the contract.

TRO. If Steve fears that Barbara may use up or sell the mineral rights that she is in possession of while the matter is sorted out, he may want to ask for a TRO (temporary restraining order) or preliminary injunction to keep B from taking either of thes actions. In order to obtain injunctive relief at the preliminary stages of the trial, the plaintiff must establish (1) Inadequate legal remedy (2) Irreparable harm 3) balancing of hardships that weigh in favor of P. (4) Likelihood of success on the merits.

(1) Inadequate legal remedy. Here, Steve will argue that money damages will be inadequate because the contract involves a unique thing, namely, the sale of land and mineral rights. Thus, forcing B to pay S money to compensate him will not be sufficient because land is irreplaceable.

(2) Irreparable Harm. Here, S will argue that he will suffer irreparable harm if the injunction is not granted because B may maliciously sell the minerals on the land that S is seeking. At that point he will not be able to get those minerals back even though they

are rightfully his.

(3) balancing of hardships weigh in favor of P. If the injunction is not granted Steve's hardships will outweigh Barbara's because S values the minerals on the land more than B. Since S owned the property prior to B and specifically conditioned the contract on whether he would retain his mineral rights to the land, he obviously cares about them a lot and has more experience on how to utilize the mineral deposits because he's done so in the past when he owned the land. B will argue that she will suffer greater harm than S will because B does not want to have to share access to her land with someone she doesn't know. However, this was what was originally contracted for, so B's argument is weak. On balance, S will suffer greater harm than B.

(4) Likelihood of success on the merits. S has a high likelihood of success in a claim against B to reform or rescind the contract because B engaged in fraudulent behavior to induce S into entering into the contract.

Therefore, the court will grant a TRO or preliminary injunction if S requests this equitable remedy.

Specific Performance. Specific performance is a form of injunctive relief that requires to ask the court to require a party to specifically do something. If the K is reformed to meet the intent of Steve, then he may have to ask the court to require B to specifically

perform her obligations under the K if she continues to refuse. Specific performance may be granted if the plaintiff can show (1) a Valid contract exists (2) there are clear and definite terms to enforce (3) legal remedies will be inadequate (4) feasibility and (5) no defenses to specific performance exist.

(1) a Valid contract exists. A valid contract exists because S and B both entered into a written contract for the sale of the land which they both signed.

(2) there are clear and definite terms to enforce. Since the contract terms do not reflect the intent of both parties but rather only B's intent, the terms are not clear and definite. As a result, the court will have trouble requiring B to specifically perform under the contract because the contract terms are not what S is seeking.

(3) legal remedies will be inadequate. See analysis under TRO

(4) *feasibility*. Requiring a party to perform under the contract must be feasible for the court to enforce and supervise. It may be difficult for the court to ensure that B is allowing S to access the minerals on her land because at any point, B may decide to erect the barricades again.

(5) no defenses to specific performance exist. It is unlikely that any equitable defenses apply that would bar injunctive or other equitable relief.

In conclusion, specific performance is not going to be granted because the terms of the contract are incorrect. However, a TRO or a preliminary injunction requiring B to allow S access to the property until the contract is reformed or rescinded will allow S to obtain the benefits that he would have been entitled to.

Equitable Defenses

Laches. Laches could bar a plaintiffs recover if the plaintiff waited an unduly long time to bring their claim against the defendant and this delay prejudiced the defendant.

Here, laches will not help B because there's no indication that S waited a long time prior to bringing his claim. B may argue that as soon as the contract was formed, S should have visited the land to check whether he could enforce his mineral rights and access the property. However, just "shortly after the sale" S decided to investigate the property and exercise his mineral rights, so he definitely did not delay asserting his rights. Further, B has suffered no prejudice. Thus, laches will not apply.

Unclean Hands. Unclean hands exists when the plaintiff acted with bad intent when contracting. S did not act with bad intent. In fact, he was the innocent party who suffered from B's fraud.

A V. B - ACME'S EQUITABLE REMEDIES.

Constructive Lien / Equitable Trust. When a defendant uses the profits he obtained from the plaintiff unjustly for other things, and the plaintiff can trace the source of the funds to the property or bank account, the plaintiff can get a constructive trust or equitable lien over the property. The elements are (1) D has legal title to the property (2) D was unjustly enriched (3) money damages are inadequate.

Here, B embezzled $250k from Acme (A) which A can trace back to the purchase of the Columbia property. B has legal title to the Columbia property because she purchased the land in a valid land sale contract. Next, B was obviously unjustly enriched because she is able to keep the entire property she purchased 50% of which was purchased using A's stolen funds. If she hadn't embezzled A's funds, then she likely wouldn't have had enough money to purchase the property at all. Last, money damages might be an adequate remedy because A just wants the money back that was embezzled. However, since B's bank account has a balance of $0, she will not be able to return the money she stole. Thus, money damages are inadequate.

In conclusion, a constructive trust or equitable, will likely be granted by the court if A requests this equitable remedy. When the value of the property purchased with the plaintiff's money has increased, the plaintiff is better off requesting a constructive trust because this allows the plaintiff to keep the entire property. In contrast, equitable liens

effectively sell off the property and return the proceeds back to the plaintiff for the exact amount that was stolen from them, even if the property sold for more. Acme is better off requesting a constructive trust because property tends to increase in value.

A'S RECOVERY FROM B'S CHECKING ACCOUNT

Commingled Funds. Typically, when a defendant embezzles or otherwise steals, the stolen property or money can be traced to the defendants' purchases. However, once the defendant begins mixing the stolen funds with her own funds, tracing will become very difficult, and the plaintiff won't be able to continue tracing.

Here, B embezzled $20k from A which she deposited into her checking account containing $5k of her own funds. At this point the embezzled money likely could still have been traced and returned to A. However, once B used the entirety of the fund to pay off debts, bringing her balance to $0, the funds were no longer recoverable by A because they could no longer be traced.

In conclusion, Acme will not be able to recover the $20k as part of an equitable remedy from Barbara's checking account.

California Bar Examination

Essay Questions and Selected Answers

February 2023

The State Bar of California

OFFICE OF ADMISSIONS

ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2023

CALIFORNIA BAR EXAMINATION

This publication contains the five essay questions from the February 2023 California Bar Examination and two selected answers for each question.

The selected answers are not to be considered "model" or perfect answers. The answers were assigned high grades and were written by applicants who passed the examination after First Read. They are reproduced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. These answers were written by actual applicants under time constraints without access to outside resources. As such, they do not always correctly identify or respond to all issues raised by the question, and they may contain some extraneous or incorrect information. The answers are published here with the consent of the authors.

Question Number	Subject
1.	Civil Procedure
2.	Constitutional Law
3.	Real Property
4.	Professional Responsibility
5.	Evidence

ESSAY QUESTION INSTRUCTIONS

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them to the facts.

If your answer contains only a statement of your conclusions, you will receive little or no credit. State fully the reasons that support your conclusions and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the resolution of the issues raised by the call of the question.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

QUESTION 1

DuraTires manufactures and installs specially coated tires. DuraTires advertised that a scientific report declared that its tires will not go flat for the first 7,000 miles of use if driven properly. DuraTires' scientific report was created at the direction of its legal counsel and contained research on flat tire incidents involving DuraTires.

Pam purchased four new tires from DuraTires and had them installed by Maurice, a mechanic. Pam drove 100 miles and one tire went flat, causing Pam to swerve and crash into another car. Pam was not physically injured in the accident. Pam gathered a written statement from the other driver, Wynne, who suffered a minor injury. Wynne's statement was favorable to Pam's case.

Pam filed and properly served a complaint in federal court against DuraTires for breach of warranty and negligent installation and manufacture of the tires. The federal court had proper jurisdiction over Pam's complaint. Pam alleged that she suffered property damage and emotional distress as a result of the accident.

DuraTires filed a motion to dismiss for failure to join Maurice as a defendant. The court denied DuraTires' motion. DuraTires filed and properly served an answer to Pam's complaint.

Pam served her initial disclosures on DuraTires, but did not produce Wynne's statement. DuraTires filed and served motions to compel Pam to produce Wynne's statement and for Pam to submit to a physical examination. The court granted both of DuraTires' motions.

DuraTires served its initial disclosures, but did not include the advertised scientific report. Pam met and conferred with DuraTires, which refused to produce its scientific report. Pam filed a motion to compel DuraTires to produce its scientific report. The court granted Pam's motion and ordered DuraTires to produce its scientific report.

1. Did the court properly deny DuraTires' motion to dismiss? Discuss.

QUESTION CONTINUES ON THE NEXT PAGE

2. Did the court properly grant DuraTires' motions:

    A. To compel production of the statement from Wynne? Discuss.

    B. To compel a physical examination of Pam? Discuss.

3. Did the court properly order DuraTires to produce its scientific report? Discuss.

QUESTION 1: SELECTED ANSWER A

1. D's Motion to Dismiss

A party may move to dismiss for failure to join a necessary party. A party is deemed necessary when its participation is required for a just adjudication. A court will consider the risk of prejudice to the current parties, as well as the potentially "necessary" party if the party is absent.

Specifically, it will analyze whether the existing parties can achieve complete relief without the "necessary" party. It will also consider the risk of multiple or inconsistent obligations that may occur if that party is absent. When a party is necessary, that party must be joined if it is feasible, meaning adding them will not defeat the court's subject matter jurisdiction and there is personal jurisdiction over the party. If it is not feasible to join such a party, a court will decide whether to proceed without them, or whether to deem them "indispensable" and dismiss the entire case, so the case may be re-filed with that party. Factors that will be considered in making such a determination are the extent of prejudice that may result, and potential ways that prejudice can be mitigated.

Here, DuraTires filed a motion to dismiss for failure to join Maurice as a defendant. Maurice is relevant to the litigation because he was the mechanic who installed the tires that allegedly caused Pam's harm. Additionally, P specifically alleges a claim for "negligent installation" of the tires, which was done by Maurice.

Potentially jointly and severally liable tortfeasors, meaning those who are both liable for a single, inseparable harm, are not necessary parties. Here, P will argue that DuraTires and Maurice fit that description, as P is suing for "negligent installation and

manufacture," which combined led to her harm, so the court properly denied the motion to dismiss for that reason. D manufactured the tires, and M installed them. It appears M was likely working for or with D, as the facts state D is in the business of "manufacturing and installing tires." The plaintiff P may still obtain complete relief from the existing defendant D, because when defendants are jointly and severally liable, the plaintiff can obtain complete relief from any one of the defendants. Further, the existing defendant D is not prejudiced because he can later seek contribution or indemnification from the third party (or seek to implead him in the current case). The third party, Maurice, is not prejudiced because he may still defend his interest in such a later contribution or indemnification claim by DuraTires. Thus, Maurice is not a necessary party and did not need to be joined.

2a. Motion to Compel Production of Wynne's Statement

The scope of discoverable material includes all material that is relevant to a party's claim or defense, is not privileged, and is proportionate to the needs of the case. Discoverable material need not be admissible, but it does need to be reasonably calculated to lead to the discovery of admissible material.

Initial disclosures must include the names and contact information of likely witnesses, relevant tangible evidence (documents and things), and insurance policies, that are in the party's possession and that the party may use to support its claims or defenses. Prior to filing a motion to compel evidence, the opposing party must attempt in good faith to confer with the other party to try to get the relief sought without court intervention.

Here, P had possession of W's statement, which was favorable to her case, so she would likely be using this to support her claim at trial. W was also injured as part of P's accident, so her statement regarding that accident is relevant to both P's claim, and D's potential defenses.

Additionally, there is no undue burden that appears present from P being required to compel this, and she would likely need to produce it anyway as part of her final pretrial disclosures, which requires production of likely testimony of witnesses who will be testifying. Therefore, W's statement is within the scope of discovery. However, it appears that DuraTires failed to attempt to confer with P prior to making this motion to compel, so P will likely argue that the granting of this motion was improper for that reason. On balance, it is likely that the court still properly granted this motion, because the statement fits the scope of discovery, but it may sanction D for failing to confer first.

2b. Motion to Compel a Physical Examination of Pam

A party may compel a physical examination of an opposing party when it obtains a court order to do so, after showing good cause for the examination, and that the physical condition of the party is at issue. D will argue this examination is relevant because it will assist it in preparing its defense against P's claims. However, this will be unsuccessful.

A physical examination of Pam is inappropriate here because she has not alleged that she was physically injured as a result of the accident. She is only seeking relief for her property damage and emotional distress that resulted from the accident. Thus P's physical condition is not in issue, and there is no good cause for this examination. D instead could have sought a *mental* examination, because P's mental state (her alleged

emotional distress) is at issue. The court properly denied this request for a physical examination.

3. DuraTires' Scientific Report

See rule above for scope of discovery, which excludes privileged material. D's scientific report is relevant to this case because it specifies the warranty that P is claiming was breached by D-- that the tires will not go flat for the first 7,000 miles of use if driven properly, as the tires went flat after she only drove 100 miles. Further, it is tangible evidence within the possession of D, that will likely be used to support its defense, as it states that the 7,000 mile warranty is only in place when the car is "driven properly." Additionally, P properly conferred with D regarding this piece of evidence prior to filing the motion to compel. Further, if D will likely have the expert who prepared the report testify at trial, or another expert who uses this report as the basis for his opinion, the report could also be compelled as part of the mandatory disclosure of expert witness materials, which include the bases each testifying expert relied upon. However, D will likely argue that it should not have been required to produce this report because it is privileged.

Work product protects from discovery documents that were created by or at the direction of the opposing party's attorney, in anticipation of litigation or for trial. The scientific report here was created that the direction of its legal counsel, but it is unclear whether that was done in anticipation for litigation. D will argue that it was, because it contained research on flat tire incidents involving D, which D likely anticipated being sued about. Based on those facts, it is likely the document is protected by work product privilege. However, work product that does not include the attorney’s mental impressions,

opinions, or legal theories or research; and instead only contains factual information relevant to the case, is discoverable when the opposing party demonstrates a substantial need for the material, and that there would be an undue burden in obtaining it from other sources. Here, the scientific report contains factual information about flat tire incidents, so if it does not also contain mental impressions, opinions, or legal theories or research (which is not indicated by these facts), it may be compelled if P shows such a substantial need and undue burden. P likely does have a substantial need for this information, as research on other flat tire incidents involving D would be highly material to her claim regarding this accident caused by such a flat tire. Additionally, conducting this research herself would be very burdensome and expensive, which would likely cause her prejudice. On balance, the court properly ordered D to produce this report under the exception to work product.

Attorney-client privilege protects against compelled disclosure of confidential communications between attorney and client, made for the purpose of obtaining legal representation or advice. D will also likely argue that the scientific report is privileged because it was created at the direction of the attorney. However, it does not appear on these facts that this was a confidential communication between D and their attorney (or investigators employed by the attorney for purposes of legal services), although more facts are needed to properly determine this. Further, because the report was the basis of D's advertisements, it does not appear that D attempted to keep this confidential or private from third parties. When material portions of an allegedly privileged communication are voluntarily communicated to third parties, the privilege as to that information is generally waived. More facts are needed regarding whether D attempted

to maintain the confidentiality of this communication. However, if D's experts will be relying on this material as basis for their opinions, it will likely be discoverable as part of the mandatory expert witness disclosures.

QUESTION 1: SELECTED ANSWER B

1. Did the court properly deny DuraTires' motion to dismiss?

The Federal Rules of Civil Procedure ("FRCP") govern the procedural process in federal court. Pursuant to the FRCP 10, a defendant may file a motion to dismiss in response to a complaint filed against them. There are numerous grounds for filing a motion to dismiss. For example, a defendant can file a motion to dismiss for failure to state a claim upon which relief may be granted, or for lack of personal jurisdiction. Here, DuraTires ("DT") filed a motion to dismiss for failure to join Maurice as a defendant. Maurice is the mechanic who installed the four new tires that Pam purchased from DT. Failure to join a necessary party is a permissible ground for filing a motion to dismiss. So, the first issue is whether Maurice was a necessary party.

Failure to Join a Necessary Party

A party is a necessary party under the FRCP if complete relief cannot be granted without them or if there absence from the case subjects them to inconsistent judgments. Generally, joint tortfeasers are not necessary parties. Joint tortfeasers are jointly and severally liable to successful plaintiffs and tortfeasor defendants may thereafter seek contribution from joint tortfeasers who have not paid their fair share of the award. However, because a plaintiff can collect their full damages from any one tortfeaser, tortfeasers are not generally necessary parties. In other words, tort plaintiffs can go after tortfeasers in one combined action, or in consecutive actions,

and tortfeasers themselves can go after joint tortfeasers in separate actions if they were not joined in an initial action.

Here, Pam is bringing suit for breach of warranty and negligent installation and manufacturer of the tires. She has chosen to sue DT, the manufacturer and installer of the tires. Despite the fact that Maurice, the mechanic, may have been negligent in installing the tires, Pam is permitted to bring her suit solely against DT. Maurice is not a necessary party and the federal court properly denied DuraTires' motion to dismiss for failure to join Maurice as a defendant.

If Pam successfully proves her claims against DT, DT can go after Maurice for contribution if he was contributorily negligent in installing the tires. Pam may also bring a second action against only Maurice for his negligence. There are many reasons for why Pam might not have brought suit against Maurice (maybe it would destroy diversity jurisdiction in federal court or maybe he's insolvent) and the court will not dismiss the claim because she did not include him.

If DT wants to join Maurice in the case, they may be able to file a third party claim against him. Third party claims are permissible in federal court. However, DT will have to ensure that the federal court has subject matter jurisdiction over that claim and personal jurisdiction over Maurice. Because this is a diversity case (we have no reason to believe that breach of warranty and negligent installation and manufacture arise under federal law), complete diversity and $75,000 in controversy will be required. If this is not satisfied, DT will have to show supplemental jurisdiction, which will require them to show that their claim arises from the same transaction or occurrence.

2(A). Did the Court properly grant DuraTires' motion to compel the production of the statement from Wynne?

In federal court, parties are entitled to seek discovery of all relevant non-privileged information that is proportional to the needs of the case. Discoverable information is broader than admissible information. Relevant information is any information that has any tendency to make a fact of consequence more or less likely. The proportionality requirement ensures that parties do not request unduly burdensome amounts of information.

Under the FRCP, parties are required to file initial disclosures. In their initial disclosures, parties must identify and/or produce the names of all individuals who are reasonably expected to have discoverable information relevant to the claims or defenses. Parties are also required to identify and produce the documents in their possession which they intend to rely on in proving any of their claims or defenses. Opposing parties do not have to request this information prior to the initial disclosure deadline. Finally, in initial disclosures, parties must identify whether they have an insurance policy covering the claim.

Motions to compel are a discovery tool that enable a party to seek discoverable information from an opposing party when the opposing party has failed to produce the information. Generally, before filing a motion to compel with the court, parties should attempt to meet and confer regarding a discovery dispute. The point of a meet and confer is to attempt to work out reasonable disagreements about the discovery process between the parties before involving the judge. If a party has attempted to meet and confer with opposing counsel and the parties have failed to reach an

agreement, or the opposing party refused to engage in negotiations, the moving party should file a motion to compel. Pursuant to FRCP 11, the court has wide discretion to impose sanctions on a party that files frivolous discovery motions or fails to engage in the meet and confer process regarding reasonable discovery disputes. In some instances, the court could order a losing party to pay the costs of the motion to compel if they did not engage in good faith.

Here, Pam served her initial disclosures on DT, but did not produce Wynne's statement. Wynne was the other driver in Pam's accident. Pam gathered the written statement from Wynne after the accident. Wynne suffered a minor injury in the accident and her statement was favorable to Pam's case. There is no indication that DT sought to meet and confer with Pam before filing a motion to compel.

The court properly granted DT's motion to compel production of the statement from Wynne. Because the statement from Wynne was favorable to Pam's case, and it is in Pam's possession, Pam will reasonably rely on it in proving her case for breach of warranty and negligent installation and manufacture of the tires. Wynne's statement could presumably say something about what Wynne witnessed regarding the state of the tires during the accident. Pam will want to rely on this to prove her case. Accordingly, the court properly granted DT's motion to compel production of the statement from Wynne.

(Please note that if the statement was not in Pam's possession, DT may have needed to subpoena Wynne as a third party to obtain the statement. Because it appears Pam

gathered the written statement, and it is thus in her possession, and because she is a party, a subpoena is not required.)

2(B). Did the Court properly grant DuraTires' motion to compel a physical examination of Pam?

The FRCP provide for certain circumstances in which a party is permitted to compel an opposing party to submit to a physical examination or psychological examination. Generally, for these rules to be relevant, the party's physical condition (for a physical exam) or psychological condition (for a psychological exam) must be relevant to the claims. A psychological exam always requires court involvement.

Here, the issue is whether the court properly granted DT's motion to compel a physical examination of Pam. The court erred in granting this motion because Pam's physical condition is not relevant to the case. Pam was not physically injured in the case. Her complaint alleges only that she suffered property damage and emotional distress as a result of the accident.

Accordingly, Pam has not put her physical condition in issue in the case, and the court erred in granting DT's motion to compel a physical examination of Pam.

3. Did the court properly order DuraTires to produce its scientific report?

The next issue is whether the court properly ordered DT to produce its scientific report. DT advertised that a scientific report declared that its tires will not go flat for the first 7,000 miles of use if driven properly. DT's scientific report was created at the direction of its legal counsel and contained research on flat tire incidents involving DT.

As set forth above, all relevant, non-privileged information is discoverable, subject to the proportionality requirement. Privileged information is not discoverable. Privileged information can be information protected by the attorney-client privilege or the work product doctrine. The attorney-client privilege protects confidential communications made by a client to counsel in furtherance of the representation. The privilege belongs to the client and survives the attorney-client relationship and the client's death. The work product doctrine protects information prepared in anticipation of litigation. These doctrines do not protect underlying facts.

Here, DT served its initial disclosures on Pam but did not include the advertised scientific report. After unsuccessful meet and confers, DT continued to refuse to produce the report. Thereafter, Pam filed a motion to compel, which the court granted.

As an initial matter, the advertised scientific report is clearly relevant to the dispute. Apparently, the report declared that DT's tires will not go flat for the first 7,000 miles of use if driven properly. This is presumably the basis for Pam's breach of warranty claim. What the report says thus is clearly relevant to Pam's claim that she had only driven 100 miles when one tire went flat, causing her to swerve and crash into Wynne's car.

The issue is whether the report is protected by the attorney-client privilege or work product doctrine. The attorney-client privilege does not apply because the report is not confidential information communicated to counsel. However, DT will likely argue that the report is protected work product because it was prepared at the direction of its legal counsel and contained research on flat tire incidents involving DT. This is a

losing argument. As set forth above, the work product doctrine protects documents prepared in anticipation of litigation or for the purpose of litigation. While DT may try to argue that the report was prepared for litigation generally, Pam will counter that "anticipation of litigation" means specific litigation. For example, work product will protect an attorney's report summarizing an interview with the client or relevant witnesses. It will also protect a report prepared by a retained expert regarding the circumstances giving rise to litigation.

This report was prepared at the direction of counsel, but before Pam's accident, so it cannot fairly be said to have been prepared in anticipation of Pam's litigation.

Another important factor weighing in favor of finding that the report is not protected by the work product doctrine is the fact that DT advertised the report. DT will argue that it did not waive its work product protection by advertising the report because it only advertised a specific claim that the tires would not go flat for the first 7,000 miles. It did not publish the entire report. If the entire report was published or advertised, then presumably Pam wouldn't need to file a motion to compel to obtain it. Pam will argue that, even if the report was prepared "in anticipation of litigation," DT waived the work product protection by advertising the report.

Additionally, the work product doctrine is intended to protect attorney mental impressions and general litigation strategy. As set forth above, it does not protect underlying facts. So, to the extent the report contains only research on flat tire incidents and scientific reporting about the efficacy of DT's tires, it will be admissible. It is important to note that if the report contains attorney mental impressions, notes or

litigation strategy information, the court should permit DT to redact this information before producing it. However, there is no reason to believe in this situation that there is anything that requires redaction.

It is also worth noting that Pam followed the required procedures and met and conferred with DT before raising the motion to compel with the court.

In sum, the scientific report is clearly relevant and is not protected by attorney-client privilege or the work product doctrine. Thus, the court properly ordered DT to produce its scientific report.

QUESTION 2

In response to a significant rise in diabetes among school-age children, and based upon links between diabetes, exercise and diet, Congress has passed, and the President has signed, the Childhood Physical Education Act (the Act). The Act, administered by the Federal Department of Education, provides significant additional funds to states for public schools with daily physical education classes for students. These funds are to be used for the hiring of additional physical education teachers and purchase of physical education equipment.

Testimony before Congress has revealed that, on average, public schools spend only 25% of their school lunch budgets on fresh fruits and vegetables. The Act requires that states accepting the funds must enact legislation setting as a minimum that 50% of public school lunch food budgets be allocated to the purchase of fresh fruits and vegetables.

Testimony has also revealed that rates of childhood diabetes tend to be highest in minority and low-income communities. The Act has significant additional subsidies for public schools where the majority of the student population is non-Caucasian.

Before the Act has gone into effect, State X, through its attorney general, has brought suit in federal court seeking a declaratory judgment that the Act is unconstitutional. The National Association of School Dieticians (NASD) is seeking to intervene in the attorney general's lawsuit. According to NASD's charter, it seeks to promote healthy diets for school-age children, especially through school lunch programs. The attorney general opposes NASD's intervention.

1. What constitutional challenges can the attorney general make to the Act and are they likely to succeed? Discuss.

2. Does NASD have standing to intervene? Discuss

QUESTION 2: SELECTED ANSWER A

1. Constitutional challenges to the Act

The Act was properly passed by Congress and signed by the President, so the AG cannot challenge the Act on those procedural grounds.

Spending Clause

The AG might argue that the Act is not a proper exercise of Congress's spending power. However, this argument will fail. Congress may spend to promote the general welfare; spending is itself an enumerated power of Congress, so spending bills do not have to be rooted in a different enumerated power. Other than the requirement that states pass certain laws, discussed more below, the Act is purely a spending bill, and any enumerated powers challenge will fail.

Spending requirement on fruits and vegetables

The Act's requirement that states enact legislation setting a minimum of 50% of public school lunch budgets be allocated to fresh fruits and vegetables is permissible under the constitution.

1. Anti-commandeering

If the requirement were a direct requirement that states pass laws, then it would be unconstitutional as a violation of the Tenth Amendment. The Tenth Amendment reserves all powers not given to the federal government to the states (or to the people). The Tenth Amendment embodies the principles of federalism, and core

among those principles is that the federal government may not command state legislatures to pass certain laws, because states are sovereign governments and not merely local agents of the federal government. This is called the "anti-commandeering" principle. To demand a state pass a certain law violates that principle.

(Further, if the law were written that way--as a direct command--then the Spending Clause would not provide a basis for Congress's act, and another basis would be required. The Commerce Clause might provide such a basis, except that Congress's commerce power cannot force anyone, which presumably includes the states, to engage in commerce.)

2. Condition on funding - Dole test

However, that is not the way the Act is written. Instead, it is a requirement for states that accept the funding to pass these fruit-and-vegetable laws. Such conditions on funding are permissible, even if they require states to pass a law, so long as the *Dole* test is satisfied: The funding must be reasonably related to the spending and it must not be such a great amount of money as to be coercive. This inquiry also looks at whether the program is well- established. Because this test is rooted in the Tenth Amendment, the separate anti- commandeering test is not further applied.

Here, the conditions are reasonably related to the spending, because the purpose of the bill is to combat childhood diabetes. It does that in several ways, including providing the spending for PE classes and the other subsidies. The fit need not be perfect; for example, the federal government may require seatbelt laws and a minimum drinking age in exchange for highway funding. The connection between the low budgets for fruits and

vegetables and combatting childhood obesity is sufficiently tight: All the federal funding for PE education may be essentially wasted if the children then go eat very unhealthy foods at lunch right after class.

The facts don't say whether the amount of money is large or small. However, state lunch programs should be quite small as a proportion of state budgets: While education is a big part of state budgets, the lunch money is a relatively small fraction of that--most of the education budget will be the buildings and buses and teachers, not the lunch food. Therefore, it is not coercive to require states to spend this amount of money on lunches (especially because it is structured as a fraction of the total public school lunch budget).

Further, the programs at issue are brand-new, so a state is especially free to turn down the funding and opt out of the program entirely. This is quite different from a situation like Medicaid, where states have long-established budgets built around Medicaid funding from the federal government. The states will not be coerced in this way either.

An additional requirement of *Dole* is that the required state act may not violate another constitutional right, such as the First Amendment. Spending money on fruits and vegetables will not violate any other such right.

Therefore, since this provision is a condition on the other funding, this requirement does not violate the constitution.

Equal Protection

The Equal Protection Clause (EPC) of the Fourteenth Amendment requires the government to treat people the same in various ways.

The EPC by its text applies to the states; but the same rules apply to the federal government via the Due Process Clause of the Fifth Amendment, which "reverse-incorporates" the EPC against the federal government.

The EPC can only be violated by the government, not private parties. There is such "state action" here in the form of the federal government passing the law and spending the money, and the states being forced to pass the lunch money laws.

1. *First two provisions*

The first two parts of the law, appropriating funding for PE classes and requiring states to budget lunch money for vegetables, do not differentiate on any suspect class such as race, gender, national origin, or legitimacy. Therefore, only rational basis review applies. Rational basis review requires that the government have a legitimate interest and that the means are rationally related to that interest. Both are satisfied for the first two provisions: Congress has factual findings about a significant rise in childhood obesity and the links between diabetes, exercise, and diet. Childhood diabetes is a legitimate concern of the government because it hugely affects the lives of children. And to combat childhood diabetes, the government is rationally focusing on physical education (exercise) and lunch quality (diet). (The evidence for this review need not be very strong, and can be hypothetical. But here, there is specific evidence about exercise and state budgets.) These two provisions definitely do not violate the EPC.

2. Extra subsidies

However, the last provision of the Act is constitutionally problematic. That provision provides "significant additional subsidies" for public schools based on whether the majority of the school is Caucasian. That is, it treats people differently based on their race (and the race of those around them). Race is a suspect class and triggers strict scrutiny under the EPC. Strict scrutiny requires that the government have a compelling government interest and take action that is necessary to accomplish that action.

Here, childhood diabetes does not rise to the level of a compelling government interest, despite its importance, because there are simply too many concerns of similar importance (even among health conditions alone) to justify the extraordinary step of discriminating on the basis of race. (Nor is there past specific discrimination that Congress is rectifying, which can be a compelling interest.)

But even if it were, the action here is not necessary or narrowly tailored. Congress is allocating "significant" budgets to schools based on their students' races. This is not "necessary" to fixing differential childhood obesity rates. For one thing, Congress could allocate such additional funds to all schools.

In any case, the action is not properly tailored: Congress has findings that diabetes is most prevalent in minority *and* low-income communities. But the funding is directed solely based on the race of the community, not its income level. So some funding will go to wealthy schools who are mainly minorities, while funding won't go to poor white

schools with sky-high diabetes rates. (Note that income is not a protected or suspect class.)

This provision of the Act violates the EPC, so the challenge to it should succeed on the merits.

Additional issues

State X standing

Standing (discussed more below) is present for State X because the law requires them to take action (passing laws) and affects their state budgets. States also get "special solicitude" in the standing analysis, so even if it were a close question, a court would likely find that there is standing.

Ripeness

Article III's "cases or controversies" requirement means that courts will not hear cases before they are ripe--before the injury is present or imminent. Here, the Act has not yet gone into effect. This might mean that the case is not ripe yet. However, a court is not likely to rule on this ground because the law has been passed by Congress and signed by the President, so the question of whether it is constitutional is ready to be adjudicated. States are now faced with the certainty of the law going into effect unless it is blocked, and must prepare themselves and their budgets now, not later.

2. NASD standing

Article III limits the federal courts to hearing "cases" or "controversies." This limitation has been interpreted to include the requirement of "standing." Standing's irreducible constitutional minimum has three components: Injury in fact, causation, and redressability.

Injury in fact

The injury-in-fact requirement means that a party must have a real, concrete harm that is actual or imminent, and not just hypothetical. Economic losses are the classic form of injury in fact.

NASD has no economic losses. Their argument will be that they still have an injury because the implementation or non-implementation of the act will further or harm their group's mission. But there is no standing based on merely an interest in seeing that the laws are applied correctly; groups cannot intervene merely because they are interested in the policy question at stake. A mission statement cannot confer standing.

A better argument is that NASD's budget will be severely affected by this legislation: if it goes into effect, they will have to spend less money advocating for healthy lunches, because states will be required to spend more money. That argument is too hypothetical, because NASD may have to spend the same or even more money as the policy space evolves. Therefore, any such injury is too hypothetical to be an injury in fact (which must be more certain).

Causation

Causation means that the other party's actions are the cause of the party's injury. Even if a court accepted the knock-on argument about NASD's budget, the causation would be too diluted, because NASD is not itself spending its budget on fruits and vegetables. The state's expenditures would not neatly replace NASD's, so any economic harm to NASD's budget is not caused by the law going into effect or not.

Redressability

Redressability means that a court's judgment would fix or cure the injury in fact (at least in part). Here, because the injury and causation prongs are not met, the redressability prong is not met either (though arguably the court could let the law go into effect, but all three prongs must be met, so this prong need not be reached).

Other theories of standing also fail.

Associational standing

An association has standing when its members would have standing to bring the suit themselves. The NASD members appear to be school dietitians. For the reasons explained above, any given school dietician does not have an injury-in-fact, because they are not personally harmed by the law going into effect or not going into effect.

Taxpayer standing

NASD or its members cannot have standing on the basis of their status as taxpayers. Taxpayer standing argues that the party's interest is in the correct use of their tax

dollars. But absent extremely narrow circumstances (mainly religious establishment clause issues), there is no taxpayer standing because it would swallow the "cases or controversies" requirement.

Conclusion

Therefore, NASD does not have standing to intervene.

(However, it is common in federal courts to allow a party like NASD to participate as amicus curiae in a lawsuit, but not as a party. In this capacity NASD could file amicus briefs to let the court benefit from its expertise. However, as a non-party, it could not bring claims or defenses or engage in discovery. An amicus curiae does not have to meet the standing requirement because it is not a party.)

QUESTION 2: SELECTED ANSWER B

(1) Constitutional challenges against the Act

The first issue is what constitutional challenges the attorney general ("AG") may bring against the Act. The AG can challenge the legislation as a (1) violation of the Tenth Amendment's anti-commandeering principle and (2) a violation of the equal protection clause.

1. Violation of the Tenth Amendment anti-commandeering principle

The AG can first challenge the Act as a violation of the Tenth Amendment's anti-commandeering principle. The federal government is one of limited powers, and can only act with authorization under the Constitution. States, on the other hand, have general police powers. The Tenth Amendment of the U.S. Constitution provides that all powers not vested in the federal government are reserved to the states.

The first issue is whether the federal government had power to enact the legislation. The U.S. Constitution grants to Congress the power to tax and spend for the general welfare. This power is very broad, and just requires a rational connection to a legitimate purpose. Here, the Act was enacted in response to a significant rise in diabetes among school-age children, which affects the health and welfare of the nation's citizens. The Act provides additional federal funding for the hiring of P.E. teachers, purchase of P.E. equipment, and healthier school lunches. The Act's purpose is to increase the physical education in schools and also improve the health of school lunches, which was based on the link between diabetes, exercise, and diet. Because the Act was rationally related to the goal

of reducing diabetes and improving the health of school-age children, the Act was within Congress's taxing and spending power.

The next issue is whether the federal government's act nonetheless violated the Tenth Amendment and principles of federalism. The federal and state governments are separate sovereigns, the federal government may not exercise its spending and taxing power in such a way as to "commandeer" the states to act. This is called the anti-commandeering principle.

Under the anti-commandeering principle, a spending measure enacted by Congress will be invalidated if it (1) directly compels the states to act or (2) is unduly coercive, such that the states are left with no choice but to comply with the federal government's directives.

Here, the Act does not directly force the states to enact litigation, so (1) is not applicable. However, the Act does involve strings or conditions on the receipt of federal funding that the AG may argue are unduly coercive.

Here, the Act makes receipt of the "significant" additional funds conditioned on the states enacting certain legislation related to the Act's purpose. Specifically, if the states receive the funding, they are required to set as a minimum that 50% of public school lunch food budgets be allocated to the purchase of fresh fruits and vegetables.

The AG may argue that this spending condition is unduly coercive, effectively "commandeering" the state legislatures to enact legislation that the federal government desires. AG's strongest argument is that the Act provides "significant funding," and states

may therefore feel compelled to comply with the conditions because the financial upside is so high (and public schools are notoriously under-funded.)

This argument, however, is not likely to succeed. The Act does not make any changes to the federal funding states already receive for the administration of public schooling; it merely adds additional funds. A spending condition is more likely to be found to be unduly coercive where, for example, the condition threatens a significant portion of the state's budget. For example, if the Act made the receipt of *all* federal funding for public schools conditioned on enacting the desired legislation, the AG would have a stronger argument. But the Act here keeps schools' normal amount of federal funding intact; it just gives them the option of obtaining *more* federal funding.

The AG will therefore likely not succeed in a challenge to the Act based on the anti-commandeering principle of the Tenth Amendment.

2. Violation of the Equal Protection Clause

The AG may also argue that the Act's additional subsidies to majority-non-white schools violates the equal protection clause.

The Equal Protection Clause ("EPC") of the Fourteenth Amendment provides that the government shall treat similarly-situated people or entities in a similar way. Although the Fourteenth Amendment is applicable only to the states, the Fifth Amendment's due process clause -- applicable to the federal government -- has been held to contain an identical guarantee.

The level of review applicable to a challenge under the EPC depends on whether the government's action burdens a suspect or quasi-suspect classification. Suspect classifications (including race, national origin, and alienage) are subject to strict scrutiny, meaning that the government must prove that the action is narrowly tailored to serve a compelling government purpose. Quasi-suspect classifications (gender and legitimacy) receive intermediate scrutiny; the government must prove that the action is necessary to achieve a substantial government interest. All other classifications receive rational basis review, which means the government action must be rationally related to a legitimate government purpose.

Here, the Act provides significant additional subsidies for public schools where the majority of the student population is non-Caucasian. Accordingly, the Act, on its face, draws a distinction between schools with majority white students and schools with majority non-white students. Because this is a classification based on race, the government must prove that the action is narrowly tailored to serve a compelling government purpose. The government, not the AG, bears the burden on this issue.

The stated purpose for the Act's additional subsidies is that rates of childhood diabetes tend to be highest in minority and low-income communities, so it is providing the additional funding to provide extra help to those schools in combatting these issues. The government can likely prove that reducing the rate of childhood diabetes is a compelling government purpose. The diabetes and obesity epidemic in this country results in a huge burden on the country's public health infrastructure and leads to countless deaths each year. The fact that there is a "significant rise" in childhood diabetes makes it even more crucial to combat the disease earlier rather than later.

The government, however, likely cannot prove that the additional subsidies are narrowly-tailored to serve that purpose. The facts state that there has been a significant rise in diabetes among *all* school-age children, not just minority children. The additional subsidies are based on testimony that the rate of childhood diabetes "tends to be higher" in minority and low-income schools, but there is no additional evidence that the Act's "significant additional funds" that already will be provided to all schools will not be enough to address this issue, such that the minority and low-income schools need even more funding. Moreover, the evidence of higher diabetes rates also applies to low-income schools, which may be predominantly white, and those schools will not be eligible for the additional funds since the classification was drawn entirely on race. (The government would have been better off drawing the classification on socioeconomic status, since many low-income schools are also heavily minority, and wealth is not a suspect class under the EPC.)

Accordingly, the AG can likely succeed in a challenge to the additional subsidies based on the EPC.

(2) Whether NASD has standing to intervene

All parties in federal court must have standing to assert their claims. Standing means that a litigant has a concrete stake in the outcome of the case. Standing requires (1) an injury in fact, that is concrete and particularized; (2) traceable to the challenged conduct; and (3) that can be redressed by a favorable court decision.

For an organization to have standing, it can either (1) base standing on an injury to itself, or (2) assert a claim on behalf of its members, where (a) the members would

have individual standing to assert their claims and (b) the nature of the suit or remedy requested does not require that the members participate individually.

Here, the organization is a non-profit that seeks to promote healthy diets for school-age children, especially through school lunch programs. However, it will likely be unable to prove standing to intervene because it is unclear what concrete stake it has in the case. Although the legislation is related to its stated purpose and it would therefore prefer that the legislation be upheld, an injury-in-fact must be concrete and particularized.

NASD likely lacks standing to intervene.

QUESTION 3

Tuan sells antique furniture. He signed a ten-year lease for a warehouse owned by Leo at $1,000 a month, with a start date of January 1. The warehouse would be used to store Tuan's inventory. When Tuan attempted to occupy the warehouse on January 1, he discovered Annika there pursuant to her validly executed lease, which was not due to end until January 31. Tuan then immediately rented another almost identical warehouse from Bruno, on a month-to-month basis, for $1,500 a month.

When Tuan returned to Leo's warehouse on February 1, Annika told Tuan she was not leaving until May 31.

When Tuan visited the warehouse on June 1, he discovered that Leo had stored equipment in the warehouse that made 25% of the space unusable. Tuan refused to take possession and informed Leo that he was terminating his lease immediately.

The next day, Leo retook possession of the warehouse and placed "For Rent" signs in several windows. Shortly after, Leo executed a ten-year lease with Juanita for the warehouse at a monthly rent of $500, with a start date of July 1.

Tuan rented Bruno's warehouse from January to June. He later signed a new lease for 9 ½ years starting on July 1 with a monthly rent of $1,500.

Tuan has never paid any rent to Leo.

Tuan decided to sue for damages based on his rights under his lease with Leo.

1. What claim(s), if any, may Tuan reasonably assert against Leo? Discuss.

2. What claim(s), if any, may Tuan reasonably assert against Annika? Discuss.

3. What counterclaim(s), if any, may Leo reasonably assert against Tuan? Discuss.

QUESTION 3: SELECTED ANSWER A

1. TUAN'S CLAIMS AGAINST LEO

A. Violation of Duty to Deliver Possession

The question is whether Annika's continued residence from January 1st to January 31st under a valid unexpired lease or from February 1st to May 31st without a valid lease constituted a violation of Leo's duty to deliver possession. A landlord has a duty to deliver possession of a leased premises to a tenant. Under the majority English rule, this duty is the duty to deliver both actual possession of the premises and a legal claim to superior title over the premises. Under the minority American rule, a landlord only has the duty to deliver legal possession of the premises. In either case, a tenant has the right to evict a holdover tenant.

Here, Leo violated the duty to deliver possession under both the majority and the minority rule from January 1st to January 31st. The reason is that Annika continued to have a validly executed lease that gave her priority of legal possession over Tuan. Therefore, Tuan did not have legal possession. In addition, under the majority English rule, Leo likely violated the duty to deliver actual possession from February 1st to May 31st because, although Annika did not have a legally superior right to Tuan at the time, Annika was still in physical possession so that Tuan could not retake the premises without legal action. Under the minority rule, Tuan would have had an obligation on February 1st to evict Annika himself.

In contracts, a party is generally entitled to expectation damages consisting of the benefit the party would have received from the bargain. Additionally, because the duty to deliver

possession and the duty to pay rent are dependent covenants, Tuan would not have had to pay rent for the period in which he was out of possession. During the periods when Tuan was out of possession, he could sue for the difference between the rent he should have paid for the warehouse and the rent he had to pay in order to obtain substitute space, or $500 a month. This would give him damages of $500 for the period from January 1st to January 31st. For the four-month period after that when Annika was not staying under a valid lease issued to her by Leo, it is less clear what Tuan's damages would be.

Even under the majority rule it is unclear whether Tuan could sue for the full period from February 1st to May 31st because Tuan appeared to fail to inform Leo of the holdover tenant, and to surrender the premises even though he had the legal right to it. A tenant who surrenders the premises in this way does so at the tenant's own peril and may not receive full damages. A party to a contract typically has their damages reduced by any amount that the party could have avoided through reasonable efforts. Tuan could have brought an ejectment or unlawful detainer suit against Annika, or he could have asked Leo to do so if Leo had a duty to deliver actual possession.

B. Actual Eviction

A tenant is actually evicted when the tenant is denied physical possession of all or some part of the premises. If a third party has evicted the tenant from even part of the premises, then the tenant is typically not obligated to pay rent any longer. Indeed, the tenant may abandon the premises. However, if a landlord deprives a tenant of only a portion of the premises, then the tenant's obligation to pay rent is merely decreased proportionally.

Thus, Tuan may have a defense to paying rent from the entire period lasting from January 1st to May 31st because he was evicted from the premises-- a third party (Annika) was in physical possession and he could not access the premises. (As mentioned above, Tuan's failure to make any moves to evict Annika may reduce this recovery). Tuan could have justifiably abandoned the premises but didn't. Additionally, for the period from June 1 to July 1 wherein Leo stored equipment in the warehouse making 25% of it unusable, Leo had taken physical possession of 25% of the premises from Tuan, thus actually evicting him. For that period, then Tuan would have owed proportionally less rent by 25%. Tuan could not justifiably abandon the premises because he was only deprived of part of it, however (unless he proves a constructive eviction claim-- see point 1C below).

Notably, however, Tuan could not recover double on both his claim of failure to deliver possession and actual damages. In addition, Tuan's eviction claim would be subject to the same duty to mitigate discussed in A, above.

C. Constructive Eviction

The final issue is whether Leo's possession of 25% of the space in the warehouse constituted constructive eviction that would justify Tuan's abandonment and give him a claim for damages for the rest of the lease term. A tenant may claim constructive eviction if the landlord's actions or failure to act deprive the tenant of the substantial enjoyment of the premises. A constructive eviction suit justifies a tenant in abandoning the premises. To prevail in this suit, the tenant must notify the landlord of the problem, give the landlord a reasonable amount of time to fix the problem, and then vacate the premises.

Here, because the nature of the commercial property was a warehouse used to store inventory, Tuan could make a strong claim that being deprived of a quarter of the space he had bargained for deprived him of substantial enjoyment of the premises. Assuming that he selected the spot in a cost-conscious manner and only had just enough space to suit his needs, he would no longer be able to profitably operate his business with a quarter of his inventory out on the street. However, Tuan failed to inform Leo that the arrangement was unacceptable (which was likely necessary because from Leo's perspective Tuan hadn't been occupying the warehouse at all). Furthermore, Tuan gave Leo no time to remedy the problem. Instead, Tuan immediately quit the premises. Thus, it is unlikely that Tuan will be able to claim constructive eviction.

Because Tuan cannot claim he was justified in abandoning the premises, Tuan likely cannot collect the difference of $500 monthly for the rest of his 9-1/2 year lease term under this theory.

2. TUAN'S CLAIMS AGAINST ANNIKA

A. Trespass

The question is whether a holdover tenant may be liable for trespass for either (1) a period during which both the tenant and the claimant held a valid lease or (2) a period during which the holdover tenant's lease had expired and the tenant had a current lease entitling the tenant to possession. The elements of trespass are an intentional entering or remaining on the land of another without the consent of the other. A tenant with a valid lease has a term of years or other present possessory interest, while a landlord holds a reversion.

Here, Annika is not liable for trespass for the period lasting from January 1st to January 31st because Annika had a right to possession of the property as demonstrated by her valid lease. The property she entered or remained on would not be the property of "another" because it was her leasehold property at the time. However, for the period from February 1st to May 31st, when Annika's lease had ended, she was not the owner of the property. Thus, if Tuan asked her to leave, she would have been trespassing because she would not have had consent from the current holder of a present possessory term of years on the premises.

Tuan's best remedy in that instance would have been an action for ejectment, which would have constituted a request to order the sheriff to remove Annika from the property. Tuan did not. However, insofar as trespass results in injury to the property or a substantial interference with the owner's right to the enjoyment of the property, the owner may also seek damages. In this instance, Annika deprived Tuan entirely of the property for four months. He could request the fair rental value of the property at that time as a measure of the use of the property he was deprived of.

3 LEO'S CLAIMS AGAINST TUAN

1. Abandonment

The issue is whether Tuan unjustifiably abandoned the premises in violation of Tuan's lease agreement, entitling Leo to damages for future rent he would have obtained under the ten-year lease. A tenant typically has a duty to occupy or pay rent on the leased premises for the entire term of the lease. A tenant violates this duty by unjustifiably abandoning the property. Abandonment occurs when a tenant quits the premises, has no

intention of returning, and defaults in the payment of rent. Here, Tuan left the premises on January 1st; however, he didn't form an intent not to return until June 1st, when he told Leo he was terminating the lease. Before that, Tuan continued to return on the dates he was told the warehouse would be available. Tuan has paid no rent, so he defaulted on rent as of February 1st, when the first payment of $1,000 was due under the lease term. Thus, all elements for abandonment were present by June 1st. As noted above, while Tuan likely would have been justified in abandoning the premises from January 1st to May 31st when he was completely evicted, Tuan did not. Instead, Tuan selected June 1st, a date on which he was not justified in abandoning the premises (see point 1C above).

When a tenant abandons the premises, a landlord has one of several options. First, the landlord may accept surrender, which terminates the tenant's duty to pay rent. Acceptance of surrender may be implied if the landlord remodels or alters the premises so they are no longer suitable for the tenant's use, or it may be an explicit declaration to the tenant. Another option is that the landlord may treat the abandonment as unjustified but relet the premises for the tenant's remaining term on the tenant's behalf and hold the tenant accountable for a difference in the value of the rent, if any. Finally, in a minority of jurisdictions wherein a landlord does not have a duty to mitigate damages, the landlord may simply leave the premises open and sue for rent as it accrues over the lease term.

Here, the facts indicate that Leo treated the surrender as unjustified and relet the premises for Tuan. Leo made no representation to Tuan that he accepted Tuan's surrender. The facts do not indicate that Leo said anything to Tuan. While Leo retook possession of the warehouse, he did not relet it for the exact period remaining on Tuan's

lease, but 10 years is close to 9.5 years and it was likely necessary to round up for the sake of a new tenant. This indicates he was merely reletting to minimize damages.

Typically, Leo's damages would be measured by the difference between the contract price and the substitute contract he was able to obtain. Tuan's lease was $1,500, while Juanita's was $500. This would make Tuan accountable for a difference of $1,000 a month. However, Tuan would be able to contest these damages if the relet to Juanita was not commercially reasonable. If there were other tenants willing to pay closer to the amount that Tuan paid and Leo failed to rent to those tenants because of a non-commercial preference for Juanita, Leo's damages would be reduced proportionally.

Additionally, if Tuan made an argument that his abandonment of the premises was justified because Leo breached the lease first through Tuan's eviction from January 1st to May 31st (almost half a year) (see points 1A and 1B), then Leo would not be entitled to any future damages. A party that materially breaches first is no longer entitled to expectation damages or return performance. A material breach occurs if the other party is deprived of the benefit of their bargain. Factors in whether a breach is material include the extent of the deprivation, whether the deprivation can be cured with money damages or other remedies, the likelihood of cure, and whether breach was willful. We do not have facts indicating whether Leo knew that Tuan had been evicted or Annika was holding over. However, six months out of possession is a long time, even for a ten-year lease. While Tuan could be compensated for his extra rental expenses, property is considered unique and so his loss of use might not be able to be cured, particularly if he chose Leo's warehouse as a strategic location. Therefore, if a court does not find that Tuan's

failure to take steps to evict Annika renders the breach immaterial, Leo will not recover future damages.

2. Rent

A tenant has a duty to pay rent. If a tenant violates this duty, then a landlord is entitled to damages for the accrued unpaid rent. Here, Tuan has failed to pay rent for six months from January through June. Therefore, in the absence of Leo's breach, Leo would have been entitled to $1,500 for each of the six months he has already rented to Tuan.

However, a party in material breach has no right to a return performance, as discussed above. Leo failed to deliver possession to Tuan from the beginning of the lease. From January 1st to January 31st, Tuan certainly would not owe rent because Annika's lease still gave her a legal right to possession. From February 1st to May 31st, Tuan also was evicted and Leo did not deliver on his duty to deliver possession. Leo would have to demonstrate that Tuan was at fault for failing to notify him or bring an eviction suit in order to recover rent for this period. If Tuan had occupied the premises in June, then Leo would have been entitled to 75% of rent because he was only occupying 25% of the warehouse. However, if a court finds that Tuan's obligations had already ended due to Leo's material breach by June, then Tuan would owe nothing after that period.

QUESTION 3: SELECTED ANSWER B

1. Tuan's Claims Against Leo

Failure to Provide Right to Possession

A landlord owes a tenant a duty of providing the actual right to possess the property throughout a valid lease, as well as the legal right to possess it, at least in most states. (In a minority of states, a landlord need only provide the legal right to possess.) The right to possession is the right to maintain exclusive control of the whole of the property. A tenant-possessor must have the ability to exclude anyone that he does not want on the property or else he is not in full control of all of his rights under the lease.

For the first month, from January 1 to January 31, Leo provided Tuan neither the legal right nor the actual right. Leo signed two leases for the same month governing the same property, with Tuan and Annika. Leo's failure to provide either right to Tuan for that month is a material breach of the lease, and in every state Tuan may bring a claim against Leo for that.

Actual Right to Possession

For the months February through May, Leo again failed to provide Tuan with the actual right of possession of his property. Annika remained at the property in a tenancy at sufferance, preventing Tuan from accessing or possessing it. The tenancy at sufferance began at the expiration of Annika's lease and continued throughout the period that she remained in control of the property without a lease or other tenancy.

In most states, Leo's failure to provide Tuan with the actual right of possession for these four months is a material breach of their lease. For much the same reasons as *supra*, Tuan could not access the property or control it for use of the storage of his inventory. Tuan would thus have a claim against Leo for these four months in addition to the month of January in most states.

In a minority of states, however, Leo need only provide Tuan with the legal right to possess the property. Tuan's valid lease is that legal right beginning on February 1. In this minority of jurisdictions, Annika's holdover tenancy does not mean that Leo breached the lease with Tuan. It would require Tuan to pursue his own legal action against Annika for this four-month period (discussed *infra*).

Implied Covenant of Quiet Enjoyment

Every lease includes an implied covenant of quiet enjoyment (ICQE). This requires a landlord to permit the tenant the use of and control over the property in legitimate and legal ways. It bars the landlord from substantially interfering with the tenant's right.

Tuan will argue that Leo's equipment storage - rendering 25% of the warehouse unusable - was a violation of the ICQE. Because of that violation, Tuan will argue that he was constructively evicted. A constructive eviction can occur when a landlord's substantial interference with the ICQE is not resolved within a reasonable time of the landlord's receipt of notice of the interference and the tenant elects to break the lease and leave the property. Upon a constructive eviction, the lease terminates.

The storage of goods rendering 25% of the warehouse unusable is likely a violation of the ICQE. It is a substantial interference with Tuan's use and enjoyment of the

property. Tuan leased the warehouse for the storage of his own inventory, and Leo is instead holding back 1/4 of the property for his own storage. The analysis may be different if Leo used the property in a different way that did not affect the capacity of the warehouse to store Tuan's goods, or if Leo's use of the property rendered 1% or 2% of it unusable for Tuan. But making 25% of it unusable for Tuan's storage is a substantial interference with his use of the property, and thus Leo has breached the ICQE. (A discussion of constructive eviction is *infra.)*

Mitigation and Damages

In January, upon learning Leo failed to deliver both legal and actual possession of the property, Tuan promptly mitigated his damages by renting an almost identical warehouse for $1,500.

Tuan acted reasonably, because the replacement warehouse is nearly identical and because Tuan elected to sign a month-to-month periodic tenancy rather than a lengthy tenancy for years. Tuan would then be able to end his tenancy with Bruno's warehouse to come to Leo's warehouse as soon as it was made available for him.

Leo will likely argue that Tuan did not reasonably mitigate because he found a replacement property at a 50% cost increase. That suggests that Tuan did not shop around or that he got an unreasonably poor deal from Bruno. But Tuan will argue that Leo's failure to provide possession on January 1 forced him to immediately sign another lease to allow him a place to store his goods on that same day. Tuan did not have to spend much time shopping around, because it was already January 1 when he learned that his lease starting that same day would not be honored. A 50% price

premium - especially considering the month-to-month nature of the lease will not be seen as unreasonable on Tuan's part, and Leo will be responsible for it.

Tuan paid $500 extra for this warehouse in January. In every state, Tuan could seek this $500 from Leo.

Tuan also paid a total of $2,000 above and beyond his lease with Leo to use Bruno's warehouse for the four months of February through May. Tuan's ability to pursue these funds from Leo would vary by state. In most states, because Leo failed to provide Tuan with actual possessory rights in addition to legal possession rights, Leo is liable to Tuan for his damages accrued over those four months. In a minority of states, though, because Leo provided Tuan with legal possession rights as the sole holder of a valid lease for those four months, Leo fulfilled his duties and complied with the law. Thus, Tuan would be forced to pursue Annika for those funds (see *infra*).

Finally, Tuan will argue he was constructively evicted on July 1 and was required to then pay $500 extra per month in perpetuity for the remaining 9.5 years of the lease lifetime, a total of $57,000 in damages. Tuan will seek this $57,000 from Leo.

<u>9.5 Year Lease</u>

Tuan will argue that his constructive eviction forced him to continue using Bruno's warehouse for the remaining 114 months at the $1,500 price. Leo will argue it is neither reasonable nor fair to require him to pay the lease-price difference in perpetuity. First, the reasons underscoring the reasonableness of the $1,500 price in January are not present here. Tuan is no longer paying a month-to-month price premium and should be able to secure a price closer to $1,000 for such a lengthy lease, assuming

the $1,000 lease was in line with market conditions. Second, Leo will argue Tuan needed only a warehouse for the 25% of his goods that could not be stored in Leo's warehouse, since Tuan could still use the 75% of Leo's warehouse that remained available to him. This will turn on the constructive eviction question discussed *infra*.

The court will likely evaluate the reasonableness and foreseeability of Leo having to pay damages for the increased rent price Tuan was subjected to by leasing Bruno's warehouse. On one hand, Leo was aware that Tuan sought a 10-year storage lease because he entered into one with Tuan. It is foreseeable that Tuan could have damages for that full lease period if Leo failed to live up to the lease. Assuming Tuan was constructively evicted, a court could find that he acted reasonably in a foreseeable way.

But on the other hand, a court could find that Tuan's decision to stick with the same warehouse that he found on short notice on January 1 for a 9.5-year lease, at the same price that he originally got the warehouse when he needed it that same day and on month-to-month terms, was not reasonable. The court could determine Tuan was required to analyze market conditions and seek better terms, even if Tuan could have stayed with Bruno for another month or two on the month-to-month lease before doing so. Ultimately, if Tuan truly was constructively evicted, this middle approach is likely. The court will consider expert testimony or other evidence about market conditions and decide, after reviewing all of the facts, whether Tuan should have spent one or two more months with Bruno before signing a 110+ month lease with some other party at a price closer to $1,000 a month.

Total of Claims

Thus, Tuan will argue Leo breached the lease by failing to provide him possession of the warehouse from January through May and that Leo constructively evicted him through a breach of his ICQE. Tuan will seek $500 for January, $2,000 for February through May, and another $500 for every month after that through the end of his 10-year lease term. But Tuan is unlikely to get all of it, even if he was constructively evicted.

2. Tuan's Claims Against Annika

Tuan's claims against Annika depend on which rule the jurisdiction follows. He also can bring a tort claim for trespass to land.

Majority Rule

Under the majority rule, Leo owed Tuan actual and legal possession as of the start of the lease. Leo breached that duty throughout the entire time Annika was present because he did not deliver actual possession. Thus, Tuan will pursue remedies from Leo for that period relating to the lease. But this does not affect a trespass analysis; see *infra*.

Minority Rule

Under the minority rule, Leo complied with his duty to provide legal possessory rights as of February 1, when the conflicting leases no longer overlapped. Thus, Tuan's claims for possession of the property under the lease would be brought against

Annika. Annika would be solely responsible to Tuan under this role for any of his foreseeable damages as a trespasser to his land.

Trespass to Land

Trespass to land is an intentional tort. It is committed when a party encroaches on another's property and interferes with it. Trespass to land can be very slight, and nominal damages are available. It need not be a significant trespass to be cognizable.

Here, Annika's trespass is certainly significant. Annika is trespassing to the extent that she is using the whole of the property for herself. Tuan cannot use the property to store his goods. Thus, Annika has committed a trespass from which significant damages may flow.

Tuan may seek from Annika the $500 per month extra that he was forced to spend in renting Bruno's warehouse from February through May. But Annika is not responsible for the $500 extra Tuan spent in either January or June. In January, Annika was present at the property as the holder of a valid lease. Tuan's damages for January may only be sought from Leo, who unlawfully rented the same warehouse to both Annika and Tuan. And in June, Annika had terminated her lease and vacated the premises.

Still, Leo may argue that it is Annika who should be responsible for the 9.5 years' worth of $500 additional rent. Leo will say that, because Annika held over in sufferance, Tuan gave up and left on June 1. Had Annika not held over beyond February 1, Leo will argue, Tuan never would have left. But this argument is likely to fail. It is too attenuated in its causal chain, and it is neither foreseeable nor reasonably certain that Tuan would

have stayed under Leo's lease long-term had Annika not overstayed her lease after February. Thus, Annika is not going to be liable for Tuan's damages after May.

3. Leo's Counterclaims Against Tuan

Leo will argue that Tuan breached their lease when he departed on June 1 and refused to pay. Leo was forced then to mitigate his damages and rent to Juanita for only $500 a month. Thus, Leo will argue that the $500 delta in rents he was paid for that 9.5 year period are Tuan's fault and Tuan owes him damages.

To determine who is right, a court will analyze whether Tuan was constructively evicted by Leo's actions. A constructive eviction occurs when a landlord violates the IWQE, the tenant notifies the landlord of that violation, the landlord does not remedy it within a reasonable time, and the tenant leaves and considers him or herself evicted. Upon constructive eviction, the lease ends. Thus, if Tuan was constructively evicted, he owed Leo no duties after June 1 and Leo cannot recover from him.

Substantial Interference

Leo will argue his use of 25% of the warehouse wasn't a substantial interference. This will likely fail for the reasons in the IWQE section *supra*. Using 25% of the warehouse that Tuan wanted to store his goods is a substantial interference.

Constructive Eviction

Leo will argue that Tuan's constructive eviction was wrongful because Tuan did not give him notice and a reasonable opportunity to cure. When Tuan arrived on June 1 and found 25% of the warehouse unusable, he terminated his lease immediately.

Tuan did not give Leo notice then and a chance to cure. This is Leo's strongest argument.

Tuan will argue that the "notice" relates back to at least January 1, when he found Annika in his warehouse. Because Leo executed valid leases with both Tuan and Annika for that month, Leo is considered to have actual knowledge of that conflict. Tuan will say that Leo was on notice as of that time. In addition, in some states, Tuan may be excused from the notice requirement for futility. Tuan may argue that it would have been futile to give Leo notice of yet another breach of his lease, because Leo had already failed to perform it for five months. Rather than the June 1 event being the sole thing giving rise to eviction, Tuan will argue, it was the last in a long series of events that gave rise to it.

The notice and opportunity to cure issue is the crux of Tuan and Leo's dispute. Tuan will argue that he was done at that point with Leo's repeated breaches of their lease. Upon showing up on June 1 - five months after his lease was supposed to start - he saw that Leo had reserved an entire quarter of the facility for his own use. Tuan will say that such a blatant disregard of the lease shows that any notice to Leo would have metaphorically gone in one ear and out the other, or alternatively, that Annika's presence for the months prior was sufficient notice.

But Leo will argue that Tuan never told him Annika overstayed her lease. While Leo will be considered to have known Annika was there in January due to the overlapping leases, no facts suggest that Tuan contacted Leo between February and June to inform him of Annika's tenancy at sufferance or to ask (or demand) that Leo provide him with

the warehouse. Leo will argue that, had Tuan told him of that, he would have fixed it. Instead, Leo simply stored some things in the warehouse on the same day Tuan was moving in. Leo might argue that he would have immediately removed those items had Tuan asked him to do so.

Because Tuan never asked Leo to move the items, it is likely a court will find Tuan was not strictly constructively evicted.

If the court decides that Tuan was constructively evicted on July 1, it will not require Tuan to pay back Leo for anything under the lease after that point. Tuan will not be liable to Leo for his cheaper lease with Juanita.

If the court decides that Tuan was not constructively evicted because he failed to give notice and a chance for Leo to remedy the issue, then Leo will be able to sue Tuan. Leo will argue that he expected $1,000 a month for that property for the 10-year lease. His damages are $1,000 for the month of June, in which no one paid rent, and $500 a month for the 9.5 years after that when he only was able to get $500 from Juanita.

Tuan will argue the $500 lease with Juanita was not sufficient mitigation. He will likely use his lease with Bruno as evidence of market conditions. If warehouses are going for $1,500, then why is Leo renting his for $500? Leo will argue in return that he put "For Rent" signs in several windows to attempt to rent the warehouse. The reasonableness of this mitigation measure will likely be judged by context and business custom. If the warehouse is in the middle of a busy area in Los Angeles or San Francisco, such that many people would have seen those signs, then it will be seen as a more reasonable mitigation measure. But if the warehouse is in a rural area, or if it is intended for use

for some specialized storage purpose that a narrow class of renters might need, then Leo might have been expected to take other measures to market its availability, such as advertisements or Internet marketing.

QUESTION 4

LawnCare Company (LawnCare) manufactured and sold a liquid weed killer for lawn care. Paula brought a personal injury suit against LawnCare when her children developed breathing problems after LawnCare's weed killer was applied on her lawn. LawnCare entered into a valid retainer agreement with Andy, an attorney, to defend LawnCare in the action.

Andy is a member and financial supporter of Citizens Concerned About Chemicals (C2AC), a consumer group that is currently lobbying for environmental regulations that would remove chemicals such as LawnCare's weed killer from the market as unsafe. Andy provided pro bono free legal advice to C2AC in the past regarding an unrelated corporate matter, but did not enter into a formal attorney-client relationship with C2AC.

Since Andy is convinced that his association with C2AC will not affect his representation of LawnCare, he did not tell LawnCare about his relationship with C2AC. LawnCare is impressed with Andy's reputation as a litigator, and Andy did not want to jeopardize losing LawnCare as a client by discussing his private concerns about their chemicals.

In response to an anonymous questionnaire sent to all C2AC members, Andy mentioned the publicly available information regarding Paula's complaint filed against LawnCare, but did not provide any other details. One week after Andy returned the questionnaire to C2AC, Andy received a call from the Chief Executive Officer ("CEO") of LawnCare, who said a representative of C2AC had called to ask about Paula's lawsuit. Andy told the CEO that he did not know where C2AC would have received that information from and recommended that LawnCare not disclose any details about the lawsuit.

What ethical violations, if any, has Andy committed? Discuss.

Answer according to California and ABA authorities.

QUESTION 4: SELECTED ANSWER A

Retainer Agreement:

Under ABA there is no writing requirement for a representation of a client, unless it is a contingency case. Similarly in CA, there is no writing requirement for representation up to $1,000, corporate client, or in the case of an emergency. Here, the facts suggest that LawnCare and Andy entered into a valid retainer agreement to defend LawnCare in a personal injury case against Paula when her children developed breathing problems after LawnCare's weed killer was applied on her lawn.

Corporate Client:

An attorney representing a corporation owes a duty of loyalty to the corporation itself and not its employees. If an attorney believes that the employees of the corporation are being misled to believing that the attorney is representing them directly, the attorney must make it clear that his attorney-client relationship belongs to the corporation. Here, Andy is defending LawnCare Company in a personal injury case and if at any time during the representation any employee is misled, Andy must make it clear that he represents LawnCare and not the employee. This is done to avoid any confidential information or conflict of interest arising during the representation.

Duty of Loyalty:

An attorney owes a duty of loyalty to his client. The duty of loyalty includes refraining from conflict of interest (COI) that will materially limit the representation of the client. An attorney should not materially limit the representation of a current client by the attorney’s own interest, interest of a previous client, or current client. If the

attorney reasonably believes (subjectively & objectively) that he can competently and diligently represent the client, not prohibited by the law, and gets informed consent (ABA) or informed consent, confirmed in writing (CA), then the attorney may represent the client. Limitations of the attorney's own interest in the representation can be evidenced by relationship with the opposing attorney, stake in the outcome, membership in organizations that are against what the attorney is advocating for the client. A COI may arise during representation of a client or be apparent before the representation begins.

Association with C2AC:

Andy is a member and financial supporter of C2AC, a consumer group that is currently lobbying for environmental regulations that would remove chemicals such as LawnCare's weed killer from the market as unsafe. Unless Andy reasonably believes that he can defend LawnCare in the case without materially limiting LawnCare's representation and gets informed consent (ABA) or informed consent, confirmed in writing (CA), disclosing his membership with C2AC he may be in violation of ethical rules. Andy is convinced that his association with C2AC will not affect his representation of LawnCare and he did not disclose his relationship with C2AC; however, that is not enough because under both ABA and CA Andy should've disclosed his association with C2AC because there is a potential conflict of interest. Andy will argue that he simply wants to support organizations that care about the safety of the public and the current personal injury case between LawnCare and Paula has no bearing on it. This argument may not prevail as the facts later suggest that he even provided pro bono work for C2AC. Lastly, the COI became apparent because

Andy knew that if he reveals his personal concerns about chemicals, it'll jeopardize looking LawnCare as a client.

Conflict of interest between current and former client*:*

An attorney who represented a previous client may not represent another client that would materially limit the current client or potentially reveal confidential information regarding the former client, unless the attorney reasonably believes that he can competently and diligently represent the current client, not prohibited by the law, not advocate an issue that is the opposite of what the attorney previously advocated for the former client, and gets informed consent (ABA) or informed consent, confirmed in writing (CA).

Pro Bono for C2AC:

Andy provided pro bono free legal advice to C2AC in the past regarding an unrelated corporate matter, but did not enter into a formal attorney-client relationship with C2AC. Although Andy provided pro bono legal advice, that does not make any difference that C2AC is still be considered a previous client of (discussed below). Andy may have reasonably believed that his previous pro bono work for C2AC will not have any bearing on his representation with LawnCare, because there was no apparent conflict of interest; however, Andy should've disclosed the potential conflict to both LawnCare and C2AC. Andy's previous knowledge about corporate matters may materially limit his representation with LawnCare, or in the alternative will require him to reveal confidential information regarding C2AC. Additionally, the COI existed once

Andy responded to the questionnaire and at this point Andy should've disclosed to both LawnCare and C2AC his limitation.

Attorney-Client Relationship:

An attorney-client relationship begins when the client reasonably believes that a relationship has begun. Additionally, under ABA, the attorney-client relationship lasts forever and under CA, the relationship terminates once the client has died and his estate has been settled. In the case of corporate clients, it is upon dissolution of the company. Here, Andy believed that he did not enter into a formal relationship with C2AC; however, it is not the attorney who has to believe that he did or did not enter into the attorney-client relationship, but rather the client.

Anonymous Questionnaire:

An attorney owes his client a duty of confidentiality to not reveal any confidential information regarding the representation. Confidential communication encompasses anything that the client has communicated to the attorney in confidence for the representation or the attorney has gathered in anticipation of litigation.

In response to an anonymous questionnaire sent to all C2AC members, Andy mentioned the publicly available information regarding Paula's complaint filed against LawnCare, but did not provide any other details. Since the information was available only, Andy would successfully argue that he did not reveal any confidential information regarding the representation. However, it is also possible that, but for Andy's anonymous tip, C2AC would have never known about the lawsuit. Now that C2AC

knows about this, they may further push their lobbying for environmental regulations to remove LawnCare's weed killer from the market. Thus, Andy's anonymous response created a snowball effect on his clients.

Duty of Competence:

Under ABA, an attorney must represent its client with competence which includes knowledge, thoroughness, and completion. Under CA, an attorney's duty of competence is defined as the attorney must not act with reckless disregard, with gross negligence, or willfully when representing its client.

When Andy responded to the anonymous questionnaire he acted with reckless disregard, gross negligence because a competent attorney, regardless if information is publicly available or not, will not reveal any information that could potentially harm his client. Thus, under CA, Andy has failed to act with competence.

Duty of Diligence:

Under ABA, an attorney must represent its client with diligence which includes knowledge, thoroughness, and completion. Under CA, an attorney's duty of diligence is defined as the attorney must not act with reckless disregard or with gross negligence when representing its client.

Similarly here, Andy acted without diligence when he answered the anonymous questionnaire.

Duty to Communicate:

An attorney has a duty to communicate with his client regarding all critical stages of the case and disclose all potential or apparent conflicts.

Here, Andy did not want to jeopardize losing LawnCare as a client by discussing his private concerns about their chemicals. Andy had the duty to communicate with LawnCare his affiliation with C2AC, his personal concerns about their chemicals, and the pro bono work he did for C2AC.

Lying to your client:

An attorney must never lie to their client even if doing so would jeopardize their relationship with their client. An attorney has the duty to be truthful and communicate to the client about all critical stages of the case. In the case of the attorney made a mistake, the attorney should still stay truthful to the profession and notify the client about his mistake.

Andy received a call from the CEO of LawnCare, who said a representative of C2AC had called to ask about Paula's lawsuit. Andy told the CEO that he did not know where C2AC would have received that information from and recommended that LawnCare not disclose any details about the lawsuit. At this point, Andy has committed multiple ethical violations. To begin with, he has materially limited his former client (C2AC) and his current client (LawnCare). Andy has lied to his clients and has acted without competence, diligence, or any respect for the profession of law. Instead, Andy should've come forward and disclosed to Lawncare’s CEO that he has made the mistake of making an anonymous response letting C2AC know that there is a pending case going.

Withdrawal:

Under both ABA & CA, an attorney must withdraw when their representation is in violation of ethical rules. At this point after Andy did not disclose his association with C2AC, has personal belief against what LawnCare does, made an anonymous response about the pending case, lied to the CEO of LawnCare about how C2AC found out about the case, Andy must give notice to LawnCare to withdraw from the representation while he does not incur further damages to the case. When giving notice of withdrawal, Andy should give enough time for LawnCare to find an alternative attorney for the representation. Andy should return any money that has not been used for the case and turn over all documents that were gathered.

QUESTION 4: SELECTED ANSWER B

1. DUTY OF LOYALTY TO LAWNCARE

The first issue is whether, by failing to inform or receive LawnCare's consent to represent LawnCare despite the fact that C2AC is his former client, Andy has violated his duty of loyalty to LawnCare.

A lawyer has a duty of loyalty to operate in the best interests of the lawyer's client, and to exercise independent legal judgment in evaluating the client's case. Therefore, under both the Model Rules and California law a lawyer has a duty not to represent a client if either (1) the client's interests are directly adverse with those of another client the lawyer has in the same or a different matter; or (2) there is a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's obligations to a current client, former client, third party, or by the lawyer's own interests. If either of these situations arise, a lawyer may only represent the client if the lawyer reasonably believes the lawyer can competently represent the client, the representation is not prohibited by law, the client and another client are not opposing parties in the same litigation, and the lawyer obtains informed consent, confirmed in writing (under the Model Rules) or informed written consent (under California law). Informed, written consent requires an attorney to inform a client of all of the surrounding circumstances and risks of representation, as well as reasonable alternatives.

Here, C2AC is not a current client, so the rule about directly adverse client interests does not apply. However, C2AC is a former client. The question is thus whether Andy has any

continuing commitments to C2AC as a former client that would materially limit his obligations to LawnCare. This is unlikely. The prior representation was limited to free pro bono legal advice in an unrelated corporate matter. Andy would not have acquired confidential information he would have to avoid sharing with LawnCare as a result of the representation because it wasn't about weedkiller such as LawnCare would be using, but corporate matters.

That said, Andy's relationship with C2AC as a third-party organization of which he is a member creates a significant risk of materially limiting his representation. It is clear that Andy deeply cares about C2AC's mission because he's provided free advice and given the group financial support. In addition, while Andy believed his representation of LawnCare would not be affected, he created a situation in which his obligations to C2AC and LawnCare conflicted by informing all C2AC members about Paula's complaint. This has materially limited his representation to LawnCare because Andy is now lying about his role in C2AC to LawnCare and informing the organization about LawnCare's litigation. Thus, Andy has violated his duty of loyalty by failing to inform LawnCare of this relationship and receive its informed consent to continue representation.

Finally, an attorney is permitted to be a member of a nonprofit legal services group, even if it advocates for legislation and rulings that are adverse to the attorney's client. However, an attorney is not permitted to take any action within that group if it would (1) adversely impact the attorney's current client or (2) if the attorney would be making a decision for the organization that impacts a person with interests adverse to the attorney. Here, by informing an advocacy group about LawnCare's pending litigation so that they could potentially begin a campaign about LawnCare, Andy has acted adversely to LawnCare's

interests. When an attorney acts adversely to a client's interests this violates their duty of loyalty.

2. DUTY OF LOYALTY TO C2AC

A lawyer owes a duty of loyalty to former clients not to represent future clients in the same or a substantially related matter if the future clients' interests are materially adverse to the former clients'. If the lawyer does so, the lawyer must obtain the clients' informed consent, confirmed in writing (under the ABA) or their informed written consent (under California law). Here, C2AC is a former client because they sought legal representation and Andy provided it, regardless of whether Andy and C2AC entered into a formal attorney-client relationship. However, LawnCare's personal injury litigation regarding weedkiller is not the same or substantially related matter as the corporate matters Andy handled for C2AC. Therefore, Andy did not violate a duty of loyalty to C2AC.

3. DUTY OF CONFIDENTIALITY

A lawyer owes a duty of confidentiality to all prospective, current, and former clients until the client is deceased and the client's estate is settled. Under the Model Rules, a lawyer must take reasonable care not to reveal confidential information the lawyer obtains about the client in the course of representing the client-- whether from the client or a third-party source. In California, the duty is to maintain a client's confidentiality inviolate at every peril to the attorney's self. Here, it is a close question whether Andy breached a duty of confidentiality. On the one hand, Andy only disclosed publicly available information to C2AC members. However, on the other hand, the existence of the lawsuit and its

relevance to C2AC were matters Andy would have become familiar with only through his representation of LawnCare. This indicates that the information is something Andy should have held in confidence. In summary, the claim for a violation of a duty of confidentiality is weaker than the claim that there was a violation of Andy's duty of loyalty not to take adverse action against his client-- but using information he learned through his representation likely qualifies as a duty of confidentiality violation, even if he also derived it from public sources.

4. DUTY TO INFORM A CLIENT

A lawyer has a duty to keep a client reasonably informed of the status of a matter under the ABA. Under California law, a lawyer must inform a client of all significant developments related to a case. The lawyer must also respond to all the client's reasonable requests for information related to the status of the case. Here, Andy likely had a duty to inform LawnCare of his relationship with C2AC. In addition, Andy may have had a duty, once he learned C2AC might be going after LawnCare in a way that might negatively impact trial publicity, to inform LawnCare of the risk. This would have been necessary for LawnCare to plan a public relations mitigation strategy. Regardless, however, Andy breached this duty when LawnCare directly requested information about how C2AC received information about Paula's complaint and Andy failed to respond truthfully.

5. DUTY OF CANDOR

A lawyer has a duty not to make a false representation of fact to any person, including the client. This duty applies under both the ABA and California law. Here, Andy has violated

this duty because, when LawnCare asked him how C2AC learned of Paula's lawsuit, Andy responded that he did not know. Andy did know because he supplied the information.

Therefore, Andy violated this duty.

QUESTION 5

Pedro brought a fraud and breach of contract action against Gallery in federal court.

At a jury trial, Pedro testified that he purchased a painting from Gallery for $200,000 after seeing an advertisement bearing Gallery's logo stating that the painting was the only painting by a noted 17th century artist available for sale in the world. On Pedro's motion, a photocopy of the advertisement was admitted into evidence. Pedro also testified that the painting was worth only $10,000 because it was a reproduction of the original and that he based his valuation on the average of three appraisals of the painting by art dealers.

Pedro called Rex, a chemistry professor, who had been retained by four art galleries to determine the age of paintings. Rex testified that the painting had been painted within the past 50 years and was a painted reproduction of the original painting. He testified that he had used the XYZ technique on Pedro's painting to arrive at his conclusion. Rex testified that he had tested the XYZ technique on paintings of known ages and that the results corresponded with their known age. He testified that the XYZ technique was reliable and used by most experts to determine the age of paintings. After cross-examination, Rex was excused and left the courtroom.

Gallery called Marie, and both parties stipulated that she is an expert in dating works of art. She testified that a publication entitled "The Science of Dating Works of Art" is generally recognized as a reliable authority. She then quoted an excerpt from that publication that asserted the XYZ technique is not reliable for determining the age of works of art. Gallery moved, and the court received, the excerpt into evidence as an exhibit.

Gallery then offered into evidence a journal article authored by Rex that included a statement that the XYZ technique is not reliable for determining the age of works of art.

Assuming all proper objections and motions to strike were timely made, should the court have admitted:

1. The photocopy of the advertisement? Discuss.

QUESTION CONTINUES ON THE NEXT PAGE

2. Pedro’s testimony about the value of the painting? Discuss.

3. Rex’s testimony about the age of the painting? Discuss.

4. The excerpt from “The Science of Dating Works of Art”? Discuss.

5. Rex’s journal article? Discuss.

Answer according to the Federal Rules of Evidence.

QUESTION 5: SELECTED ANSWER A

1. Photocopy of Advertisement

Relevance

Evidence must be relevant to be admitted. Evidence is logically relevant if it tends to prove or disprove a fact of consequence. Otherwise, relevant evidence may be excluded under the rule for legal relevance if its probative value is substantially outweighed by the danger of undue prejudice, confusing the jury, or undue consumption of time.

Here, since Pedro has brought an action for fraud, he is trying to prove that Gallery made a fraudulent misrepresentation in claiming that the painting was the only one of its kind. Therefore, as the advertisement with Gallery's logo stating that the painting is the only one available for sale by this artist, this advertisement tends to prove the disputed fact that Gallery made this representation. Therefore, it is logically relevant.

As there is no indication that the probative value will be outweighed by a substantial danger of undue prejudice, the evidence is legally relevant.

Therefore, this evidence is
relevant. Authentication

To be admitted, evidence must be shown that it is what it is purported to be. A document or writing can be authenticated by the testimony of a person familiar with it. Additionally, documents with a trade seal may be self-authenticating.

Here, as the advertisement has been introduced on Pedro's motion and Pedro himself saw the ad, he may have authenticated the advertisement through his testimony of his familiarity with it. Additionally, since the advertisement bears the Gallery's logo, it may be considered to be self-authenticating if the logo is considered a trade seal.

Therefore, it is authenticated.

Best Evidence Rule

When the contents of a writing are at issue, the original is required. Generally, photocopies are as admissible as originals, unless a genuine question is raised as to its authenticity.

Since the case pertains to the fraudulent misrepresentation that the painting was a valuable one-of-a kind, the contents of the advertisement and its claim are at issue to show that there was fraud. While the copy admitted is a photocopy, this will satisfy the best evidence rule unless a genuine question is raised as to its authenticity.

Therefore, this rule is satisfied.

Hearsay

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

The advertisement contains the out-of-court statement made by Gallery about its painting. Therefore, if offered for the truth that the painting was the only one by this

painter available for sale, it will be hearsay and inadmissible unless an exception or exemption applies.

Nonhearsay Purpose

Where the purpose of the out-of-court statement is not to prove the truth of the matter asserted, the statement is admissible under a nonhearsay purpose. Where the statement itself is a legally operative act, such as words of a contract, will, or deed, the statement is admissible.

Here, since the statement is part of the alleged fraud, it is a legally operative act. Therefore, it is offered to show that Gallery committed fraud, not for the truth of Gallery's statement.

Therefore, the statement is admissible under a nonhearsay purpose.

Hearsay Exemption

An out-of-court statement by an opposing party, that is relevant, and offered against that party is admissible for the truth of the matter asserted.

As the statement in the advertisement was made by Gallery, is relevant, and is being offered against Gallery, it also satisfies the exemption for statement by an opposing party. Therefore, even if the statement is offered for its truth, it will be admissible.

Therefore, the court should have admitted this evidence.

2. Pedro's testimony about the value of the painting

Relevance

Rule given above.

As Pedro's testimony to the actual value of the painting tends to prove that its value was significantly misrepresented by Gallery, this evidence is logically relevant. While it is unfavorable to Gallery, its probative value is not substantially outweighed by danger of undue prejudice, so it is legally relevant.

Therefore, this evidence is
relevant. Competence

Under the FRE, everyone is presumed competent to testify.

Therefore, Pedro is competent to testify.

Personal Knowledge

A lay witness must have personal knowledge of the matters to which he testifies. Personal knowledge may be proven by the witness's own testimony.

Here, as Pedro has testified that his opinion of the painting's value is based on the average of three appraisals done by art dealers, his testimony is not based on his personal knowledge of the painting's value, but rather on the opinions of others.

Therefore, Pedro does not have adequate personal knowledge to testify to the value of the painting.

Lay Opinion

Generally, lay witnesses testify to facts, not opinions. Lay opinion is appropriate where it is rationally based on the witness's perception and helpful to the jury in deciding the

issues. Generally, lay witnesses can testify to perceptions, such as those of emotional states or of the value of property.

As Pedro is giving a valuation of the painting, he is offering opinion, not facts as a lay witness. Since as discussed above, his valuation is not rationally based on his own perception of the painting, but rather on the opinions of others, it is not proper. Additionally, since the jury does not get to hear from the art dealers appraisals, but rather only hears Pedro's averaging of the dealers with actual personal knowledge, this lay opinion will not be helpful to the jury.

While value of property is often a proper subject for lay opinion, Pedro's testimony here is improper lay opinion.

Therefore, Pedro's testimony should not be admitted.

3. Rex's testimony about the age of the painting

Relevance

Rule given above.

As an issue in the case is that Gallery misrepresented the painting as a valuable original from the 17th century, expert testimony that the painting was done within the past 50 years tends to prove that Gallery fraudulently presented the painting as from the 17th century. Therefore, it is logically relevant. As its probative value is not substantially outweighed by a danger of undue prejudice, Rex's testimony is also legally relevant.

Therefore, the testimony is

relevant. Competence

General Rule given above.

Therefore, Rex is competent to testify.

Expert Opinion

An expert must be qualified as an expert by their technical experience, specialized knowledge, education, or otherwise relevant experience in the relevant field. To be admissible, expert opinion must be believed by the expert to a reasonable certainty and based on reliable methods that are reliably applied. An expert may base his opinion on his own tests and experience as well as information that is presented to him at trial. Under the *Daubert* test, courts test the reliability of a scientific technique by evaluating factors such as: whether it has been tested, the rate of error, and whether it has been peer reviewed. Under the minority *Frye* test, the method must be generally accepted in the relevant community.

As Rex is a chemistry professor who has been retained by art galleries to date paintings, he appears to be qualified in dating paintings, based on his education in the area and experience. While the opposing side may impeach his level of experience in only four galleries, he nonetheless appears qualified to testify. As he used the XYZ method to arrive at his conclusion, he is able to properly testify to out-of-court tests performed to render his opinion. Here, as Rex has testified that the XYZ method is reliable and used by most experts to determine the age of paintings, his method appears to be a reliable method reliably applied. This method is approved under the

Frye test if accepted by most experts to date paintings. While not all the *Daubert* factors are clear, Rex has testified to testing it himself to determine the accuracy. While other facts, such as high rate of error or lack of peer review may render the method unreliable, the method appears acceptable under the facts presented in Rex's testimony.

Therefore, Rex's testimony should be admitted.

4. Excerpt

Relevance

Rule given above. Evidence to impeach another witness is always logically relevant.

Here, Gallery has offered the excerpt that XYZ is unreliable to impeach Rex's testimony and disprove the claim that the painting was dated within the past 50 years. As impeaching a witness's testimony is always relevant, this evidence is logically relevant. Moreover, it tends to disprove the assertion that the painting is from within the last 50 years. As undue prejudice will not substantially outweigh prejudicial value, it is legally relevant.

Therefore, the evidence is relevant.

Authentication

General Rule given above. Periodicals and some books are often considered self-authenticating.

Here, the excerpt has been authenticated because Marie has testified to its authenticity. Moreover, since it is a publication, it may also be self-authenticating.

Therefore, it is authenticated.

Hearsay

General hearsay rule stated above.

Since the excerpt stating that XYZ is not reliable was made out of court and is being offered for the truth of the matter asserted, it is hearsay and will be inadmissible unless an exception or exemption applies.

Learned Treatise

Under the Learned Treatise exception to hearsay, statements from a learned treatise that is generally recognized as a reliable authority and relied on by experts may be admitted. Select excerpts may be read to the jury, but the learned treatise itself is not received as an exhibit because of the concern of how juries may interpret the learned treatise.

Here, since the publication was testified to by a stipulated expert to be a reliable authority, it fits the learned treatise exception for hearsay and the statements may be admitted. However, while the excerpts may be read to the jury, they are not received into evidence as an exhibit under this exception.

While the excerpt may be properly read to the jury, it should not be received as an exhibit.

5. Rex's Journal Article

Relevance

Rule given above.

As Rex's statement in the journal article contradicting his testimony that XYZ is reliable is impeachment evidence, it is logically relevant and casts into doubt the truth of his testimony. Its probative value is high and not outweighed, so it is legally relevant.

Therefore, the journal article is relevant.

Authentication

Rule stated above.

As periodicals are considered self-authenticating, the article was authenticated.

Hearsay

Rule given above.

Since the statements in the journal article are offered to prove that XYZ is not reliable and were made out of court, they are hearsay and inadmissible without an exception or exemption.

Learned

Treatise Rule

given above.

If the statement is from a learned treatise, it may be admissible under this exception substantively and may be read to the jury, but not received as an exhibit.

Prior Inconsistent Statement

Prior inconsistent statements are hearsay exemptions, admissible to impeach testimony. The witness must be given a chance to explain or correct the statement. If they were not sworn statements, they are not admissible substantively.

Here, Rex's statement in the journal was a prior inconsistent statement to his testimony about XYZ. Therefore, it may be offered for the limited purpose of impeaching him, provided that Rex is given an opportunity to explain. Since Rex left the courtroom, he was likely not given this opportunity. Since the statement in the article was not sworn, it is not admissible substantively under this exemption.

Therefore, Rex's statements may be admitted under learned treatise or prior inconsistent statement, provided he has an opportunity to explain.

QUESTION 5: SELECTED ANSWER B

1. The Photocopy of the Advertisement

Relevance - Logical and Legal

To be admissible, evidence must be both logically and legally relevant. Evidence is logically relevant if it tends to make a fact at issue more or less likely. Evidence is legally relevant if its probative value is not substantially outweighed by the danger of unfair prejudice or confusing the jury.

Here, Pedro is claiming that Gallery committed fraud when they advertised that the painting he purchased was the only painting by a noted artist for sale in the world. The advertisement is logically relevant because it supports Pedro's claim that Gallery made this representation. The advertisement is legally relevant because it is unlikely that the advertisement will unfairly prejudice Gallery - it does not appear that they are denying the advertisement, and it does not contain any inflammatory or misleading content.

Thus, the photocopy of the advertisement is relevant.

Authentication

When submitting documents into evidence, the proponent must demonstrate that the evidence is what it purports to be. A witness's testimony about the document is generally sufficient to satisfy the authentication requirement. Here, Pedro testified that he saw an advertisement bearing Gallery's logo, and submitted a photocopy of the advertisement. Pedro's testimony is sufficient to authenticate the document.

Best Evidence Rule

The Best Evidence Rule states that when a witness is testifying about the contents of a document, the document itself is the best evidence and must be produced and submitted to the jury. Here, the Best Evidence Rule applies, because Pedro is testifying about the contents of the advertisement.

However, the Best Evidence Rule states that photocopies of documents satisfy the rule. Therefore, because Pedro submitted a photocopy of the advertisement, the Best Evidence Rule has been satisfied.

Hearsay

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Hearsay is generally inadmissible as evidence unless an exception applies. Here, the advertisement was circulated out of court, and it is a statement because it is a written claim about the painting.

However, Pedro will point out that he is not offering the advertisement for its truth - that is, he is not offering it as evidence that the painting is the only painting by a noted 17th century artist. In fact, Pedro is offering it while claiming it is *not true* - that the statement is fraudulent. If he is not offering it for its truth, the statement is not hearsay and not barred by this rule.

Hearsay Exception - Admission by Party Opponent

If the court deems that Pedro is offering the advertisement for its truth, there is an exception to the hearsay rule for a statement made by a party to a case offered into evidence by the opposing party. Here, Pedro's party opponent is Gallery. He will point

out that the advertisement bears Gallery's logo and that Gallery sold him the painting referenced in the advertisement. This is sufficient to establish that the advertisement is properly considered a statement made by Gallery, and it is admissible under the admission by party opponent exception.

Hearsay Exception - Independent Legal Significance

There is an exception to the hearsay rule when the act of making the statement is an element to the cause of action. For example, in a defamation case, the fact that a statement was made is independently legally significant, because the making of the statement is an element of a defamation claim.

Here, Pedro is claiming fraud. He alleges that Gallery's claim in their advertisement was materially false, induced him to purchase the painting, and that he suffered harm. Gallery's claim has independent legal significance because the existence of the advertisement is one of the elements of Pedro's cause of action. Thus, it is admissible.

Conclusion: The court correctly admitted the photocopy of the advertisement.

2. Pedro's Testimony about the value of the painting

Relevance - Logical and Legal

(See Rules above.) Pedro is claiming that the painting he purchased is only worth $10,000. If proven, this would make it more likely that Gallery had committed fraud when they sold the painting to Pedro for $200,000. Thus, it is logically relevant.

The main hurdle for Pedro here is whether his testimony is legally relevant. The probative value and danger of unfair prejudice depend largely on the source of Pedro's claim, and

whether it is likely to confuse or mislead the jury. Therefore, to assess whether the testimony is legally relevant, we must assess the basis of Pedro's opinion.

Opinion Evidence - Lay Witness

A lay witness is permitted to testify to opinions rationally based on their perceptions. Lay witnesses are not permitted to provide lay opinions based upon specialized or technical knowledge.

Here, Pedro is testifying that the painting is worth $10,000 because it is a reproduction of the original. This testimony is based on his valuation based on three appraisals made by art dealers. The appraisals made by art dealers require specialized or technical knowledge, because art appraisals are not the type of thing that an ordinary person would be able to conclude based on their perceptions.

Thus, Pedro's testimony is not a permissible lay opinion.

Opinion Evidence - Expert Witness

An expert witness is a witness who has specialized knowledge or training in an area. They may provide expert opinions if those opinions are based on their training and experience and methods sufficiently reliable as to pass the *Daubert* test. The *Daubert* test assesses whether the methods are generally accepted in the field, if there is a known error rate, if the methods have been subject to peer review.

Here, there is nothing to suggest that Pedro is an expert in art appraisals. Rather, he is introducing his conclusion based on appraisals by experts. Although the appraisals might well be acceptable expert opinions, Pedro has not established the training and experience of the dealers, nor the methods utilized to establish the appraisals.

Thus, the testimony about the value of the painting is not a permissible expert opinion.

Hearsay

(See Rules above.) Pedro is claiming that his valuation is based on the appraisals of three art dealers. The art dealers made those appraisals out of court, and Pedro is offering them for their truth - that is, the valuation of the painting. Thus, the appraisals of the art dealers are hearsay and inadmissible unless a hearsay exception applies.

Otherwise inadmissible hearsay may be admitted if it forms the basis of an expert opinion. However, as discussed above, Pedro's conclusion is not a proper expert opinion. Thus, it is inadmissible under the hearsay rule.

Best Evidence

(See Rule above.) Pedro is testifying about three appraisals that formed the basis of his opinion. If the appraisals were in writing, then Pedro's testimony about their conclusions would be subject to the Best Evidence Rule, and the appraisal documents themselves must be admitted into evidence. If the appraisals were made to Pedro verbally, the Best Evidence Rule does not apply.

Returning to Legal Relevance

Because Pedro's opinion is not based on his own expertise, and because the methods have not been confirmed to be reliable, the probative value of his own opinion is likely low. On the other hand, testimony that the painting is worth $10,000 -- absent a sufficient basis for that opinion -- is unfairly prejudicial to Gallery, who was not permitted to cross-examine the art dealers on their conclusions. Therefore, it is not legally relevant.

Conclusion: The court should not allow Pedro's testimony about the value of the painting, because it is an improper opinion, it is hearsay, and its probative value is substantially outweighed by the danger of unfair prejudice.

3. Rex's testimony about the age of the painting

Relevance - Logical and Legal

(See Rules above.) Rex's testimony is logically relevant because he claims that the painting is a reproduction, which makes Pedro's claim of fraud more likely. Legal relevance will be discussed further below.

Opinion - Expert Opinion

(See Rule above.) Here, Rex has specialized training and knowledge because he has been retained by art galleries to determine the age of paintings. It's not clear whether Rex's expertise in chemistry is related to the XYZ technique, but assuming that the technique involves chemistry, his specialized knowledge would qualify him as an expert.

The issue is whether the XYZ technique is sufficiently reliable to meet the *Daubert* standard. Rex testified that the principles are reliable, because he has used it in the past and his results have corresponded with the known age of paintings. He testified that it was reliable and used by most experts in his field.

Gallery's Challenge to the Reliability of the XYZ Technique

After Rex was excused from testifying, Gallery brought claims that the XYZ technique is not reliable. (Discussed more below.) However, if they wished to preclude Rex's testimony on grounds that it is not reliable, they should have raised the issue before

Rex delivered his opinion. Gallery should have requested the court make a determination about the reliability of XYZ technique outside the presence of the jury. If the court determined the technique was not sufficiently reliable, Rex's testimony would have been precluded. The fact that the court allowed it suggests that either the issue was not raised prior to Rex's testimony, or that the court determined it was sufficiently reliable.

Returning to Legal Relevance

The evidence is probative because it helps the jury understand the age of the painting and the likelihood that it is a reproduction. Although there may be some unfair prejudice if it turns out the XYZ technique is not reliable, there was a sufficient basis for the court to conclude that it satisfied *Daubert*.

Conclusion: The court properly admitted Rex's testimony about the age of the painting

4. The excerpt from The Science of Dating Works of Art

Relevance - Logical and Legal

(See Rules above.) The publication is logically relevant because it suggests that the XYZ technique is not reliable for determining age of works of art, which is at issue in this case. It is legally relevant because there is not a danger of unfair prejudice to Pedro. Thus, it is relevant.

Hearsay

The publication was created out of court, and is being offered for its truth - that is, that the XYZ technique is not reliable. Thus, it is hearsay and is inadmissible absent any exception.

Hearsay Exception - Learned Treatise

Learned treatises, or documents that are generally recognized as reliable authority, are permitted to be read to the jury despite the general rule against hearsay. Here, "The Science of Dating Works of Art" is generally recognized as a reliable authority.

However, while the learned treatise exception allows the text to be read to the jury, it does not permit the text to be introduced into evidence as an exhibit.

Thus, although the court properly allowed Marie to quote an excerpt from “The Science of Dating Works of Art,” the excerpt should not have gone back to the jury as an exhibit.

5. Rex's journal article

Relevance - Logical and Legal

(See Rules above.) The article is relevant because it undermines Rex's claim about the reliability of the XYZ technique, which is an important issue for the jury. Although it harms Pedro's theory and the credibility of his expert, this prejudice is not *unfair.* Thus, it is logically and legally relevant.

Best Evidence

(See Rule above.) This is satisfied because the article itself was offered into evidence.

Hearsay

Rex authored the journal article out of court, and Gallery is using it for its truth - that is, that the XYZ technique is not reliable. Thus, it is hearsay and is inadmissible unless an exception applies.

Hearsay Exception - Prior Inconsistent Statement

When a witness testifies under oath, the opposing party is permitted to introduce a prior inconsistent statement made by that witness. This can be used as impeachment evidence, which means it can be used to undermine the credibility of the witness.

Here, Rex had testified in court that the XYZ technique is reliable. His prior statement was that it was not reliable. Thus, the prior statement is inconsistent.

However, this exception requires that the party seeking to introduce the inconsistent statement confront the witness about it and give them an opportunity to explain. Here, Gallery did not introduce this during cross-examination of Rex, where he would have had the opportunity to explain or defend his positions. Instead, they introduced it after Rex was excused and left the courtroom.

Because Gallery did not introduce this statement while Rex had an opportunity to explain it, it is not properly admitted as a prior inconsistent statement.

Hearsay Exception - Learned Treatise

The evidence at issue is a journal article. Some journal articles may qualify as learned treatises, as explained above. However, it does not state that the journal article is generally recognized as a reliable authority. In fact, Rex's own testimony suggests that the journal article may not be reliable. Therefore, it should not be allowed under this exception.

Conclusion: Although the journal article would have been proper if Gallery had sought its admission during Rex's cross examination, the attempt to introduce it during their

case-in-chief is improper because it is hearsay not within any exception. Therefore, the court should exclude it.

California Bar Examination

Essay Questions and Selected Answers

July 2022

The State Bar of California

OFFICE OF ADMISSIONS

ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2022

CALIFORNIA BAR EXAMINATION

This publication contains the five essay questions from the July 2022 California Bar Examination and two selected answers for each question.

The selected answers are not to be considered "model" or perfect answers. The answers were assigned high grades and were written by applicants who passed the examination after the First Read. They are reproduced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. These answers were written by actual applicants under time constraints without access to outside resources. As such, they do not always correctly identify or respond to all issues raised by the question, and they may contain some extraneous or incorrect information. The answers are published here with the consent of the authors.

Question Number	Subject
1.	Contracts
2.	Constitutional Law
3.	Professional Responsibility
4.	Business Associations
5.	Wills / Community Property

ESSAY QUESTION INSTRUCTIONS

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them to the facts.

If your answer contains only a statement of your conclusions, you will receive little or no credit. State fully the reasons that support your conclusions and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the resolution of the issues raised by the call of the question.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

QUESTION 1

Bath Stuff (Bath), a retailer located in Betaville, sent Neat Scents (Scents), an importer located in Sunville, a signed offer to purchase 1,000 individually wrapped candles at a price of $10,000, free on board ("FOB") Betaville. Scents promptly sent Bath a signed acknowledgment accepting the offer, which also included the following language: "Some shipping boxes have external water damage. Contents of shipping boxes guaranteed to have no damage." Bath did not respond to the acknowledgment. No other express warranties or disclaimers were stated in the offer or acknowledgment.

Scents timely shipped the order to Bath's warehouse using TruckCo, a third-party common carrier, at a freight cost of $400. One-quarter of the shipping boxes showed signs of water damage. Each shipping box contained candles that were individually wrapped for retail sale. All candles and individual wrapping were undamaged. When the shipment arrived, Bath's employees noticed the water damage on some shipping boxes. They immediately rejected the shipment without opening any boxes, promptly notified Scents of the rejection, and refused to pay any amount.

Scents paid TruckCo $500 to ship the candles back to Sunville and notified Bath that Scents intended to resell the candles. Scents promptly solicited bids from all of its customers and received the best offer, which it accepted, from Redemption Candles (Redemption) of $9,000, FOB Sunville.

Bath promptly entered into a valid written contract with Hot Candles (Hot), an importer in Hatville, to purchase 1,000 replacement candles for $12,000, FOB Hatville. TruckCo was engaged to transport the candles from Hatville to Betaville. In transit, TruckCo's truck was struck by lightning in a storm and all of the candles melted. TruckCo's shipping contract disavows liability from acts of God, including lightning. Bath refused to pay for the candles and Hot refused to send replacement candles.

Bath sued Scents for breach of contract and Scents countersued Bath. Bath sued Hot for breach of contract and Hot countersued Bath.

1. Did Bath and Scents have a binding contract and, if so, did either party breach the contract? If there was a breach of contract, what damages are likely to be recovered, if any? Discuss.

2. Has Bath or Hot breached their contract? If so, what damages are likely to be recovered, if any? Discuss.

QUESTION 1: SELECTED ANSWER A

Applicable law

Contracts for the sale of goods (movable items of property) are governed by the UCC. Because the contracts at issue here involve candles, a movable good, the UCC applies.

Additionally, under the UCC, certain provisions apply only to merchants. A merchant is one who deals in goods of the kind involved in the contract, or who otherwise by virtue of his profession holds himself out as having peculiar knowledge in the goods involved. Here, all parties are likely merchants. Bath is a retailer that appears to deal in candles. Neat Scents is an importer that likewise appears to deal in candles. Further, Hot Candles appears to be an importer that also deals in candles. Accordingly, all parties to the relevant contracts are merchants, and the UCC's provisions pertaining to merchants will apply.

1.

Whether B&S had a binding contract

A binding contract requires mutual assent, consideration, and no defenses to enforcement or formation.

Mutual assent

For a contract to be valid, it requires mutual assent. Mutual assent involves a "meeting of the minds," and is ordinarily shown by offer and acceptance (though under the UCC, if the parties conduct indicates that there is a contract, there may be a contract even if offer and acceptance cannot be specifically identified).

Offer

An offer is an assent of willingness to be bound, made so that the offeree could reasonably expect that the offeror intended to enter into a binding agreement / make a commitment or promise. An offer must have certain and definite terms and must be made to an identifiable offeree so that he could understand that his assent would conclude the bargain.

Here, Bath sent a signed "offer" to purchase 1,000 individually wrapped candles for $10,000. It also included a "FOB" term (with FOB being Betaville, Bath's location of business), which indicates that Bath sought to enterinto a shipping contract whereby the goods would be shipped by common carrier and the risk of loss would pass to Bath once the goods reached Betaville. The facts indicate this was an offer, and it likewise meets the definition. It indicates a willingness to be bound / enter into a binding agreement for the purchase of candles. Further, it has certain and definite terms. Under the UCC, generally, an offer need only include a quantity term--all other terms can be supplied by UCC default terms. Here, the offer included the quantity (1,000) of candles while also specifying other terms, including the price ($10,000), that they be individually wrapped, and the shipment method. Accordingly, this was likely an offer, as its terms were certain and definite such that it is capable of enforcement; it was also made to Neat Scents, an identifiable offeree.

Acceptance

Acceptance is a manifestation of assent to the terms of the offer, made so as to conclude the bargain. The offer creates the power of acceptance in the offeree, and by accepting, he binds the parties to the contract. Here, the facts indicate that Scents

promptly sent a signed acknowledgment accepting the offer. In so doing, Scents appeared to assent to the terms of the offer. Under the UCC, an offer to buy goods may be accepted by prompt shipment, or by a promise to ship (the latter of which was the case here).

Under the common law, an acceptance had to be a “mirror image” of the offer; that is, it must not include any different or additional terms. However, under the UCC, the fact that an acceptance includes additional terms will *not* preclude a binding contract. Rather, a contract is formed by the manifestation of assent to be bound, and whether the different terms become part of the contract depends on if the parties are both merchants. Accordingly, when Scents sent the signed acceptance, a bargain was concluded and the parties had a binding contract.

UCC 2-207 (battle of the forms)

As referenced, Scents’ acknowledgment included additional terms. Particularly, it included language relating to the fact that the boxes would have external water damage, as well as the guarantee that the contents would have no damage.

As mentioned above, it appears that both Bath and Scents are merchants, as they both appear to deal in goods of this kind or otherwise by their profession hold themselves out as having knowledge/skill particular to candles. Accordingly, the contract was concluded with the acceptance and, under UCC 2-207, the additional terms included in the acceptance will become part of the contract unless the offeror’s offer was expressly conditioned on only the terms included, it rejects the additional terms in a reasonable time, or the terms materially change the bargain.

Here, Bath did not respond to the acknowledgment, nor did Bath’s offer appear to

include any language indicating that the offer was expressly conditioned on only being accepted on the particular terms stated without any additions. Accordingly, the only issue is whether the terms included in Scents' acknowledgment materially altered the bargain.

Scents will argue that the fact that *some of the shipping boxes* would have external water damage hardly alters the bargain. After all, it also included that express warranty that the contents would have no damage. It does not appear that Bath was entering into the bargain with any particular expectancy or desire to have the shipping boxes be in a certain condition. While they did specify the candles' condition--that they be individually wrapped--no reference whatsoever was made to the external boxes. Moreover, damage to the external boxes which does not affect the contents (which are the things being bargained for) likely cannot be said to materially alter the terms of the bargain. Further, the express guarantee that the contents would not be damaged, if anything, is a desirable term for Bath, so cannot be said to materially alter the bargain. In other words, the terms included in Scents' acknowledgment did not significantly change Bath's expectancy under the contract, nor materially alter its potential damages or liabilities. As such, since both parties are merchants, these terms likely became part of the contract.

Accordingly, a contract was formed when Scents sent the acknowledgment form, and the terms included therein--that some of the boxes would have external water damage and the express warranty (i.e., the explicit promise as to the condition of the goods) that the contents would have no damage became part of the contract.

Note that, even if the explicit promise that the candles would not be damaged had not been included as an express warranty, it likely would have been implied anyway (which

further supports the notion that it did not materially alter the contract), as--discussed below--the UCC requires perfect tender of goods. Moreover, the fact that the contract included an FOB term for Betaville (Bath's location) indicates that Scents would bear the risk of loss if the goods were damaged until they reached Betaville, thus implying that they should be undamaged.

Consideration

Consideration is the bargained-for exchange of legal value. Each promise must induce the detriment, and vice versa. Here, Bath promised to pay $10,000 if Scents promised to ship the 1,000 candles, and vice versa. Accordingly, there was consideration.

Thus, there is mutual assent and consideration here and there was a binding contract.

Defenses

There do not appear to be any viable defenses to formation. Scents could try to argue there was no mutual assent based on the additional terms included in the acceptance, but as discussed above, that argument will fail.

Statute of frauds

Some contracts require a signed writing to be enforceable. One such contract is a contract for the purchase of goods over $500. Here, Bath was to buy $10,000 worth of candles, and thus, this contract must be evidenced by a signed writing.

The writing and signature requirements, however, are liberally construed. There need not be a single writing embodying the entire contract; multiple writings can be put together, so long as they evidence that a valid contract was formed. Moreover, under the UCC, the writing(s) must indicate the quantity term.

Here, putting together both the offer--which was signed by Baths--and the acceptance--which was signed by Scents--there is likely sufficient written evidence to evidence both a contract and its essential terms (including, most importantly, quantity--1,000 candles). Moreover, the writing(s) is signed by both parties, and thus, both parties to be charged.

Also note that since both parties sued under the contract, they have effectively affirmed its existence in court.

Merchant confirmatory memo

Bath may argue that it only signed the *offer* and not the acceptance, and thus, that it cannot be charged with the contract because the only writing signed by it is the offer. However, this is likely not a good argument. Under the UCC merchant's confirmatory memo rule, where both parties are merchants, so long as there is a signed writing--*even if signed by the party bringing suit*--that was sent memorializing the terms' of the parties agreement, and the other party received it and had reason to know of it and did not object in a reasonable time, it can serve to bind the parties / satisfy the SOF, even if only signed by one.

Here, Scents signed the acknowledgment form and Bath received it but did not respond at all. As both parties are merchants, the acknowledgment form is likely enough to bind both Bath and Scents, even though it was only signed by Scents, under the merchant confirmatory memo rule.

Since there do not appear to be any other defenses to formation, and since there was mutual assent and consideration, the parties had a binding contract.

Whether either party breached & likely damages

Perfect tender rule

The UCC requires "perfect tender." This means that if a shipment of goods fails to conform in any way to the terms of the contract, then it is considered a breach and the buyer is entitled to reject all, reject some, or accept all.

Here, Scents shipped the goods timely to Bath's warehouse using TruckCo, a third-party common carrier. Though the contract did not specify the common carrier that should be used, there are no facts indicating that using TruckCo was unreasonable and, since this contract involved an FOB term, it was very likely a shipment contract requiring goods to be sent by common carrier (which is the presumption if a contract is silent, anyway). Accordingly, sending the goods in a reasonable time and via TruckCo appears to be compliant with the contract.

Moreover, though one-quarter of the boxes were water damaged, as discussed above, that term very likely became part of the contract. Though the contract indicates that "some" boxes would be damaged--which is not necessarily precise--the fact that only one-quarter of the boxes were damages is likely compliant with that term. Moreover, all the candles inside were individually wrapped (as required) and undamaged (as compliant with the express warranty provided by Scents which, as discussed, was likely part of the contract).

As such, it appears that Scents completely complied and did not breach any terms of the contract. Accordingly, it appears that tender was indeed perfect, and thus, that Scents did not breach.

Bath's rejection

Even though Bath's employees rejected the shipment because of the water damage, they were not entitled to do so, as that was a part of the contract, per the above discussion. Moreover, they immediately rejected the shipment without even taking time to inspect the goods to determine whether they complied. Though a buyer is entitled to reject a shipment where there has been imperfect tender--and though Bath did so immediately (which thus does not raise any issues re: revoking an already given acceptance) --since there was no breach by Scents, Bath was not entitled to reject the shipment. Thus, by rejecting the shipment and *refusing to pay* as they were obligated to do under the contract, Bath breached.

Scents' damages

Since Bath was in breach, Scents is likely entitled to damages.

Expectation damages

The standard measure of damages when a buyer wrongfully breaches under a contract is expectation damages, which are intended to give the non-breaching party the benefit of the bargain and to put them in a position as if the contract had not been breached. Damages can only be collected where they are certain and where they could not be mitigated.

As part of mitigating damages, a seller is entitled to engage in a commercially reasonable resale of goods wrongfully rejected. Here, Scents sold the goods to Redemption for $9,000. It apparently solicited bids--and did so promptly--from all its customers and selected the highest bid from Redemption. As such, the resale appears to be commercially reasonable (done timely and for a reasonable amount--indeed, it was fairly close to the original amount that Bath was to pay and Scents appears to have

considered multiple offers before accepting Hot's). Since it was $1,000 less than Scents was supposed to get under the Bath contract, Scents is entitled to $1,000 for Bath's wrongful breach. Additionally, since Scents notified Bath that it would resell the candles, it was entitled to do so.

Incidental damages

Under the UCC, a non-breaching party is also entitled to incidental damages (i.e., commercially reasonable costs associated with dealing with the breach including shipping, storing goods, and other such costs). Here, Scents paid $500 to ship the candles back from Sunville. This appears to be a reasonable cost of reshipping the goods; though, originally, it only cost $400 to ship to Bath--perhaps it costs more to collect them from a buyer, or perhaps the fees were different since it was likely a few days later. Since the charge to ship them back was only $100 more, this was likely commercially reasonable and Scents is entitled to $500 as incidental damages. Bath may try to argue that it was not commercially reasonable to include the FOB Sunville term, but that argument will bear no weight since Scents' original contract with Bath also included an FOB term for the buyer's city of business.

Note that Scents cannot collect the $400 it originally spent on shipping the goods to Bath, because that was always going to be an expense under the shipping contract that Scents would be required to spend.

As such, Scents is entitled to $1,500 total.

Bath

Though Bath may try to argue that it is entitled to $2,000--the difference it had to pay for

replacement candles--it will not succeed because, as discussed above, it breached and was not entitled to reject the shipment. As such, it will be unable to collect any damages from Scents, but rather will be required to pay $1,500 as discussed above. Though it has sued Scents, it will be unable to recover anything and Scents will instead win its countersuit.

2.

Here, the facts indicate that the parties had a valid contract. The contract included an FOB Hatville term. As mentioned above, an "FOB" term in a shipping contract indicates that the goods will be shipped by common carrier, and that the risk of loss will pass to the buyer when the goods reached the identified location. Here, Bath and Hot's contract indicated Hatville as the FOB location. Hatville is Hot's place of business. Accordingly, Hot was responsible for getting the goods to Hatville. Once the candles arrived in Hatville, the risk of loss passed to Bath. Accordingly, even though the goods were to be shipped by common carrier (which, again, is the presumption in light of silence, but is also assumed when an FOB term is included), Bath would bear the risk of loss from the time the goods were in Hatville until they arrived with them.

Breach by Hot

Bath will argue that Hot breached by not delivering the candles. As such, it will argue that it was relieved of its liability to pay given the imperfect tender. As mentioned above, the UCC requires perfect tender. Obviously, failing entirely to deliver the candles is not perfectly compliant with the terms of the contract. Moreover, melted candles obviously are not a perfect tender of the ordered candles. However, as discussed below, Hot very likely bore the risk of loss when the goods were destroyed, and thus is liable for the

contract amount.

Breach by Bath

As mentioned, an FOB term indicates that the buyer will bear the risk of loss from the time the good arrive at the specified location. Here, TruckCo was engaged to transport the candles from Hatville to Betaville. The goods were destroyed in transit, i.e., they had already left Hatville by the time they were destroyed. As such, Bath bore the risk of loss when the goods were struck by lightning. When the risk of loss has passed to the buyer, and when the goods are destroyed after--through no fault of the seller--the buyer will be liable for the full contract price.

Here, Hot will argue that the goods were destroyed by a lightning storm that struck the truck after the risk of loss passed, i.e., after the goods had been in / left Hatville. Moreover, Hot will note that this was not their fault in any way. They will also likely point out that TruckCo's shipping contract disavows liability from acts of God, including lightning. It should be noted, though, that this is not especially relevant here because, as discussed, under the FOB term, the risk of loss passed to the buyer after the goods were in Hatville.

Bath may try to argue that the risk of loss did not pass because it would have been entitled to reject the goods. It is true that the risk of loss will not pass if nonconforming goods are the ones that are destroyed--i.e., if the buyer would have a right to reject the goods, the ROL will not pass. Bath may try to argue that the candles were melted, and thus, that it would have had a right to reject them and should not be liable for the ROL. However, this would be bootstrapping the very thing that *destroyed the goods* as an attempt to argue that it had a right to revoke the goods. In other words, there is no

indication that the goods--when sent--did not conform, or that Bath would have had a right to reject the candles had they not been melted by the lightning storm. As such, it cannot argue that the risk of loss did not pass. Accordingly, the goods were destroyed when Bath bore the risk of loss. Thus, Hot did not breach the contract. Rather, Bath did when it refused to pay for the goods.

Refusal to send substitutes

Bath may argue that Hot breached by refusing to send substitute candles after they were destroyed. However, the seller is under no obligation to send replacement goods if they are destroyed after the ROL passes. As such, this was not a breach.

Damages

Hot's damages

When goods are destroyed after the ROL passes, the seller is entitled to the full contract price, provided that they had no fault in destroying the goods. This is effectively expectation damages--i.e., gives the seller the benefit of the bargain. As such, Hot will be entitled to $12,000 from Bath and will win its countersuit.

Bath's damages

As discussed above, since Bath breached by refusing to pay after the risk of loss passed, it was incorrect to refuse to pay Hot. Thus, it will be liable for the full contract price and will lose its suit and be entitled to no damages from Hot.

QUESTION 1: SELECTED ANSWER B

The UCC will apply because this is a sale of goods.

Bath and Scents Contract

Bath and Scents had a valid contract, which Bath breached. To have a valid contract, there must be mutual assent and consideration. Mutual assent is defined as an offer plus acceptance. A valid contract is breached when one party, or both, breaks a promise in the contract and there are no defenses to the contract or excuses for non-performance. The UCC requires "perfect tender," and thus even a minor breach constitutes a total breach, allowing the buyer to reject goods or the seller to seek full damages. A court will award damages based on the type of harm suffered.

Mutual Assent

Mutual assent consists of an offer and acceptance. An offer is a manifestation of the intent to be bound. An offer must be relatively certain and definite. It should identify the parties and subject matter of the contract with reasonable certainty. An offer can be revoked at any time unless it is an irrevocable option contract, merchant firm offer, or one party reasonably incurs detrimental reliance. An advertisement is generally not an offer.

Here, Bath made an offer to Scents when they sent a signed offer to purchase 1,000 candles for $10,000. The quantity and price terms (note: price terms are not required by the UCC, only quantity terms are required) are sufficiently definite, and Bath has identified the parties.

An offer is accepted when the offeree accepts the terms of the offeror's offer. An offer

must be accepted in a reasonable amount of time. Under the UCC, the offeree's acceptance does not need to mirror the offeror's terms. Additional terms will become part of the contract if: (1) both parties are merchants; (2) the terms are not material; and (3) the offeror does not object to the terms. A merchant is an individual who: (1) regularly deals in the type of goods sold; or (2) holds themself out as having special knowledge or skills regarding the goods sold. Terms are material if they have a tendency to cause surprise or hardship to the other party. Disclaimers of warranties are always material. A person is thought to accept additional terms when they do not object in a reasonable amount of time.

Here, Scents responded "promptly," accepting Bath's offer for 1,000 individually wrapped candles for $10,000, FOB Betaville. However, Scents' response included some additional terms. Scents stated that the boxes the candles would be sent in had external damage and added an express warranty that the contents (candles and wrapping) would have no damage. As stated above, these terms will become part of the contract if the two sellers are merchants, the terms are not material, and the offeror does not object. Here, both parties are merchants. Bath is a retailer that typically sells candles. Scents is a candle importer and that regularly deals in candles.

The terms will not become part of the contract if they are material. It is likely that the state of the shipping boxes and whether or not the shipping boxes themselves are damaged is not a material term. Water damage on the shipping boxes has no bearing on the state of the candles inside (it is stated they showed up undamaged). Shipping boxes with water damage would not cause surprise or hardship to a reasonable party. Most parties likely throw the boxes out. Still, Bath might argue that they intended

to keep the shipping boxes to use when they sell candles to their own customers, and that the damage makes this more difficult. Scents will respond that they did not have knowledge of this purpose and that the damaged boxes still have no material impact on their contract, which was simply to purchase individually wrapped candles. Scents also expressly stated a guarantee that the candles themselves will have no damage. While the disclaimer of warranties is considered material, an express warranty from a seller will become part of the contract.

Last, Bath did not object to Scents additional terms. They did not respond at all, and this will be deemed an acceptance of the additional terms. Thus, Scents' terms likely became part of their contract, and the contract was for: 1,000 candles at $10,000 shipped FOB Betaville; some shipping boxes with water damage; and the express warranty the candles would have no damages.

Consideration

Consideration is bargained-for exchange. A court will typically not second guess the value of any agreed consideration. Here, this is easily met. Bath paid $10,000 for 1,000 candles. That is a bargained-for exchange.

Defenses to the Contract

Even if there is mutual assent and consideration, a party can still seek to get out of performance if there is a valid defense to the contract, including: lack of contractual capacity, mistake, ambiguity or misunderstanding, unconscionability, and violation of the statute of frauds. If the subject matter of a contract falls under the statute of frauds, the contract must be in a signed writing. The statute of frauds includes: (1) any promise in which the consideration is marriage; (2) contracts in which performance cannot happen

in less than a year; (3) land sale contracts; (4) executorships; (5) sale of goods $500 or more; and (6) sureties.

Here, the statute of frauds is applicable. This is a sale of goods over $500. However, this is easily met. Both parties sent signed documents stating the quantity and price terms of the transaction. No other defenses apply, so neither party will be able to have the contract declared unenforceable.

Excuses for Non-Performance

Excuses for non-performance include impracticability and frustration of purpose. Impracticability is when an unforeseeable event has caused the performance of a contract to be rendered impossible or highly impractical. Frustration of purpose occurs when both parties are aware of the contract's purpose and an unforeseeable event has occurred that renders this purpose void.

Here, none of these excuses apply so, as stated above, there is a valid contract between Bath and Scents to which no excuses or defenses apply.

Breach

Under the UCC, there is the perfect tender rule. The perfect tender rule states that a contract has been breached when performance does not occur perfectly. When a seller breaches, the buyer may either: (1) accept all goods; (2) reject all goods; or (3) accept and reject some of the goods.

Here, it appears that Scents has met the perfect tender rule. Scents shipped the order to Bath's FOB Betaville. As Scents had stated, some of the boxes showed water damage and all of the candles and wrapping were undamaged. Thus, Bath did not have

a right to reject the shipment and refuse to pay. Bath should have opened the boxes and inspected the contents before deciding if the shipment was not up to their standards. Because the terms of their contract included the term that some of the boxes would have water damage, Bath does not have the right to now say that the contract is breached. As stated above, this term became part of the contract when Bath did not object to the additional terms.

Thus, Bath is in breach of this contract and Scents can pursue damages.

Damages

A court will most likely award Scents expectation damages. Expectation damages are damages intended to put the non-breaching party in the position they would have been had the contract been performed as stated. Here, the contract was for $10,000. Still, sellers are obligated to use good faith and seek to resell any items rejected by the buyer. The buyer will be responsible for the difference between the original contract price and the new contract price.

Here, Scents was able to resell the candles to Redemption for $9,000. It appears that Scents attempted to cover in good faith, solicited bids from many customers, and indeed chose the best / highest offer. Thus, Bath will not be able to argue that Scents did not resell in good faith and that the damages should be reduced accordingly.

A non-breaching party will also be able to recover incidental damages. Incidental damages are damages that result from seeking to remedy the breach. Here, this would likely include any cost Scents had to pay to solicit bids from new customers and the $500 shipping cost they had to pay to ship the candles back to Sunville.

Scents will not be able to recover the initial $400 shipping fee as expectation damages, because, had the contract been performed fully and Bath paid the $10,000, Scents would have always been out the $400.

Last, Scents might try to argue they are entitled to lost profits damages. Lost profits damages are awarded when a seller is able to sell an infinite number of the goods in question and thus should be able to recover the lost profits from the sale. Here, the sale of candles likely qualifies as a lost profits situation. There is not a limit on the number of candles to be sold, and presumably Scents could order and sell as many candles as wanted. Thus, they may try to seek lost profits damages. However, I do not have enough facts to determine what the profit would have been on the 1,000 candles sale.

Bath might try to argue that any damages they owe Scents should be reduced by $2,000, because they had to purchase candles from Hot for $12,000. However, this argument is likely to fail because, as stated above, Bath is the breaching party and thus cannot recover any damages from Hot.

In conclusion, it is likely that a court will award Scents the $1,000 difference in contract prices, the $500 cost to ship the candles back to Sunville, and any expense they had to make to find a new buyer for the candles.

Bath and Hot Contract

As stated in the fact pattern, Bath and Hot had a valid written contract, so I will assume that mutual assent and consideration is satisfied.

Defenses and Excuses for Non-Performance

The defenses and excuses stated above do not apply here. Bath might try to argue that

it is unconscionable for them to have to pay $12,000 when the goods were damaged and lost in transit. However, unconscionability of contract enforcement is determined at the time the contract was formed. Here, there is no indication the contract for 1,000 candles at $12,000 is unconscionable.

Breach

Hot has not breached the contract. Bath has breached the contract by refusing to pay. Bath and Hot had a shipment contract. A shipment contract is a contract in which the seller disclaims all liability for damage or accident to the items once the seller has delivered the goods to the third-party common carrier and notified the buyer. A shipment contract is formed when the seller is a merchant, and the contract states: FOB [seller's city].

Here, the seller is a merchant. Hot regularly deals in the type of goods sold (candles). The contract stated "FOB Hatville." Hot is located in Hatville; thus, this is the seller's city and the parties had a shipment contract. TruckCo is a third-party common carrier and it appears that Hot properly delivered the items to TruckCo. Thus, the cost of any accident or damage that occurs in transit or delivery of the items lies with the buyer, and Bath has no right to refuse to pay Hot. In addition, Hot is not required to send replacement candles. Hot has fulfilled their duty under this contract, i.e., deliver 1,000 candles to TruckCo.

Damages

Because Bath is in breach, a court will likely award Hot expectation damages as well. Here, the contract was for $12,000, so to put Hot in the position it would have been had the contract been performed, Bath must pay Hot $12,000.

QUESTION 2

Public School District (District) in State X is attempting to reduce gang violence in District's high schools. After consulting with local law enforcement, District has determined that most violence results from confrontations between two gangs, the Westsiders and the Eastsiders. As a result, District has adopted the following rule for all high school students: "No student shall wear any label, insignia, words, colors, signs or symbols that reflect gang-related activities. Students violating the policy will be immediately suspended or expelled from school."

For several years, Paloma, a high school senior, has had a small tattoo of a dove on one wrist, her "self-expression" as a peaceful person. Paloma has never been associated with any gang, including the Westsiders and Eastsiders. After learning of Paloma's tattoo, District officials described it to local law enforcement officials who said that it sounded like a Westsider gang symbol, which includes birds. Paloma was suspended for the last ten days of school after she refused District's request that she either wear long sleeves to cover her tattoo or have it removed.

Paloma, now graduated, and attending the college of her choice, has brought a declaratory relief action challenging the validity of District's policy under the First and Fourteenth Amendments to the United States Constitution. District has moved to dismiss Paloma's lawsuit as moot on two grounds: (A) because she is no longer a high school student, and (B) District has now redefined "gang-related activities" in its rule in a manner consistent with State X's criminal code.

1. What arguments can Paloma make in support of her First and Fourteenth Amendment claims? Discuss.

2. Will either or both of District's arguments in support of its motion to dismiss Paloma's lawsuit be successful? Discuss.

QUESTION 2: SELECTED ANSWER A

First & Fourteenth Amendment Claims

First & Fourteenth Amendments

Paloma (P) is suing District (D) on the grounds that it violated her constitutional rights under the 1st and 14th Amendments. The First Amendment provides that Congress shall make no law abridging the freedoms of speech, press, association, and religion. The First Amendment is applied to the states via the 14th Amendment Due Process Clause (in other words, the First amendment is "incorporated" to apply to the states under the 14th Amendment Due Process Clause). Thus, P must show that her 1st Amendment rights, which apply to D under the 14th Amendment, were violated.

Standing

To bring a constitutional action in federal court, the plaintiff must have standing under Article III (because Article III only grants jx to "cases or controversies"). To show standing, the plaintiff must show: 1) injury in fact; 2) causation; and 3) redressability.

Here, P has suffered injury in fact because she was suspended for the last ten days of school (in other words, she has suffered actual harm as a result of D's policy). Second, P can show causation; the reason that she was suspended was because of D's policy prohibiting gang-related speech. Third, P can show redressability because a favorable court decision would declare the policy invalid and could potentially remove the suspension from her academic record. Thus, P has sufficient standing to bring this action (assuming it is not moot, see arguments below).

Freedom of Speech

P will argue that D's policy violates her freedom of speech under the 1st and 14th Amendments of the US Constitution. As a preliminary matter, speech is broadly defined under the 1st Amendment, and it can include symbolic/expressive conduct that would not be traditionally thought of as speech. Here, P was punished for having a small tattoo as an act of self-expression; the fact that she wore this tattoo as an act of self-expression shows that this is a symbolic/expressive act that counts as speech. P's tattoo constitutes expressive/symbolic speech that implicates the 1st Amendment.

State Action

To show a First Amendment violation, P must first show that there was state action (the Constitution does not apply to private actors, other than the 13th Amendment, which is not at issue here). State action simply means government action (it need not be at the "state" level; it can be local, federal, etc.). Here, P is challenging the actions of D, a public high school district. As a public school district, D is a part of the government and is thus a state actor. This requirement is met.

Vagueness

Laws/policies infringing on the freedom of speech cannot be vague; this requires that the law give fair notice of the prohibited conduct such that a reasonable person would understand what is prohibited by the policy.

Here, P can challenge D's policy on the grounds that it is vague. It prohibits symbols that reflect "gang-related activities," however, it does not define what exactly "gang-related activities" means. D will argue that given the prevalence of the two gangs, W and E, in the community, it would be obvious to a reasonable person what constitutes gang-related activities. However, P can argue that "gang-related activities" is a broad

and unclear term with no set definition, and thus it does not put a reasonable person on notice of what conduct is prohibited--indeed, P had never had any association whatsoever with W or E, yet the symbol tattooed on her arm apparently was enough to get her suspended. P will argue that she was punished simply because her tattoo was a bird and birds are included in W's gang symbols--the phrase "gang-related activity" was insufficient to put her on notice that her own small dove tattoo may be punished. P has a good argument that this regulation was impermissibly vague.

Overbreadth

Similarly, a speech regulation will be struck down if it is overbroad, i.e., it regulates more speech than is necessary. P can also argue that D's regulation is impermissibly overbroad because it purports to broadly prohibit all symbolic speech reflecting "gang-related activities." This could include speech such as P's, which is not gang related in any way, simply because it looks similar to gang-related activity. This regulation could have been drawn more narrowly by clearly defining what constitutes gang-related activity; by allowing D officials to punish any speech that looks remotely gang-related, this regulation goes too far, and P can potentially challenge it as overbroad. D will argue that the rule was drawn as narrowly as possible to only impact gang-related activities but, given that that term is not defined and could be construed very broadly (as it was in P's case), D will have a difficult time proving this law is not overbroad.

Prior Restraint

A prior restraint is an order (such as an injunction or gag order) or a licensing scheme that seeks to prohibit speech before it has occurred. Here, although the regulation punishes speech, it does not appear to be a prior restraint in the way the court has

traditionally defined it (this policy punishes speech after it happens, like most speech related laws). Thus, P cannot challenge this policy on the grounds that it is a prior restraint.

Symbolic Speech

P will argue that D's policy impermissibly regulates expressive speech under the 1st and 14th Amendments. The test is as follows: a regulation will be upheld only if: 1) it serves an important, non-speech related interest; 2) it burdens no more speech than necessary; and 3) the primary aim is not the suppression of speech. The government, D, has the burden of proving this test. Also, as a threshold matter, the government must have the power to create the law--here, the school district has the power to create reasonable regulations on public high school students, so D has the authority to implement such regulations.

Here, D will argue that this regulation passes the symbolic speech test. First, D will argue that it serves an important interest unrelated to speech--here, the purpose of this regulation is to reduce gang violence in public high schools. D will argue that a consultation with law enforcement has revealed that two main gangs, W and E, are responsible for gang violence in the community, and the goal of this regulation is to identify those students who are associated with the gang and may lead to violence. D will argue that there is an important interest here in making sure that children are safe from gang violence while at school. Moreover, D will argue that the primary aim of this law was not the suppression of speech, but rather to ensure the safety of students while at school. D will argue that permitting students to flash gang signs and represent their gangs will disrupt school and lead to violence; the goal of this law is not to suppress

speech, but rather to facilitate public safety. Finally, D will argue that this policy does not burden any more speech than necessary--D will argue that this policy was narrowly drawn to only prohibit symbols/expression involving gang-related activities. D will argue that students can still express themselves in many other ways while at school and that this regulation only burdens gang-related speech; and is thus narrowly tailored and burdens no more speech than necessary. D will also point out that P could have simply worn long sleeve shirts for the final 10 days of her high school career and there would have been no issue (thus, the law is not overly burdensome on student speech because she was not required to remove the tattoo, she simply had to wear certain clothes to cover it up).

On the other hand, P will argue this regulation fails the test. P will argue that D's true aim is not to encourage safety in the school, but rather to suppress any speech it does not like by defining it as gang-related--she will point out that she is a peaceful person who has never been associated with any gang, and yet she was still punished and suspended from school for 10 days. P will argue that even if there is a valid interest in protecting student safety, this regulation burdens more speech than necessary by punishing students who engage in symbolic, expressive speech that is not gang-related, but arguably could be. She will argue that being suspended from school simply because she has a bird tattoo and one of the gangs (W) used bird symbols is a prime example of how this regulation is not narrowly drawn and burdens more speech than necessary---birds are an incredibly common symbol in numerous different contexts (religion, product logos, national symbols, etc.), and construing the ban on gang-related symbols to include all bird-related symbols is going much too far--this will result in the regulation of

far more speech than is necessary to serve the interest of reducing gang violence and protecting students from such gang violence. P will argue that D's policy clearly burdens more speech than necessary by applying to anything that is even remotely gang-related, even if it is simply a bird tattoo that is designed to show "peaceful" self-expression.

On balance, even though D can likely establish an important, non-speech related interest motivating this policy (the safety of students at school and reduction of gang violence), P will likely prevail here by showing that the law burdens more speech than is necessary to protect that interest. P can most likely demonstrate this policy is an unconstitutional regulation of symbolic/expressive speech, and thus the court should strike it down and grant her relief on that basis.

Content-Neutral vs. Content-Based

If the court did not apply the symbolic/expressive speech test set forth above, and instead took a more traditional freedom of speech approach, the court would examine whether the regulation was content-neutral, or content-based. Content-neutral regulations are subject to intermediate scrutiny-like analysis, while content-based regulations receive strict scrutiny.

Here, the regulation is content-based given that it specifically targets gang related expressive conduct/speech (it regulates a particular type of content, not the time/place/manner of the speech's occurrence). Because it is content-based, it must pass strict scrutiny. Strict scrutiny requires that the government show the regulation is the least restrictive means of achieving a compelling government interest. Here, D will argue that it has a compelling interest in the protection of high school students from

gang violence. A court may or may not find this to rise to the level of compelling. However, even if it is compelling, the policy still fails strict scrutiny because P can show that it is not the least restrictive alternative. Broadly banning all symbols/labels/colors that reflect "gang-related activity" (which is not clearly defined) is not the least restrictive way of preventing gang violence--the school could establish clear guidelines showing what counts as gang-related activity and could establish some sort of review process rather than outright suspending/expelling students. Because the district policy is not the least restrictive means of achieving the goal of reducing gang violence, it would fail strict scrutiny. Thus, P could successfully challenge it as a content-based regulation of speech that fails strict scrutiny.

Unprotected Categories of Speech

There are certain categories of speech that are viewed as unprotected: incitement, fighting words, true threats, and obscenity. Here, D may try to argue this regulation is attempting to regulate speech that falls into one of these categories. However, the problem is that this regulation is broadly drawn to impact all expressive speech related to "gang-related activities." This does not explicitly regulate incitement (words that have a likelihood of inciting imminent lawless activity), fighting words (words that tend to cause an immediate breach of the peace), true threats of violence, or obscenity (sexually explicit material under the 3-part Miller test; not seen here). Although gang-related speech *may* tend to incite violent activity and *may* tend to cause a breach of the peace, a broad regulation prohibiting any gang-related expressive conduct does not qualify as a regulation of a category of unprotected speech, and D could not defend against P's claims on that ground.

Type of Forum: SCHOOL

Additionally, there is an issue raised by the fact that this is a public high school regulating speech within its walls. As SCOTUS held in *Tinker*, public students do not shed their First Amendment freedoms at the schoolhouse gate. Thus, the fact that this speech took place while at school does not give the school district plenary authority to regulate it; it can only regulate speech at school if there is a substantial and material likelihood that the speech will cause disruption to class. Although there is a likelihood that gang-related conduct/speech could cause disturbances at school, there are zero facts to suggest that P's small, peaceful dove tattoo caused a substantial/material disruption to the mission of the school. Thus, even though D was regulating her speech while at school, P can still challenge the constitutionality of that regulation under the 1st and 14th Amendments.

Conclusion

P can likely succeed on a First Amendment freedom of speech claim, either because this fails the test for regulating symbolic speech or because it fails the content-based strict scrutiny test.

Freedom of Association

The First Amendment also guarantees the freedom to associate with groups whom one chooses. Arguably, a regulation prohibiting gang-related speech would violate the freedom to be associated with that gang. P may potentially consider raising a challenge under this provision of the 1st Amendment as well, although she would likely be better served by challenging this on speech grounds since it would likely be difficult to convince a court that high school students should have the right to associate with

gangs, which are often a source of violence/criminal activity in local communities.

Fourteenth Amendment Claims

Additionally, P may be able to argue that this regulation violates her constitutional rights under the 14th Amendment only.

Procedural Due Process

Under the 14th Amendment procedural Due Process Clause, no person shall be deprived of life, liberty, or property without due process of the law. This requires a showing that 1) there was a deprivation of a protected interest, 2) without due process protections (namely, notice and a hearing). When deciding what process is due, the court looks at the nature of the interest affected, the probable value of additional safeguards, and the burden on the government.

The court has recognized that students have a protected interest in public high school education; they cannot be denied the opportunity to attend school without some level of due process protections. Here, the decision to suspend P took place immediately and it does not appear the speech regulation allows for any opportunity of notice and a hearing. Notice and a hearing are generally viewed as the bare minimum for PDP, and here P was provided with neither. P can argue that a hearing would have been helpful because she would have been able to present evidence that shows her tattoo was a peaceful non-gang-related symbol, and that the burden on the school district to have a pre-suspension hearing would be relatively minimal (it would not be too difficult for D to hold a quick hearing in connection with each suspension rather than implementing it immediately). Thus, given that P was not provided with any sort of due process protections and was suspended immediately, she likely can show a PDP violation here.

She may be able to challenge this law on PDP grounds because she was suspended without any sort of due process protections (i.e., notice and a hearing).

Substantive Due Process

Under the 14th Amendment substantive Due Process Clause, the government shall not infringe on individual rights in an arbitrary or irrational manner. If the right is fundamental, strict scrutiny applies; if the right is not fundamental, it is subject to rational basis review. Here, D will argue that there is no fundamental right to attend public school, and thus suspending her from school did not violate her fundamental rights and this action should be viewed under the rational basis test. If the rational basis test is applied, the law will be upheld as long as it is rationally related to a legitimate government interest (here, preventing gang related symbols is rationally related to the interest in preventing gang violence at school; the law will likely be upheld).

On the contrary, P will argue this law infringes on her rights of speech/self-expression while at school, and the First Amendment rights are regarded as fundamental. She will argue that strict scrutiny should apply here, and as set forth above, this policy will fail strict scrutiny because it is not narrowly tailored/least restrictive alternative.

The court could potentially go either way, depending on whether it views this regulation as infringing on the right to go to school (not fundamental) or the right to free speech (fundamental). P would be best served by pursuing the First Amendment claims set forth above, but she could also potentially raise this substantive due process argument.

Equal Protection Clause

The EP clause protects from unconstitutional discrimination. If the law discriminates

based on a suspect class or involves a fundamental right, strict scrutiny applies; if it's not a suspect class, rational basis review applies.

Here, P may argue this law violates EP because it discriminates against students wearing gang-related symbols and students who do not. However, people who belong to gangs are not a protected class, so the law will be subject to RBR (will be struck down; see above). The arguments re whether it involves a fundamental right will be the same as they were for SDP (see above).

The Equal Protection Clause is not the best argument for P to advance. She would be better served by focusing on the First Amendment and procedural due process issues.

D's Arguments in Support of Motion to Dismiss as Moot

D has moved to dismiss P's action as moot. An action is moot when a live controversy under Article III no longer exists. Here, D will argue that this case is moot and there is no more controversy because: 1) P is no longer a student being harmed by the regulation; and 2) the district has redefined "gang-related activities" to be consistent with the criminal code (implying that under this new definition, P would not have been punished).

1. P No Longer HS Student

D argues the case is moot because P is no longer a high school student and thus no longer subject to D's policy. However, P will argue that this falls under an exception to the mootness doctrine: cases capable of repetition yet evading review. The key example of this exception is pregnancy: claims involving pregnancy often evade review because the length of time is short, but because one can get pregnant again, they are

capable of review.

P will argue that such cases will keep arising as more and more students are subjected to this policy (i.e., her type of claim is capable of repetition), and yet because high school only lasts four years and the process of litigation a case often also takes years, it is often that these claims will evade review because students will graduate by the time the claim gets through the court system. D will argue this should not apply because the length of time (4 years) is far longer than something like a pregnancy (9 months), so it is not truly going to evade review (although it unfortunately does for this specific plaintiff, given that she sued so late into her career). Moreover, D will argue that it is not capable of repetition because P will not go to high school again.

On balance, the court will probably side with P and not dismiss it as moot because the claim is capable of repetition (more students will be subjected to the policy in the future and thus will have claims), but evading review (students will graduate before claim is finished because high school only lasts 4 years).

2. Redefined "Gang-Related" Activities

Another exception to the mootness doctrine arises when the defendant voluntarily ceases the offending activity--the case will not be deemed moot simply because the offender has ceased the activity, given that they could always do it again and that would render the case no longer moot.

Here, P will argue that D's voluntary redefining of the term in the policy does not render her action moot because D's voluntary choice to change the policy could always be overturned (it's not as though the state's legislature changed the law; a school district policy can be changed far easier). Here, P will argue that D's voluntary choice to change

the policy does not make her case moot because D could always choose to change the policy back, and thus everyone would be right back in the same situation. A declaratory relief action can help clarify the constitutionality of this policy and will prevent future cases if the district decides to simply change the policy back. Thus, on balance, a court will likely find that P's action is not moot on this ground, because D could always re-define the policy in a manner that is overly broad/unconstitutional.

QUESTION 2: SELECTED ANSWER B

I. ARGUMENTS THAT PALOMA CAN MAKE IN SUPPORT OF HER FIRST AND FOURTEENTH AMENDMENT CLAIMS

Sovereign immunity

Paloma is suing the public school district for declaratory relief challenging the validity of the district's gang-related clothing rule. Under the Eleventh Amendment, a state cannot be sued in state or federal court by a citizen unless certain circumstances exist. A citizen may sue for declarative relief or sue a local government or municipality.

Here, Paloma seems to be seeking a declaratory judgment holding that the District's rule is unconstitutional, thereby abolishing the rule. This type of declaratory judgment does not fall within sovereign immunity protection. Furthermore, Paloma is suing a school district, which likely qualifies as part of a local government or municipality, which can be sued under the Eleventh Amendment. Thus, there is no Eleventh Amendment bar to Paloma's suit.

State action

Only a unit or instrument of government can be sued for violating the Constitution, because private parties not subject to state action cannot violate the Constitution. Here, the District is an instrumentality of the state, seeing as it’s a public school, and can be sued for unconstitutional actions. Thus, Paloma may sue the District for constitutional violations.

Standing

An individual only has standing to sue when there is an injury in fact, causation, and

redressability. Here, Paloma has suffered an injury by being suspended from school for violating the District's policy, the injury was caused by the District enacting and enforcing its policy, and the injury is redressable if a court awards declaratory relief to Paloma because she may be able to get damages based on the District's action or ensure that the rule is not enforced for future students. Thus, Paloma has standing to sue.

Ripeness and Mootness

As will be analyzed further below, the issue of the constitutionality of the District's policy is ripe because Paloma suffered an injury from it and the policy is still in effect. The issue is not moot because it will be a continuing harm that can be redressed for future students and for Paloma's incurred injury, even though Paloma is no longer a high school student. Thus, the requirements of ripeness and mootness are satisfied.

1. FIRST AMENDMENT CLAIMS

The First Amendment prohibits the government from limiting an individual's freedom of expression in most cases. There are a variety of First Amendment grounds upon which Paloma could challenge the District's policy. If a court finds that Paloma succeeds on any of these grounds, then the District's policy constitutes an unconstitutional violation of the First Amendment.

Symbolic Speech

Symbolic speech, such as freedom of expression when doing an action (i.e., flag burning) is protected by the First Amendment. The speech at issue in this case is Paloma's dove tattoo, which isn't written or spoken speech, but qualifies as symbolic

speech because it is her "self-expression" as a peaceful person. The government (here, the District as a public school) may only regulate symbolic speech if the regulation is narrowly tailored, related to a significant government interest, and not primarily concerned with the suppression of symbolic speech.

Narrowly tailored

A regulation is narrowly tailored when it is not too restrictive and targets the conduct at issue.

The District's policy prohibits all students from wearing any "label, insignia, words, colors, etc... that reflect gang-related activities." This is very broadly tailored to basically encompass all forms of bodily expression, including clothing and tattoos, that bear any relation to a gang. The District could have narrowly tailored this policy by providing specific restrictions, such as prohibiting an exact bird gang sign or finding the actual signs used by the Westsiders and Eastsiders and banning the use of those signs. Instead, the District enacted a broad rule that covers almost everything on a student's body, and which can be related to "gangs" in general, not even mentioning the Westsiders and Eastsiders. Additionally, the restriction provides a broad and harsh punishment that is not narrowly tailored to fit any violation of the restriction.

Thus, the restriction here is not narrowly tailored.

Related to a significant government interest

In addition to being narrowly tailored, the restriction on symbolic speech must be related to a significant government interest. Here, the District has a significant interest in reducing gang violence in schools. The District has consulted with local law

enforcement to determine that the most violence results from gang confrontations between the Westsiders and Eastsiders. The District, in overseeing public schools, has a significant interest in fostering a safe learning environment without violence so that students can learn peacefully and be shielded from the gangs and violence beyond the school. Thus, the District has a significant government interest in reducing gang violence and this interest is related to the District's policy prohibiting students from wearing labels that reflect gang-related activities.

Suppression of symbolic speech

To be valid, a restriction on symbolic speech must not be primarily enacted to suppress that speech or have that effect. Here, the District will argue that its purpose in enacting the policy is to suppress gang violence and reduce the violence in the District's high schools, not ban students from having dove tattoos and engaging in self-expression of their peacefulness. However, Paloma will argue that the District's failure to narrowly tailor its policy effectively results in the suppression of symbolic speech, as any symbolic speech that bears a relation to gang-activity in general will constitute a violation of the District's policy and open the student to a harsh punishment.

Thus, the lack of narrow tailoring in the District's policy leads to an unjustifiable suppression of symbolic speech, even though the policy is related to a significant government interest. Thus, the District's policy is unconstitutional as a suppression of symbolic speech.

Time, Place, or Manner Restriction

If the court does not accept Paloma's argument that the District's policy unconstitutionally suppresses symbolic speech, Paloma can argue that the policy is an

unconstitutional time, place, or manner restriction. These restrictions apply to the government's limitation of speech in traditional public forums or designated public forums and enable the government to place restrictions on the time, place, or manner of speech so long as the restriction is content-neutral.

A content-neutral restriction does not regulate the content of speech, and to be valid as a time, place, or manner restriction, it must be narrowly tailored to serve a significant governmental interest and leave alternative avenues of communication available. A content-based restriction is subject to strict scrutiny and must be necessary for a compelling governmental interest and narrowly tailored to that interest.

Paloma may try to argue that her high school is a traditional public forum whereby students can engage in free speech. A court may not accept this characterization, but if it does, then Paloma can argue that the District's policy is an invalid time, place, or manner restriction that regulates students' speech during the time they are at school.

Content-based

A content-based regulation prohibits some speech on the basis of its content and is subject to strict scrutiny. Here, Paloma will argue that the District's policy is a content-based one because it prohibits expression related to gang activities, so it regulates the content of gangs.

Under strict scrutiny, the regulation must be necessary for a compelling governmental interest and narrowly tailored to that interest. The burden is on the District (the governmental unit) to prove these elements. The District will argue that it has a compelling governmental interest in reducing gang violence in high schools, for reasons of student safety and school functioning outlined above. The District will argue that the

regulation is narrowly tailored because it only regulates expression related to gang activities, and only while the student is in school. The District will argue that gang signs are changing and numerous, and the District or law enforcement officers may not have all the information on what constitutes a gang sign, so it is necessary to restrict students from having anything that might be related to gang activities in order to discourage students from aligning with their gangs in school or breaking out in fights upon seeing the sign of a rival gang and disrupting school operations and student safety. The District will thus argue that its policy is necessary due to the problem of gang violence in its high schools and the difficulty of nailing down who exactly is a gang member and what constitutes a gang sign, and thus that its policy passes strict scrutiny.

However, as analyzed above, Paloma will argue that the policy is not narrowly tailored because it prohibits basically any expression related to a gang activity without defining these terms and comes with a harsh punishment. Even if the policy is necessary for a compelling governmental interest, Paloma has a good argument that it is not narrowly tailored, and thus the regulation will likely fail strict scrutiny.

Content-neutral

The elements of being narrowly tailored to a significant governmental interest have already been analyzed above under the symbolic speech analysis. The additional element here is that there are alternative avenues of communication available. The District will argue that its policy only applies in schools, and that students are free to wear gang insignia outside of school so there are alternative avenues of communication. However, Paloma will argue that the District is requiring students to remove things like tattoos, which are not temporary and cannot be banned in school

while existing outside of school. Even though the District gave Paloma the option of covering up her tattoo, it confines her to only being able to show the tattoo outside of school which may be impossible if she has strict family that will not let her show the tattoo. Additionally, students often spend much of their day in school and there are not many alternative avenues of communication outside of school for students who go to school and then return home.

Thus, even if classified as a content-neutral time, place, and manner restriction, the District's policy will likely fail, primarily because it is not narrowly tailored.

Nonpublic forum

The government has more freedom to restrict speech in nonpublic forums, such as prison. In these forums, a restriction on speech is valid so long as it is viewpoint neutral and related to a significant government interest. The District will argue that a school is a nonpublic forum and should be subject to this analysis, instead of being classified as a traditional or designated public forum and subject to strict scrutiny or the time, place, and manner analysis.

If a court accepts the District's classification of a school as a nonpublic forum, then the restriction is valid if viewpoint-neutral and related to a significant governmental interest. The significant governmental interest has been analyzed above in the suppression of symbolic speech point. The District may argue that the policy is viewpoint-neutral because even though it bans content-based speech on the subject of gangs, it does not take a viewpoint stance on gangs. Rather, the language of expression that reflects "gang-related activities" can cover viewpoints that are supportive of gangs, as well as viewpoints that are opposed to gangs, as long as the viewpoint is related to gangs.

Thus, the District likely has the best chance of convincing the court that its policy is constitutional if it argues that a public high school is a nonpublic forum and subject to that analysis.

Vagueness

A restriction on speech is unconstitutional if it is too vague. The District's policy that "no student shall wear any label, insignia, words, colors, signs... that reflect gang-related activities" is likely much too vague and unconstitutional for vagueness. This is because the policy basically prohibits any form of clothing, tattoo, paint, or anything that a student can wear, possibly extending even to backpacks and items that touch a student --essentially any item, so there is no limitation or definition on what constitutes a banned item. Furthermore, the term "gang-related activities" is much too broad and not defined at all. As analyzed above, this term encompasses both viewpoints supportive and dismissive of gangs, and can encompass any gang, not just the Westsiders or Eastsiders. It could conceivably encompass a fictional gang, a gang in another city that causes no harm in the District's schools, or symbols that have a non-gang meaning and possibly a gang meaning, such as Paloma's tattoo. The lack of definition makes the policy too vague and almost absurd because it has no limit, essentially.

Thus, the policy is very likely to be void for vagueness.

Overbreadth

A restriction on speech is unconstitutional if it is overbroad and encompasses too much protected speech. As analyzed above, the District's policy is not narrowly tailored, to the point of being overbroad because it encompasses too many items, and "gang-related activities" is not defined to the point where it can be broadly interpreted to encompass

symbolic speech such as Paloma's tattoo. Thus, the District's policy is likely to be void for overbreadth.

2. FOURTEENTH AMENDMENT CLAIMS

The Fourteenth Amendment applies to the states and contains the Equal Protection Clause as well as the Due Process Clause.

Equal Protection Clause

Under the Equal Protection Clause, all individuals must be treated equally without discrimination. A restriction is subject to strict scrutiny if it discriminates on the basis of a suspect class such as race or national origin, subject to intermediate scrutiny if it involves gender or legitimacy, and subject to rational basis review for everything else.

Here, Paloma will likely argue that the District's policy violates the Equal Protection Clause because it discriminates on the basis of gang members or those who may be gang members. Gang members are not a suspect class, so the policy would be subject to rational basis review under which the challenger must show that the policy is not rationally related to a legitimate governmental interest. As analyzed above, the District has a legitimate interest in reducing gang violence in its high schools.

Paloma will argue that there is no rational relationship between the District's policy prohibiting gang-related symbolic expression and the District's interest in reducing gang violence. However, this argument will likely fail because it is conceivable and likely that the District's prohibition on gang-related symbolic expression will make it harder for gang members to identify each other at school and get into disputes, so there is a rational relationship here. Thus, Paloma's Equal Protection Clause challenge will likely

fail because the policy satisfies rational basis review.

Due Process Clause

Under the Due Process Clause, a person may not be deprived of life, liberty, or property without due process. This clause comes from the Fifth Amendment but is applied to the states through the Fourteenth Amendment. Paloma will argue that her procedural due process and substantive due process rights have been violated by the District's policy.

Procedural due process

Procedural due process guarantees protective procedures such as notice and hearing when an individual is deprived of life, liberty, or property.

Life, liberty, property interest

Paloma will argue that she has a liberty interest in wearing what she wants at school, or a property interest in her body such that the school cannot make her cover up her tattoo or remove it. Paloma can further argue that she has a liberty interest in going to school and cannot be immediately suspended or expelled without an opportunity for notice and hearing. Here, Paloma was immediately suspended for ten days when she refused to cover up or remove her tattoo. A court will likely find that Paloma's liberty and/or property interest was implicated here.

Notice and hearing

A court weighs many factors in deciding what process is due. The main issue is Paloma's suspension, seemingly without notice or a hearing. It is unclear when the District enacted the policy or how much notice Paloma had, especially considering she had her dove tattoo for years without issue. More facts are needed here, but if the

District did not broadcast its policy and adequately inform students, then it is likely that Paloma did not have notice. Furthermore, due to the vagueness and overbreadth of the policy, it's likely that, even if Paloma knew about it, she did not know that it could apply to her dove tattoo due to the lack of definitions or examples in the policy.

Thus, Paloma likely lacked notice of the policy and was likely entitled to a hearing of whether she should have been suspended, especially considering she was not a gang member and she lost out on the last few days of her high school experience.

Substantive due process

Substantive due process applies when the government prohibition at issue impacts an individual's fundamental right, such as the right to travel, vote, or have privacy. Here, Paloma will argue that her right to privacy was intruded on when the District tried to make her cover up or remove her tattoo.

Right to privacy

An individual has a right to privacy, including a right to what they wear on their body. This is a fundamental right that is subject to strict scrutiny. If the court finds that Paloma had a valid privacy right in her tattoo and her choice of how to display it, then the District has to pass the strict scrutiny standard. This standard is the same for purposes of due process and the Equal Protection Clause, so the strict scrutiny analysis above will apply to Paloma's right of privacy. Even if the court finds that Paloma doesn't have a right to privacy here, and that any right is only subject to rational basis review, that analysis has also been done above and will apply here.

Conclusion

Paloma can make all the above arguments in support of her First and Fourteenth Amendment claims, but her strongest argument is that the policy is unconstitutional due to vagueness and overbreadth.

II. WILL EITHER OR BOTH OF DISTRICT'S ARGUMENTS IN SUPPORT OF ITS MOTION TO DISMISS PALOMA'S LAWSUIT BE SUCCESSFUL

The District can dismiss Paloma's lawsuit in the first instance if it can show that Paloma does not have standing to bring the suit. A lack of standing will cause the court to dismiss the lawsuit. The District will argue that Paloma's lawsuit is moot, meaning that the injury has passed and there is no current or continuing harm to sue on.

1. Mootness--Paloma is no longer a high school student

A claim is moot if the injury has passed and is not capable of repetition. But, as in abortion standing cases, mootness will not bar a suit when the injury is one that eludes judicial review because it passes before a court has time to hear and decide the issue. The District will argue that Paloma's injury has passed because it occurred when she was in high school and she is now in college, so the lawsuit is now moot because Paloma will never again be subject to the District's policy for high school students.

However, Paloma can argue that when the harm occurred in high school, she was not able to sue for some reason, or that the harm is one that will likely repeat itself for future high school students in the District. Paloma can likely successfully argue that the brevity of her high school experience (this injury occurred during the last days of senior year) is similar to the abortion-standing in that the harm eluded judicial review, but is capable of repetition. Paloma will likely prevail on this point given that the District's policy still exists.

2. Mootness--District has redefined "gang-related activities" in a manner consistent with State X's criminal code

A court may still hear a case even if the offending party has stopped its criminal conduct or reformed its conduct. This is because there is no guarantee that the criminal or otherwise prohibited conduct will not continue because the offending party may merely be pretending to conform to avoid judicial review or has the discretion to repeat the offensive conduct in the future in the absence of an injunction or a judicial determination that the conduct is unconstitutional.

Here, the District may not argue mootness merely because it has redefined "gang-related activities" to be consistent with State X's criminal code. First, there is no guarantee that the District will adhere to this definition or not change the definition in the future, thus repeating the harm that Paloma is suing upon. Second, it is unclear whether its redefinition is constitutional because it may not be enough to redefine the term in accordance with a criminal code that itself may be unconstitutional. Third, the redefinition of gang-related activities does not solve the other parts of the policy that may be unconstitutional, namely the vagueness and overbreadth in what items of clothing/tattoos/etc. are covered under the policy, and the harshness of the immediate suspension or expulsion without any procedural protections in place.

Thus, both of the District's mootness arguments will likely fail, and the case will proceed.

QUESTION 3

Clint hired Linda, a lawyer, to represent him in a personal injury lawsuit against Dan, the driver of the car that collided with Clint's car, thereby causing him serious bodily injury. Clint could not afford to pay Linda, so Linda told Clint not to worry about paying anything until there is a recovery in the case. Linda told Clint that if a recovery is obtained, Linda would take 50% as her attorney fee and Clint will get the other half, less any costs Linda incurred. Clint orally agreed to this fee arrangement.

Dan's insurance company, Acme Insurance (Acme), emailed Linda before Linda completed any substantive work on the case, and offered to settle the matter for $100,000. Linda was thrilled and replied to the email that she accepted the settlement offer. Linda then told Clint about the settlement. Clint was relieved that the case settled so quickly.

Acme delivered a check for $100,000 payable to Linda, who deposited it into her law firm's business account. Linda then wrote a check from that account to Clint for $50,000, minus her costs, and mailed it to him. Upon receipt of the check, Clint complained about Linda's fee and threatened to sue Linda for malpractice and report her to the State Bar. Linda offered to return $10,000 of the fee in exchange for an agreement releasing Linda from all liability associated with the representation. Clint accepted and executed the release.

What ethical violations, if any, has Linda committed? Discuss.

Answer according to California and ABA authorities.

QUESTION 3: SELECTED ANSWER A

Formation of Client Relationship

Formation

A lawyer-client relationship is formed when the client reasonably believes that the relationship has been formed. Here, Clint (C) asked Linda (L) to represent him, and L agreed. At this point, C would reasonably believe that L was his lawyer so a lawyer-client relationship had been formed.

Duty of Competence

A lawyer should not accept representation of a client unless they are competent to perform the duties or can reasonably become competent through preparation. Here, there is no evidence that L has experience doing anything to do with personal injury law. If she did not have personal injury experience, then she either needed to ensure that she could adequately represent C through adequate preparation, or associate with a competent lawyer with C's permission, or decline the representation. Because there is not enough information to determine if L was competent to accept representation, there is no clear violation here.

Conflicts of interest

A lawyer also must ensure that they have no conflicts of interest that would prevent them from providing competent and diligent representation to the client before accepting or continuing representation. This could be due to personal conflicts or current, former, or prospective client conflicts. Here, there is no evidence of conflicts of interest, so there is no violation.

Working with an indigent client

A lawyer may waive fees for an indigent client and may advance reasonable expenses for litigation. If the client is in fact indigent, then the client does not need to pay the lawyer back. If the client is not indigent, then there must be arrangements for the client to repay the lawyer for the advanced costs. Here, it states that C cannot afford to pay L so there is some indication that he may be indigent. Therefore, L could ethically advance only the legal costs and is not obligated to force C to repay her for those if he is in fact indigent. Otherwise, C must repay her.

Contingency Fee Agreement

A lawyer is permitted to work for a contingency fee in most cases. The exceptions are when there is defense of a defendant in a criminal case or when the lawyer is working on a divorce or divorce settlement case and the contingency fee is based on obtaining a divorce or the amount of settlement. Here this is not the case, so L is able to agree to a contingency fee.

Writing Requirement

Under both the ABA and CA rules, all contingency fee agreement must be in writing.

For the ABA, the agreement must be: (1) signed by the client; (2) include the allocation of expenses; and (3) outline the scope of the representation. Under CA, the agreement must: (1) be signed by both the client *and the lawyer* and a copy must be given to the client; (2) include allocation of expenses; and (3) outline the scope of performance.

Here, L did not comply with the ABA or CA requirements. This is a contingency fee arrangement because it is based on a percentage of the outcome of the case. However,

it is not in writing, it is not signed by anyone, and C never got a copy. C and L merely agreed orally to the arrangement. L did state that it would be "less any costs," but this was not an exact definition of what costs C should be expected to pay and what costs L will pay as is required. It also did not dictate when this would be paid, nor did it state the scope of their relationship.

Therefore, L violated her ethical duties through making this oral agreement with C for a contingency agreement.

Fee must be reasonable / not unconscionable

Any time a lawyer represents a client, the fee must be reasonable (ABA) and not unconscionable (CA). Under the ABA, the reasonableness of the fee is determined by the complexity of the case, the preclusion of other employment, the expertise and reputation of the lawyer, the actual outcome achieved, structure of the fee (fixed v. contingent), and community standards for these kinds of cases.

Characteristics of the case

Here, this is a very easy case of a personal injury suit negotiating with an insurance company. L did not have to give up any other employment as she ended up doing no real work on the case. She also was likely not expecting to give up substantial work as this is a one-off personal injury case, so it was unlikely to lead to wide reaching conflicts of interest. While this case may have taken some work, it was not likely to dominate her entire practice and preclude her from taking on other jobs. This kind of case requires some expertise, but not extensive as it seems like it is a standard accident personal injury negligence case and there is also no information on L's reputation in the field.

L's Actual Work, Fee structure, and Community Standards

Her actual outcome was good for C as it was a fast and efficient resolution getting him a large settlement, but that was not actually due to anything that she did, but rather her just accepting a settlement so this does not deserve such a large fee. This is a contingent fee agreement, which does inherently come with more risk for the lawyer. Therefore, in general, it is reasonable for the fee on contingency to end up being higher than a fixed fee as the lawyer takes on more risk when structuring the agreement this way. However, it is not justifiable to have a fee that is grossly disproportionate to the amount of work done. Contingency fees also must still be reasonable on community standards. There is no information about the kind of fee normally charged, but, in general, contingency fees tend to be 20-30% of the settlement, not 50% plus fees. Here, L is getting $50,000 plus costs for doing no substantive work at all on the case other than accepting an unauthorized agreement for settlement. This fee is grossly disproportionate to the services that she rendered to the client and would imply an outrageous hourly rate of about $100,000, assuming she even did 30 minutes of work total on the case. Therefore, this fee seems unreasonable.

CA's Unconscionably also looks to the negotiation process

Under CA, most of the above elements are also considered. CA does not expressly look at the community standard for fees, but they do take into account the complexity, time/skill, reputation of lawyer, structure of the fee, and preclusion of other employment when considering the fee. In addition, they add several more requirements to these by looking at the time when the agreement was made. This includes elements such as if the lawyer committed fraud or misrepresentation in making the agreement, the relative

sophistication between lawyer and client and the existence of a preexisting relationship. Here, this fee was also likely unconscionable. L had a duty to memorialize this agreement in writing and get C to sign it, but she did not. Instead, she spoke it orally when C was likely desperate for a lawyer. Therefore, the instance of negotiating this fee was unethical on L's part. Additionally, there is likely a large discrepancy in the sophistication of the parties because C was a potentially indigent client who could not pay. He is seeking a lawyer because of a personal injury suit, not a business relationship, which indicates that he may have no prior experience with the law. Therefore, there is a substantial power imbalance here that makes the negotiation and agreement to the fee unconscionable as well as the rest of the factors described above.

Therefore, the fee is unconscionable as well and L violated both her duties under ABA and CA.

C has option to void, and L would get reasonable fee

Because the writing requirement for a contingency fee was not met, C would have the option to void the contingency fee contract. In this instance L would get a reasonable fee, which would be substantially less than $50,000.

Agreement to settle

Duty to communicate settlement offers

A lawyer has a duty under the ABA to communicate all settlement offers. Under CA, the lawyer in a civil case has a duty to communicate all written settlement offers and all oral significant settlement offers. Here, this is a written settlement offer being made by Acme (A) to settle the claim. This means that under both ABA and CA, L had a duty to

communicate this settlement offer to C. She failed to communicate this offer to him prior to accepting the deal. This was a violation of her ethical obligations under both ABA and CA.

Client's decision to accept settlement offers

The clients and lawyers have different spheres within the representation. The lawyer has control to make decisions regarding the strategy of the case, but the client has complete authority to make all decisions that are substantively related to the rights under the case, such as acceptance of settlement offers, plea deals, or demand for a jury trial. Here, it was only within C's power to accept the settlement offer. L was not permitted to accept the settlement offer without express authority from C. If C had given her express authority to accept any settlement above $90,000, then L's acceptance would have not been unethical, but here there was no such agreement beforehand. Therefore, L violated her ethical duties by accepting this agreement.

L may argue that C was happy with the settlement and was not harmed by this. However, a client need not be harmed for an ethical violation to occur. Therefore, L has still violated her ethical duties and should still be punished accordingly.

Duty of Competence

A lawyer has a duty of competence to their client, which means that the lawyer must act with the required knowledge, skill, thoroughness, and preparation of a reasonable lawyer to provide services to the client. Under CA, the rule is that a lawyer must not intentionally, recklessly, with gross negligence or repeatedly fail to provide competent representation to a client. The standard of competence for CA is similar, requiring knowledge and skill as well as the appropriate physical and emotional state to serve the

client.

Here, L likely breached her duty of competence to her client. She failed to take any investigation or preparation to uncover if the $100,000 settlement offer was in fact in the best interest of her client. She took no action to understand similar claims, what her client's claim may be worth if they went to trial, or what the chances of success on the merits would have been. By accepting the settlement offer without making any effort to properly investigate the claim or the potential alternatives that C would have if he did not accept it, L breached her duty of competence.

Duty of Diligence

A lawyer has a duty of diligence to their client, which means that the lawyer must act with the reasonable promptness to provide services, managing their workload to ensure that they can see the matter through to the end. Under CA, the rule is that a lawyer must not intentionally, recklessly, with gross negligence or repeatedly fail to provide diligent representation to a client. Here, L could have also been said to have violated her duty of diligence by quickly accepting the settlement offer and cutting short the chance to fully explore all the options. However, she did respond quickly and take prompt action, which is also required under the duty of diligence. Therefore, this violation is less clear.

Duty of Loyalty

The lawyer also owes a duty of loyalty to act in the best interest of their client. A lawyer need not press for every possible advantage for the client, but they must reasonably act to serve the best interest of their client and not act in a self-serving manner that undermines the best interest of the client.

Here, L violated her duty of loyalty by accepting the settlement offer without making reasonable investigations into the true value of the claim. L was acting in her own best interest when she did this because she was going to make $50,000 for doing no work. However, she clearly did not adequately consider the client's best interest as she had completed no substantive work yet on the case. Therefore, it was not possible for her to reasonably know if accepting the settlement offer would be in C's best interest. As a result, it was a violation of the duty of loyalty to accept this settlement (regardless of the issues with lack of client consent) without proper investigation.

Receiving settlement check

Client Trust Account and Commingling Client Funds

When a lawyer receives client funds, they must keep that money in a separate client trust account. A lawyer is strictly prohibited from commingling the client funds with the lawyer's personal assets or firm's assets.

Here, L violated her duty to keep the client funds separate. She took the $100,000 check that was given to her from A as the settlement and deposited the check into her law firm's business account. This meant that she commingled C's settlement with the rest of the firm's assets. This is strictly prohibited and is a violation of both ABA and CA rules.

Disputed amount

L then sent C the amount that she believed that he was entitled to under their agreement by mailing him a check for $50,000 less fees. L was right to promptly deliver the client their funds from a settlement. A lawyer has a duty to hold client property and

promptly distribute all client settlements to the client once the settlement is complete. Therefore, this action itself was not a violation.

However, once there became a dispute with the funds L was obligated to continue to hold the rest of the fee, or any disputed amount if not all the amount is disputed, in the client trust account until the matter was resolved. Here, L never had a client trust account which was a violation, as explained above. Now that there is a dispute, it continues to be a violation as L is required to hold all disputed funds in the client trust account. Only funds that she has a clear legal and undisputed right to can be deposited into her own account. Here, she deposited the funds in her own account prematurely and this is a violation.

Settling claims of malpractice

A lawyer under CA rules is strictly prohibited from making agreements to prospectively limit their malpractice liability. Under the ABA, a lawyer is permitted to do this only if the client is represented by independent counsel when they make this release. Here, under both rules, L would have violated as C was not represented by counsel.

Here, L is negotiating after C has threatened her to sue for malpractice. Therefore, this should be analyzed as a settlement offer for malpractice rather than a prospective release.

Written Release and Representation by independent counsel

Here, when negotiating settlements of malpractice liability, the client should be advised and given an opportunity to seek external counsel. This makes the negotiation process substantially more fair and will allow the client the best chance to protect their own

interest. Here, L never told C that he should seek independent counsel, nor did she give him an opportunity to do so.

L and C only negotiated orally on the release after C threatened to sue. L offered to return him $10,000 of the settlement that she had withheld in exchange for him not suing. While under contract law, this likely would be an enforceable contract. This is also unethical because this was purely an oral conversation in which C had no counsel. Additionally, C did have a reasonable claim and could have voided the entire agreement. This was an option that C was not aware of because he was not advised of his rights. Therefore, L violated her duty of loyalty to C in this situation as well by failing to provide him with an adequate warning and opportunity to seek counsel.

QUESTION 3: SELECTED ANSWER B

Fee Agreements

Under the California rules (CA), a written fee agreement is required if fees will likely exceed $1,000. It must be signed by the client and attorney, and the client must get a copy. It must explain the basis of the fee. Under the ABA Model Rules (MR), a writing is not always required except for contingency fees. Under both rules, cases on a contingency fee basis always require a writing. In CA and the MR, fees must be reasonable. Under CA rules, they must not be unconscionable.

Even if this were not a contingency fee case, the fact that the agreement was oral, not written, would violate the California rules. Were it not contingent, the lack of a written agreement would be acceptable under the MR, though that is not the case here.

Reasonable Fee

Fees must be reasonable, and this is evaluated on factors including the skill of the attorney, the time the matter will take, the matter's complexity, the amount to which the work will preclude other employment, and the standard fees generally charged in related matters and circumstances. In California, the prohibition on unconscionable fees also looks to the relative sophistication of the parties in negotiation.

50% of a client's recovery in a case is very high for a personal injury contingency fee. Contingency fees are generally around 30%, so this is significantly higher and could be viewed as unreasonable.

Clint is likely not a sophisticated negotiator regarding personal injury representation. There's no indication he has prior experience seeking legal services, nor that he works

in a related field. This made him lack knowledge about negotiating the fee and could suggest procedural unconscionability. Clint also said he is unable to pay for a lawyer, so is in a disadvantageous financial position, giving him less power in negotiating a fee. Due to his inability to pay, he may think that he is unable to afford a lawyer at all, and this offer may seem generous to him, or at least, the only offer he is able to get.

The fact that C was surprised at how low his cut of the settlement amount was also indicates that he was not provided with information on how the fees and costs would be allocated--another ethical issue.

Contingency Fee Agreements

Under both the CA and MR, a contingency fee requires a written fee agreement. Under the MR, this requires a writing signed by the client indicating the basis of the fee and the extent to which the client will be responsible for costs at the end of the case. The CA rules are more stringent and require the agreement, again, to be signed by both the client and the attorney. They require noting the basis of calculation of the fee, the extent to which the client is responsible for costs in the outcomes of the case, and a statement that the fee is negotiable, if it is not a medical malpractice case.

When C told L he didn't have money for an attorney, L told C not to worry about payment and that instead she could provide legal services where she took 50% of the ultimate recovery. This is a contingency fee agreement and, under MR and CA rules, requires a writing signed by the client (MR and CA) and, in CA, also the attorney. There was no writing here, as C orally agreed to the terms.

There is no indication C knew the fee was negotiable, which would violate CA rules.

L told C she would take 50% as well as "any costs" she incurred. This is likely insufficient information to meet the requirements that the agreement specify his responsibility for costs. It doesn't indicate what types of costs that could include, and whether and to what extent he would be responsible for them in the case that he did not prevail. This would likely violate CA and MR rules.

CA also requires an explanation of how fees are calculated. L would say that noting the 50% split is sufficiently specific. However, this doesn't make any explanation of costs of litigation, which may be insufficient. She merely told him to "not worry about it," which is vague, providing no basis or explanation.

Advancing Costs of Litigation to Clients

An attorney may not give money to clients, however under CA and MR, an attorney may advance litigation costs so long as the client must repay those at the end of litigation.

L did not pay C but did front litigation costs as under their agreement she would pay for any costs and then recoup them from the ultimate recovery amount at the end of the case. This was permissible.

Scope of Employment

In an attorney-client relationship, the client has control over setting the goals of the case, while the attorney can make strategic decisions. The client controls aspects of the representation such as whether to waive a jury trial, testify in a criminal case, or accept settlement offers among others.

D's insurance company emailed L with a settlement offer for $100,000. L accepted it without D's consent. This violated her duty as that was D's choice, not L's.

L would argue that D was relieved when he heard of the settlement, so there was no issue, but that does not absolve her of her violation.

Communicating Settlement Offers

A lawyer has a duty to communicate with the client, keeping them reasonably apprised of the status of the case. In the model rules, the lawyer must communicate all settlement offers to a client. In CA, the lawyer must communicate all written offers as well as any oral offers that are a significant advancement in the case.

Dan's insurance company emailed Linda with a settlement offer. She did not communicate it to Dan before accepting it. This violated the CA and MR rules as it was both written and a significant advancement in the case.

L would argue that D didn't object to the settlement as he was "relieved" it settled so quickly. However, this doesn't cure her ethical violation. Dan did object later once he came to understand how little he would recover (again indicating the issue of fee reasonableness discussed above). Also, harm to the client is not required for an attorney to be in violation of ethical duties.

Duty of Competence

Under MR and CA rules, a lawyer has a duty of competence and must have the requisite skill, knowledge, training, and preparation to represent the client. In CA, an attorney may not repeatedly, recklessly, or grossly negligently fail to provide competent representation. If a lawyer is not competent in an area, they may accept representation if they are able to educate themselves on the matter enough to become competent in a timely manner, seek assistance from another attorney who is competent in the area, or

in an emergency.

Here, L didn't set an appropriate fee agreement, which arguably shows a lack of knowledge regarding how to proceed in a personal injury case on a contingency fee basis. She also accepted a settlement offer without asking for C's permission, also arguably demonstrating a lack of competence as a client advocate.

There is no indication whether L has experience in personal injury cases, or whether this was an area she was unfamiliar with. Her overall conduct indicates lack of competence which may suggest this wasn't her usual area of practice; if so, she should have not taken the case, done additional preparation, or retained co-counsel to assist. This situation was also not an emergency.

L didn't do any substantive work on the case before accepting a settlement offer, also indicating lack of preparation and skill in negotiating and advocating for a client. L likely violated her duty of competence.

Duty of Diligence

Per the MR and CA rules, a lawyer has a duty represent the client diligently, including keeping the client reasonably apprised of updates in the case, pursuing a matter to completion, meeting all filing deadlines, and managing workload.

L had not done any substantive work on the case when she received and accepted the settlement offer. This is clearly a lack of diligence as she did no work on the case. Had she done work on it, she would have had the knowledge about the extent of his injuries, applicable law, and comparable amounts of recovery at trial or by settlement in comparable cases. As it stands, she has seemingly no basis for determining whether

this was a reasonable settlement offer in the circumstances (this overlaps with the competence issue). It also violates this duty in that she did not keep her client updated on a serious development in the case.

As noted above, the duty of diligence also includes the duty to keep clients reasonably updated on their case. Here, L only informed him after she accepted the offer. Based on C's surprise at how little he received, it seems that her explanation of the situation to him did not in fact provide him with a reasonable amount of information, suggesting failure to adequately communicate regarding substantive information as well as timing.

Client Trust Account

An attorney may not mingle their assets and a client's assets under the CA and MR. A lawyer must keep all a client's money in a separate client trust account. An attorney may only move money out of the trust account into their account once they have earned the fees.

Here, A gave L a $100,000 check and she put it in her firm's business account. She did not put it in a client trust account. She mingled this with her assets. After depositing the money in her account, she then wrote a check to C for $50,000 minus costs.

She would argue that she paid C in a timely manner, but that is not sufficient to meet the requirements of either the MR or CA rules.

Disbursement of Disputed Fees

When there is a dispute about the fees owed to an attorney or payment due to a client, the attorney must immediately pay the client all money that is not disputed as theirs and maintain the rest in the trust account until the matter is settled.

D disputed that the amount L took as costs deducted from the check was not acceptable, complaining about it and threatening to sue her. At that point, L should have maintained the disputed amount of money in a trust account until the issue of fees was resolved. But she did not, as she had the money in her firm account and kept it there.

Settlement of Malpractice Claims

Under the CA and MR, an attorney may not settle a malpractice case with a client before advising the client to seek independent legal counsel and giving them an opportunity to do so.

C threatened to sue L for malpractice and report her to the State Bar. L offered him $10,000 to settle the malpractice allegation as well as all liability with the representation. L did not advise C to seek independent counsel, nor gave him the opportunity to do so. C accepted the money and executed the release without having the opportunity to seek counsel. L violated her ethical duties here.

QUESTION 4

The Articles of Incorporation for Corp Inc. (Corp) provide that it is a closely-held corporation formed for the purpose of manufacturing televisions. Corp has been highly profitable in this business for twenty years. The Articles also provide that, for the purpose of electing directors, each shareholder shall have one vote per share that they own multiplied by the number of open director positions, i.e., cumulative voting.

Aliyah and Bowen each owned sufficient shares to elect, through cumulative voting, one of the three directors of Corp. Aliyah and Bowen entered into a signed written agreement stating that they will vote to elect themselves to the board of Corp and agree on the election of any successor board members and, if they cannot agree on a particular successor, will abstain from voting in that election. They also agreed that, once they became directors, they would select Palmer as the new president of Corp. The agreement stipulated that it is binding on all subsequent owners of the shares. Aliyah and Bowen stamped "Subject to Agreement" on the backs of all of their share certificates.

Aliyah and Bowen were subsequently elected to Corp's board of directors, along with Chantal. At the next board meeting, Aliyah and Bowen voted to select Palmer as the new president of Corp, Chantal abstained, and Palmer was named as president.

Palmer immediately instituted several costly changes intended to shift Corp solely into the manufacturing of bicycles. Palmer reasoned that, by the time the directors heard anything about the changes, Corp would be so profitable that no one would complain.

Bowen discovered almost immediately what Palmer had done. Bowen then informed Daya of all of these facts, sold his shares to her, and resigned from the board.

Esgar, a shareholder of Corp since its inception, wishes to seek legal relief regarding Palmer's actions and Corp's change to solely manufacturing bicycles.

1. Is the agreement between Aliyah and Bowen valid? Discuss.

2. Is Daya bound by Aliyah and Bowen's voting agreement with respect to the election of successor directors? Discuss.

QUESTION CONTINUES ON THE NEXT PAGE

3. On what theory or theories, if any, might Esgar bring an action to enjoin Corp from moving solely into manufacturing bicycles, and what is the likely outcome? Discuss.

4. On what theory or theories, if any, might Esgar bring an action for damages against Palmer related to Corp moving solely into manufacturing bicycles, and what is the likely outcome? Discuss.

QUESTION 4: SELECTED ANSWER A

1. Is the agreement between A and B valid?

Type of Entity

The first issue is what type of business entity is at issue. A de jure corporation is one that has been properly formed through the filing of articles with the secretary of state. Here, the facts indicate that Corp Inc. is a closely held corporation. Thus, it will be presumed that Corp Inc. (C) was properly formed and is a valid de jure corporation. Because it is a corporation, C has distinct legal personhood and the capacity to sue, or B sued. Additionally, its shareholders will enjoy limited liability.

A and B's Role in the Company

The next issue is the role that A and B play in the company. A corporation is generally managed by a board of directors, but financially owned by shareholders (who enjoy limited liability). Here, the facts indicate that A and B each own shares in Corp, thus they will be considered shareholders. It is unlikely that they will be controlling shareholders, given that each was only capable of electing one director to the board through cumulative voting (had they been controlling shareholders, they likely could have elected more individuals to the board than one each). Thus, A and B are shareholders of Corp Inc., and, as shareholders, they also have the power to vote in the corporation's annual election of the board of directors. Corp adheres to cumulative voting, so A and B, as shareholders, are permitted to pool their votes behind one candidate in the hopes of electing someone to the board (as they did here).

Moreover, A and B were subsequently elected as directors, and thus also serve as

directors of Corp in addition to being shareholders. This may potentially expose them to liability (see more discussion below). However, the agreement they entered into was done so prior to them becoming directors, thus this agreement will be viewed as an agreement between shareholders, not directors.

Validity of Agreement to Vote Together as Shareholders

The issue is whether A and B's agreement is valid. The agreement contains two key provisions: 1) A and B agreed to elect themselves to the board and to agree on the election of successor board members (and if they could not agree, they would abstain from voting); and 2) A and B agreed that once they became directors, they would select P as the new president of Corp. Moreover, the agreement indicated that it would be binding on subsequent owners of their shares (and they indicated as such on the actual share certificates). Here, each of the two provisions will be addressed separately.

The first provision provides for how A and B will vote as shareholders. A shareholder voting agreement, known as a "voting pool," is permissible, as long as it is in a signed written agreement clearly setting forth the terms. Here, A and B will argue that they entered into a valid shareholders agreement when they agreed to elect themselves to the board of directors. Shareholders are permitted to enter into contracts agreeing on how to vote at director elections and, here, A and B entered into a signed written agreement doing just that. Thus, the provision of the shareholder agreement which provides that A and B will vote to elect themselves to the board of directors will likely be upheld as valid.

However, it is less clear whether this voting agreement would be binding on successor shareholders (this will be discussed further below).

Validity of Agreement to Select P as President

The next issue is whether the second major provision of the shareholder agreement, providing that they will elect P as president, can be upheld. Although shareholders are permitted to enter voting agreements, they are *not* permitted to enter into agreements that will control how they will vote and act in their capacity as *directors*. This is because directors are required to exercise their independent business judgment and have a duty to look out for the best interests of the corporation, thus we don't want them to be constrained by prior voting agreements (if they have contracted to elect P, but P is a bad option, we want the directors to make the best decision for the company, not feel bound by a prior K). Here, A and B have entered into an agreement providing that they will select P as president of Corp once they become directors. This part of the agreement must be struck down as invalid because shareholders cannot limit their discretion as directors through agreements such as this. The court will likely find that this agreement was designed to control their actions as directors and it will be struck down as invalid.

Some courts have recognized a limited exception to this rule in the context of a close corporation, where all of the shareholders enter into the agreement (if all the shareholders are on board with an agreement as to how to elect the directors, that may be permissible). The concern behind this rule is that courts don't want controlling shareholders who can elect directors entering into agreements that will harm the minority shareholders; thus, if all the shareholders enter the agreement, this concern is eliminated. Here, A and B may argue this exception should apply. However, this argument will fail, because even though C is a closely held corporation, this agreement

was only entered into by A and B, not by all of the shareholders.

Thus, the provision of the agreement providing that they will elect P as president once they are made directors will be struck down as invalid.

Conclusion

The provision of the agreement governing how A and B will vote as shareholders at director elections will be upheld as valid. The provision governing how A and B will vote for P once they become directors will be struck down as invalid.

2. Is D bound by A and B's voting agreement with respect to the election of successor directors?

The facts indicate that B, unhappy with P's actions, sold his shares to D and resigned from the board. As discussed above, the voting agreement between A and B provided that it would be binding on subsequent owners of the shares. As already demonstrated, the voting agreement between A and B was likely valid given that shareholders are permitted to enter agreements governing how they will vote at director elections. Thus, the issue becomes whether this agreement binds D.

In order to form a voting agreement that is binding on subsequent shareholders, some jurisdictions may require that the parties enter into a "voting trust" that is filed with the secretary of state. Here, it does not appear that A and B have done so, so this agreement will likely not be found to apply to subsequent shareholders if the jurisdiction follows such a rule.

However, they will argue that the agreement should still be binding on D under general contract/equitable principles because D, the subsequent purchaser of B's shares, had

valid notice of the agreement given that B informed D of "all of the facts" and the shares had "subject to agreement" stamped on the back. A and B will argue that D had notice of their agreement and of their intent to make the agreement binding on subsequent purchasers, and as such, D should be estopped from arguing she is not bound by the agreement. A court may go either way, but the more likely result is that since D was on notice of the agreement and bought the shares "subject to" the agreement, D too will be bound by the agreement's terms.

3. E's Action to Enjoin Corp from Manufacturing Bicycles

E seeks to file an action against C in the hopes of enjoining C from changing from a corporation that manufactures televisions into a corporation that manufactures bicycles. In order to do so, E should bring a derivative lawsuit on behalf of the corporation to enjoin it from engaging in ultra vires actions.

E's Status in the Corporation

The facts indicate that E has been a shareholder of Corp since its inception. Thus, E is a shareholder of Corp and has standing to bring either a direct action to vindicate his own rights or potentially a derivative action on behalf of the corporation to protect the corporation's rights. A shareholder can only bring a direct action to challenge specific harms to them, such as being denied a distributed dividend or if a tort is committed against them by the corporation.

Derivative Shareholder Lawsuit

A shareholder of a corporation may bring a derivative lawsuit on behalf of the corporation against its own directors/officers, where the shareholder believes those

directors/officers are not protecting the rights and interests of the corporation. In order to do so, the shareholder must: 1) have been a shareholder at the time of the wrong and continue as a shareholder throughout the time of the suit; 2) adequately represent the interests of the shareholders; and 3) make a demand on the board, unless such demand would be futile.

Here, the facts indicate that E has been a shareholder since Corp's inception, and there are no facts suggesting he is no longer a shareholder; thus the first requirement is met. There are also no facts to indicate that E does not represent the interests of the other shareholders; this requirement is likely met. Finally, there are no facts to suggest that E has already made a demand on the board. If E does not do so, E may be prohibited from bringing suit. However, E can argue that demand here would be futile--the board contains three members, A, B, and Chantal, and two of those three members elected the president whose actions E is challenging. E can argue that A and B are interested directors because they made the decision to hire P, and thus 2 / 3 of the board members would be biased in favor of not bringing a lawsuit (because it could potentially open them up to liability, as the ones who voted to have P as president). Demand would likely be futile on these facts.

Thus, it appears that E can bring a derivative lawsuit, assuming that E either makes adequate demand or demonstrates demand is futile.

Ultra Vires Action

Through the derivative lawsuit, E will challenge P's decision to move Corp solely into the business of manufacturing bicycles as an ultra vires action that is not permitted by Corp's Articles of Incorporation. When a corporation registers with the secretary of state,

they will file Articles of Incorporation. The AOI will state a purpose for the corporation. In modern times, most AOI state a very broad purpose for the corporation such that almost any legitimate commercial activity is permissible. However, even today, there are still corporations with a limited, enumerated purpose in the AOI. If the corporation's controlling officers/board take an action contrary to the stated purpose, shareholders can bring a derivative action to prevent the action as an improper "ultra vires" action.

Here, C has an AOI with a stated purpose: manufacturing televisions. Moreover, C has been highly profitable in this business for years, and there are no facts to suggest that C has ever engaged in any activity other than manufacturing televisions. Thus, E will argue that C's purpose as a corporation is limited to manufacturing televisions. However, once P became president, P instituted numerous costly changes that shifted C into the business of manufacturing bicycles--E will argue this is an ultra vires prohibited act that is contrary to Corps stated purpose in the AOI. E can point out that televisions and bicycles are vastly different products that are manufactured differently, sold in different markets, and serve different purposes. E will argue that shifting C's purpose from making TVs to bikes constituted a fundamental corporate change that required amending of the AOI, and yet there was no valid amendment of the AOI. To amend the AOI, there must be a special meeting of shareholders called to vote on whether to amend the AOI. Here, there was no such special meeting; P simply made the unilateral decision to change the purpose of the corporation that has been operating for years. This was an ultra vires action without approval.

Accordingly, E can likely establish that manufacturing bicycles is an improper ultra vires action that Corp should not be permitted to undertake.

Direct Action

E can also potentially bring a direct action on the grounds that his shareholder rights were violated because he was not permitted to vote on a fundamental corporate change, i.e., the amendment of the Articles of Incorporation. E will argue that P's actions were an attempt to unilaterally amend the AOI without calling a special shareholder voting meeting and, as such, E's rights as a shareholder were violated by Corp and E may be permitted to sue directly on these grounds.

Right to an injunction

In order to obtain a permanent injunction the moving party must show success on the merits, inadequate remedy at law, irreparable harm, the balance of hardships/equities tips in their favor, and public interest does not disfavor the injunction. E can likely establish these elements given that Corp engaged in a wrongful ultra vires action that will likely cause imminent harm to the shareholders' interest in the form of lost profits.

Conclusion

E can likely bring a derivative lawsuit to enjoin Corp from changing to bicycle manufacturing because this is an ultra vires action and there was no special shareholder meeting called to amend the AOI.

4. E's Action for Damages Against P

E also seeks to bring an action against P directly for damages in connection with the ultra vires action. As a preliminary matter, E would once again need to bring a derivative action on behalf of the corporation itself, not a direct action (see above; analysis would be the same--E can probably bring a derivative lawsuit). E will bring a shareholder's

derivative action against P in his capacity as a corporate officer and allege that he breached the duty of care.

Liability as an Officer

Officers are generally viewed as agents of the corporation (an agent is one who agrees to work for the principal's benefit subject to the principal's control). P, as president of Corp, is thus considered an officer and an agent of Corp. As an agent, P owes the corporation a duty of care and a duty of loyalty.

Breach of Duty of Care

Here, E will argue that P's decision to move Corp solely into bicycle manufacturing constitutes a breach of the duty of care. Corporate officers/agents are required to act as reasonably prudent persons, and their goal must be to serve the best interests of the corporation. Here, E will argue that P breached his duty of care by unilaterally implementing costly changes that entirely changed the direction of Corp's business. E will argue that Corp has been operating for twenty years in the TV manufacturing industry, and they have been highly profitable. Thus, E will argue it was unreasonable for P to cast aside twenty years of effort and goodwill in the hopes of pursuing a new line of business. E will argue that P also acted unreasonably by making these changes without going through the proper channels and acting unilaterally behind the directors backs--E will argue that shareholders have a right to vote on such fundamental decisions or, at the very least, P should have ran such a serious decision by the board of directors (had he done so, it is clear that B likely would have disagreed and voted against such a change given that B resigned from the board immediately upon finding out P's actions).

E will likely successfully be able to show that P failed to act as a reasonably prudent person when P made the unilateral decision to entirely change Corp's business and engage in an ultra vires action without ever seeking the consent of the board or the shareholders.

Business Judgment Rule

P will argue his actions were protected by the business judgment rule.

The business judgment rule provides that corporate officers and directors are not liable for mistaken business judgments that were made in good faith. This creates a rebuttable presumption that the director/officer (here, P) was acting in good faith in the best interests of the corporation. This can only be overcome by a showing of bad faith, fraud, illegality, or the failure to be reasonably informed.

P will argue he was acting in good faith and is thus protected by the BJR, because his reasoning behind the decision was to increase Corp's profits. He was not acting out of self-interest, but rather he was trying to maximize Corp's profits by entering a new market (his hope is it would be so profitable that no one would complain). He will argue that the costly changes he implemented were in a good faith attempt to expand C's business and maximize shareholder profit and is thus protected by the BJR.

Here, however, E can likely overcome the business judgment rule for two reasons: 1) there are no facts to suggest that P did any research or investigation into whether this would be a good decision for the company, so it was highly likely that P was not reasonably informed (overcomes the BJR); and 2) P appears to be acting in bad faith/slightly fraudulently because he made all of the changes unilaterally without telling the directors, in the hopes that they would not find out until it was too late and C was

already making money from the bikes. The fact that P intentionally concealed his plans for the company's new direction suggests he was acting in bad faith (and potentially even fraudulently since he failed to disclose that he was making material, fundamental changes to the business).

Conclusion

E can derivatively sue P for breaching his duty of care owed to Corp as an officer by unreasonably and unilaterally engaging in ultra vires acts, and E can most likely overcome the business judgment rule presumption.

QUESTION 4: SELECTED ANSWER B

1. Valid Shareholder Agreement

Shareholders have the power to vote directors into office. Additionally, shareholders are able to vote for fundamental changes such as mergers, dissolutions, amendments to articles, and sale of substantially all assets. Additionally, shareholders are able to enter into voting agreements with each other. Voting agreements are contracts between shareholders to vote in a specific way. Voting agreements must be signed and must pertain to matters in which shareholders have the power to vote on. Here, Aliyah ("A") and Bowen ("B") entered into a written agreement stating that they will vote to elect themselves to the board of Corp and agree on the election of any successor board members, and if they cannot agree on a particular successor board member, they will abstain from voting. This agreement is enforceable because it is written and both A and B have the power to elect directors because of their status as shareholders. The fact that the voting is cumulative does not impact A and B's ability to enter into a voting agreement.

However, their agreement to vote for Palmer once they became directors will not be enforceable. Board members do not have the ability to enter into voting agreements with each other. Board members are charged with exercising a duty of care to act as a reasonable director under the circumstances, which means being informed on matters and having a good faith and honest belief that their actions are in the best interest of the corporation. A voting agreement among directors runs counter to a director's duty to act with care and reasonableness. Therefore, this provision of the voting agreement is unenforceable.

2. Is Daya Bound?

Voting agreements can be binding on successors if the successor has notice of the agreement (i.e., there is some notice on the actual stock certificate). Here, A and B stamped the certificates with "subject to agreement" on all of their stock certificates so Daya ("D") would be on notice of the shareholder agreement between A and B. Thus, she is probably bound to the enforceable terms of the voting agreement (see above). Daya could argue that she is not bound because B violated federal securities laws by selling his shares to her. A corporate insider runs the risk of violating Rule 10b5 when they trade on the basis of material, non-public information without first disclosing the information to the person they are trading with. Here, B did disclose all of the material facts to D. Thus, he likely didn't violate federal securities laws and Daya will probably be bound.

3. Enjoining Corp

To be valid, corporations must have a suitable purpose (as well as filing Articles of Incorporation with the secretary of state). Generally, a corporation's purpose is stated as "any lawful purpose." That is sufficient to fulfill this requirement. However, when a corporation is formed for a specific purpose, such as for the purpose of manufacturing televisions, that purpose must be strictly adhered to. If not, the director or officer has committed an ultra vires act. Remedies available for ultra vires act include an injunction if brought by a shareholder, damages for breach of duty if brought by the corporation, or dissolution if brought forth by the state and there is evidence of unlawful actions or other wrongdoing. Here, Corp was incorporated for the specific purpose of manufacturing

televisions. Corp has adhered to this purpose for twenty years. Palmer's attempt to shift the corporation into the bicycle manufacturing industry diverges from the specific purpose of manufacturing televisions that is stated in the Articles of Incorporation. This is an ultra vires act. As such, Esgar is a shareholder and can sue to enjoin Palmer's actions. Additionally, Palmer can be civilly liable to the corporation for damages caused by a breach of duty if he has committed one. The facts do not suggest that there was unlawful activity, so the state is unlikely to seek dissolution.

Palmer will argue that he had authority to take the actions he did. An agent can bind a principal if there is an agency relationship in which both parties have consented that agent is to act for the benefit of principal and principal asserts control over agent. For an officer (i.e., agent) to be able to bind a corporation (i.e., principal), there must be either actual or apparent authority to act. Actual authority can be express or implied. Express authority derives from the express agency agreement between the two parties. Implied authority is present when the agent has a reasonable belief that they have the power to take the action in question based on the principal's conduct (i.e., past dealings, necessity, emergency, etc.). Here, the facts do not state whether Palmer had actual authority to shift corporate operations into another industry. Normally, the president of a corporation has implied authority, if not actual authority, to enter into business transactions with other entities. However, because Corp has a limited purpose to manufacture televisions, it is unlikely that Palmer had a reasonable belief that he could move Corp into the bicycle manufacturing business. In fact, he reasoned that no one would care once his actions proved to be profitable. As such, Palmer probably did not have a reasonable belief based on Corp's conduct that he had the implied authority to

take the course of action he did. Absent express authority, which is unlikely given the specific purpose of Corp, he probably will not have a justification for his actions.

Palmer could also argue that he has apparent authority to act. Apparent authority is present when a third party reasonably believes that an agent has the authority to take a certain action based on the principal's conduct. Here, apparent authority is unlikely because Corp has a specific purpose, so any third party that dealt with Palmer could not have a reasonable belief that Palmer had authority to enter into the bicycle manufacturing business. Thus, Palmer likely did not have apparent authority either.

Furthermore, he will be liable for the transactions because he acted without actual authority.

Palmer could argue that Corp has ratified his actions, and therefore, Esgar is not able to enjoin Palmer's actions. A board of directors can ratify a transaction if they expressly accept it by way of a board resolution, or if they accept the benefits of the transaction. Here, the facts do not state that the board has made any board resolution or otherwise accepted the benefits of Palmer's actions. Thus, the board of directors likely did not ratify Palmer's actions.

4. Damages Against Palmer

Derivative Suit

Shareholders can bring actions directly when their rights as shareholders have been infringed. Additionally, a shareholder may bring forth a derivative suit on behalf of the corporation when the corporation is harmed because of an action taken by a director or officer. To be able to bring forth a derivative suit, a shareholder must have standing,

must be able to adequately represent the corporation's interests, must be a shareholder through the duration of the litigation, and must file a demand on the corporation's board of directors to take action. A shareholder must wait ninety days after making demand on the board to take action before filing a suit. In some states, the demand requirement is not required if making such a demand would be futile or if irreparable harm will result. A shareholder has standing to sue if they owed stock in the corporation when the transaction or conduct occurred. Here, Esgar has standing to sue because he has been a shareholder since its inception. Furthermore, nothing in the facts suggests that he won't be able to adequately represent Corp's interests.

The facts do not state that Esgar has made a demand on the Board to take action against Palmer for his acts. However, Esgar can argue that waiting 90 days until the Board decides whether it will take action or not can lead to irreparable harm to him as a shareholder. If a court accepts this argument, Esgar will be able to successfully bring forth a derivate suit against Palmer so long as he remains a Corp shareholder throughout the litigation.

Note that, in the event that Corp wins the suit, Esgar will not be entitled to any damages. Damages will be awarded to Corp. However, Esgar will be able to have his legal fees paid for.

QUESTION 5

Hari and Wanda were married to each other for 20 years, being domiciled in State X (a non-community property state) for the first 15 years, and thereafter, until Hari's death, being domiciled in California for 5 years.

At Hari's death in 2020, two documents were submitted for probate:

1. A formal will signed by Hari and Witness One on June 1, 2018 and signed by Witness Two on June 3, 2018. Both witnesses were disinterested. This document left all of Hari's community property to Wanda, but did not mention any separate or quasi-community property.

2. An undated pre-printed will form that had printing at the top, declaring that it was intended to be a will. On the form Hari had written, in his own handwriting, "All of my separate property and 25% of my community property goes to my son, Samir." Hari signed the will form, but no witnesses signed it, and there was no date on the form.

Hari had full mental capacity throughout his life.

At his death, Hari's property consisted of:

A. Separate property worth $100,000;

B. Community property – Hari's half being worth $50,000;

C. California land worth $100,000, which Hari had bought with his earnings while he and Wanda were still living in State X. In 2017, without Wanda's written consent, Hari gave this land to himself and his daughter, Deepa, as joint tenants on her birthday.

What rights, if any, do Wanda, Samir and Deepa have in Hari's estate? Discuss.

Answer according to California law.

QUESTION 5: SELECTED ANSWER A

What rights, if any, do Wanda, Samir, and Deepa have in Hari's Estate?

Wanda will have a right to all of Hari's community property, as well as a one-half interest in the California land. Samir will have a right to all of the separate property, worth $100,000. And lastly, Deepa will have a one-half interest in the California land.

Hari's Death in 2020

At his death, Hari left behind a formal will and a holographic will. The validity of each will be discussed in turn.

Will Witnessing Requirements

To be a valid will in California, certain formal witnessing requirements must be met. There must be: (1) a signature by the testator or someone else at the testator's direction; (2) in front of, or previously signed and then acknowledged in front of; (3) two disinterested witnesses; (4) who sign in the testator's lifetime; and (5) who understand that the document that they are signing is a will.

Here, Hari's will seems to comply with nearly all the formal statutory requirements, but there may be some doubt as to the complete adherence to formality because of the witnesses' signatures. It appears that one witness signed on June 1, 2018, and the other on June 3, 2018. These signatures are within Hari's lifetime because he died in 2020. However, there is no requirement that the witnesses sign at the same time, and no facts indicate the witnesses did not witness actual signing or acknowledgement at the same time. If the reason for these two dates is that Hari did not either sign his will in front of them at the same time or acknowledge the signature in front of them at the

same time, then the will may fail the formal witnessing requirements.

Substantial Compliance Doctrine

In an event where the formalities of witnessing requirements are not perfectly met, the proponent of the will may still be able to have the will properly probated if they are able to show substantial compliance with the witnessing requirements and that the testator intended the document to be their will.

Here, if there is some doubt raised as to the witnesses' signatures, the proponent of the will should be able to show intent by Hari that this document be his will, in part because of how closely he followed the strict requirements.

Thus, this will is valid despite any perceived inadequacies in the witnessing requirements; it is valid and Wanda has interest in the will.

Holographic Wills

A holographic will is a handwritten will and it does not necessarily need to follow the same formal requirements as a typed will. A holographic will is valid if it contains: (1) a signature by the testator (in whatever marks the testator intended to be a signature); (2) in the testator's own handwriting; (3) and the will contains the material provisions. Material provisions are the beneficiaries and the gifts to be distributed. A date on a holographic will is very helpful to understanding the disposition of property but is by no means necessary to finding a valid will.

Here, the undated pre-printed will form is signed by Hari and written in his own handwriting, which satisfies the first few requirements. Additionally, the will names the beneficiaries "my son, Samir" and the gifts to be bequeathed, "All of my separate

property and 25% of my community property," which successfully handles the material provisions requirement. Samir will likely be the proponent of this will, as he would want to obtain the property, and he will have a successful claim to the estate.

However, Samir will run into problems with the gift of community property because it is inconsistent with the other will from 2018. Unless he can prove that the holographic will came after the formal will and revoked the community property clause, he will be unable to assert rights to that part of the estate.

Revocation

A will or its clauses may be revoked physically, expressly, or impliedly. Physical revocation may be some physical act, such as tearing, crossing out, obliteration, destruction, or burning. Express revocation occurs where a subsequent will specifically disavows a previous will. Implied revocation occurs where a subsequent will contains clauses or gifts which are inconsistent with the previous will, such that they cannot both exist at the same time. In these cases, the latter will controls.

Here, the formal will leaves all community property to Wanda, but the holographic will leaves 25% of the community property to Samir. Because the holographic will has no date, the courts will probably not consider it to be the "second will," and will probably consider the dated will's disposition of the conflicted property as being superior. As such, the terms of the formal will were probably not "revoked".

Thus, the courts will likely distribute the community property solely to Wanda.

Conclusion as to Samir

In conclusion, Samir will have a right to all of Hari's separate property at the time of his death, in the amount of $100,000.

Capacity

A testator must have proper mental capacity when making their will. This means they must: (1) be over 18; (2) be of sound mind; (3) understand the nature of their assets and the extent of their bounty (those who could possibly receive under the will); and (4) understand that they are creating a will.

Here, the facts state that Hari had full mental capacity throughout his life, so his disposition of property would be tough to challenge. The fact that he left inconsistent terms in his wills does not sufficiently demonstrate a failure to understand the nature and extent of his assets, and so a challenge to capacity.

Thus, capacity is likely a non-issue.

California Community Property

California is a community property state. This means that all property obtained during the marriage is presumptively community property. All property obtained before and after the marriage is separate property. Community property includes wages of a spouse, in addition to the fruits of a spouse's efforts and labor. Furthermore, title alone nor change in nature of the property will not determine the characteristic of the asset. Where the asset is unclear, courts will "trace" the funds used to purchase a property to determine whether it is community property or not. Quasi-community property is any property obtained in a non-community property state, which would be community property had it been obtained in California.

California community property laws take effect at either death or divorce.

Here, Hari and Wanda lived in State X, a non-community property state, for 15 years,

and then eventually in California for 5 years whereupon Hari died. Because Hari died in California, certain property will be administered under California community property laws. Hari purchased California land worth $100,000 with the earnings he made in State X. It appears that Hari had purchased this land and put title in his name alone, using funds that he earned solely on his own, which is a valid disposition of separate property in State X. However, because he retained his interest until death and he died in California, the land will become quasi-community property.

Thus, the land is quasi-community property at Hari's death.

Gifts During the Marriage

Where one spouse wishes to gift community property to someone outside the marriage, the spouse must obtain the written consent of the other spouse to make such a gift. Failure to obtain consent gives rise to the non-gifting spouse to demand reimbursement to the community, or to refuse the gift altogether.

Here, Hari gifted a one-half interest in California land to his daughter, which was quasi-community property at his death, but at the time of the gift it was separate property. Because the funds can be traced back to his separate property earnings in State X, and he had neither died nor divorced in 2017, the property was still separate property.

Thus, Hari did not need Wanda's consent to make the gift to Deepa.

Joint Tenancy with Right of Survivorship

A joint tenancy with right of survivorship occurs where two or more tenants have simultaneous interest in: (1) time; (2) title; (3) interest; and (4) possession. When one joint tenant dies, the other receives the ownership interest that the other one had. This

interest cannot be disposed of by will. There are four ways to sever a joint tenancy: inter vivos conveyance, contract, mortgage in a title theory jurisdiction, and agreement. Under the *Strawman* rule, a self-conveyance does not break joint tenancy, even though it is an inter vivos conveyance because it prevents the needless complication of someone transferring land to a third person and simply transferring it back to oneself.

Here, in 2017 Hari created a valid joint tenancy with right of survivorship with his daughter, which was within the time of the marital community (2000 to 2020). Although an inter vivos conveyance may sever a joint tenancy, it is doubtful that the self-conveyance would qualify as a severance due to the *Strawman* rule.

Under normal circumstances, at Hari's death the property interest would fully vest in Deepa as his survivor. However, because of the *Clawback* rule, this situation must be examined more closely.

Clawback Rule

Where quasi-community property owned by a deceased spouse and given away without paid-for consideration, but while retaining some ability to exercise ownership or control over the property (such as a trust or joint tenancy property ownership), the surviving spouse may "claw back" the property to their own possession as community property at the death of the spouse.

Here, Hari gave the half-ownership in the California land to Deepa as a gift for her birthday. Because he gave it to her as a gift, there was no paid-for consideration. Further, because he maintained a one-half ownership in the property, he maintained ownership and possession of the property until his eventual death in California. Once he dies, California community property rules apply, and Wanda will be able to reclaim his

quasi-community property ownership in the property as her own because no consideration was paid in the conveyance.

Thus, Wanda owns a one-half interest in the California land as tenants in common with Deepa.

Conclusion as to Wanda

Thus, Wanda has an interest in all of Hari's half of the community property and a one-half interest in the California land worth $100,000 (her share $50,000).

Conclusion as to Deepa

Pretermitted Children

A child who is unintentionally left out of a will is nevertheless able to have rights in the will and inherit some of their parent's property. However, a pretermitted child will not be able to recover when: (1) the testator intentionally left the child out of the will; (2) the testator left a sizable estate to the child's parent; or (3) the child is provided for outside the will, such as with a trust.

Here, Deepa was not left anything under either will, and all of Hari's property has been disposed of, so she may challenge the will claiming she is pretermitted. This argument would likely fail as she was provided for outside the will in $50,000 worth of land, and her mother has received a sizable estate from Hari which could be used to provide for her. Also, as mentioned above, Hari had full mental capacity so he probably did not leave her off the will unintentionally.

Thus, Deepa is likely not a pretermitted child and has no interest in the estate.

QUESTION 5: SELECTED ANSWER B

How is community property treated in California?

California is a community property state in which there is a presumption that all of the property that is acquired during the marriage will be considered to be community property. Upon death, each spouse may only freely transfer or will away one-half of the community property. Separate property is all the property that was acquired either before marriage, after marriage, or as a result of earnings of separate property. A spouse has full disposition of this property upon his death.

Here, Hari has $50,000 worth of community property and the distribution is discussed below. Hari also has $100,000 of separate property, which is discussed in its disposition below.

Was there a valid will in 2018?

A valid will has the following requirements: (1) there must be a writing concerning the disposition of property upon death; (2) the writing must be signed by either the testator or by someone in the testator's presence and at their direction; (3) there must be at least two disinterested witnesses who were both present contemporaneously at the time that the testator signed the will, and they must then (4) both sign the will at some point during the testator's lifetime; and (5) they must understand when they are signing the will that the document that they are signing is the testator's will. A valid will does not have to dispose of all of a decedent's property, as any remaining parts of the property will go through intestacy. Additionally, even if there was not a valid witness requirement that was met, after 2009, as long as the proponent of the will can show by clear and

convincing evidence that the testator intended the document to be his will at the time that he signed it, then the will is still able to be probated.

Here, there was likely a valid will from Hari that he made on June 1, 2018 because there was a writing concerning the disposition of his property that he signed on June 1, 2018, and the facts state that the witnesses both signed the will before Hari's death in 2020, and because the last signature was on June 3, 2018. Additionally, the facts state that Hari was competent at all times when he disposed of his property. Even though Samir might argue that there was nothing in the facts to indicate that both of the disinterested witnesses were contemporaneously present at the time that the will was actually signed by Hari, even if they were not both present, given that Hari was of full mental capacity through his life, the proponent (Hari's wife) would likely be able to show that Hari intended the document to be his will at the time that he signed it.

Thus, here, Hari had a valid will in 2018.

Was there a valid Holographic will?

California allows testators to use holographic wills as wills and as codicils; all that they require is that the material terms of the will must be in the testator's handwriting and that the will be signed by the testator in his own writing. The material terms are usually considered to be who is getting the property and what amount of the property they are getting. Holographic wills do not have to dispose of all of the decedent's property in that instrument and they do not have to be dated. However, if the holographic will is not dated and there is another will that conflicts with the undated holographic will, then the dated will is likely to prevail unless there can be clear and convincing evidence that the other will was made after.

Here, it is likely that Hari's undated will on the pre-printed will form would have been a valid will because Hari wrote the material terms of the will in his own handwriting, stating that all of his separate property was going to his son and that 25% of his community property would be going to his son as well. The holographic will was signed by Hari in his own writing. However, because the holographic will is undated there will be a problem with the conflicting terms in the holographic will and the 2018 will regarding who gets the community property because the 2018 will that is dated states that Wanda gets all of the community property.

Therefore, unless Samir can rebut the presumption and show clear and convincing evidence that the undated holographic will was created after the 2018 will, Samir will only take the separate property gift under the valid holographic will.

<u>If the holographic will was shown by clear and convincing evidence to be made after the 2018 will then who would take the 25% of the community property?</u>

A party may revoke their will by a subsequent will, codicil, or valid holographic will as long as they can show that they had an intent to revoke, and as long as they followed the proper will requirements. Then any subsequent will, codicil, or holographic will that is made that directly conflicts with a prior will takes effect over the prior inconsistent provision.

Here, in the (unlikely) event that Samir could prove by clear and convincing evidence that Hari made the holographic will after the 2018 will, then the subsequent holographic will would revoke the 25% gift of community property to the mother.

<u>Who would get the Quasi-Community Property Real Property Upon Hari's Death?</u>

What is Quasi-Community Property?

Quasi-community property is all property that was acquired while living in another state that would have been considered to be community property had the spouses been domiciled in the state of California at the time of the acquisition of the property. If a spouse has quasi-community property and then dies while domiciled in California, during the spouse's lifetime, the quasi-community property will be treated as separate property. However, upon dissolution it will be treated as community property and, upon death, all personal property will be treated as community property. All real property will be governed by the state in which the property resides.

Here, the house would have been treated as quasi-community property because the house was purchased by Hari with his earnings, which would be presumed to be community property as stated above. Not only did Hari purchase the property with his marital earnings, but he also purchased the property while married and living in State X. Because he purchased the property while married and living in another state, it would have been considered to be community property had they been living in California at the time of purchase, and thus the property would be considered to be quasi-community property at death, but separate property during his lifetime.

Was there an illusory transfer of the quasi-community property house during Hari's lifetime?

Generally, QCP is treated as separate property during a marriage, which means that the owning spouse is free to sell or manage the property how they would like. However, there is an exception if there is an illusory transfer. There will be an illusory transfer of quasi-community property if: (1) the decedent dies while domiciled in the state of

California; (2) the spouse sold the property for less than its fair or reasonable value or gave it away; (3) did so without the other spouse's consent; and (4) the decedent spouse retained some control over the quasi-community property by “keeping their hooks in the property,” either by retaining some sort of right of reentry in the property, joint title in the property, or retaining some other usage. If there is an illusory transfer of quasi-community property, then the non-transferring spouse can demand back up to one-half of the QCP after the death of the decedent spouse. If there is a right of survivorship that is granted to another party, which gives joint title to both holders and then avoids probate altogether, courts usually consider this to be a means to retaining control over the property.

Here, Deepa is likely going to try and argue that she has a right to the real property in California because Hari granted himself and Deepa a right of survivorship on her birthday. Thus, Deepa would claim that the real property will pass over probate and go straight to her upon Hari's death. However, Wanda is likely to argue that Hari's transfer of the real property was an illusory transfer because: first, Hari died while domiciled in California; second, Hari gave the property away to Deepa as a gift and thus it was given away for less than substantial value; third, Wanda did not provide her consent or agreement to the transfer of the real property. Thus, Wanda would claim that, under the illusory transfer rules, she is entitled to one-half of the real property located in CA and thus should get $50,000 worth of the land. Given that the property was given away for free and without Wanda's consent, the court is likely to agree with Wanda that this was an illusory transfer.

Thus, there would be an illusory transfer and Wanda and Deepa would each get one-

half of the cabin, both getting $50,000 and they will each own the property as tenants in common.

Who gets what share of the property?

In light of rules stated above, the following is the likely disposition of the property: (A) First, regarding the $100,000 of separate property, this will all go to Samir through the holographic will; (B) Second, regarding Hari's $50,000 of community property, this will all go to Wanda, unless it can be shown by clear and convincing evidence that the holographic will was made after the 2018 will; and (C) third, regarding the California property, one-half (or $50,000) worth will go to Wanda and one-half (or $50,000) worth will go to Deepa.

Feb 2022

California Bar Examination

Essay Questions and

Selected Answers

The State Bar of California

OFFICE OF ADMISSIONS

ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2022

CALIFORNIA BAR EXAMINATION

This publication contains the five essay questions from the February 2022 California Bar Examination and two selected answers for each question.

The selected answers are not to be considered "model" or perfect answers. The answers were assigned high grades and were written by applicants who passed the examination after the First Read. They are reproduced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. These answers were written by actual applicants under time constraints without access to outside resources. As such, they do not always correctly identify or respond to all issues raised by the question, and they may contain some extraneous or incorrect information. The answers are published here with the consent of the authors.

Question Number	Subject
1.	Criminal Law and Procedure
2.	Community Property
3.	Torts / Remedies
4.	Evidence / Professional Responsibility
5.	Business Associations / Remedies

ESSAY QUESTION INSTRUCTIONS

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little or no credit. State fully the reasons that support your conclusions and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

Q1 Criminal Law and Procedure

Jim and Fred armed themselves with handguns and drove to a store on Avon Street. They both went into the store, drew their guns, and demanded that Salma, an employee, give them the store's money. After Salma handed Jim the money, he nervously dropped his gun. The gun discharged when it hit the floor, and the bullet hit and killed Chris, a store customer. Salma then got a shotgun from under the counter and shot Fred, killing him. Jim picked up his gun, ran out of the store, and drove back to his apartment.

Later that evening, Jim saw Salma while walking down Park Street. Thinking that he could eliminate her as a witness, Jim shot at Salma with his gun, but the bullet missed her. Jim then drove away in his car.

A few minutes later, Police Officer Bakari saw Jim driving down the street. Officer Bakari, who had no knowledge of the events at the store or on Park Street, pulled Jim over because Jim looked nervous. When Jim got out of his car, Officer Bakari noticed a bulge under his shirt. Officer Bakari then patted Jim down and found Jim's gun. Officer Bakari arrested Jim for possession of a concealed firearm and seized the gun.

1. With what crime(s) could Jim reasonably be charged regarding the events at the store? Discuss.

2. With what crime(s) could Jim reasonably be charged regarding the incident on Park Street? Discuss.

3. Under the Fourth Amendment to the United States Constitution, can Jim successfully move to suppress Jim's gun from being introduced into evidence at trial? Discuss.

Answer A

1. Jim's crimes at the store

Conspiracy

A conspiracy is an agreement between two or more people to commit a crime. A conspiracy requires 1) an intent to enter into an agreement, 2) an intent to agree, and 3) an intent to carry out the target offense. Most modern jurisdiction also require an **overt act** which sets the conspiracy in motion. A conspiracy punishes the agreement. However, a conspirator will be liable for not only the target offense, but for all substantive crimes that are the natural and foreseeable consequences of the target offense (Pinkerton rule).

Here, Jim(J) will likely be found guilty of a conspiracy with Fred(F) to rob the store. 1) J and F "Armed themselves" with guns and drove to the store. This act of supplying a dangerous weapon, coupled with driving to the store is circumstantial evidence of J and F's intent to enter into an agreement to rob the store. Thus, they intended to enter into an agreement to commit a crime. 2) They both armed themselves and endeavored on this venture **together**. This further indicates that they intended to agree with one another to fulfill their intent. 3) Finally, the fact that they grabbed weapons and drove to the store evidences an intent to commit the underlying offense of robbery (there is no other logical reason for driving to s tore with likely illegal weapons other than for the purpose of committing some crime). Further, the act of driving to the store will amount to an **overt act** which set this conspiracy in motion.

Therefore, J will likely be charged with conspiracy and will be culpable not only for the underlying offense, but for all crimes which were the reasonable and foreseeable

consequences of committing a robbery.

Assault

Assault is either 1) a failed battery (a non-consensual offensive touching), or 2) an intent to cause imminent apprehension in another of an imminent battery.

In this case, J will also likely be guilty of assault because by drawing his gun and pointing it at Salma (S) and demanding that she give him the money, he intended to put S is apprehension that if she did not comply, she might be shot (which would certainly amount to an offensive, non-consensual touching).

Therefore, J committed an assault.

Larceny

Larceny is the 1) trespassory (without consent), 2) taking, and 3) carrying away (the slightest movement is sufficient) of 4) the personal property or 5) another with 6) the intent to permanently deprive that person of their property.

Here, J also committed a larceny because 1) S did not give voluntary consent when she gave J the money (rather, she was under threat of possible death if she did not), therefore making it trespassory, 2) he took the money when S handed it to him, 3) J carried it away when he "ran out of the store," 4) the property was cash (and therefore personal property), which 5) belonged to the store, not Jim, and 6) J intended to permanently deprive the store of this money because he obtained it by force and ran away. Clearly, he had no intention of returning it.

Therefore, J committed a larceny.

Robbery

Robbery is essentially an assault plus larceny. It is the 1) taking of 2) the personal

property 3) from a person's presence, 4) by force of threat of force, 5) with the intent to permanently deprive that person of their property.

Here, J committed an assault and a larceny and thus also committed a robbery. He 1) took 2) the cash 3) from S, who was in charge of safeguarding it, 4) by threat of force by drawing his handgun and making S believe that she may be shot if she did not comply, and 5) intended to permanently deprive the store of its property because he had no intention of returning it.

Therefore, J also committed a robbery.

Burglary

At common law, burglary was the 1) breaking and 2) entering of 3) the dwelling house 4) of another 5) in the nighttime 6) with the intent to commit a felony therein. However, many jurisdictions have eliminated the breaking and nighttime requirements and expanded "dwelling house" to include a multitude of enclosed structures.

Here, J and F did go into the store with the intent to commit a crime. However, there was no "breaking" because they went during store hours and thus had permission to be on the premises.

Thus, there was no burglary.

Murder (Chris)

Common Law Murder

At common law, murder was the killing of one human being by another human being with malice aforethought. The intent to kill--malice--can take several forms: 1) the intent to kill (express malice), 2) killing with reckless indifference to human life (depraved heart murder), 3) intent to cause great bodily injury (GBI), or 4) felony murder.

1. Express Malice

Express malice requires the intent to kill.

Here, J "nervously dropped his gun" and it accidentally discharged. Therefore, J did not intend to kill Chris.

2. Depraved Heart

Depraved heart murder is a killing with a reckless indifference to an unjustifiably high risk to human life.

Here, J did not kill Chris with indifference to a high risk to human life because he dropped his gun. He did not know the gun was discharge and it was completely accidental. Therefore, he probably cannot be convicted of depraved heart murder.

3. Intent to Cause GBI

Malice can be inferred from the intent to cause GBI.

Again, J accidentally dropped his gun and did not intent to harm Chris and thus did not intent to commit GBI. This type of malice thus does not apply.

4. Felony Murder

Under the felony murder doctrine, malice is implied from the intent to kill the underlying felony. However, many jurisdictions have adopted the Redline theory, which states that a co-felon **cannot be guilty of felony murder for the killing of another co-felon during the commission of the felony by a third party**.

Here, J intended to commit a robbery, as discussed above. In all jurisdictions, a robbery is a felony. Therefore, J can be found guilty of felony murder for any killing that occurs during the commission of the robbery. Chris was a store customer, not a co-felon, so the Redline theory would not bar J from being convicted.

Therefore, J can be found guilty of felony murder of Chris.

First Degree Murder

First degree murder is statutory in nature and most jurisdictions have held that it encompasses 1) premeditated and deliberate murder or 2) felony murder during certain inherently dangerous enumerated felonies (including burglary, rape, arson, robbery, and kidnapping).

1. Premeditation and deliberation

As stated above, the killing of Chris was accidental, so it was not premeditated or deliberate.

2. Felony Murder

Here, the killing occurred during the commission of a robbery--a first degree felony murder offense.

Therefore, J will likely be found guilty of first-degree murder.

Second Degree Murder

Second degree murder includes all murders not in the first degree.

Here, J will not be guilty of second-degree murder because he can be found guilty of first-degree murder.

Murder (Fred)

See rule above.

1. Express Malice

Here, S shot F. Therefore, J did not have intent to kill F.

2. Depraved Heart

Again, because S is the one show shot F, J would not have killed F with a depraved

heart.

3. Intent to Cause GBI

J did not intent to cause F GBI because he is not the one who shot him.

4. Felony Murder

Here, the state will argue that J is guilty of felony murder to F because it was a killing during the commission of a felony. However, if this jurisdiction has adopted the **Redline theory**, then J cannot be found guilty of murder of F because a third party---S--killed a co-felon.

Therefore, assuming the jurisdiction has adopted the Redline theory, J will not be guilty of murder of F.

First Degree Murder

See rule above.

1. Premeditation and deliberation

This was not a premeditated or deliberate murder because J did not plan to kill F.

2. Felony Murder

This was a killing during the commission of an inherently dangerous felony. However, assuming this jurisdiction has adopted the Redline theory, J cannot be found guilty of murder of F.

Second Degree Murder

See rule above.

This is inapplicable because J did not intent to kill F.

2. Jim's crimes on Park Street

Attempted Murder (Salma)

Attempt is a specific intent crime which requires 1) the specific intent to commit the underlying offense and 2) a substantial step toward the commission of that offense (the substantial step element requires that the crime come dangerous close to commission).

Here, J will likely be found guilty of attempted murder of S because 1) he thought he could "eliminate her as a witness" and drew his gun at her, thereby evidencing his intent to kill S so that she could not testify against him. 2) There was a substantial step toward the crime because J actually "shot" and fired his gun at S.

Therefore, J will be guilty of attempted murder of S.

Assault

See rule above.

J will also be guilty of assault because he attempted to shoot S (which would be a harmful or offensive touching, i.e., a batter), but he missed her.

Therefore, this was a failed battery and thus an assault.

3. 4th Amendment Claim

4th Amendment

The 4th Amendment protects against unreasonable searches and seizures. A search without a warrant is per se unreasonable unless there is an exception to the warrant requirement.

Here, J was subject to a stop by the police when he was pulled over and this he was searched without a warrant. Therefore, this stop and seizure is per se unreasonable, and thus a violation of J's 4th Amendment rights, unless there is an exception.

Government Conduct

The 4th Amendment only protects individuals from governmental conduct--it does not

govern purely private behavior.

Here, J was pulled over by a police officer--a government employee. Therefore, this element is met.

Search/Reasonable Expectation of Privacy

A search is a governmental intrusion into an area where a person has a subjective expectation of privacy that society is willing to regard as reasonable, or a search into a constitutionally protected area. In order to assert a reasonable expectation of privacy, and thus have **standing** to make a 4th Amendment claim, the person must have had an ownership or possessory interest in the place searched or item seized.

Here, J has standing to object to the search because he was pulled over in his car which he presumably owned, and thus had a reasonable expectation of privacy in his vehicle (although the courts have held that there is a diminished expectation of privacy in one's vehicle, there is nonetheless some expectation of privacy). Furthermore, J's person was searched during a pat-down and the police officer took an item of personal property from him.

Thus, J has standing.

Warrantless Search

As stated above, warrantless searches and seizures are per se unreasonable without a warrant expectation.

Here, the stop and seizure were without a warrant and is per se unreasonable unless there is an exception.

Vehicle Stops: Reasonable Suspicion

A police officer may pull over a vehicle if they have reasonable suspicion, supported by

articulable facts, that criminal activity is afoot. Whether an officer has reasonable suspicion will be determined based on the totality of the circumstances, although the courts have held that it requires more than a mere hunch.

Here, the officer stopped J because he "looked nervous." The officer had no knowledge of any of the preceding events and thus no basis to believe that criminal activity was afoot. A person "looking nervous" is not enough for reasonable suspicion. There must be **facts** which support the officer's basis for concluding that some criminal activity is happening.

In this case, J's mere "nervousness" likely did not amount to reasonable suspicion such that the stop was unreasonable and thus a violation of J's 4th Amendment rights. However, assuming the stop was not unreasonable, the state must further prove that the officer had grounds to search J.

Warrant Exception: *Terry* Stop and Frisk

A stop and frisk, or *Terry* stop, permits an officer to stop a person whenever they have reasonable suspicion, based on articulable facts, that criminal activity is afoot. If the officer also believes that the person is armed and dangerous, then the officer can conduct a pat-down of their outer clothing in order to search for weapons.

Here, if the officer had reasonable suspicion for the stop, then the frisk was likely a permissible *Terry* frisk because the officer noticed a bulge under J's search. Based on his experience, the officer likely had justifiable grounds for believing that "bulge" could be a weapon, thereby supporting his basis for patting J down.

So long as the court finds that the stop was supported by reasonable suspicion, then the pat-down and seizure of the gun will also be permissible.

Exclusionary Rule/Fruit of the Poisonous Tree

The exclusionary rule is a judge-made doctrine that states that any evidence obtained in violation of a person's 4th, 5th, or 6th Amendment rights is inadmissible (subject to a few exceptions not applicable here). Under the fruit of the poisonous tree doctrine, all secondary evidence obtained as a result of an unlawful search will also be excluded. Here, it is more than likely that the stop of J when the officer pulled him over was unreasonable because it was not supported by reasonable suspicion. Therefore, any evidence obtained as a result of the unlawful search, such as the gun, will also be inadmissible as fruit of the poisonous tree.

Conclusion

Because J was stopped in violation of his 4th Amendment rights, J can successfully move to suppress the gun from being introduced at trial.

Answer B

(I) Events at the Store

Jim could be charged with first- or second-degree murder depending on how a jurisdiction codifies those crimes. He can also be charged with robbery and conspiracy to commit robbery.

Robbery

J committed the crime of robbery. A robbery is the taking of property of another with force. Here, J took property of another, i.e., the cash of the store from the store whose property it was. J also used force to take that property. Specifically, he brandished his firearm, threatening the use of force if Salma the store employee did not comply. Thus, J committed the offense of robbery.

Murder

J committed the crime of murder. He could be found guilty of felony murder (which could be first- or second-degree murder depending on the jurisdiction) or involuntary manslaughter.

A. First degree murder is generally codified as one of two things (a) premeditated, calculated murder that occurs in a calm, dispassionate manner or (b) felony murder.

(a) Premeditated murder. Here, Jim (J) and Fred (F) armed themselves with handguns and drove to a store on Avon Street. They both went into the store with their guns drawn and demanded that the store employee Salma (S) give them money. It does not appear that J and F's intent was to murder anyone, nor did they premeditate committing a murder; rather, they were only interested in obtaining the money from the store. J only killed C when he nervously dropped his gun, and the gun fired a bullet. And F was killed

only when S shot him. Thus, J cannot be convicted of first-degree premeditated murder as he did not premeditate either of those deaths.

(b) Felony murder. Some jurisdictions codify felony murders as first-degree murder. If the state where J and F committed this offense is one of those states, then J could be found guilty of first-degree murder. Felony murder is found when a murder occurs during the commission of certain violent felonies, including burglary, kidnapping, robbery, assault, and rape. This is because the commission of these felonies is dangerous on their own, and it is foreseeable that a death could occur in their commission. To find felony murder, it must be first established that one of these underlying crimes occurred. Here, as discussed above, J intended to commit a robbery and did do so. Thus, the deaths that occurred can be considered under the felony murder rule.

Here, two deaths occurred--those of C and F--which we will discuss in turn. First, as to C's death, C was killed when J nervously dropped his gun and when S was handing J the money he demanded. C's death was not really in furtherance of the commission of the crime--J was already getting the money handed to him and probably would have left after that. And J and F did not point the gun at C or ask C for his money or except C to hand them over the store's money. Nonetheless, it was a reasonably foreseeable consequence of the robbery, given how J and F chose to commit the robbery. J and F both brandished firearms at S. Because they have it pointed at someone and clearly there is no safety on, it is reasonably foreseeable that they would use the firearms in the commission of the offense or even that a firearm may accidentally discharge, harming someone. Thus, J could be found guilty of C's death under the felony murder rule.

As to F's death, there are two theories as to whether J would be liable for it. Under the majority theory, a defendant is not liable of a co-conspirator's death by a third party (such as a victim of the offense, here S). This theory believes that F's death is not foreseeable, since a third party took independent action and caused the death. However, under the minority theory, such an action is foreseeable since the defendant was already involved in such a dangerous offense and any resulting death is foreseeable. Thus, under the minority theory, J would be held liable, but J would not be held liable under the majority view. Accordingly, depending on whether the jurisdiction follows the majority or minority rule, J could also be found liable for F's death.

B. Second degree murder is the codification of common law murder. Common law murder has four variations: (a) a malicious intent to murder another (b) a malicious intent to cause substantial bodily harm (c) a disregard for human life, and (d) murder while committing a dangerous offense (i.e., felony murder).

(a) malicious intent to murder another. It does not appear that J had any intent to murder C. J dropped his firearm and it accidentally discharged. The firearm was not even pointed towards C when he did have it brandished. Thus, J would not be found guilty of second-degree murder under this theory.

(b) malicious intent to cause substantial bodily harm. Again, it does not appear that J had any intent to murder C. J dropped his firearm and it accidentally discharged. The firearm was not even pointed towards C when he did have it brandished. Thus, J would not be found guilty of second-degree murder under this theory.

(c) disregard for human life. Again, it does not appear that J had any intent to murder C. J dropped his firearm and it accidentally discharged. The firearm was not even pointed

towards C when he did have it brandished. Thus, J would not be found guilty of second-degree murder under this theory.

(d) felony murder. As noted above, J could be found guilty of felony murder of C. And depending on the rules of the jurisdiction, he could also be found guilty of murder of F under this theory.

C. Voluntary Manslaughter. Voluntary manslaughter is the codification of murders committed while the defendant is still under the stress of an event. These murders are often described as heat of the passion murders. The prototypical example is when a husband walks in on his cheating spouse and immediately murders the spouse and/or spouse's lover. Here, the murder of F and C did not occur while J was under the stress of any event--the robbery was a pre-planned event between J and F. Thus, J could not be charged with voluntary manslaughter.

D. Involuntary Manslaughter. Involuntary manslaughter can be thought of as criminal negligence. This charge is generally used to charge drunk drivers when they murder someone. Here, it is possible that J could be convicted of involuntary manslaughter. Here, J, in holding the firearm, had a duty to take the precautions that someone holding a firearm should, i.e., hold it steady, don't drop it, keep the safety on until you are ready to discharge. J did none of those things. He did not have the safety on, he did not hold the firearm steadily, thus breaching his duty of care when he dropped it and it discharged. And his dropping of the firearm caused the death of C--but for him dropping it, C would still be alive. Thus, J could be charged under this theory as well for the death of C.

Conspiracy

Also, J could be charged with a conspiracy. A conspiracy is an agreement between 2 or more persons for a criminal purpose to act in furtherance of that criminal purpose. The modern jurisprudence also requires the commission of an overt act in furtherance of a conspiracy. Under the modern jurisprudence, the crime is committed once an overt act has occurred, and the defendants can no longer withdraw from the conspiracy at that point. Here, although there is no written agreement between the J and F (and a written agreement is not required but would help if you're prosecuting these types of crimes), J and F are clearly in agreement that they were going to rob the store. J and F, prepared with guns, armed themselves with firearms and both drew their guns at the store clerk and demanded money. Here, their actions clearly demonstrate they were acting in concert with one another towards to the same agreed upon goal--the commission of a robbery. They have also clearly committed an overt act, in furtherance of their criminal purpose--they drew their guns and demanded money from the store employee S. Upon completion of the overt act, the crime of conspiracy is completed, and neither could withdraw from the conspiracy.

2. Incident at Park Street.

Here, J could be charged for attempt 1st degree or 2nd degree murder. To be convicted of an attempt, a defendant must have the intent to commit a specific offense and take a substantial step in furtherance of that crime. The substantial step need not be criminal in nature, but it must be in furtherance of the offense (i.e., it takes defendant one step closer) and cannot simply be planning or preparation.

Here, J had the intent to commit 1st or 2nd degree murder. Specifically, he had the

intent to commit a premeditated murder (1st degree) or intent to maliciously murder another or cause substantial bodily injury (2nd degree). As to the premeditated murder, premeditation does not need to be a long-drawn out plan. Premeditation can occur instantly so long as defendant has sufficient time to intend to murder before attempting to do so. Here, upon seeing S, J believed that he should murder her to eliminate her as a witness to his robbery and other offenses. J had enough time to come to a decision to murder S in a cool, dispassionate matter. Alternatively, if J did not form the requisite intent and did not have time to premeditate, he could alternatively be charged with murder in the 2nd degree. As discussed above, murder in the second degree includes a malicious intent to kill or to cause substantial bodily harm. J clearly had both of those intents as he hoped to eliminate S as a witness by killing her. Thus, alternatively, if he did not have time to come to a cool dispassionate decision to murder S while he was driving past her, he did have the requisite intent to commit a second-degree murder.
In addition, Jim took a substantial step towards his offense--he actually fired his gun at S hoping to kill her. Even though the bullet missed her and the substantive, underlying crime (murder) was not completed, J completed the crime of attempt when he took this substantial step.
Accordingly, J can be found guilty of attempt murder.

3. Suppression of the Gun

The Fourth Amendment protects against unreasonable searches and seizures. To trigger the protections of the Fourth Amendment, the search/seizure must have been done by a government actor. Here, the search and seizure were done by Officer Bakari (Off B), who works for some type of government entity (either local, state, or federal

police department). And the search that was done was of Jim's person, thus Jim has standing to challenge the seizure of the firearm.

An unreasonable search/seizure is one that is done where an individual has a reasonable expectation of privacy. Those areas include an individual's person and their home. An individual has a lessor privacy interest in their vehicle.

Here, Off B pulled over J because J looked nervous. Off J had no knowledge of the events at the store or on Park Street. Off B just stopped J because J looked nervous. An officer can stop an individual for a reasonable period based on reasonable suspicion that that individual committed a crime. The officer must be able to point to specific articulable facts justifying the reasonable suspicion/stop. Notably, a stop can be pretextual *(see Whren*), but there still must be reasonable suspicion for the stop. Here, at a suppression hearing, Off B would testify simply that J looked nervous. That is not sufficient to justify the stop, because nervousness, on its own, does not suggest any evidence of criminal activity. It is totally possible that J is simply a nervous driver. Accordingly, the stop was in violation of the 4th Amendment. Any evidence that is found in violation of an illegal stop must be suppressed in accordance with the fruit of the poisonous tree doctrine. And accordingly, the firearm would be suppressed. (Also, note that there are no facts that would suggest that the firearm would be found in the normal course in the investigation, negating any exception such as inevitable discovery or collateral source doctrine).

Assuming arguendo that the stop was legal, Off B then did a pat down search of J. It should be first noted that an officer may ask an individual to exit their car during a lawful search. Searches generally need to be done in accordance with a search warrant;

however, there are exceptions to the warrant requirement, including but not limited to a search incident to arrest, exigent circumstances, Terry search, automobile exception, and administrative searches. Here, J was not under arrest at this time, there were no exigent circumstances justifying the search, and there was no administrative search. Off B could try to justify his search under the automobile exception. An individual has a lessor privacy interest in his/her vehicle because vehicles are so regulated. However, to search a vehicle after a lawful traffic stop, an officer must have probable cause that he will find evidence of an offense. (This most commonly occurs when the officer, after a stop, smells drug use or sees drugs/alcohol in plain view). Because Off B did not know of the previous crimes and was only stopping J because he looked nervous, Off B did not have PC that a crime had occurred and could not justify his search. Off B then could alternative try to justify his search as a Terry frisk. A Terry frisk is not a search for evidence of a crime, but a safety pat down to ensure that an individual is not dangerous. TO justify a Terry frisk, the officer must have reasonable suspicion that a defendant is dangerous or trying to flee. Here, Off B would testify that J looked nervous and that he had a visible bulge. There are no facts to suggest that the bulge was in the shape of a firearm or other weapon, however. Also, J looked nervous prior to the stop. Thus, a likely result is that the Terry frisk will be deemed a search without reasonable suspicion and thus found in violation of the 4th Amendment. Thus, the search of J's person was in violation of the 4th Amendment as no exceptions to the warrant requirement apply. Accordingly, because the stop and the search were both in violation of the 4th Amendment, the firearm will likely be suppressed.

Q2 Community Property

Harry had premarital savings of $10,000 in a bank account when he married Winona in California in 2015. After the wedding, Harry started working at a new job and deposited his $3,000 salary check into the account. Shortly afterward, he paid $2,000 for rent and $2,000 for living expenses with checks drawn on the account. He then bought $1,000 in Acme stock in his own name with another check drawn on the account. The Acme stock increased in value over time.

During the marriage, Winona purchased disability insurance out of her salary. She later became disabled and could no longer work. As a result, she became entitled to monthly disability insurance payments, which will continue until she reaches the age of 65.

Thereafter, Harry and Winona decided to live separately, but to go to counseling with the hope of reconciling. After Harry moved out of the family home, he used his earnings to gamble at a local casino, winning a large amount of money with which he opened an investment account in his own name. Harry did not tell Winona about his winnings or investment account because she did not approve of gambling.

Subsequently, after a period of counseling, Harry and Winona concluded that they would not reconcile and Harry filed for dissolution. A few days later, Harry took out a loan to pay for a sailboat, hoping that sailing would relieve the stress of the divorce.

What are Harry's and Winona's rights and liabilities regarding:

1. The Acme stock? Discuss.

2. Winona's post-separation disability insurance payments? Discuss.

3. The investment account? Discuss.

4. The loan for the sailboat? Discuss.

Answer according to California law.

Answer A

INTRODUCTION

California is a community property state. The marital community begins upon the formation of a valid marriage and terminates upon permanent separation, divorce, or death of a spouse. During marriage, all earnings and income of both spouses, and all property acquired by either spouse during the marriage with community funds, are part of the marital community and are considered to be community property ("CP"). All income and property owned by either spouse from before marriage, as well as earnings through inheritance, gift, or bequest during marriage, are separate property ("SP") of the recipient spouse. All debts and liabilities of both spouses from before and during the marriage are generally presumed to be CP. All debts and liabilities of each spouse after permanent separation or dissolution are generally SP.

1. ACME STOCK

Presumption--CP

All property acquired by either spouse during the existence of a valid marriage is generally presumed to be CP. In this case, Harry acquired the Acme stock after the formation of the marital community. Thus, the stock will generally be presumed to be CP, although Harry will try to rebut this presumption.

Action: Titling Stock in Harry's Name Alone/Transmutation

If property is acquired as community property, the action of titling the property in one spouse's name alone will not suffice to change the nature of the property. Since 1984, in order to change the nature of acquired property from community property to separate property, there must be an express writing by the adversely affected spouse assenting

to the change in nature of the property.

In this case, Harry may attempt to argue that the Acme stock is his separate property because it is titled in his name alone. However, that alone is not sufficient to change the nature of the property. Moreover, the facts do not indicate that there is any writing by Winona acknowledging the nature of the change in status of the stock, or that she even knew about the existence of the stock. As such, Harry's titling the property in his name will not suffice to rebut the presumption of it being community property, without more.

Source: Harry's Bank Account

Harry will argue that the stock is his separate property because the purchase was conducted via a bank account that contains his premarital savings of $10,000. Savings from before marriage are Harry's SP. However, the facts also indicate that following the marriage, Harry deposited $3,000 of his salary into the account. All wages and salaries earned by both spouses during the marriage are for the benefit of the community and are community property. Thus, because Harry commingled community property and separate property in his bank account, he may attempt to rebut the presumption of community property through tracing.

Tracing

When separate property and community property are commingled, a spouse may establish that the source of funds was separate property through tracing.

Direct Tracing

A spouse may trace the source of funds to separate property by directly linking a deposit of separate property to a purchase, so long as the spouse had intent to purchase the property as separate property.

In this case, Harry had deposited $3,000 of CP into the account before making the $1,000 purchase of stock. All of the other deposits seem to have been made prior to the marriage. Thus, Harry will be unable to directly trace the source of the funds to SP. Moreover, the facts are unclear as to whether Harry intended the stock to be SP when he purchased it. He placed the stock in his own name, but without more, he probably cannot establish intent to keep the stock as SP.

Exhaustion

Alternatively, a spouse may establish that any CP funds in a commingled account were exhausted prior to the purchase of purported SP.

In this case, Harry deposited $3,000 of CP into the bank account. He then paid $2,000 for rent and $2,000 for living expenses. Rent and living expenses of spouses during the marriage are CP. When a commingled account is used to pay for CP liabilities, it is presumed that CP funds are withdrawn first, followed by the spouse's SP. Because the total of CP costs withdrawn from the account are $4,000, which exceeds the CP deposit of $3,000, Harry will be able to establish that the CP funds in his bank account were exhausted prior to the purchase of the stock, and that the source of the funds can be adequately traced to Harry's pre-marriage SP savings.

Distribution

The Acme stock is Harry's SP, because the CP funds in the account were exhausted before he purchased the stock, and he will be able to establish the source of the funds for the stock as his SP savings. As such, the stock, along with the increase in value that occurred during the existence of the marriage, will be assigned to Harry upon divorce.

2. WINONA'S POST-SEPARATION DISABILITY PAYMENTS

Disability Insurance--Presumed CP

The disability insurance was purchased by W during the existence of the marriage. Moreover, the source of the payment of the insurance policy was W's salary, which is CP. Thus, the insurance policy qualifies as CP.

Disability Payments

When a spouse receives disability or other payments, the court will first look to whether the payments are intended to compensate for past work or to replace future earnings. In this case, W purchased the insurance policy during the marriage with CP, as discussed above. The facts indicate that the disability payments will continue until W is 65 years old. Thus, it appears that the disability payments are meant to replace future earnings, rather than compensate for past earnings. As such, all payments received by W prior to permanent separation are CP, as they acted as a replacement for W's earnings during the existence of the marriage.

When did separation occur?

Since 2017, permanent separation occurs in California when one spouse indicates intent to permanently end the marriage, and that spouse's behavior is consistent with that intent. Living separately is not required but will be considered when examining the intent and behavior of the spouses.

In this case, the facts indicate that H and W decided to live separately but continued to go to counseling in the hopes of reconciling. After a period of counseling, H filed for dissolution after deciding that they could not reconcile. Even though the spouses were living separately, they were attempting to reconcile. As such, it cannot be said that

either spouse had intent to permanently end the marriage at that point. However, at a later point, W and H decided that they could not reconcile, and H then filed for dissolution. Because H's filing for dissolution is consistent with his intent to permanently end the marriage, the court will determine that permanent separation occurred at that point. Prior to H filing for dissolution, permanent separation had not occurred, even though the spouses were living separately.

Disability Payments Post-Separation

When disability payments that replace future earnings are received by a spouse after permanent separation, those payments are that spouse's SP. In this case, W will continue receiving disability payments until she is 65. The payments she receives after dissolution will replace earnings that she would have acquired through labor. All payments received after H filed for dissolution will be considered to be W's SP.

Distribution

All of W's disability payments prior to H filing for dissolution are CP and will be assigned to the marital estate. All payments received after H filed for dissolution are W's SP and will be assigned to her.

3. INVESTMENT ACCOUNT

Presumption=CP

As discussed above, the marital community did not end, and permanent separation did not occur, until H filed for dissolution. H may argue that the parties were separated and that the account is his SP. However, the purchase of the investment account occurred during the existence of the marriage because the spouses were attempting to reconcile at that point. As such, it is presumed to be CP.

Action: Titling Account in Own Name/Transmutation

See rule above. The fact that H titled the investment account in his name alone is not by itself sufficient to change the nature of the account. Moreover, the facts do not indicate that there is any writing by W acknowledging the change in character of the property, or that she knew about the account at all. Rather, the facts indicate that H did not tell W about the account because she did not approve of gambling. Thus, H will need to provide more facts in order to establish a change in the nature of the account.

Breach of Fiduciary Duty

Spouses are considered to be fiduciaries of each other and owe each other the highest duties of good faith and loyalty. When a spouse breaches his fiduciary duty, a court may take that into account when distributing community property and may assign the non-breaching spouse a higher share of the CP or take other action consistent with remedying the breach.

In this case, the facts indicate that H won a large amount of money gambling at a casino. Because W does not approve of gambling, H declined to tell her about the winnings and instead opened an investment account in his own name. The court will likely find that this action constituted a breach of H's fiduciary duty to W. H had a duty to keep W apprised of his financial status, and not to take actions in order to disadvantage W. When H opened the account without telling W, he was presumably attempting to hide earnings from W in order to benefit himself in a possible future divorce. This is a clear breach of fiduciary duty.

Distribution

Because the investment account was purchased during the existence of the marriage

and there are no facts indicating that a valid transmutation occurred, the account is CP and will be divided equally between the spouses upon divorce. However, because H breached his fiduciary duty to W by refusing to tell her about the account and attempting to hide its existence from her, the court may determine that W is entitled to a larger share of CP.

4. LOAN FOR THE SAILBOAT

Debts

All debts and liabilities of both spouses before and during the existence of the marriage are CP. All debts and liabilities by spouses after divorce or permanent separation are that spouse's SP. An exception exists if the debt or liability is for necessaries of life, such as food or medical expenses.

End of Marital Community

See discussion above. Although H and W started living separately prior to H filing for dissolution, the court will determine that the marital community did not end until H filed for dissolution, because prior to that point the spouses were attempting to reconcile.

Action: Acquiring the Loan After Filing for Dissolution

Debts acquired by both spouses after permanent separation or dissolution are SP of the debtor spouse. In this case, the facts indicate that H took out the sailboat loan a few days after filing for divorce. Even though the marriage had not been formally dissolved at that point, the fact that H and W had decided that they could not reconcile, and that H had filed for dissolution indicates that permanent separation had occurred. Thus, the loan will be assigned to Harry as his SP.

Liability of H's SP for Loan

Because the loan is H's SP, his SP will be liable for payment of the loan.

Liability of CP for Loan

If a loan is acquired by a spouse following permanent separation, the loan will be the debtor spouse's SP, and the CP will not be liable for the debt. An exception exists for necessaries of life, for which CP may be liable even following permanent separation. H may attempt to argue that the sailboat loan qualifies as a necessary, because it helped him to cope with the stress of the divorce. However, the court will not accept that argument, as the loan was not necessary to sustain H's health or life.

Liability of W's SP for Loan

If a debt acquired after separation may be satisfied from CP, the non-debtor spouse's SP may also be reached if all other funds are exhausted. The non-debtor spouse may protect their SP from liability by keeping their money in a bank account titled in their name alone and to which the debtor spouse does not have access.

In this case, as discussed above, the CP is not liable for H's sailboat loan, because it was acquired after separation and is not a necessary of life. As such, W's SP will also be protected from liability for the loan.

Distribution

The loan is H's SP and will be satisfied from his SP funds.

Answer B

Community Property Essay

California is a community property state. This means that the marital economic community begins at marriage and ends at divorce, or permanent separation, or the death of a spouse. All earnings made during a valid marriage are considered community property (CP), and all things purchased with those earnings are also considered CP. Property acquired before marriage or after divorce or permanent separation is presumed separate property (SP). Additionally, all property acquired during marriage by either gift or inheritance are considered SP.

Valid Marriage

In California, a valid marriage requires (1) consent, (2) capacity, and (3) legal formalities. Here, the facts simply state that Harry (H) and Winona (W) were married in California in 2015. Therefore, it is presumed they had a valid marriage that began in 2015.

Permanent Separation

Permanent separation ends the marital community. This occurs when one spouse (1) communicates to the other spouse a desire to end the marital community, and (2) conduct in conformity with that desire. Permanent physical separation is no longer required. Here, at some point, H and W decided to separate but continued to go to marital counseling before there was a final dissolution of the marriage. Although there was a physical separation between H and W when H moved out of the family home, the fact that both sought marriage counseling indicates that they wanted to work things out and there was no set intent on ending the marital community with conduct in conformity

with that intent. Therefore, although H and W physically separated, it is unlikely that the marital community ended until there was a final dissolution.

1. Acme Stock

CP Presumption

The general presumption is that all property acquired during a valid marriage is CP. This presumption can be rebutted by a preponderance of the evidence that the property acquired was traced from a separate property source or an agreement between the spouses to keep certain property separate.

Here, the Acme stock was purchased after H and W were married. Therefore, the general presumption is that it is CP.

Earnings

A spouse's labor, skill, and effort are considered community assets and therefore, the earnings of a spouse during a valid marriage are CP, absent agreement between spouses to contrary. Here, Acme stock was purchased from funds in bank account that had H's earnings deposited into it, and those earnings were acquired during marriage. Therefore, account that purchased Acme stock had CP earnings in it. But H's account also had premarital savings of $10,000 which are H's SP. H will likely want to claim Acme stock as his own SP and must therefore rebut CP presumption by tracing the purchase of stocks to his SP.

Tracing to SP

CP presumption can be rebutted if spouse demonstrates that funds used to make purchase came from SP source. If this evidence is proffered, then spouse is entitled to refund of SP contribution but not any increase in the value of the property acquired with

SP funds.

Here, H will want to argue that Acme stock is his SP. Since it was acquired during marriage, H must overcome CP presumption. Since H purchased stock from commingled account that had both CP and SP in it, H can only establish Acme stock as his SP if he can show direct tracing or exhaustion method.

Direct Tracing

Direct tracing requires that the spouse show that the funds used from commingled account to purchase property came from a SP deposit, and CP funds were not used. It is not enough for the spouse to show that the account had more SP funds than CP funds at time of purchase. Generally, a spouse can prove direct tracing by keeping conspicuous records of the deposits and credits of the account and their characterizations (CP or SP). With this information, the spouse must then show that he had the intent to make purchase with SP funds and the proof of the SP deposits and credits that demonstrate such SP funds were in fact used to make the purchase.

Here, H had $10,000 SP funds in account and H also deposited CP earnings into same account. Facts are unclear as to whether H intended purchase of Acme stock to come from SP funds in account, and the facts are also silent as to H's accounting practices that would help corroborate that needed intent. For these reasons, it is unlikely that H can demonstrate direct tracing.

Exhaustion Method

The exhaustion method of tracing requires that the proponent spouse show that the commingled account was depleted of all CP funds at the time of the purchase, and the only remaining funds in the account to make the purchase were SP funds. It is

presumed that family expenses are paid with CP funds first, and then SP funds. Here, account had $10,000 SP, then H deposited $3,000 salary check (CP), and thereafter withdrew $2000 for rent and $2,000 for living expenses. Since H and W lived in the family home prior to separation, the rent payment and living expenses payments are considered family expenses to be paid from CP funds first. Since CP funds in account only totaled $3,000 and the family expenses totaled $4,000, there was not enough CP in account to pay off those family expenses. Therefore, $1,000 of H's SP funds were used to pay the rest. After this payment, the account only had $9,000 left, which is considered H's SP. Thereafter, H made purchase of Acme stock. Since CP funds depleted from account at time of purchase, exhaustion method can be properly used here to help H prove that Acme stock was purchased with SP funds and therefore H is entitled to reimbursement for his SP contribution to the Acme purchase.

Title

A spouse placing title to property in his or her name alone does not change the character of the property without more, such as a valid transmutation. Therefore, the fact that H bought stock in his name alone is not determinative on this issue.

Conclusion

H can trace Acme purchase to SP funds using exhaustion method. Therefore, H is entitled to his $1,000 SP contribution for the purchase of that property but not any increase in value of the stock beyond that amount. The appreciation is considered CP.

2. Post-Separation Disability Insurance Payment

CP Presumption

See above rule. Here, W purchased disability insurance during marriage. Therefore, it is

presumed CP.

Earnings

See above rule. Here, the insurance was bought with W's earnings made during marriage, which makes the earnings CP, as well as the property purchased with those earnings (i.e., the insurance policy).

Disability Insurance Payment

Disability payments will generally be considered the disabled spouse's SP upon dissolution, but if the disability payments were, in part, given as a form of prior compensation, then the community is entitled to its proportionate share of the disability payments that reflects the compensation earned during marriage.

Here, W purchased the disability insurance during marriage with CP earnings. Therefore, the community is entitled to an interest in the policy and the policy is generally considered CP until divorce. W became disabled while still married to H and began receiving disability payments. These payments made while H and W were still married will be considered CP. But after H and W dissolved their marriage, the court will likely find that it would be equitable for W to be entitled to most of the proceeds for the disability payments because she resultingly became disabled and likely needs the policy payments to replace her lost earnings. But the community will likely be entitled to any CP contributions made to acquire the policy (i.e., the premiums paid out of W's earnings).

3. Investment Account

CP Presumption

See above rule. As noted above, although H and W physically separated in prior to their

dissolution, since they both sought marriage counseling, it is likely that they would not be deemed to have permanently separated until the dissolution. Here, H acquired the gambling winnings used to fund the investment account after using his earnings made after separation. This would usually result in the investment account and the gambling winnings being considered SP because earnings after separation are SP as well as things purchased with SP earnings. But since there was no permanent separation at the point in time when H made those earnings (see above analysis) used to gain gambling winnings, the earnings were still CP and thus, the gambling winnings acquired from those earnings and the investment account funded with those winnings are also presumptively CP.

Breach of Fiduciary Duties

Spouses owe fiduciary duties to each other to act in the highest of good faith and fair dealings. Spouses must be loyal to each other, and each is entitled to a full account and disclosure of the community estate and in some instances, the other spouse's SP interests. It is a breach of a spouse's fiduciary duties to actively conceal property from the other in order to derive a secret profit from the property. This is a breach of the duty of loyalty.

Here, H likely breached his fiduciary duty of loyalty to W when H did not disclose the fact that he used CP earnings to gamble and take a substantial amount of gambling winnings to open up an investment account in his name alone. As noted above, the investment account is presumptively CP, and therefore, W has an interest in the winnings and investment account. The fact that H did not disclose any of this to W may be found to be active concealment which could lead the court to punish H for such

breach by depriving him of any interest in the investment account.

Title

See above rule. Here, although H titled the investment account in his name alone, this does not change the character of the account to SP.

4. Loan for Sailboat

Debts and Creditor Rights

Generally, debts acquired before or during marriage, by either spouse are considered community debts. These community debts are first paid with CP and then the SP of the spouses. After permanent separation, debts acquired by either spouse are usually considered the separate debt of the debtor-spouse. While permanently separated but before divorce, the debts acquired by one spouse for necessities can result in the non-debtor spouse's SP being reached to satisfy those debts for necessities during separation.

SP Presumption

See above rules. Here, H acquired a loan for a sailboat. This loan was acquired after H and W concluded counseling would not help their marriage and H filed for dissolution. Since this debt was acquired either after permanent separation or divorce, the loan is the SP debt of H, rather than it being a community debt. Therefore, the loan on the sailboat will be H's separate debt.

Division of Community Estate

At the end of the martial economic community, the community property is usually divided equally among the spouses. Each spouse is entitled to a 1/2 portion of the net community estate.

Q3 Torts / Remedies

Thirty years ago, Diana built a large open-air theater to provide an outdoor multi-use entertainment venue. On weekdays, Diana rents the venue to the local dance companies. On weekend evenings, Diana hosts rock concerts at the theater. Revenue from the rock concerts funds most of the operating costs of the venue. The theater employs about 200 people and has been a focus of the city's cultural scene. When built, its location was near the edge of the city. As time went by, city development expanded to include housing in the vicinity of the theater.

Pedro recently purchased a house in a subdivision located adjacent to the theater. Although Pedro knew about the theater when he bought his house, he thought that the new house was a perfect place to raise a family.

As soon as Pedro moved into his new house, he was horrified by the noise and vibration coming from the theater during rock concerts. He could feel the floor shake and could not have a normal conversation because of the loud noise. Pedro later learned that his neighbors complained to Diana about the noise and vibration, that they were unsuccessful in obtaining relief, and that they decided to live with it in the end.

Pedro approached Diana. She explained that she had already taken steps to mitigate the negative impact by requiring that all concerts end by 11:00 p.m. and setting a maximum noise level. Diana explained that the facility could not survive economically without rock concerts and that rock concerts were, by their nature, loud.

A few days later, in an effort to find out if she might be able to relieve Pedro of some of his discomfort, Diana went to his house to determine whether sound-deadening materials might be added. She forgot to tell Pedro that she was coming. Diana let herself into Pedro's backyard, took some measurements, and left without disturbing anything.

Pedro intends to sue Diana.

1. What claims may Pedro reasonably assert against Diana? Discuss.

2. What remedies may Pedro reasonably seek? Discuss.

Answer A

Pedro v. Diana

1. Pedro's Claims Against Diana

The issue is which claims that Pedro may assert against Diana.

Private Nuisance

The issue is whether Pedro may assert a claim for private nuisance against Diana due to the excessive noise and vibration from the open-air theater. A claim for private nuisance can be established by demonstrating that the defendant is causing a substantial and unreasonable interference with the plaintiff's use and enjoyment of the property. Interference is considered substantial when a reasonable person would find that there has been a significant deprivation of his or her ability to enjoy the property. A plaintiff's hyper-sensitivities are ignored when a court is adjudicating whether a nuisance exists.

Here, the facts describe the noise level coming from the rock concerts as "horrific." The floor shakes and Pedro is precluded from having even a normal conversation in his own home. Pedro purchased the home because he thought it was going to be a perfect place to raise a family. Much to his horror, the loud noise from the rock concerts coming from the open-air theater constitute a substantial and unreasonable interference with his use and enjoyment of his residence. Pedro does not appear to be hypersensitive to the noise, given that his neighbors have also complained to Diana about the noise level on the property. Further, a reasonable person would find a substantial and unreasonable interference with the enjoyment of his or her own home if the floor was shaking every weekend and conversations could not be had. Diana may argue that no reasonable

person would see this as a substantial interference because she has taken steps to mitigate the noise and resulting inconvenience as a result of the rock concerts (e.g., she only hosts rock concerts on weekends, the concerts must be done by 11:00 p.m., and she has set a maximum noise level). Diana also appears to be considering installing sound-deadening equipment as evidenced by her taking measurements in Pedro's backyard. But Diana's arguments are not likely to be availing given the significance of the disruption that Pedro is suffering.

Thus, Pedro can assert a viable claim for private nuisance against Diana.

Public Nuisance

The issue is whether Pedro may assert a claim for public nuisance against Diana. A claim for public nuisance can be established by an unreasonable interference with the health, safety, and morals of the community at large. To recover under a theory of public nuisance, the plaintiff must suffer unique damages.

Here, Pedro will argue that the public health and safety is being threatened by horrific loud noise coming from the rock concerts at the theater every weekend. However, Pedro's claim for a public nuisance suffers because he cannot identify that he has suffered unique damages. In particular, Pedro's neighbors have already complained about the noise. Pedro also lives in a subdivision located adjacent to the theater. Pedro's interest as a homeowner of one home in this subdivision that is experiencing noise is not unique as compared against to any other member of the residential community. Further, Diana will likely entirely contest that the theater is a public nuisance at all because the community thrives upon the inclusion of the theater; it is a cornerstone of the community and a focus of the cultural scene.

Thus, Pedro is not likely to assert a viable claim against Diana for public nuisance.

Trespass to Land

The issue is whether Pedro may assert a claim for trespass to land against Diana. A trespass to land is an intentional tort. Trespass to land requires the showing of: (i) an intentional act on the part of the defendant, (ii) a physical invasion of real property, and (iii) causation, meaning that the defendant's conduct was a substantial factor in causing the injury.

Here, Diana went to Pedro's house without his permission. She intended to come onto Pedro's property to determine whether sound-deadening materials might be added. She then voluntarily let herself into Pedro's backyard, which constituted a physical invasion of Pedro's real property. Moreover, Diana caused the action to occur because her letting herself into the backyard was the substantial factor in causing the trespass.

Thus, Pedro can reasonably assert a claim against Diana for trespass to land.

Conclusion

Therefore, Pedro can assert claims for private nuisance, public nuisance, and trespass to land against Diana.

2. Remedies that Pedro May Seek

The issue is which remedies Pedro may seek against Diana.

Compensatory Damages

The issue is whether Pedro may obtain compensatory damages from Diana for the nuisance claims. Compensatory damages are meant to compensate the plaintiff for foreseeable losses and may be pecuniary or non-pecuniary (such as pain and suffering). Compensatory damages must also be certain and unavoidable. Traditionally,

the method of damages calculation for a nuisance claim is the loss of use and enjoyment of the property plus any costs incurred while attempting to abate the nuisance. Courts will also offer an additional award to the plaintiff for the discomfort incurred as a result of the nuisance. Modernly, some courts are applying the doctrine of "permanent nuisance" when calculating a damages award in order to reduce the multiplicity of lawsuits that are being filed. Under this damages model, the plaintiff is entitled to recover as damages the diminution in value of his or her land.

Here, if the court applies a traditional damages calculation, Pedro will be entitled to his loss of use and enjoyment in his residence. The facts do not indicate that Pedro incurred any costs in an attempt to abate the nuisance. In fact, the only action that he took to abate the nuisance was when he approached Diana and explained to her the complaints about the nuisance. Pedro did not incur any costs as a result of having this conversation. The court will make a reasonable award of damages to compensate Pedro for the discomfort caused. Diana may argue that Pedro's damages award should be reduced by his knowing purchase of a residence in close proximity to a theater that is known to host rock concerts.

If the court applies the "permanent nuisance" doctrine, then Pedro will be entitled to recover the value of the diminution in his land as a result of the rock concerts. Diana will similarly argue that Pedro's recovery will need to be reduced by virtue of his assumption of the risk of coming to the nuisance.

Thus, Pedro can recover compensatory damages under either of the models above.

Nominal Damages

The issue is whether Pedro may obtain nominal damages from Diana for the trespass to

land. Nominal damages are those that are obtainable by a plaintiff when no harm was actually suffered (as in a simple trespass to land case).

Here, Pedro did not suffer any damages as a result of Diana entering his property without his permission. The facts indicate that Diana left without disturbing anything in the backyard; thus nothing was damages as a result of Diana's conduct. Pedro can only be entitled to nominal damages from Diana for the trespass to land.

Thus, Pedro can recover nominal damages from Diana for her trespass to land.

Punitive Damages

The issue is whether Pedro may seek punitive damages against Diana. Punitive damages are designed to punish a defendant for intentional conduct arising out of an intentional tort. Here, Pedro will not likely be able to recover punitive damages from Diana because she has acted in good faith by establishing reasonable parameters to confine the impact of the noise from the rock concerts. Thus, Pedro will not be able to seek punitive damages from Diana.

Permanent Injunction

The issue is whether Pedro may obtain a permanent injunction against Diana enjoining rock concerts at the open-air theater. An injunction is an equitable remedy. A permanent injunction will last for the amount of time imposed by the court. A negative injunction enjoins the defendant from engaging in a specified activity. A mandatory injunction orders the defendant to perform an affirmative act. The elements of a permanent injunction are (1) inadequate remedy at law, (2) the injunction is feasible, (3) the balancing of hardships weighs in favor of granting the injunction, and (4) no defenses apply. Each element will be discussed in turn below.

Inadequate Remedy at Law

The issue is whether there is an adequate remedy at law. If a violation if continuing, a court will deem that there is no adequate remedy at law.

Here, the nuisance is continuing. In fact, on weekend evenings, Diana hosts rock concerts at the theater. The theater is a large open-air theater and Diana explained that the loud rock concerts will need to continue.

Thus, there is no adequate remedy at law.

Feasibility of Enforcement

The issue is whether an injunction is feasible. The feasibility of enforcement turns on whether the injunction will be mandatory or negative. See above for the definitions of mandatory and negative injunctions. There are no feasibility issues with negative injunctions because the court can merely exercise its contempt power and hold the defendant in contempt of court if the defendant commits an act that it is enjoined from engaging. There are feasibility issues with a mandatory injunction, however, because it requires the court to supervise the defendant in ensuring that the defendant is complying with the injunction. Generally, the scarcity of judicial resources precludes courts from acting as supervisors to enforce mandatory injunctions.

Here, Pedro will request a negative injunction in that the theater be enjoined from hosting further rock concerts. This will be feasible to enforce because the court can simply hold Diana in contempt of court if it learns that she sponsors a rock concert in violation of the injunction order.

Thus, enforcement of the injunction is feasible because it will be a negative injunction.

Balance of Hardships

The issue is whether the balance of hardships will favor the granting of injunctive relief. In effectuating the balancing test, the court will balance the interests of the plaintiff in obtaining the injunction against the interests of the defendant and the public. If the burden to the defendant and the public outweighs the benefit to the plaintiff, then damages will be deemed an adequate remedy and an injunction will not be proper. Here, Pedro will argue that the balance of hardships tip in his favor because the noise from the rock concert is horrific and causing the floor to shake. Pedro cannot even maintain a conversation in his home due to the severe noise. Moreover, Pedro will argue that the public interest weighs in his favor because Pedro's neighbors have complained to Diana about the noise and vibration, and they received no meaningful response from Diana. Further, the theater is also rented to local dance companies during the week and generates revenue that way; it cannot be said that the theater is wholly dependent upon rock concerts for revenue generation.

On the contrary, Diana will argue that her interests and the public interests will be significantly burdened if an injunction is issued against her. With respect to Diana, she has owned the facility for 30 years; in fact, she built it. At the time that she built the facility, it was near the edge of the city, and it was only as time went by that the city development expanded to include housing in the vicinity of the theater. The theater cannot survive economically without rock concerts and thus Diana's financial interests could be wholly, negatively impacted. Moreover, Diana will argue that the public interest will lie against granting injunctive relief because the theater employs 200 people and has been a focus of the city's cultural scene for many years. Without the rock concerts, the theater will become bankrupt, and 200 citizens will be out of work.

Moreover, Diana has already taken steps that will work to mitigate the amount of the nuisance. Not only are rock concerts only on the weekend, but she requires that all concerts end by 11:00 p.m.; Diana also set a maximum noise level. Pedro's neighbors further dropped their complaints about the noise and Diana is taking reasonable measures to ensure that the nearby housing is only minimally impacted by the nuisance.

In consideration of all of this evidence, a court will likely side with Diana in concluding that the public interest and her interests outweigh the burden on Pedro. An injunction would have an overall negative impact of the economy and the culture of the community, force numerous people out of jobs, forfeit revenue brought in by the rock concerts, and cause the theater to close its doors.

Thus, on balance, the balance of hardships weighs against granting a permanent injunction.

Defense - "Coming to the Nuisance"

The issue is whether Diana can raise the defense of "coming to the nuisance" in precluding Pedro from obtaining injunctive relief. "Coming to the nuisance" means that the plaintiff voluntarily encountered the nuisance and decided to live near the nuisance anyway. "Coming to the nuisance" is generally not a defense to equitable relief.

Here, Diana may argue that Pedro came to the nuisance and thus assumed the risk because he knew about the theater when he purchased the house. But that will not be a successful defense in the injunction action. (Diana could assert this in response to the damages award so that Pedro's damages can be mitigated by those that would have been avoidable.)

Thus, "coming to the nuisance" is not a defense to the injunction.

Conclusion

Thus, it is likely that Pedro may reasonably seek a permanent injunction from Diana, but it will likely be denied on the basis of hardship.

Overall Conclusion

Therefore, Pedro may reasonably seek injunctive relief and damages remedies against Diana.

Answer B

I. PEDRO'S CLAIMS AGAINST DIANA

Trespass to land

Trespass to land is intentional physical invasion of the land of another. Knowledge of legal title or intent to legally invade is not necessary; only the intent to physically invade suffices.

Here, "A few days later, in an effort to find out if she might be able to relieve Pedro of some of his discomfort, Diana went to his house to determine whether sound-deadening materials might be added. She forgot to tell Pedro that she was coming. Diana let herself into Pedro's backyard, took some measurements, and left without disturbing anything." As such, D physically entered P's backyard, which is P's land, without consent. Although D did not intend to interfere with P's rights, D intended in fact to enter P's backyard physically. This satisfies the intent requirement.

In conclusion, D committed trespass to land and is liable

Defense of consent or private necessity fails

Consent is a defense to trespass to land. Consent may be express or implied. Necessity is also a defense that exists when the action was justified because the trespass was done to prevent an imminent harm. Private necessity is when trespass was necessary to prevent harm to a private interest. Public necessity applies when the imminent or threatened harm was to the public. Public necessity is immune to damages caused by trespass. Private necessity claimant is still responsible for damages caused by trespass.

Here, D may raise the defense of consent or private necessity. Consent defense fails

because D did not seek P's consent expressly. Further, the mere owning of land does not imply consent to let others enter the backyard, even if they seek to enter to help the landowner. Further, any private necessity argument is weak. D could argue that it was necessary for D to measure P's land to help P. However, D could simply have asked P before entering. Since D forgot, D could have called P or returned at some other time. Since D simply entered P's backyard without seeking any form of consent, and since D had alternatives available and no imminent threat existed to make D's immediate entrance necessary, D will not establish these defenses.

Only nominal damages available

A physical trespass presumes that harm existed, and as such P does not have to prove that P suffered a specific pecuniary harm. However, based on the facts, D did not disturb anything and so it is unlikely P suffered any significant pecuniary damages. P will likely recover nominal damages, which are little amounts of damages that are awarded to vindicate the plaintiff's rights when not much harm was incurred in fact.

Conclusion

In conclusion, D committed trespass to land against P, and is liable. However, P can recover nominal damages, but will likely *only* recover nominal damages unless P can prove that P suffered some facts that indicated in the facts.

Pedro approached Diana. she explained that she had already taken steps to mitigate the negative impact by requiring that all concerts end by 11:00 p.m. and setting a maximum noise level. Diana explained that the facility could not survive economically without rock concerts and that rock concerts were, by their nature, loud.

Pedro intends to sue Diana

Private nuisance

Private nuisance occurs when the defendant substantially and unreasonably interfered with another private person's possession or use of private property. An interference is substantial when it would be offensive to a reasonable person. A hardened plaintiff who is subjectively not bothered by the interference can still recover if that interference is "substantial." An interference is unreasonable when the harm it causes is outweighed by the value it provides.

Whether interference is substantial

Here, "As soon as Pedro moved into his new house, he was horrified by the noise and vibration coming from the theater during rock concerts. He could feel the floor shake and could not have a normal conversation because of the loud noise." It appears that the shaking is physical as P can feel the vibrations of the sound. This likely offends reasonable persons because although whether loud noise by itself offends a reasonable person is arguable, when the sound physically vibrates and causes movement the reasonable person is likely to be offended by it and be annoyed by it, and the reasonable person's life will be interfered by it and their enjoyment of their home is likely reduced, possibly significantly. Further, "Pedro later learned that his neighbors complained to Diana about the noise and vibration, that they were unsuccessful in obtaining relief, and that they decided to live with it in the end." As such, it appears that people other than Pedro were in fact offended by the noises and vibrations to the point that they instituted a good faith lawsuit. D will highlight that they decided to live with it, and this shows that the interference is not substantial. Had it been substantial, D will argue, then the neighbors could objectively not decide to live with it. Although whether

interference is substantial is a fact intensive inquiry, given the fact that the venue is surrounded by residences and the noise physically vibrates and quakes the neighbors, the court will likely deem the noise and vibrations substantial and offensive to a responsible person.

Whether interference is unreasonable

Here, "D operates a large open-air theater. "On weekdays, Diana rents the venue to the local dance companies. On weekend evenings, Diana hosts rock concerts at the theater. Revenue from the rock concerts funds most of the operating costs of the venue. The theater employs about 200 people and has been a focus of the city's cultural scene."" As such, it appears that D produces a lot of value to the community. Local dance companies likely need D's venue to do their performances and make their living. Further, rock and culture are important benefits to the community. It appears that culture is a major economic drive for the city. Further, the theater employs 200 people, which is a great benefit and contribution to the community. D will highlight that D's venue allows 200 people to make a livelihood while promoting the city's culture and fostering social ties and community bonds through art. Although P will counter that the harm is significant because it makes the lives of people around the venue difficult to live, to sleep, etc., D will counter that the very fact that the neighbors can decide to live with the noises attest to the fact that the harm is not significant, especially considering the great magnitude of value to the community - 200 jobs, cultural focus, tourism, economy, dancers, and musicians, etc.

Conclusion

In conclusion, the court can rule either way, if this were a case of first impression and

preclusion was not a consideration. Although it appears that the interference is substantial, it also appears that an organized group of people can decide to live with it. Also, it appears that the venue provides a great amount of value to the public that cannot be denied. As such, the court may legitimately determine that the interference is not unreasonable and thus there is no private nuisance here.

Coming to the nuisance is not a defense

Coming to the nuisance is typically not a defense. Such consideration only is a defense when a party intentionally comes to the nuisance for the sole purpose of harassing or instituting a lawsuit. In general, coming to the nuisance is one of many factors considered in the overall analysis.

Here, "Thirty years ago, Diana built a large open-air theater to provide an outdoor multi-use entertainment venue." Then, "Pedro recently purchased a house in a subdivision located adjacent to the theater. Although Pedro knew about the theater when he bought his house, he thought that the new house was a perfect place to raise a family." As such, it appears that P not only came to it, P knew of the theater and its potential consequences and P did not investigate at all. Since the neighbors had already brought a lawsuit before, a simple asking of questions around would likely give P notice of the theater's activities. As such, it appears that P was on inquiry notice to inquire into the theater's activities but failed to do so. However, coming to the nuisance is not dispositive in any way because P did not come to the nuisance solely to harass with a lawsuit; P genuinely came in good faith because P believed that it was a perfect place to raise a family. As such, the court will not outright dismiss P's private nuisance. However, the court may use the fact that P came to the nuisance and the fact that P

failed to inquire at all into the theater's activities to conclude on the substantial/unreasonableness analysis in favor of D.

Neighborhood creeping into D's venue

Another factor is the neighborhood's creeping into D's venue. As mentioned above with P's coming to nuisance, the "neighborhood" coming to the nuisance will not be a dispositive factor and may merely be one of many other factors. However, it appears that the court should at least give some weight to the fact that "When built, its location was near the edge of the city. As time went by, city development expanded to include housing in the vicinity of the theater." As such, D was operating D's venue in good faith.

Conclusion

In conclusion, the court will likely side with D based on the totality of circumstances and find that the value of D's operation outweighs harms that apparently were accepted to by the neighbors. Further preclusion may or may not be a consideration as discussed below.

Public nuisance

Public nuisance is substantial and unreasonable interference with health, safety, morals, or other rights of the community. When a private party seeks to bring a lawsuit for public nuisance, that party must have suffered a harm distinct from the harm suffered by the community.

Here, the harm as mentioned above might be ruled not unreasonable. Further, P has not suffered any harm from the noise or vibration that is unique from the harm suffered by other neighbors. P suffered the same exact harm that everyone around P suffers. As such, P cannot bring a public nuisance claim.

Preclusion

Preclusion bars the re-litigation of issues already litigated. Claim preclusion and issue preclusion exist.

Claim preclusion

Claim preclusion bars re litigation of same claims when there is a final valid judgment on the merits, asserted by same parties in same configuration, and the claims are the same. Here, the parties are different because P was not part of the earlier lawsuit for relief. As such, claim preclusion does not apply.

Issue preclusion

Issue preclusion bars re-litigation of same issues when 1) in a final valid judgment on the merits exist; 2) the issues was necessarily determined; 3) the issue was essential to the judgment; and 4) no mutuality problems exist.

Here, the prior parties were unsuccessful in obtaining relief, and they decided to live with it. As such, the prior lawsuit likely ended, and the plaintiffs decided against appealing. As such, the decision is final. It appears that the claim was not unsuccessful because of personal jurisdiction or other issues, and so it appears that the prior lawsuit went into the merits. The vibrations and noise are the whole point of the prior lawsuit and of this lawsuit as well. As such, the issue was both necessarily determined and essential to prior judgment. Finally, mutuality problems must not exist. First, D was party to the prior action and had a chance to defend D's self. Further, P was not party to the prior action. However, in this case since D was successful in the prior action, D will seek to assert issue preclusion against P. Since P was not party to the prior action, P had no

chance to be heard. As such, D cannot assert issue preclusion against P.

Conclusion

In conclusion, D will not be able to assert issue preclusion against P. P will not want to assert preclusion because D prevailed (it appears) in the former action.

Negligent infliction of emotional distress

Defenses: defense (self, property, others); consent; arrest; necessity

Other torts (negligence, strict liability)

II. REMEDIES PEDRO CAN SEEK

Remedies for trespass to land was discussed earlier and is likely to be limited to nominal damages, especially since D will probably not come against and against and cause a multiplicity of suits problem. The remedies here will concern the case that P wins on the nuisance claim.

Money damages

Tort money damages are primarily "compensatory damages" which seeks to compensate the plaintiff put make the plaintiff whole. Sometimes there are "nominal" damages that seek to vindicate a plaintiff who basically has not been harmed, as discussed above. There are also "punitive" damages which will punish the defendant for willful and wanton conduct.

Here, punitive damages should not be available because D is not engaged in willful and wanton conduct to harm P or others. Rather, D is engaged in a legitimate business that benefits the entire community which happens to also harm nearby neighbors, who came to the nuisance because both the neighborhood crept towards D's venue and the neighbors decided to purchase the homes or rent the homes (in which case it would not

be that costly for them to relocate or move away).

Further, P was seeking to raise a family here and live a quiet life here with P's family. However, the value of what P is unable to do this because of the noise and vibrations. First, it is not certain that P will win damages because of reasons discussed above - no nuisance might exist. Second, even if P wins on the private nuisance claim, it is possible that P did not suffer much pecuniary harm. Perhaps P actually got the land for a cheaper price because the seller reduced the price because of the noise and vibrations. As such, P might not have suffered harm in decrease of land value (P might have *gotten* the land cheaply to begin with). Third, it is possible that P will be culpable as well because P failed to inquire at all, as described above, when a simple few questions would have revealed the problem, or even a visit on a weekend.

If P's land value did go down because of the noise and vibrations, then P may be entitled to the difference between the value of the land as P purchased it without the noise and vibration issues.

Temporary restraining order, preliminary injunction, permanent injunction

P may also seek equitable relief. Although P might go through temporary restraining orders and preliminary injunction, ultimately it is a permanent injunction that P would seek to try to enjoin D from having such loud noises.

Permanent injunction is appropriate when 1) legal damage is inadequate; 2) enforcement is feasible; 3) property right exists; 4) balance of harms and equities; 5) no defenses.

1) legal damage is inadequate

Legal damages might be inadequate when the conduct at issue might be repeated or

occur in the future; or when damages would be speculative or uncertain; or when the defendant is insolvent so a judgment would be meaningless.

Here, damages would be speculative because it would be difficult not only to measure the harm of constant noises and vibrations. Further, D seeks to play noises every weekend into possibly likely decades into the future. But D might stop the operation next year. As such, damages are speculative and uncertain. It can be argued that the decrease in value of land with the noises is a sufficiently certain measure of damages, however.

2) enforcement is feasible

A negative injunction prohibiting an action is easier to enforce than affirmative injunctions. One single act is easier to enforce than series of acts. An act requiring skills or personal taste is harder to enforce than objective acts. Involuntary servitudes are disfavored if not unconstitutional.

Here, the injunction sought is negative, which is not hard to enforce. Every time D engages in the making of noise, every neighbor would hear. As such, it would be noticed, and someone can make a complaint to the court and the court can issue contempt order. Further, since the land is in the state and city of the court, there are no jurisdictional issues and the injunction, and its enforcement is feasible.

3) property right exists

Traditionally, a protectible property right was needed. Modernly and in CA, property right is not necessary. Here, however, there is right in use and enjoyment of land property, quiet enjoyment, without the noise and vibrations. As such, this element would be satisfied.

4) balance of harms and equities

The harms and equities must be balanced, including benefit to the public. Here, the harm to public would be high because 200 people would lose their jobs. The harm to P would be high as well because on every weekend P would suffer loud noises and vibrations until 11pm, which is arguably very late and offensive to reasonable ordinary persons. The harm to D would be significant, although perhaps D can still operate during weekdays because dance performances seem not to be the issue, only rock concerts.

5) no defenses

It appears that P did not unduly delay and cause D prejudice (no laches). It also appears that P did not act in a culpable manner even if failure to inquire was a little neglectful (no unclean hands)

Conclusion

In conclusion, the analysis for permanent injunction does not appear to be one sided. As such, the court may likely refuse to grant it, as it did in the prior action by neighbors against the same D.

TROs and preliminary injunctions

The analysis for TROs and preliminary injunctions is similar to that for permanent injunctions. The major difference is that they require the necessity of maintaining status quo until a preliminary hearing can be held because of imminent harm (TRO) and until a full trial (preliminary injunction).

Here, it appears that neighbors can decide to live with the noise and vibrations. The neighbors had organized to file a lawsuit. As such, they would not merely decide to "live

with it" out of shyness, since they could commiserate with each other and feel free to complain and such feelings would avalanche and not be reduced. As such, it appears that there is no imminent irreparable harm that would justify TROs and preliminary injunctions.

Further based on the analysis above on private nuisance especially, likelihood of success does not appear to be great; It might be 60% at most.

other remedies

Other remedies such as constructive trust and equitable lien do not apply and are not relevant. Permanent injunction is the only relevant one and even that is unlikely.

Q4 Evidence / Professional Responsibility

Dan is facing trial in the Superior Court of California for the murder of Victor. Dan entered into a valid retainer agreement with Attorney Anita for her to represent him. Anita met with Dan to discuss Dan's defense. In their interview, Dan claimed he had spent the entire evening when the murder occurred with his father, Frank. The next day, Anita sent an email to Dan expressing her concern that his alibi was weak. Dan replied to the email and admitted that he had lied about his alibi, but denied that he killed Victor.

Anita visited Dan's apartment and spoke with Dan's roommate, Ben, who said that Dan confided in him that he had killed Victor. Ben gave Anita a pair of Dan's pants that were covered in blood. The next day, Anita gave the prosecutor the bloody pants and the email exchange about Dan's alibi.

Anita then decided she did not want to represent Dan any longer because she was tired of his lies. Anita petitioned the court to withdraw as Dan's attorney. The court granted permission for Anita to withdraw. Frank then immediately hired another lawyer to represent Dan.

At Dan's trial, the prosecutor called Ben as a witness to testify to Dan's statement that he killed Victor. The prosecutor then called Anita to testify: (1) about Dan's statement that he had been with Frank on the night of the murder; (2) that Anita had received the bloody pants from Ben and turned them over to the prosecutor; and (3) that Ben had told Anita that Dan said he killed Victor.

1. Assume all proper objections have been made. Should the following items be admitted into evidence:

    a) Ben's testimony? Discuss.

    b) Anita's testimony regarding Dan's statement that he was with Frank the night of the murder? Discuss.

    c) Anita's testimony that she had received the bloody pants from Ben and turned them over to the prosecutor? Discuss.

    d) Anita's testimony that Ben told her that Dan said he had killed Victor? Discuss.

    Answer each according to California law.

QUESTION CONTINUES ON THE NEXT PAGE

2. What ethical violations, if any, did Attorney Anita commit by:

    a) Turning over the bloody pants to the prosecutor? Discuss.

    b) Turning over the email exchange regarding Dan's alibi to the prosecutor? Discuss.

    c) Withdrawing from representing Dan? Discuss.

    Answer each according to California and ABA authorities.

Answer A

Under Proposition 8 of the California constitution, all relevant evidence is admissible during a criminal trial, unless it is subject to an exclusion such as hearsay or privilege.

Logical relevance

For any evidence to be admissible, it must be logically relevant. Evidence is logically relevant when it makes the existence of any fact of consequence more or less likely to be true. In California, the fact of consequence must also be in dispute.

Legal relevance

Evidence is legally relevant when the probative value of the evidence exceeds the risk of undue prejudice, confusing the jury, or unnecessary delay.

1. (a) Ben's testimony

Logical Relevance

See rule above.

Ben's (B's) testimony is logically relevant. B is able to testify that D admitted to killing Viktor (V). That is a fact at issue and of consequence, and highly relevant to this case.

Legal Relevance

See rule above.

B's testimony is also legally relevant. D's statement has substantial probative value. It wouldn't confuse the jury or cause undue delay. And while it would be prejudicial to D's case, it would not be unduly prejudicial, as the requirement of legal relevance does not prohibit any evidence that may show guilt.

Witness Competency

In order for witnesses to testify as to a certain topic, they must have personal

knowledge of the facts they are speaking to, and a present recollection of the events. They must also take an oath to tell the truth and be able to present their testimony in a way that is helpful to the trier of fact.

Here, B is competent to give this testimony. It is based on his personal knowledge of his conversation with D, and he is able to presently recall it.

Accordingly, because his testimony is relevant and he is a competent witness, he was property allowed to testify.

Hearsay

However, the issue is whether D's statement that Ben is testifying to is hearsay. Hearsay is an out of court statement offered for the truth of the matter asserted. Hearsay is not admissible, because the party is offered against is not able to impeach the witness or make issue of the declarant's credibility.

Here, D's statement is hearsay. It was told to B out of court, and it is being offered by the prosecutor as evidence that D killed V. Accordingly, it is inadmissible as hearsay. However, there are exceptions and exclusions to the hearsay rule. If one exists, the statement can still be offered into evidence.

Party admission

A party admission is an exclusion from hearsay. It exists when the opposing party has offered the statement out of court, and it is an admission of a relevant fact.

Here, the statement is being offered into evidence by the prosecution, so D is the opposing party. Additionally, this constitutes an admission of the most important fact of all - that D killed V. Accordingly, D's statement could be offered into evidence as a party admission.

Statement against interest

D's statement could also possibly be offered as a statement against interest. In order for this exception to apply, the defendant must make a statement that is against their proprietary, pecuniary, penal, or social interest, and they are aware it is against their interest when it is offered.

Here, this statement is clearly against D's penal interest. By admitting to a murder, he could be charged and sent to prison. This is also a fact that any reasonable person would be aware of.

However, in order for this exception to apply, the declarant must be unavailable. A declarant is unavailable when they are dead or sick, when they refused to testify, or when they assert a privilege, among other reasons. Here, it is possible that D, as the defendant in this case, will assert his right not to testify. If he were to do so, this exception would also be available.

In conclusion, this testimony was properly admitted as a party admission, and may also be proper as a statement against interest if D choose not to testify.

(b) Anita's testimony regarding Dan's statement.

Logical Relevance

See rule above.

Anita's (A) testimony is logically relevant because it speaks to D's possible alibi. Whether or not D was with Frank is a fact of consequence, and one that it is in dispute.

Legal Relevance

See rule above.

Her testimony is also legally relevant. Information concerning D's alibi has substantial

probative value and outweighs any of the other factors discussed above.

Witness Competency

A is competent to testify to testify on this topic because it is based on her conversation with D.

Attorney/Client Privilege

The issue is whether D's statement is covered by attorney/client privilege.

Attorney client privilege prevents the disclosure of any confidential information obtained from the attorney from their client for the purpose of furthering the representation. The privilege is held by the client, and only the client can choose to waive it, not the attorney. In California, the privilege lasts until the client's will has been probated after their death.

Here, D's statement to A was made during the representation. D and A entered into a valid retainer, and then the two of them met to discuss the case and provide A with the facts. The statement was provided as D's alibi, and while he later admitted that the statement was false it was still made as part of the representation and in furtherance thereof.

Hearsay

Additionally, the statement may be objected to as hearsay. However, it would not be provided into evidence for the truth of the matter asserted because (1) the prosecutor would not want to help D establish an alibi, and (2) D later admitted it was false.

In conclusion, the statement is protected by the attorney/client privilege and should not be admitted into evidence.

(c) The bloody pants.

Logical Relevance

See rule above.

This testimony is logically evidence is relevant because it speaks to the source of important evidence.

Legal Relevance

See rule above.

This testimony is also legally relevant because it is highly probative, and outweighs the other factors discussed above.

Witness Competency

A is competent to make this testimony because it is based on her personal interaction with B, and she has a present recollection of the events.

Attorney/Client Privilege

See rule above.

D may also assert that this evidence is subject to attorney/client privilege. However, information regarding where the bloody pants came from was not communicated to A by D. The attorney client privilege only covers statements made in confidence from the client to the attorney, not statements made by third parties, and not information obtained independently from the attorney. Because A received the bloody pair of D's pants from B, no information surrounding them is subject to attorney/client privilege.

In conclusion, the testimony regarding the bloody pants should be admitted into evidence.

(d) Ben's statement that Dan had killed Victor.

Logical Relevance

See rule above.

This testimony is logically evidence is relevant because it is an important admission by D as to his guilt.

Legal Relevance

See rule above.

This testimony is also legally relevant because it is highly probative, and outweighs the other factors discussed above.

Attorney/Client Privilege

D may once again attempt to assert attorney/client privilege. However, for the reasons discussed above, statements by third parties are not covered by the privilege, only statements between attorney and client. Accordingly, this information is not subject to attorney/client privilege.

Hearsay

See rule above.

However, this statement is also hearsay, as it is being offered for the truth of the matter asserted. When there are two layers of hearsay, both of them must be admissible for the statement to be admitted into evidence. Here, D's statement to B that he killed V is hearsay, and B's statement to A that D admitted to killing V is also hearsay.

D's statement to B would be admissible for the reasons discussed above. It is a party admission, and potentially a statement against interest.

However, Ben's statement does not fit into any hearsay exception. Because the hearsay rules require that all levels of hearsay have an exception, this statement should not be admitted.

In conclusion, B's statement to A regarding Dan's admission should not be admitted.

2. Anita's ethical violations.

(a) Turning over the bloody pants.

Duty of confidentiality

A may have violated her duty of confidentiality to D under the ABA and California rules of professional conduct. An attorney owes their client a duty of confidentiality. All confidential info obtained by an attorney in the course of representation must not be disclosed to third parties, and only used for their client's benefit. This duty is broader than the attorney/client privilege, as it prevents all disclosures not just testimony.
Here, that duty covers all confidential information A obtained about D during their representation. However, the duty of confidentiality does not extend to the fruits of a crime.

Fruits of a crime

If an attorney comes into possession of the fruits of a crime, that information cannot be protected by the duty of confidentiality. It must be turned over to the authorities. If a client informs their attorney where evidence of their crimes is located, the attorney is under no obligation to retrieve it. If they do, they must turn it in. However, an attorney is allowed to hold an item of evidence for a reasonable period of time in order to inspect it as part of building their client's case. Additionally, the attorney cannot disclose the source of the evidence when turning it over.
Here, A was under an obligation to turn in the bloody pants and did not violate her duty of confidentiality by doing so. However, if she was to disclose any information regarding where the evidence came from, that would have been a violation. Though that does not

appear to have occurred based on the facts presented.

Accordingly, A did not violate an ethical obligation by turning in the bloody pants.

(b) Turning over the email

Duty of confidentiality

See rule above.

However, A did commit a breach of her duty of confidentiality by turning over the emails from D. That information was protected by the duty of confidentiality, and A was under no requirement to turn that information over.

By disclosing this email, she breached her duty to D.

Duty of competence

A also may have breached her duty of competence. An attorney owes a duty to their clients to use their skill, knowledge, thoroughness, and preparation solely for their client's benefit. They must act prudently and diligently in their client's best interest.

By turning over an email admitting he lied about his alibi, A has violated that duty. A reasonably prudent attorney would not turn over confidential information regarding their client’s case and alibi.

If D has insisted on testifying at trial that he had this alibi when A knew it was not true, she would have ethical obligations to dissuade him from testifying, to seek to withdraw if D insisted on offering false testimony, and to only allow him to testify in a narrative fashion if she could not withdraw. However, this was far before that point

Accordingly, A also breached her duty of competence owed to D.

In conclusion, by turning over the email, A breached her duty of confidentiality and duty of competence.

(c) Withdrawing from representation.

Mandatory withdrawal

An attorney is required to withdraw when (1) they are terminated, (2) when their representation of the client violates the law or ethics rules (such as in the case of a conflict), (3) when a mental or physical condition prevents the attorney from undertaking effective representation, and (4) where the client's course of conduct requires the attorney to participate in or assist with a crime or fraud.

Here, A has not been terminated, there is no violation of law or ethics rules, she has no mental or physical condition preventing her from representing D, and D has not asked her to participate in a crime or fraud. Accordingly, there are no rules mandating that she withdraw.

However, there are also grounds that exists for permissive withdrawal.

Permissive withdrawal

Under the ABA, an attorney is permitted to withdraw if they can do so without prejudicing their client's case. This rule does not exist under the California ethics rules. Under both sets of rules, an attorney can also withdraw if the client insists on a course of action the lawyer disagrees with or considers repugnant, if the client has misused the client's services in the past, or if the client has not performed their duties (such as the payment of fees).

The most likely reason for withdrawal that A could argue is that D is insisting on a course of conduct that she disagrees with or considers repugnant. If she believes based on the evidence that D is guilty, and is lying about his innocence, that may be sufficient grounds. As the court has allowed her to withdraw from this case, it appears that they

agree with her.

However, A is required to give D notice prior to withdrawal. It does not appear that she has done so. By not providing him notice, there is a risk that her withdrawal has prejudiced his case.

Additionally, A is required to return any portion of an unused fee that D has paid and return his files promptly. The facts don't appear to indicate that she has done this either.

In conclusion, A has violated a duty to D by improperly withdrawing.

Answer B

Ben's Testimony

Relevance

In order to be admissible, evidence must be both legally and logically relevant. Under the CEC, evidence is logically relevant if it tends to prove or disprove any fact in dispute related to the matter. However, judges have broad discretion to exclude logically relevant evidence if it is not legally relevant. Evidence is legally relevant if its probative value is not substantially outweighed by other factors such as unfair prejudice, waste of time, delay, unnecessarily cumulative evidence, or confusing the jury. Under Proposition 8, all relevant evidence is admissible in a criminal trial, subject to some exceptions such as hearsay and privilege rules.

Ben's testimony is logically relevant, since it tends to prove a fact in dispute (that Dan killed Victor). It is also legally relevant since its probative value is not substantially outweighed by unfair prejudice or other issues. Prop 8 will not apply because the statement is hearsay.

Hearsay

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Hearsay is inadmissible unless an exception applies. Here, Dan's statement that he killed Victor is an out-of-court statement that is being offered to prove that Dan killed Victor (the truth of the matter asserted). Thus, the statement is hearsay and will be inadmissible unless an exception applies.

Statement by Party Opponent

A statement made by a party to a proceeding will be admitted even though it is hearsay

if it is offered by the party's opponent. Here, the hearsay declarant is Dan, who is a party to the proceeding. The statement is being offered by his opponent, the prosecution. Thus, the statement qualifies as a statement by a party opponent and will be admissible.

Statement Against Interest

A statement against interest is a statement that was against the penal, financial, or social interest of the declarant when it was made. In order to be admissible as an exception to hearsay, the declarant must be unavailable to testify. A declarant is unavailable to testify if they have a total loss of memory, are dead, or are unreachable by subpoena. Here, Dan's statement that he killed Victor was against his penal interest, since confessing to murder can get you arrested and sent to prison. However, if Dan is testifying in his own defense, then he is available, and the exception will not be available. If Dan is not testifying in his own defense (as is his right as a criminal defendant), then he will be considered unavailable, and the statement may come in under this exception. Regardless, the statement will be admitted under the "statement by party opponent" exception.

Conclusion:

Ben's testimony is admissible.

Anita's Testimony: Dan's Statement

Relevance

Anita's testimony about Dan's statement that he was with Frank the night of the murder is logically relevant, as it tends to make it less likely that Dan killed Victor. Additionally, depending on how the prosecutor tries to use it, it may be relevant as impeachment

evidence. However, it may not be legally relevant. Since Anita used to be Dan's attorney, having her testify against him may hold undue influence with the jury, and create unfair prejudice that substantially outweighs the probative value of her evidence. Thus, the evidence may not be legally relevant.

Privilege

Even if the evidence is logically and legally relevant, it is protected by the attorney-client privilege. Attorney-client privilege is an evidentiary privilege held by the client, whereby an attorney may not disclose anything a client told her in confidence in the course of seeking legal services. Here, Dan clearly told her that he was with Frank in confidence, as they met (apparently alone) in order to discuss his case. Additionally, Dan told Anita this while seeking legal services, since they were discussing Dan's defense. Thus, Anita violated the attorney-client privilege by testifying against Dan without his waiver of the privilege. Under the CEC, the attorney may only violate the privilege in limited circumstances. For instance, the attorney may violate the privilege to prevent a crime that would result in substantial bodily harm or death to another. Here, the crime has already occurred, so Anita's testimony does not fall within the exception.

Prop 8 does not overcome attorney-client privilege.

Hearsay

Dan's statement to Anita does not qualify as hearsay, because it is not being offered to prove the truth of the matter asserted (that Dan was with Frank). Rather, it is either being offered for impeachment purposes (to show that Dan was lying), or for some other purpose. However, the testimony was still improperly admitted as it violated the attorney-client privilege.

Impeachment

If this statement is being offered for impeachment purposes, it is also improperly admitted, as it is not permissible to impeach a witness by prior inconsistent statement (in this case, Dan) who has yet to testify (and thus, there is nothing that his prior statement could be inconsistent with). It is also improper to impeach a witness by prior inconsistent statement if that witness is not given a chance to explain the inconsistency (which Dan will not get if he is asserting his Fifth Amendment right not to testify).

Character Evidence

If this statement is being offered to show Dan's character for dishonesty, it was also improperly admitted. In a criminal trial, character evidence is only admissible about traits pertinent to the crime charged and is only admissible once the defendant has opened the door. Here, Dan has not opened the door, and honesty is not a pertinent trait in a murder trial. Thus, this would be improperly admitted character evidence.

Anita's Testimony: Bloody Pants

Relevance

Anita's testimony about the bloody pants is logically relevant, since the fact that Dan had bloody pants tends to make it more likely that he killed Victor. Additionally, Anita's testimony can be used to authenticate the pants. There is the same legal relevance issue as before, where the fact that Anita was formerly Dan's attorney might create unfair prejudice sufficient to outweigh the probative value of the testimony. Thus, this testimony likely should not be admitted unless Prop 8 overcomes this issue.

Privilege

Receiving Dan's pants from Ben would not qualify as privileged information, since it was

not a statement made by Dan for the purpose of obtaining legal services. Thus, the attorney-client privilege does not apply.

Personal Knowledge

A witness must have personal knowledge about the matter of which they are testifying. Anita knows that she received the bloody pants from Ben and turned them over to the prosecutor. Thus, she had personal knowledge sufficient for this requirement.

Conclusion

The testimony about receiving Ben's pants was improperly admitted unless Prop 8 allows the evidence in despite the legal relevance issue.

Anita's Testimony: Ben's Statement

Relevance

Anita's testimony about Ben's statement is logically relevant because Dan's statement that he killed Victor tends to make that fact more likely. Anita's testimony still has the same legal relevance issue related to her being Dan's prior attorney. However, other than that the probative value is not outweighed by unfair prejudice, and so the evidence is legally relevant.

Personal Knowledge

There is no personal knowledge problem, because Anita is testifying about what Ben told her Dan said, rather than testifying that she heard Dan said something to someone.

Hearsay within Hearsay

Anita's testimony contains two levels of hearsay: the outer hearsay is Ben's statement, and the inner hearsay is Dan's statement. Where there are multiple levels of hearsay,

each level must be admissible under an exception in order for the entire statement to be admissible.

Dan's Statement (Inner Hearsay)

Dan's statement is hearsay because it is being offered to prove the truth of the matter asserted (that Dan killed Victor). As discussed above, this is likely admissible as the admission of a party opponent.

Ben's Statement (Outer Hearsay)

Ben's statement is hearsay because it is being offered to prove that Dan said he killed Victor. This is hearsay not admissible under any exception. It is not the statement of a party opponent since Ben is not a party. It also was likely not an excited utterance to Anita, as there is no indication that Ben was under the stress of a stressful event when he made it. Thus, because the outer hearsay is inadmissible, the entire statement was improperly admitted. Prop 8 cannot overcome hearsay issues.

Privilege

Attorney-client privilege does not apply to this statement, since Ben was not Anita's client and Dan's statement was not made directly to Anita (because it was made to a third party, it was not confidential).

Ethical Violations: Turning over Pants

Duty of Candor/Duty of Fairness to Opposing Counsel

Attorneys have an obligation of candor to the tribunal and a duty of fairness to opposing counsel. This duty prohibits them from concealing evidence. While Anita likely should have refused to take the bloody pants in the first place, it was likely not an ethical violation for her to turn them over to the prosecutor once she had them.

Ethical Violations: Turning over Email Exchange

Duty of Loyalty

Lawyers have a duty of loyalty to their clients. Anita violated this duty when she turned over the email exchange about Dan's alibi to the prosecutor, since a defendant in a criminal case could reasonably expect his attorney not to help the prosecution in ways not required by law or the ethical rules. Thus, this constituted a violation of the duty of loyalty.

Duty of Confidentiality

Under both the ABA and California rules, lawyers have a strict duty of confidentiality to their clients. This prohibits lawyers from revealing any information they learn related to their client's case that is not known to the general public. This rule is broader than the attorney-client privilege; the California rule is much stricter than the corresponding ABA rule.

Under the ABA rule, a lawyer may break the duty of confidentiality if it is necessary to prevent a crime, substantial bodily harm or death, or mitigate financial loss if the lawyer's services were used in connection with that financial loss. Additionally, if the lawyer's services were used or are currently being used to perpetrate a crime or fraud, the lawyer may break confidentiality to mitigate the harm. Under the California rules, confidentiality may only be broken in order to prevent a crime that is likely to result in substantial bodily harm or death.

Here, the breach of confidentiality was not permissible under either the ABA or California rules. Turning over the email exchange did not prevent or mitigate the harm from any crime or activity in which the lawyer's services were used. Anita might try to

argue that Dan was attempting to use her services to lie to the court by lying about his alibi. However, there is no indication that Dan was going to lie on the stand at trial, as he admitted his alibi was false. Additionally, even if he was planning on lying on the stand, Anita had a duty to try to mitigate by attempting to persuade him not to lie. If he insisted on lying on the stand, Anita would have been allowed to withdraw (under the ABA rules), or simply allow him to testify without engaging (the narrative approach, under the California rules). However, Anita did not attempt to dissuade Dan from lying, if that was even his intention in the first place. Thus, Anita violated her duty.

Duty to Communicate

Lawyers have a duty to communicate with their clients. By not telling Dan that she was turning the email exchange over to the prosecutor, Anita likely violated her duty to communicate with Dan and keep him appraised of her actions related to the case.

Ethical Violations: Withdrawal

Duty to the Profession

Lawyers have a duty to the profession that discourages them from withdrawing from the representation of clients simply because they are guilty, especially criminal defendants. Anita likely violated this duty by her withdrawal.

Permissive Withdrawal

Under the California rules, a lawyer is allowed to withdraw from representation if the client is making the representation unreasonably difficult. Here, the fact that Dan lied once about his alibi is probably not enough to meet the standard of "unreasonably difficult". It sounds like she has only had one conversation and one email exchange with him and did not even try to see if he had a different alibi. Additionally, just the fact that a

client is guilty is not "unreasonably difficult". Thus, Anita likely violated her duty under the California rules by withdrawing when it was not permitted.

Under the ABA rules, an attorney may withdraw if it will not result in unfair prejudice to the client. Here, the trial had not started, and Frank was immediately able to hire another lawyer for Dan. Thus, it is unlikely that there was unfair prejudice, and Anita did not breach her duty under the ABA rules. The ABA rules also permit withdrawal if a client's view is repugnant to the lawyer, which Anita can argue that Dan's views are.

Mandatory Withdrawal

Mandatory withdrawal under the ABA and California rules arises when a client is insisting on a course of conduct that would violate the law or ethical rules, or if the client insists on a course of conduct solely to harass another person (California only), or if the lawyer's mental or physical condition make it impossible to continue. None of these exceptions apply, so Anita is not covered by mandatory withdrawal.

Q5 Business Associations / Remedies

Arnold and Betty agreed to launch a business selling a durable paint that Arnold had developed and patented. They agreed to share all profits and to act as equal owners. Betty agreed to contribute $100,000 to the business venture. Arnold agreed to contribute his patent for durable paint. Arnold told Betty that he thought the patent was worth $100,000. He did not tell Betty that he had previously tried to sell the patent to several reputable paint companies but was never offered more than $50,000. Arnold and Betty agreed that Betty would be responsible for market research and marketing and Arnold would be responsible for incorporating the business and taking care of any other steps needed to start the enterprise.

Arnold first located a building within which to operate the business, owned by Landlord Co., and entered into a one-year lease in the name of Durable Paint, Inc. Subsequently, after Arnold took the necessary steps, Durable Paint, Inc. was incorporated. At the corporation's first board of directors meeting, Arnold and Betty were named as sole directors and officers. During that meeting, Arnold and Betty voted for the corporation to assume all rights and liabilities for the lease and to accept assignment of Arnold's patent rights.

Over the next six months, Durable Paint, Inc. faced unforeseen and costly manufacturing and supply problems. At the end of the first six months, the corporation had exhausted all its capital and was two months behind on rent. To make matters worse, a competitor developed a far superior product, making Durable Paint, Inc.'s patent effectively worthless. Durable Paint, Inc. had no other assets.

Landlord Co. sued Arnold and Betty personally for damages for breach of the lease.

Betty sued Arnold.

1. On what theory or theories might Arnold be found personally liable for damages to Landlord Co.? Discuss.

2. On what theory or theories might Betty be found personally liable for damages to Landlord Co.? Discuss.

3. On what theory or theories might Arnold be found personally liable for damages to Betty? Discuss.

Answer A

Arnold's Liability

There are multiple theories under which Landlord Co. can try to hold Arnold personally liable.

Corporation Formation - when did Arnold and Betty form a corporation?

De Jure Corporation

A corporation is a business entity which is separate from its legal owners (shareholders). This means that the shareholders of the business are not personally liable for the obligations and liabilities of the business. They are only liable to the extent of their investment (and for their own torts). In order to form a corporation (known as a de jure corporation if properly formed), articles of incorporation must be filed with the secretary of state following certain required procedures and including certain information.

Here, Arnold did not take the necessary steps to form Durable Paint, Inc. until after entering into the lease with Landlord Co. Accordingly, a de jure corporation was not formed when Arnold entered into the lease.

De Facto Corporation

If a corporation is *not* properly performed, the corporation still may be treated as a corporation for purposes of personal liability of its shareholders if there is a corporation formation statute, there is a good faith attempt to comply with the statute, and the corporation acts as if it is a corporation. In this situation, the incorporator must not know that it failed to form a corporation.

Here, Arnold did not form the corporation or attempt to form the corporation until *after*

the corporation entered into the one-year lease with durable Paint, Inc. Accordingly, Betty and Arnold cannot take advantage of the de facto corporation doctrine.

Promotor Liability

Promoter liability concerns a situation in which an individual enters into contracts on behalf of a corporation before the corporation is formed. In this scenario, the promoter is liable on the contract unless there is a later novation (between the corporation, third party and promoter) or the contract states that the promoter is not liable, in which case it is treated as a revocable offer for the corporation. The corporation is only liable on the contract if the corporation adopts the contract.

Here, while the corporation arguably adopted the contract, the facts do not state that there was a novation of Arnold or that the lease stated that Arnold was not liable for the lease. Accordingly, Arnold will be found personally liable on the lease as a promoter. The corporation, Landlord co. and the promoter would have been required to adopt a novation in order to release Arnold from the contract or the lease would have had to state that Arnold was not liable. Thus, Arnold will be found liable on the lease under the promoter theory (unless he is successful on his claim for corporation by estoppel).

Corporation by Estoppel

Corporation by estoppel is another doctrine which allows an entity that is not a corporation to be treated as a corporation for purposes of personal liability. This has been abolished in most states, but if applicable, it is applied when the entity has been treated as a corporation by a third party. In this scenario, the third party is estopped from arguing that the corporation is not a corporation. This applies in contract actions, but not in tort actions (because tort plaintiffs do not voluntarily enter into torts). This can

also prevent the incorporator from stating that the corporation was not formed as well. Here, Arnold entered into a one-year lease with Landlord Co. in the name of "Durable Paint, Inc.". Accordingly, Arnold held out the tenant of the lease as being a properly informed corporation. Thus, Arnold can argue that Landlord Co. had the opportunity to investigate Durable Paint, Inc. and see that it was not incorporated. If Arnold is successful in having the court apply this doctrine, Landlord Co. will be estopped from arguing that Durable Paint Inc. is *not* a corporation because it treated Durable Paint, Inc. as a corporation, in which case both *Arnold* and *Betty* would not be personally liable (unless Landlord Co. is successful in piercing the corporation veil, discussed below). However, since Arnold never tried to incorporate the entity before signing the lease, the court may be reluctant to assert this doctrine.

Betty's Liability

Partnership

Formation - did Arnold and Betty enter into a partnership before incorporating the business?

A partnership is an association of two or more persons to carry on a business for profits. Intent to carry on a business for profit is required, but intent to form a partnership is not. Sharing profits establishes a presumption that a business is a partnership. Equal management rights further add to such presumption. No formalities are required and there need be no written partnership agreement. A partnership is a separate entity from its partners; however, the partners are jointly and severally liable for all obligations and liabilities of the partnership. However, a person that is seeking remedies from the partnership must first extinguish all partnership assets before attempting to recover from

the partners personally.

Here, before the business was incorporated as a corporation, Arnold and Betty agreed to launch a business selling durable paint that Arnold had developed and patented. They agreed to *share all profits* and act as *equal owners*. This created a presumption that they intended to carry on a business for profit. Accordingly, before Arnold and Betty entered into a corporation, they entered into a partnership. The fact that they "called" the partnership "Durable Paint, Inc." is irrelevant for purposes of establishing a partnership. Thus, Arnold and Betty were both personally liable for all obligations of the partnership

Authority - is the partnership liable for the lease?

A partner is an agent for the partnership and has the actual and apparent authority to enter into all ordinary business transactions on behalf of the partnership. Actual authority is authority the partner reasonably believes she has from the written partnership agreement or agreement of the partners. Apparent authority is authority a third party reasonably believes the third party has based on the manifestations of the principal. A partnership is liable for obligations and liabilities entered into by a partner acting with authority. Accordingly, the partners are personally liable for all such obligations and liabilities as well (see rules above).

Here, Betty and Arnold agreed that Betty would be responsible for market research and marketing and Arnold would be responsible for incorporating the business and "taking care of any other steps needed to start the enterprise." Accordingly, Betty had actual authority to conduct market research and market the business and Arnold had actual authority to incorporate the business and take care of its other startup needs. Betty will

argue that entering into a one-year lease is not a step need to start the enterprise and that, therefore, Arnold had no actual authority to enter into the lease and that the partnership was therefore not liable on the lease. Landlord co. will argue that entering into a one-year (short-term) lease is a normal step needed to start an enterprise for developing paint. Landlord co. is likely to succeed on this point. As to apparent authority, entering into a one-year office lease is the type of ordinary business transaction that a third could reasonably think that a partner was entering into on behalf of the partnership. Accordingly, under either an actual authority or apparent authority theory, Arnold likely had authority to bind the partnership to the lease.

Therefore, Betty would be personally liable for the obligations of the partnership - i.e., the entering into of the lease. However, Landlord co. would first have to exhaust partnership assets (and the assets are apparently already exhausted).

Betty will argue she is not liable on the lease because the partnership turned into a corporation. While the partnership was dissolved when it turned into a corporation, the lease was entered into while the business was still a partnership. She may be able to argue that the liability (failure to make payments) was not incurred until the partnership was a corporation. If this is the argument, Landlord. Co. can attempt to proceed on a piercing the corporate veil theory.

Corporation's Adoption of the Contract

As discussed above, a corporation can assume a contract entered into by a promoter by adopting the contract after formation. In order for a corporation to adopt a contract, the directors, who are in charge of the management of the corporation, must vote by a majority to adopt the contract.

Here, the facts state that Arnold and Betty assumed all rights and liabilities for the lease. Arnold and Betty were named as the sole directors, and they both voted to adopt the contract. Accordingly, the corporation validly adopted the contract.

Piercing the Corporate Veil

As discussed above, shareholders of a corporation are not ordinarily liable for the obligations of the corporation. However, they may be held liable when the court pierces the corporate veil to prevent fraud and abuse. This will occur (i) when the corporation does not observe corporate formalities (alter-ego theory), (ii) the corporation was undercapitalized, or (iii) to prevent a fraud.

Here, Landlord co. will argue the corporation was undercapitalized as Betty only contributed $100,000 and Arnold contributed his patent. Landlord co. will argue that clearly the corporation was undercapitalized because it could not make payments on a one-year lease or take care of its startup costs. However, $100,000 is not a minor amount, and the facts suggest that the manufacturing and supply problems were unforeseen. However, six months is a very fast amount of time to lose $100,000. Further, the rent may have been expensive if the lease was for manufacturing space. If the lease was for office space, the rent would be cheaper, and the capitalization amount may have been reasonable. Ultimately, this is a question for the court, but Betty is likely to succeed on this point. There are no facts to suggest corporate formalities were not formed as the corporation held a board of director's meeting where the directors were named, and no corporate funds are implied to have been used for private use. Further, there is no evidence of fraud.

Accordingly, Landlord Co. is probably unlikely to succeed on a claim for piercing the

corporate veil unless it can prove undercapitalization.

Arnold v. Betty

Contribution - Partnership

When a partner is held personally liable for an obligation of the partnership, such a partner may be entitled to sue the partner who is actually responsible for such liability for contribution if they violated an obligation to the partnership. Further, a partner is a fiduciary to the partnership and partners and owes a duty of care to act in the best interest of the partnership and with reasonable care.

Here, as discussed above, Betty may be found personally liable to Landlord Co. for damages for the unpaid rent. However, as discussed above, Arnold entered into the partnership lease with Landlord Co. However, he did so with authority of the partnership. Accordingly, Betty will probably not succeed against Arnold in an action for damages based on contribution under a partnership theory.

Betty can argue that Arnold breached his duty of care in failing to form the corporation before entering into the relationship with Landlord and in failing to properly "capitalize" the corporation with a patent. However, Arnold will argue that it was Betty's job to conduct market research, not Arnold, and she should have known about the competitor. She will likely not succeed on this argument, but she may succeed in arguing that Arnold failed to properly form the corporation since he violated his duty of care in doing so and thereby injured the partnership.

Fraudulent Misrepresentation

A person may be found liable for fraud when they make a material misstatement of past or present fact upon which a reasonable person would rely and upon which the person

does, in fact, rely to their detriment.

Here, Arnold agreed to contribute his patent for durable paint to the partnership. He told Betty that he thought the patent was worth $100,000. However, he did not tell Betty that he had previously tried to sell the patent to several reputable paint companies but was never offered more than $50,000. Accordingly, at worst, he had no reasonable basis to believe the paint was worth $50,000, and at best, he failed to disclose a material fact. It is likely that Betty agreed to enter into the partnership and corporation with Arnold due to an equal share of investment and that this induced her to enter into such business. She then lost her investment and was held personally liable for an obligation of the business. Accordingly, she may be able to succeed against Arnold on a theory of fraudulent misrepresentation for his nondisclosure regarding the true worth of the patent.

Duty of Care - Corporation

A director owes a corporation the duty of care. Betty can sue Arnold on a derivative claim for violation of the duty of care in mismanagement of the corporation in causing it to financially exhaust its resources, but the damages would go to the corporation, and not to Betty. Further, Arnold can rely on the business judgment rule, which defers to the judgment of the directors so long as they act reasonably and in good faith without a conflict of interest.

Answer B

ANSWER TO Q5

I. Arnold's Liability to Landlord Co.

A. Partnership Liability

The issue is whether Arnold can be held personally liable as a partner of Durable Paint, Inc.

i. Formation

The issue is whether Arnold and Betty formed a valid partnership.

A partnership is the carrying on of a business for profit by two or persons as co-owners. There are three types of partnerships: general partnerships, limited partnerships, and limited liability partnerships. There are no formalities necessary to create a general partnership. A general partnership will be presumed where two parties share the profits of a business venture. The parties' subjective intentions are irrelevant when considering whether a partnership was formed. Where a partnership is formed, the partnership agreement will generally control the rights and liabilities of the partners, but where the agreement is silent, the provisions of the Uniform Partnership Act will control.

Here, Arnold and betty agreed to launch a business selling a durable paint that Arnold had developed and patented. Thus, they entered into an agreement to carry on a business for profit. Moreover, Arnold and Betty agreed to share all profits and act as equal owners in the partnership. Even though Betty contributed $100,000 as a capital investment and Arnold only contributed a patent worth $50,000, the two will likely be considered to have entered into a general partnership where Betty would be responsible for market research and marketing and Arnold would be responsible for incorporating

the business and taking care of other steps to start the enterprise. They did not enter into a limited partnership or limited liability partnership, because each require filing for certification with the secretary of state.

Thus, Arnold and Betty were each general partners of a valid general partnership.

ii. The Partnership's Liability on the Lease Contract

The issue is whether the partnership is liable on the contract entered into with Landlord Co., and if so, whether Arnold can be found personally liable.

A general partner is considered an agent of the partnership when acting in the ordinary course of business. An agent has authority to bind the principal where they have been given express authorization to do so. They have implied authority to do what is necessary to carry out their responsibilities. If the agent has authority to enter into a contract, either express or implied, the principal will be bound by the agreement. The agent will not be personally liable unless they did not disclose the identity of the agent.

Here, Arnold was an agent of the partnership and thus could act as its agent. The partners expressly agreed that he would be responsible for incorporating the business, but also in taking care of any other steps needed to start the enterprise. Arnold entered into a lease with for a building in which the Arnold and Betty would operate the business. Entering into the lease would be considered a "step needed" to start he enterprise, and thus Arnold was acting according to his actual express authority when he agreed to the lease. Because Arnold is a general partner of the partnership and acted under his authority to bind the partnership, the contract is binding on the partnership. Moreover, Arnold disclosed that he was entering into the lease on behalf of the partnership, which he named Durable Paint, Inc. Thus, Arnold is not personally

liable for the contract.

iii. Arnold's Liability as a General Partner

The issue is whether Arnold, as a general partner, is liable for the contracts.

General partners not in a limited liability partnership are personally liable for the obligations of the partnership. The general partners are jointly and severally liable and can seek contribution from any partners who do not pay their share. Absent any agreement otherwise, the partners are liable in the same proportions as they share in profits.

After six months, Durable Paint, Inc. breached the lease agreement. Arnold, as a general partner, would be personally liable for the breach by the partnership. However, though he is jointly and severally responsible to Landlord Co., the obligations of the partnership must be split equally between himself and Betty - which is the proportion in which they split profits. It is of no consequence that they contributed different amounts of capital investment. Thus, he can seek contribution from Betty for half of the debt.

B. Corporate Liability

The issue is whether Durable Paint, Inc. can be liable for the agreement.

Promoters are those who take the preliminary steps to set up a corporation and incorporate it. Promoters are not agents of the to-be corporation, and thus have no power to bind it in a contract. However, once incorporated, the corporation can adopt the agreement either expressly or impliedly. Adoption can be by a valid resolution of the board of directors, which requires a quorum (meaning a majority of directors must be present) and a majority of the quorum must approve the resolution. If they do so, both the corporation and the promoter are personally liable on the contract. If the corporation

instead executes a valid novation, replacing the promoter with itself on the contract, the promoter is no longer liable.

Here, Arnold entered into a lease with Landlord Co. on behalf of Durable Paint, Inc. At the time, Durable Paint Inc. was not yet a corporation because it had not yet been incorporated. Because Arnold was taking preliminary steps to incorporate it and set up the enterprise, he would be considered a promoter at the time he entered the lease. Thus, as a promoter, he was personally liable on the contract. However, the board, consisting of Arnold and Betty, then voted to "assume all rights and liabilities for the lease." The vote was unanimous and with all the directors present, and thus they had a quorum, and the resolution was approved by a majority of the quorum. Thus, the corporation expressly adopted the contract. It did not, however, execute a novation, as it didn't enter into an agreement with Landlord Co. to relieve Arnold of his liability. Accordingly, both Arnold, as a promoter, and Durable Paint, Inc., by adoption, are liable on the contract.

Moreover, even if the adoption was invalid, the corporation would be estopped from denying liability. Under the doctrine of corporation by estoppel, an entity that enters a contract that was not yet properly incorporated will be stopped from asserting that as a defense to contractual liability where it would be unjust to the other party to do so. Here, Arnold entered into the contract and listed Durable Paint, Inc. as the lessee. The corporation will be estopped from asserting as a defense that the corporation was not yet an incorporation to avoid liability.

C. Piercing the Veil

The issue is whether Arnold can be held personally liable for the obligations of Durable

Paint, Inc., as a corporation.

Generally, shareholders and directors cannot be held personally liable for the obligations of the corporation. However, if necessary to avoid a substantial injustice, the court can pierce the corporate veil and attach personal liability to shareholder where (1) corporate formalities are not observed, (2) the corporation is undercapitalized, and (3) the corporation is nothing but an alter ego of the shareholders.

Here, Arnold is presumably a shareholder of the corporation as well as an officer and director. Though he would generally not be personally liable for the corporation's obligations, the court may be able to pierce the veil. The corporation exhausted all its capital in only six months and was thus likely undercapitalized. Moreover, the sole directors and officers of the corporation were Arnold and Betty, who are also presumably the shareholders. Thus, Durable Paint, Inc. is likely considered merely an alter ego of Arnold and Betty. Even though it’s unclear to what extent Arnold and Betty did not observe corporate formalities, the court will likely find that it can pierce the veil and attach personal liability for the corporation's obligations to Arnold. This especially true considering that the corporation no longer had any capital, had no assets, and the patent rights that it was assigned for Arthur's patent effectively became worthless, and thus Landlord Co. likely could not recover anything from the corporation and would be without remedy for the breach.

Thus, Arnold will be personally liable for the obligations of the corporation.

II. Betty's Liability to Landlord Co.

The issue is whether Betty can be found personally liable to Landlord Co. for breach of

the lease.

A. Partnership Liability

The rules regarding partnerships are set forth above.

Just like Arnold, Betty was a general partner in the partnership that was formed prior to the incorporation. Thus, as a general partner, she is liable on the contract, as it was entered into while the enterprise was a partnership under the authority of the partnership.

Accordingly, like Arnold, Betty can be held personally liable for the debts of the partnership, which had no assets by which Landlord Co. could recover at the time of the breach.

B. Shareholder Liability

The rules regarding corporations and shareholder liability are set forth above.

For the reasons discussed above, like Arnold, Landlord Co. will likely be able to pierce the corporate veil to hold Betty, as a shareholder and director, personally liable for the obligation of Durable Paint, Inc.

III. Arnold's Liability to Betty

A. Duty of Care

The issue is whether Arnold is liable to Betty for breaching his fiduciary duties to the partnership and corporation.

Each general partner in a partnership owes a duty of care in how they conduct the business of the partnership, just as each director owes a duty of care to a corporation. Partners and directors must act with the reasonable care that an ordinarily prudent

person would under the circumstances. As a director, this requires acting in good faith and with a reasonable belief that your actions are in the best interest of the corporation. Under the business judgment rule, a director is presumed to have acted in good faith, on an informed basis, and with an honest belief that the action is in the best interest of the corporation. If a partner or director breaches a duty, he can be liable for any damages that result from the breach.

At the inception of their enterprise, Arnold falsely told Betty that he thought his patent was worth $100,000 when it was in fact worth only $50,000. As a result, he was not required to contribute any capital investment in the enterprise, as Betty assumed that he had made a contribution equal to her $100,000 capital investment. Thus, Arnold breached his duty of care by not acting in good faith when staring the business with Betty. However, there is no indication that Arnold breached any duty in incurring the obligation to Landlord Co. that would have caused any damages to the enterprise. Nor is it clear what damages his breach caused the enterprise.

Accordingly, even though he breached a duty, he would not be personally liable to the partnership or the corporation because it is unclear what damages, if any, resulted.

B. Misrepresentation

The issue is whether Arnold can be liable to Betty for misrepresentation. Misrepresentation occurs when one knowingly makes a material representation of fact with the intent to mislead, and the other person reasonably relies on it.

It appears Arnold knowingly made a false misrepresentation to Betty regarding the worth of the patent, and he did so with the intent to induce a similar value capital contribution. Betty then reasonably relied on that misrepresentation to invest $100,000

rather than a lesser amount, which is now lost.

Thus, Betty may be able to recover for an excess she invested compared to how much she would have if she knew the patent was worth only $50,000.

Jul 2021

California Bar Examination

Essay Questions and

Selected Answers

ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2021

CALIFORNIA BAR EXAMINATION

This publication contains the five essay questions from the July 2021 California Bar Examination and two selected answers for each question.

The selected answers are not to be considered "model" or perfect answers. The answers were assigned high grades and were written by applicants who passed the examination after the First Read. They are reproduced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. These answers were written by actual applicants under time constraints without access to outside resources. As such, they do not always correctly identify or respond to all issues raised by the question, and they may contain some extraneous or incorrect information. The answers are published here with the consent of the authors.

Question Number	Subject
1.	Civil Procedure
2.	Professional Responsibility
3.	Torts
4.	Criminal Law and Procedure
5.	Wills and Succession / Community Property

ESSAY EXAMINATION INSTRUCTIONS

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little or no credit. State fully the reasons that support your conclusions and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

Q1 Civil Procedure

Jiff, a California citizen who resides in Truckee, California, just west of Reno, Nevada, provides cleaning services. At Jiff's request, customers submit written evaluations of his services so he can monitor their satisfaction.

Jiff entered into a contract with Shearer, a Nevada citizen who operates a beauty salon in Reno, Nevada. The contract, signed in Reno, obligated Jiff to use due care in cleaning. One night while cleaning, Jiff accidentally broke an antique vase, which Shearer claimed was worth $100,000.

Shearer sued Jiff for negligence in the United States District Court for the Eastern District of California, which includes Truckee. The complaint alleged that Jiff's lack of due care caused breakage of the vase. Shearer moved to compel production of evaluations completed by Jiff's customers in the past year. The court denied the motion.

Following a trial, the jury returned a general verdict in favor of Jiff and the court entered judgment on the verdict. Shearer did not appeal.

Six months later, Shearer sued Jiff again in the same court for breach of contract. The complaint alleged that Jiff's lack of due care caused breakage of the vase.

1. Was venue properly laid in the Eastern District of California? Discuss.

2. Did the court err in denying Shearer's motion to compel? Discuss.

3. May Jiff take advantage of the judgment in the first suit in defending against the second suit? Discuss.

.

Answer A

Applicable Law

The United States District Court for the Eastern District of California is a federal court. Because the cause of action at issue here is a negligence claim, the district court must have subject matter jurisdiction through diversity. Here, the requirements of diversity are satisfied because Jiff and Shearer are citizens of different states with no indication that they intend to reside elsewhere (California, and Nevada, respectively) and because the amount in controversy—the value of the broken vase—is $100,000. However, when a federal court is sitting in diversity, it is necessary to determine which law applies: state law or federal law.

To determine the applicable law, the *Erie* Doctrine applies. Generally, federal courts apply state substantive law and federal procedural law. Here, state "substantive" law includes the negligence cause of actions, a statute of limitations, and other necessary substantive elements. Rules of venue and discovery are governed by the Federal Rules of Civil Procedure. However, rules of preclusion (discussed below) are governed by the substantive law of the state in which the court sits. Therefore, the federal court will apply California law in determining whether preclusion applies.

1. Venue

Venue is proper (1) in any district in which a defendant resides, if all defendants reside in the same district, or (2) in the district where the events giving rise to the cause of

action occurred, or where the subject matter of the action is located. If neither of these is proper, then venue may be proper in any district in which a defendant is subject to personal jurisdiction.

Defendant's Residence

Here, the defendant, Jiff, is a California citizen. Additionally, Jiff is the only defendant here. Further, the facts indicate that Jiff resides in the Eastern District of California, which includes Truckee. Therefore, because Jiff is the only defendant in this action, all of the defendants live in the same state, so venue will be proper in any district in which a defendant resides. Therefore, venue will be proper over Jiff in the Eastern District of California, because it is the district where Jiff lives.

Events Giving Rise to Cause of Action

Though venue is proper on the above ground, this ground would not be a satisfactory ground for venue: though a contract would generally give rise to venue in a district in which it was signed, the contract that governed Jiff's cleaning services was also signed in Reno. Second, Jiff was cleaning in Reno, Nevada, when he broke the vase. Accordingly, the events giving rise to the cause of action, or the area where the property is located, do not give rise to proper venue in the Eastern District of California. However, venue will be proper on the first ground, as discussed above.

Conclusion

Venue is proper, therefore, in the United States District Court for the Eastern District of California.

2. Motion to Compel

Discovery

Discovery enables parties to obtain information from one another relevant to their claims and defenses. As discussed above, the Federal Rules of Civil Procedure apply to the discovery here. Before parties may properly begin discovery, they must make initial disclosures of certain information, including names of those who have information, and other necessary information to disclose. Further, parties must also confer to create a discovery schedule. Here, there is no indication that such initial disclosures were made, nor that such a process was followed. Accordingly, discovery may have been improper on the grounds of improper procedure.

Grounds for Motion to Compel

A motion to compel may be filed only upon a good faith certification by the person seeking discovery that they have either conferred or made a good-faith effort to confer with the opposing party in seeking the discovery, and the party opposing the discovery refuses to turn over the discovery regardless. Here, there is no indication that Shearer and Jiff have conferred, or that Shearer made a good faith effort to confer with Jiff. Accordingly, because the motion may not have been filed properly by Shearer, the court may have properly denied the motion to compel.

However, if this conferral and requisite procedure were properly made, then it is necessary for a court to determine if the information sought is within the scope of discovery.

Scope of Discovery

Discovery is proper for any non-privileged matter that may lead to the discovery of any relevant evidence. Relevant evidence is evidence which tends to make any fact more or less likely. However, discovery does not have to be admissible in court in order to be discoverable; so long as it is relevant, the evidence may be properly discoverable.

Here, Shearer moved to compel production of evaluations completed by Jiff's customers in the past year, and the court denied the motion. Therefore, it is necessary to determine whether these evaluations are relevant to Shearer's cause of action. The evaluations likely contain information about Jiff's cleaning services, and the extent to which the customers are satisfied with the services. They may contain good reviews, bad reviews, and history of different incidents, including breakage of items. Shearer will argue, therefore, that because his cause of action is based on Jiff using due care in cleaning, then a history of different incidents and evaluations will demonstrate whether Jiff tends to use due care, or whether he does not. Though this information would not necessarily be admissible in evidence, this is certainly relevant to Shearer's cause of action, as it would likely tend to show Jiff's pattern of behavior while cleaning, as well as any unique incidents that occurred while Jiff cleaned.

On the other hand, Jiff may argue that the evaluations are not relevant because Shearer requested all evaluations from the last year. However, Shearer will argue that a year is likely a narrow enough time period that will enable Shearer to obtain information relevant to his cause of action.

Further, Jiff may point to the fact that he requests that customers submit written

evaluations. When a person operating a service business requests evaluations, it is likely that they are only requesting evaluations that will treat them favorably, meaning that such evaluations would not likely contain information about any negligence that Jiff was engaged in. Regardless, because Jiff cannot prove that the evaluations do not contain relevant information that can assist Shearer in preparing his claim or defense, the evaluations are properly within the scope of discovery.

Request for Production of Documents

A party may properly request that another party produce documents. Though it may be possible to obtain such information from non-parties through a subpoena duces tecum, a subpoena would not be necessary here because Jiff is a party to the action. Accordingly, this is a proper discovery request, because the evaluations are documents that are within the control of the other party. Though Jiff could argue that turning over the evaluations would impose too extensive a burden on him, the documents are within his control and do not appear to invade on too extensive a privacy interest, unlike the disclosure of emails between family members, for example. Accordingly, this is a valid request for the production of documents.

Conclusion

If Shearer properly filed the motion to compel after an attempt to confer with Jiff, then the motion to compel is proper here because the information requested is within the scope of discovery, and the court erred in denying the motion. However, if Shearer failed to do so, which appears to be the case given that the facts do not mention any such conferral, then the court properly denied the motion to compel.

3. Judgment in First Suit

In order for Jiff to "take advantage" of the judgment in the first suit in defending against the second suit, he must either rely on principles of claim or issue preclusion. Preclusion may either be used offensively or defensively—though certain states have different rules on the use of offensive preclusion. Here, Jiff would be using preclusion defensively in order to prevent a same claim or issue from being raised against him a second time.

Claim Preclusion (Res Judicata)

Claim preclusion prevents the same claim from being litigated multiple times, so long as it is (1) the same claim (2) between the same parties (3) that is a result of a final, valid judgment (4) on the merits.

Same Claim

To determine whether a second claim is in fact the same claim as the first, federal courts apply a "transactional" test, which requires determining whether the incident was a part of the same transaction or occurrence, or series of transactions or occurrences. However, because federal courts apply the law of the state court in which they sit when in diversity, California law would apply, as discussed above. Under California law, the test is whether the claim arises out of the same "injury," which is broader than the federal test.

Here, Shearer's initial claim was against Jiff for negligence, and alleged that Jiff's lack of due care caused breakage of the vase. Six months later, Shearer sued Jiff again in the same court for breach of contract, and alleged that Jiff's lack of due care caused

breakage of the vase. Shearer will argue that a breach of contract claim is different than a negligence claim, which arises out of tort, and that the underlying claims are not the same. However, under either the transaction or the injury test, the underlying claim is the same because it arises out of the same transaction and injury: the breakage of the vase and Jiff's alleged lack of due care as a result. Despite the different causes of action, the underlying claim in Shearer's second case is the same.

Therefore, this element is satisfied.

Same Parties

A claim is between the same "parties" if the actual same parties are involved, or if it involves the parties' successors in interest. Here, the claim is between the same parties, meaning because the first suit was between Shearer and Jiff, and the second suit is between Shearer and Jiff.

Therefore, this element is satisfied.

Valid, Final Judgment

In federal court, a valid final judgment is one that is the result of either a motion for summary judgment or a verdict. The judgment is final after the verdict has been rendered and there is nothing additional to perform other than entry of judgment. However, under California law, a judgment is generally not treated as final until the subsequent appeals have been exhausted. Because federal courts generally apply the preclusion law of the states in which they sit, the finality of the judgment will likely be determined by California law.

Here, however, Shearer failed to appeal the verdict. Because an appeal is generally

required to be filed within 30 days after entry of judgment, Shearer's appeal will be time barred, meaning that he has exhausted the appeals process. Accordingly, Shearer's failure to appeal the verdict means that the judgment is final. Further, the judgment was rendered by a jury after a general verdict, in Jiff's favor, and the court entered judgment on the verdict.

Therefore, this element of claim preclusion is satisfied.

On the Merits

A judgment is on the merits if the court or a jury ruled on the case's substantive grounds, as opposed to dismissing the case on a procedural issue (though some procedural issues, too, may be treated as substantive, depending on the issue).

Here, the case was disposed of on substantive grounds because it occurred after a judgment by a jury through a general verdict in favor of Jiff. A general verdict means that the jury found that Jiff was not guilty. Accordingly, the case was properly decided on the merits, and the court later entered judgment.

Conclusion

Accordingly, the elements of claim preclusion are satisfied, meaning that Jiff may take advantage of the judgment in the first suit in defending against the second suit. To do so, Jiff may file a motion to dismiss on grounds of claim preclusion, or a motion for summary judgment, so long as the motion is made within 30 days after the close of discovery (though discovery would not likely occur here).

Issue Preclusion (Collateral Estoppel)

Jiff may also argue that the judgment is precluded on grounds of collateral estoppel.

Valid Final Judgment

See rule and analysis above. Because the jury returned a general verdict in favor of Jiff, and the court entered judgment on the verdict, this is a valid final judgment.

Same Issue

The same "issue" refers to the same factual or legal dispute as to a certain occurrence or transaction. Here, in the first case, Shearer's suit against Jiff alleged that Jiff did not exercise due care, which caused breakage of the vase. In the second suit, Shearer's suit was based on breach of contract, but still was based on litigating the same issue: that Jiff's lack of due care caused breakage of the vase. Therefore, because both suits deal with this same issue—whether Jiff failed to exercise due care such that there was breakage of the vase—then this element is satisfied.

Actually Litigated

To determine if the same issue was actually litigated, it is necessary to determine if the parties were able to present evidence on the issue, call witnesses, and litigate the matter. Here, the matter appears to have been actually litigated because it was the sole issue in the initial case: whether Jiff's lack of due care caused breakage of the vase. The parties would have presented evidence on the matter, called witnesses, cross-examined them, and litigated the issue.

Accordingly, the same matter was actually litigated, and this element is satisfied.

Necessarily Decided

An issue must have been necessarily decided, which means that the jury (or judge, in a bench trial) could not have ruled on some other grounds in its verdict for a party. Though this may generally be difficult to decide in the case of a jury trial with multiple issues, this is a jury trial with only one issue: whether Jiff's lack of due care caused breakage of the vase.

Therefore, in the first case, the jury would have necessarily decided whether Jiff's lack of due care caused this breakage. However, Shearer may argue that the actual underlying "issue" that they might have decided could be different, based on a narrow interpretation of "issue." Specifically, maybe the first jury ruled the way it did because of the evidence to do with causation, or maybe it did because of the evidence of Jiff's breach. Shearer would argue that because it is impossible to identify the specific ground that the jury ruled on, especially in the absence of a special verdict, it is not possible to determine that Jiff's lack of due care was "necessarily" decided.

However, Shearer's argument would be too broad: in deciding the elements of due care, the jury would have properly considered the elements of negligence, and then decided that exact issue. Accordingly, Jiff's negligence was decided in the first case, despite the different cause of action in the second case.

Therefore, this element of issue preclusion is satisfied.

Conclusion

Jiff will properly be able to take advantage of the judgment in the first suit in defending against the second suit based on grounds of claim preclusion and issue preclusion.

Answer B

Was Venue Properly Laid in the Eastern District of California?

As the below analysis will show, venue was properly laid in the Eastern District of California.

Preliminary Issues

As a preliminary matter, a venue analysis is only proper after it has been determined that there is **personal jurisdiction** and **subject matter jurisdiction** to hear the claim.

In personam personal jurisdiction is the court's ability to have jurisdiction over the people involved in the claim. Subject matter jurisdiction is the ability to render a decision on the subject matter of the dispute, in line with the delimitations on subject matter jurisdiction of federal courts covered in Article III of the Constitution.

In personam jurisdiction has three traditional bases: *presence, domicile, and consent*. Here, Jiff is domiciled in Truckee, where the suit was brought and therefore the court has PJ over him through domicile and PJ over Shearer through consent (plaintiff who brought the suit consents). Therefore, no analysis needs to be made under a constitutional analysis using a long arm statute (which would be contacts (minimum contacts - purposeful availment and foreseeability), relatedness (specific or general PJ), and fairness (an analysis under specific jurisdiction).

Article III federal courts have subject matter jurisdiction over **federal question cases and diversity cases**. Here, there is no federal question raised in the complaint of Shearer.

Federal diversity jurisdiction occurs when: the parties are citizens of different states and the cause of action is greater than $75,000. Diversity jurisdiction is the mechanism through which federal courts can hear state law claims. **Diversity** is present here as the claim is for $100,000 (it is a plausible amount based on the facts and a case will only fail this aspect if it is "beyond a legal certainty" that the amount in controversy is less than $75,000). Also, the plaintiff is diverse from the defendant and there is complete diversity (no plaintiff can be of the same state as any other defendant). Jiff is a California citizen. Shearer is a Nevada citizen. Finally, the Eastern District of CA can hear the state law claim for negligence.

Thus, there is both personal jurisdiction and subject matter jurisdiction and a venue analysis can proceed.

Venue Analysis

Under the Federal Rules of Civil Procedure, venue is proper: (1) any district where *any defendant resides*, if all defendants are residents of the state where the district court is located; (2) where the events r*elating to the cause of action* (contract formation or tort occurrence) t*ook place;* and (3), if (1) or (2) does not apply, in any district where personal jurisdiction can be had over a defendant.

Analysis Under Defendant Resides - Prong 1

In this case, Jiff is a California citizen who resides in Truckee, California. As the facts provide, Truckee California is located in the Eastern District of California. Shearer, a Reno Nevada resident, sued Jiff for negligence in the United States District Court for the Eastern District of California. Since Jiff resides in the Eastern District of California

(for residency purposes under a venue analysis for *individuals*), residency is determined by **domicile** which is where an individual resides and intends to stay [no facts indicate that Jiff planned on shifting his domicile so he does reside in Truckee, California as provided for by the facts].

Analysis Under Substantial Events - Prong 2

Since we have found that venue is proper under Prong 1, the venue analysis concludes here. However, for hypothetical analysis, venue would also have been proper if Shearer had brought suit in the federal district court that encompasses Reno, Nevada. Venue would have been proper in the district court that embraces Reno because that is where the contract was signed and that is where Jiff performed the services under the contract (cleaning Shearer's beauty salon) and where the alleged tort of negligence occurred (the breaking of the vase due to an alleged lack of due care).

While it is unlikely under these facts, since Jiff is domiciled in the Eastern District of California and it is convenient to defend the case there (and Shearer elected to bring the case there), if the parties did make a motion to transfer venue, the judge may allow the transfer of the case to a venue within the same judicial system (here the federal court system) where venue would have been proper. If such a motion for transfer was made from either party from the Eastern District of California to the federal district that embraces Reno, such a motion should be granted as venue is proper there and there are interests in favor of such a transfer (that is where the contract was made and where the alleged tort occurred). The transferee court would apply the law of the original

transferor court since venue was proper.

Analysis Under Prong 3

Since Venue is proper under prong 1, no analysis is needed under prong 3. This prong usually applies when there are multiple defendants and no determination is able to be made under prong 1 or 2. This option is the fallback option in the venue analysis.

Conclusion for Venue - Venue is Proper

Venue was properly laid in the Eastern District of California. Here, there is only one defendant, Jiff. He is a California citizen who resides in Truckee, California. Shearer brought suit in the Eastern District of California, which encompasses Truckee, and therefore venue is proper under prong 1 of the three- prong venue test under the FRCP (it is a district where a defendant resides when all defendants reside in the same state [which has happened here since there are no other defendants]).

2. Did the court err in denying Shearer's motion to compel?

The court did not err in denying Shearer's motion to compel because the evaluation records are both relevant and proportional to the discovery issues in this case relating to a claim of negligence, specifically a lack of due care.

Under the Federal Rules of Civil Procedure, **discovery** is the part of the case where the parties make requests (through interrogatories, depositions, and other mechanisms) for evidence which the other party has in order to put forth their case (and, indeed, based on discovery certain motions can be made such as a motion of summary judgment where one side alleges that based on the discovery available and the pleadings, there

exists no genuine issue of material fact). Therefore, discovery is a critical part of federal civil procedure.

Parties initially meet for a *Rule 26f conference* to meet and confer over the plan for discovery. There are certain mandatory disclosures that must take place including the identities of expert witnesses, presence of insurance, items that they will use to support their claims and other matters. From there, discovery begins and the court only gets involved when one party refuses to comply with the discovery request of another party.

It is unclear from the facts whether Shearer initially asked Jiff for the evaluations and Jiff refused. If this was the case, then Shearer is justified in bringing a motion to compel and involving the court, since the motion is asking the court to use its coercive power (the threat of sanctions as well as, in extreme cases, contempt of court or dismissal with prejudice) to compel the discovery of certain items.

Standard in Discovery - Relevant and Proportional

The key standard that a court must use when analyzing whether to grant a motion to compel (or to determine whether anything is discoverable) is whether the item in question is **relevant** to the case at hand and whether the request is **proportional** given the circumstances of the case. It is important to note that an item might be discoverable because it is relevant even though it might not be *admissible* later on under the rules of evidence (due to issues such as hearsay which might come into play here since it involves double hearsay statements of customers submitting their written evaluations of Jiff's services).

Evaluations are Relevant

The evaluations are relevant to this case. At Jiff's request, customers have submitted written evaluations of his services in the past so that he can monitor their satisfaction. Shearer will argue that these evaluations are critical to understand Jiff's track record in the cleaning industry. These evaluations could provide other examples in which Jiff has acted negligently and not adhered to a proper standard of due care. It also would be helpful to understand whether other contracts with Jiff's other customers specifically contained obligations requiring Jiff to adhere to a standard of due care in cleaning. This is relevant to show that Jiff was aware of his duties. While legal relevance under FRE 403 is beyond the scope of this question, it is likely that these evaluations would also be admissible at trial (assuming hearsay can be overcome) since the probative value is not outweighed by unfair prejudice.

Jiff might argue against their ultimate admissibility as grounds for not allowing them to be discoverable but admissibility, as stated above, is not a key touchstone in discovery analysis.

Request is Proportional

The request is proportional.

This case is for negligence and for damages of $100,000. The cost on Jiff is small to produce these records in light of the circumstances, potential liability, and hardship that Shearer would have to undergo to subpoena and identify the past customers.

No Privilege Applies

Jiff might argue that these evaluations were made in preparation for trial in an attempt

to shield them under the attorney work product doctrine. This would fail as these are preexisting evaluations that predate the litigation. Even if it were determined to be work product (not likely), that would be overcome by the substantial hardship Shearer would undergo to obtain similar information (and that there are no attorney mental impressions which are absolutely privileged).

Conclusion

The court erred on denying the motion to compel since the evaluations are relevant and proportional to discovery and no defense applies.

3. May Jiff take advantage of the judgment in the first suit in defending against the second suit?

Yes, Jiff may take advantage of the judgement in the first suit in defending against the second suit.

The doctrines of claim preclusion and issue preclusion are both applicable to this fact pattern.

Claim Preclusion

The doctrine of **claim preclusion** prevents a party from relitigating an identical case. Claim preclusion applies when there is: **(1) the same parties; (2) the same cause of action or controversy and (3) a final judgment on the merits**. *Merger* occurs when a plaintiff wins in one case and attempts to relitigate an issue that he did not raise in the first case. Such an issue merges into the first judgment and cannot be brought in a subsequent action. *Bar* occurs where a plaintiff loses and then tries to

relitigate an issue he did not raise in the first case. Such an issue is barred in a subsequent action.

Here, Shearer sued Jiff for negligence in the Eastern District of California. Following Shearer's loss in a final judgement (which was not appealed), Shearer is now bringing another action 6 months later in the Eastern District (the same court). Therefore, issue preclusion applies because it is (1) the same parties [Shearer and Jiff]; (2) the same cause of action (the damages incurred when Jiff cleaned the beauty parlor in Reno); and (3) a final judgment was issued (the jury verdict against Shearer).

Shearer could have brought the contract claim in the first case but did not and is thus *barred* now under issue preclusion from doing so.

Primary Rights Doctrine - Possible Defense to Claim Preclusion

Some states, including California, adhere to the *Primary Rights doctrine*. This means that for the same cause of action, a claim is not barred if they involve different primary rights (an example would be property damage and personal injury). Here, Shearer would make an argument that different primary rights are involved due to a tort claim and a contract claim. Shearer would argue that this is a substantive law issue that the federal court must apply CA law under the *Erie* doctrine. However, since these are not separable actions as typically found in primary rights doctrine scenario as described above (ex. property damage and personal injury), a court would most likely deny this defense and say that it is barred under issue preclusion.

Issue Preclusion

Issue preclusion occurs when there is (**1) a final judgment on the merits; (2) an**

issue was *actually litigated* in the first case; and (3) it was essential to judgment. Traditionally, only *completely mutual* issue preclusion was allowed meaning that it had to be the same parties. Under the modern view, *nonmutual issue preclusion* (either *defensive* where a defendant from a previous action can use a previous action to defend against a new plaintiff or *offensive* where a new plaintiff is attacking a defendant from a prior action). Here, there is *mutuality* of the parties so a nonmutual analysis doesn't apply (although it is worth noting that CA allows for offensive nonmutual issue preclusion).

Here, there was a final judgement on the merits. Shearer might have an argument to make as to whether the issue was actually litigated. In the first case, which centered around negligence, it is highly likely that Shearer would have pointed to the contractual language of due care in order to help establish the duty that Jiff owed to Shearer and to assist helping the trier of fact (the jury) find a breach of that duty. If Shearer had pointed this out and it was *essential* to the judgment, it is likely that issue preclusion would apply.

However, if Shearer did not point to the contractual language and/or relied primarily on general negligence principles (thereby relegating the contractual provision to a minor issue status), issue preclusion would not prevent this claim from going forward.

Conclusion:

Shearer will be prevented under claim preclusion from filing suit again. Depending on the role contractual language might have played in the first case, issue preclusion could also prevent the claim.

Q2 Professional Responsibility

Laura is a lawyer. She practices family law in a suite she shares with Alex, a tax attorney. Laura and Alex share a conference room, a printer, and a receptionist. Their receptionist is Laura's son, Sam. Laura and Alex each use separate letterhead, business cards, and telephone numbers.

Laura represented Wendy, who was divorcing her husband Henry. Laura filed a request for child support from Henry. In his financial statement, Henry claimed that he had no significant assets and that he lived alone. Wendy told Laura that she suspected Henry was not being truthful, that he had more income and assets than he claimed, and that he lived with and shared expenses with his girlfriend, Ginny.

One morning, while picking up papers from the office printer, Laura saw and read a document addressed to Alex left on the printer by Sam. The document was a property deed in the names of Henry and Ginny, and listed Ginny's address as the same as Henry's. Henry had not disclosed the property on his financial statement. Alex had received the document from Ginny, whom Alex represented on a matter unrelated to Henry's divorce.

Because Laura did not want to get her son into trouble, she never mentioned the property deed to Alex, Wendy, or the court. Wendy received a lower award of child support from the court than she should have, based on Henry's incorrect financial statement.

1. What ethical violations, if any, has Laura committed? Discuss.

2. What ethical violations, if any, has Alex committed? Discuss.

Answer according to California and ABA authorities.

Answer A

1.

Laura and Alex Office Arrangement

Laura and Alex are carrying on their respective practices in a shared family law suite. They must be sufficiently separate or else they risk being considered a partnership, and thus would be facing potential conflicts of interests with clients. While they share the same suite and the same receptionist, which could raise concerns about the adequacy of their separateness, they have been using separate telephone numbers, letter head and business cards. They are also each in different distinct specialties of family law and tax law, which could indicate to potential clients that they are separate practices.

With this arrangement they run the risk of not being sufficiently separate such that they could be considered a partnership. The facts do not indicate that they are clearly separated by demarcated offices, or how their respective individual practices are presented on the door of the suite. If they were deemed to be one firm, or a partnership, then they would face conflicts of interest.

A conflict of interest would exist between Laura representing Wendy, while another lawyer in the firm represents an opposing party in the same issue. If they were deemed to be one firm or partnership, then Sally would have to withdraw from representation of Wendy, or Alex would have to withdraw from representation of Henry and they would

have to shield the other partner from the case. Or they would be required to receive consent from both conflicted parties to representation, with informed written consent (CA) or informed consent in writing (ABA).

However, it is likely that Laura and Alex would be considered to be separate entities and must continue to keep their work separate and maintain clear boundaries between the two individual firms. They would need to create a new process for printing materials and keeping their practice clients' information confidential.

Document Addressed to Alex: Inadvertent Disclosure

When an attorney inadvertently receives confidential information or work product from an opposing party under ABA Rules. they are required to notify the sending party of the error and must not continue to read or use the document and return the offending document. In CA. the rule is that they must also refrain from reading the material and inform the sending attorney. but are not required to return the document.

Here, Laura should have stopped reading when she saw that the document was addressed to Alex. She should have also informed Alex of the inadvertent disclosure.

Duty of Competence

Laura owes a duty of competence to her client Wendy that she will competently represent Wendy in her case-meaning without negligence or recklessness. Here, Laura breached this duty because she had information about Henry's property and assets that were essential to her competently representing Wendy in Wendy's divorce. The property deed of Henry was essential to the determining of child support. And in declining to inform Wendy and apply it to the request, Laura was not acting competently

nor in the best interests of her client. The result was that Wendy received lower child support than she should have.

Communication

Additionally, Laura has a duty to communicate with her client and keep her client informed of key issues and steps in representation. Discovering that Henry had a property that he had not listed as a significant asset was important information for Wendy, as the client, to know. In failing to inform Wendy of this critical fact in her case, she violated professional ethics.

Duty of Loyalty

Laura has a duty of loyalty to her client. As discussed above, she must act competently and diligently in their representation; she must also be in communication with her client and keep them informed of the case. Here, she was concerned about her Son getting into trouble, and as a result, breached her duty of loyalty to her client by not informing Wendy of the property deed.

Duty of Candor

Laura owes a duty of candor to the tribunal. She is aware that Hugh said he lived alone, and that he had no significant assets; however now Laura is aware that there is a property deed in Hugh's name, and that Ginny resides at the same property, meaning that Hugh does not actually live alone.

Laura has a duty to inform the court of this discrepancy.

Duty to Supervise

Attorneys have a duty to ensure that their staff are behaving ethically. Here, Sam is a staff member of Laura as well as Alex. Laura has a duty to ensure that Sam is complying with ethical standards, which means keeping client information confidential. She has failed to supervise Sam, and additionally has failed to take steps to inform Sam of his duties after finding the property deed.

2.

Duty of Competence

Alex has a duty to act competently in the representation of his clients. He must not act with recklessness or negligence. Here, in leaving a property deed, a client's information, in a shared and potentially public space in the printer, is a breach of duty of competence.

Duty of Diligence

Along with competence, Alex has a duty of due diligence. This means he must timely manage and handle cases and documents. Here, Alex was not diligent in handling the property deed for Hugh and Ginny because he left it out on the office printer in a shared space.

Duty of Confidentiality

Alex has a duty of confidentiality to his client Hugh, and to possibly Ginny who is also his client, he cannot share information about representation of a client without consent

of the client or under various exceptions, such as he may reveal confidential information to prevent serious bodily harm or death. For a client to consent to attorney sharing revealing information about representation or privileged attorney client communication, the client must give informed written consent in CA or informed consent in writing (ABA). Here, the disclosure of the property deed was inadvertent, so it does not meet any exceptions like those that allow a client to reveal confidential information to prevent serious bodily harm or death (CA and ABA) or to prevent or rectify substantial financial harm where the client is using the lawyer's services in furtherance (ABA only).

Here, Alex negligently revealed confidential client information when the deed was left in the printer. He breached his duty of confidentiality to his client.

It is not clear if Alex was aware that the property deed was not disclosed in Henry's divorce case against Wendy. If Alex was aware, he could attempt to argue that this breach of confidentiality fell under the exception of revealing confidential information to rectify or prevent serious financial harm where the client is using the lawyer's services in furtherance (ABA only). However, the facts are not clear on the seriousness of the financial harm as a result of the lower child support payment, or that Henry was using Alex's services in furtherance. The information seems to have been inadvertently disclosed by Alex and Sam.

Duty to Supervise

Alex has a duty to supervise his staff, including Sam, who acts as a receptionist for Laura and Alex. Alex has a duty to supervise staff to ensure that they conform to ethical standards. Sam leaving out information on a printer in a shared office suite is behavior

that risks the confidentiality of clients.

Alex has failed to supervise staff diligently.

.

Answer B

Laura's Ethical Violations:

Duty of Loyalty: Self Interest

Laura (L) represented Wendy (W) and therefore, owed Wendy a duty of loyalty under both CA and ABA rules. The duty of loyalty requires a lawyer to act in the client's best interests. Under both rules, if a lawyer knows or has reason to know that there is a substantial risk of materially limiting their ability to represent their client competently or diligently because of a personal conflict, they must withdraw from representation unless (1) they reasonably believe they can provide competent and diligent representation, (2) representation would not be against the law, (3) they are not representing two clients on opposing ends of the same litigation, and (4) they obtain informed consent, confirmed in writing under the MR, or informed written consent under CA. CA differed in consent requirements because it requires that both the consent AND the disclosure be in writing, whereas the MR only require the former to be in writing.

Here, L had a personal conflict of interest because her receptionist, Laura's son, Sam (S), accidentally left a property deed on the printer. L will argue that at the start of representation, there was no conflict of interest and thus she did not have a duty to inform nor withdraw. However, after L found out that her son made a mistake, she acted on her own interests because she did not want to get her son in trouble. Since L was in a position to pick her son over her client, there was a conflict of interest here and thus, L breached it by not getting informed written consent or informed consent confirmed in

writing from W. Even if L did get the consent, it is unlikely that she could have believed that she would be able to provide competent nor diligent representation because she would have to pick her own client and put her son at risk of getting in trouble. Thus, this was a breach of her duty of loyalty under both ABA and CA rules.

Duty of Diligence

Under both CA and ABA rules, a lawyer must act with hard work and dedication, to diligently act in the best interest of their client. Under CA rules, a lawyer must not intentionally, recklessly, with gross negligence or repeatedly fail to provide diligent representation. This rule does not require an attorney to breach ethical rules in order to zealously represent their client; however, they must do their best to advance their client's non-frivolous interests.

Here, Laura had a duty to use all the information that she got to W's best interest. However, she did not use the information about the deed because she did not want to get her son in trouble. L will argue that she did not use this information because she did not want to breach confidentiality between Alex and his client, Ginny. However, by prioritizing Ginny and her son's interests above her own client, L failed to do all that she could to advance the best interests of her client. Therefore, L breached her duty of diligent representation to W.

Duty to Withdraw

Under MR, a lawyer must withdraw from representation if representing the client would lead to a violation of the ethical rules, or any other law. Under CA rules, the lawyer must withdraw if continued representation would lead to a violation of the ethical rules. Here,

continuing to represent W led L to breach the ethical rules of diligence, conflict of interest, and more as discussed below. Therefore, by failing to withdraw, L was also in breach of this rule under both CA and ABA rules as well.

Duty of Candor

An attorney owes a duty of candor to opposing parties and the tribunal. Under both ABA and CA rules, a lawyer must not knowingly make a false statement to the court or fail to correct a false statement previously made.

Tribunal

Here, L breached the duty of candor to the tribunal because she knew that the financial statement that Henry submitted claiming he had no significant assets and lived alone was false. She knew that the court would rely on this statement when awarding Wendy's lower award of child support. However, instead of being truthful with the court and informing the falsity of this statement that she KNEW was false, she never mentioned it. Therefore, not only was this a CLEAR breach of diligence to her client as explained above, it was also a breach of candor to the court under both ABA and CA rules.

Alex

L also arguably breached the duty of candor to Alex because she failed to tell him about getting this information about his client. L will argue that she does not owe A any duties because he isn't even opposing counsel. However, as discussed below, she did owe him a duty to inform him of the inadvertent disclosure; by failing to do so she probably breached her duty of candor to him as well. (*See below, duty of fairness).*

Duty not to assist in perjured testimony

L may have also breached her duty not to assist in perjured testimony or false evidence. Here, H gave false evidence to the court that said he did not have significant assets and lived alone. However, L will likely be successful in arguing that H was not her client. She therefore did not have a duty to prevent him or try to dissuade him from offering false evidence like she would have if L were trying to offer that false document. Therefore, it is unlikely that L assisted H in providing false testimony. However, her failure to inform the court that she knew that this information was false due to her own self-interest will still likely be a breach of candor to the tribunal.

Duty of Communication

Under both ABA and CA rules, a lawyer has a duty to reasonably communicate with their clients. In CA, this includes updates of any significant developments in the case, which includes all written settlement offers or plea deals. Under ABA, this includes keeping the client reasonably performed of the status of the matter. Under both rules, the lawyer must keep the client reasonably informed of details necessary to make an informed decision.

Here, W told L that she believed H was not being truthful about having no significant assets and living alone. However, L found out that there was a deed in the names of both Henry and Ginny. This is likely something that is necessary to communicate to a client because it is about the status of the matter for child support, and it is a significant development under CA rules because it makes W's chance of receiving a higher award of child support more likely. However, L did not inform W of the fact that she discovered

evidence that will help W's claim. Instead, she hid it and never mentioned it to Alex, Wendy, not the court. Therefore, she breached her duty of communication to W.

Duty to Supervise

Under both CA and ABA rules, lawyers have a duty to adequately supervise the staff that they manage or exercise control over. Here, L practiced family law in a suit shared with Alex (A), a tax attorney. L and A both shared a conference room, a printer, and a receptionist, who was L's son, Sam. L will argue that since S was L and A's shared receptionist, she could not exercise control over him. However, a receptionist usually follows directions given by a lawyer that they are employed by, even if that means S was under the direction of both L and A. Moreover, S was L's son, which makes a stronger case that S was within L's control. Therefore, L breached a duty of supervising S and making sure that he did not leave confidential communications on the printer. L should have provided adequate training to ensure that things like this do not happen. By failing to provide such training and corrections, and denying that this whole incident didn't happen, L breached her duty to supervise under both MR and ABA rules.

Duty of Fairness: Inadvertent Disclosure

Lawyers owe a duty of fairness to opposing counsel. Under both ABA and CA rules, when a lawyer receives information that that they know or reasonably should know was sent by mistake, they must take certain steps to mitigate the harm to opposing counsel. Under the ABA rules, the lawyer must notify opposing counsel as soon as possible that they received this information. Under CA, the lawyer must notify opposing counsel and also only read as much as necessary to determine that the information was

inadvertently sent.

Here, L saw that deed in the names of Henry and Ginny and knew that H did not disclose the property on the financial statement. Under both ABA and CA rules, L was in breach because she timely failed to notify A who was in the other office next to her. She clearly did not notify him because she didn't want to get her son into trouble; however, her failure to do so was a breach of fairness to opposing counsel. Additionally, it is unclear whether L read more than necessary before she would have been required to disclose receipt of the information, but since she failed to disclose at all, she would be in breach of both rules regardless of how much of the deed she examined.

Contingency Fees

It is unclear what L and W's fee agreement was. In CA, the fee agreement may not be unconscionable and under ABA, the fees charged may not be unreasonable. Contingency fee agreements must be in writing under both authorities, and they are not allowed for criminal cases where payment is based upon a favorable judgment, or for family law cases where payment is based upon an award of spousal or child support.

We would need more facts about the fee agreement between L and W to determine whether this would have been a breach. Since L is representing W on a divorce matter and L is seeking child support, a contingency fee agreement would not be appropriate, and if L did execute one, this would be an ethical violation under both ABA and CA rules.

Duty of Competence

Under ABA and CA rules lawyers owe their clients a duty of competence. Under ABA, a

lawyer must use the legal knowledge, skills, thoroughness, and preparation necessary to provide competent representation. Under CA rules, a lawyer must not intentionally, recklessly, gross negligently, or repeatedly, fail to provide competent representation.

Here, it is unclear whether L acted competently because it seems she did not know of the property deed until after seeing it from the printer. Assuming that the deed was recorded, it is likely that a quick title search or further research would have revealed that H and G were living together to refute any claim that H did not own any property. Assuming a reasonable investigation would have revealed these facts, L breached her duty of competence by failing to find this out. Additionally, if she was able to find this out by a title search, she breached her duty because this makes a case even stronger that she breached her duty of diligence because this information could have been lawfully obtained even despite S's mistake. A lawyer would use this preparation necessary for competent representation; by failing to be thorough and adequately prepare, L breached her duty. Additionally, L breached her duty repeatedly by failing to search, failing to disclose, and failing to advocate for her client, therefore she also breached the duty of competence under the CA rules as well.

Alex's Ethical Violations:

Duty of Confidentiality

Lawyers owe a duty of confidentiality to their clients under both ABA and CA rules. Under ABA rules, the lawyer must not disclose information acquired through representation of the client, unless the client consents or it is impliedly authorized in the course of representation. Under CA rules, a lawyer must "maintain inviolate the

confidence and at every peril to himself to preserve the client's secrets." The duty of confidentiality lasts forever under the ABA rules, and ends when the client's estate is settled under the CA rules. Encompassed in both ABA and CA rules, a lawyer must take reasonable steps to avoid inadvertent disclosure of confidential communication.

Here, Alex (A) owed his client, Ginny (G), a duty of confidentiality. A received the property deed from G during his representation of her through a matter unrelated to Henry (H)'s divorce. He had a duty to exercise reasonable care to prevent inadvertent disclosure of documents received by her. A will argue that he did use reasonable care, and that it wasn't him who was careless, but L's son, S. However, assuming that S was subject to A's control, like he was subject to L's control discussed above, it is likely that A failed to use reasonable care to provide training to ensure that such careless mistakes would not happen. A should have also checked the printer from time to time to make sure that such communications would not inadvertently be shared with L. By failing to take any reasonable steps, it is likely that A breached confidentiality.

Not confidential?

A may also argue that the deed was confidential because it was readily available. Although the ABA rules make information that is readily discoverable not confidential, the CA rules differ in this regard. Therefore, the fact that the deed could have been discoverable by a quick title search (as discussed above), may make this not a breach of confidentiality under the ABA rules. However, under the CA rules, even if the deed was discoverable through some other means, this would not affect the analysis above.

Duty of Competence

Under ABA and CA rules lawyers owe their clients a duty of competence. Under ABA, a lawyer must use the legal knowledge, skills, thoroughness, and preparation necessary to provide competent representation. Under CA rules, a lawyer must not intentionally, recklessly, gross negligently, or repeatedly fail to provide competent representation.

Here, A did not use the thoroughness necessary to provide competent representation because a receptionist, subject to his control, left a document that was found by L who represented a client whose interests were related to G's interest (since they were in a relationship). A will claim he did not breach the CA rules because he did not do this repeatedly and did not know that L even had the document. It is unclear whether A was aware of this risk which make it reckless, but it is likely that if no reasonable measures were taken to make sure that Sam wasn't doing this all the time, this would be gross negligence at least. Therefore, it is likely A breached his duty of competence.

Duty of Loyalty, Conflict of Interest: Laura and Alex

Certain measures must be taken under both ABA and CA rules when two lawyers are working in the same firm. It is unclear here whether A and L were working in the same firm. Although they shared a conference room, printer, and a receptionist, which suggest that they were sharing spaces, they also used separate letterheads, business cards, and telephone numbers, which suggests that they were just sharing an office space and not a practice. Moreover, since L practiced in family law and A was a tax attorney, they also practice in different areas, which still could make this analysis go either way.

Duty of Loyalty: Potential Conflict of Interest

Since L and A were sharing common areas, even if they aren't working in the same firms, the policy reasons for both MR and CA rules would likely apply to their situation. Lawyers may not represent a client if there is a substantial risk that representation will be materially limited by the lawyer's duties owed to a different client, whether that client is represented by the firm or by the lawyer individually. There will be a substantial risk when the lawyer receives harmful material information adverse to one of the clients. Under CA rules, the information need not harmful, but it must be material which means it is important to the subject matter of the case. The lawyer may only represent the client if they reasonably believe they can provide competent and diligent representation and they get informed written consent (CA) or consent confirmed in writing (MR).

Here, L and A were working in a common area and thus there was a substantial risk that their duties owed may be limited because harmful material information may have been shared among them with the use of a shared (arguably irresponsible?) receptionist. Therefore, they had a duty to inform both of their clients of the situation and get required consent under both rules. By failing to do so, both A and L breached their duties of loyalty. A will argue that there was no conflict of interest because he was representing W on a matter unrelated to H and W's divorce. A has a strong claim here because it is unclear whether there was a substantial risk of materially limiting representation with such different claims that are a bit removed. However, the fact that they shared so many common areas, and the fact that L's belief about H living with his girlfriend G was in direct dispute, this really could go either way.

Screening

Lawyers working in a same firm, assuming that a court does apply these rules because of the shared space between L and A, are allowed to participate in a matter if the lawyer entering a firm is "screened." Screening procedures require that the lawyer is not apportioned any part of the fee from a case and the prior client is given notice and details of the procedures taken to ensure compliance with the ethical rules. CA rules also require that the former client receive a certification by a partner in the firm and from the attorney that procedures followed were in compliance with the ethical rules. Here, no such notice was given to either W, on behalf of L, or G, on behalf of A. Even though it is likely that L and A were not operating in the same firm anyway, we can confirm that no screening measures were taken absent any additional facts.

Q3 Torts

State Hospital, a public hospital funded and managed by State, entered into a contract with Cook's Catering, a business owned and operated by Kimberly Cook, to provide on-site meal service to patients, staff, and visitors.

Recently, Denise Davis, the Chief Executive Officer of State Hospital, received a series of anonymous email messages threatening to carry out "a massive attack" at the hospital. In response to these threats, Davis decided to reassign a security guard from patrolling the kitchen area to patrolling the hospital lobby and entrance area. Davis did not share the information concerning these threats with anyone else at the hospital.

Several days later, Frank, a former patient, entered the hospital kitchen shortly before lunchtime and mixed peanut powder into a serving tray full of mashed potatoes. Neither Kimberly Cook nor any of her employees were present in the kitchen at the time because they had all left to use the restroom. A state health code provides that food served in a hospital must never be left unattended before, during, or after meal service in order to prevent contamination or tampering. At lunchtime, Patrick, a patient, consumed the mashed potatoes. Patrick, who had a serious allergy to peanuts, suffered severe injuries.

Patrick sued Cook, Davis, and State Hospital. Cook was found negligent for failing to comply with the state health code.

1. Is State Hospital liable for Cook's negligence? Discuss.

2. Does State Hospital owe Patrick a duty to protect him from Frank? Discuss.

3. What defense(s), if any, may Davis reasonably assert against the claim that she was negligent for her decision to reassign the security guard from the hospital kitchen? Discuss.

Answer A

PATRICK V. COOK, DAVIS, AND STATE HOSPITAL

(1)* State Hospital Liability *for Cook's Negligence

If State has waived sovereign immunity for negligence actions, then State Hospital may be liable for Cook's negligence under the doctrine of respondeat superior.

Sovereign Immunity

At common law, a State sovereign could not be held liable for the torts of its agents or of itself. However, most jurisdictions have passed statutes that waive sovereign immunity for negligence actions. Thus, a State can be held liable for its torts in most jurisdictions, subject to damage caps in some jurisdictions.

Here, State Hospital is a public hospital funded and managed by State. Thus, Hospital will be considered an agent of the State. Therefore, the traditional rule of sovereign immunity would prevent Patrick from holding State liable for both its own torts and the torts of Hospital's agents. However, since most jurisdictions have waived sovereign immunity for negligence actions, the suit against State can likely proceed.

Respondeat Superior

The doctrine of respondeat superior allows a plaintiff to hold a principal responsible for the torts of its agents so long as the tort was committed within the scope of the agent's employment. Principals are not liable for torts committed by independent contractors unless the principal owed a duty that cannot be contracted out.

Independent Contractor

State will argue that it cannot be held liable for Cook's negligence because Cook is an independent contractor. A principal is not liable for the torts of independent contractors. To determine if an agent is an employee (servant) or an independent contractor, the Court will look to a variety of factors including (i) the business relationship and contract between State and Cook's catering; (ii) whether State had control over the **manners and means** in which Cook performed; (iii) whether the job performance provided by Cook was the kind of performance typically provided by an independent contractor; (iv) whether the parties had thought they were in an employee-employer relationship; and (v) whether the job performed included a **duty that could not be delegated.**

State will argue that Cook is not an employee, but rather an independent contractor. Cook's Catering is an independent company that State has contracted with in order to provide on-site meals. State will also point to the fact that it did not control the **manner and means** of Cook's work -- Cook was free to provide meals however it saw fit. But Patrick will argue that this was more akin to an employee (servant) -- employer relationship because Cook was not just providing a finished product. Rather, Cook was required to be at the hospital daily and worked on-site in preparing meals.

Patrick's strongest argument to hold State liable as master of the servant is to argue that the duty to provide safe meals **could not be delegated.** Patrick will argue that the safety of patients, staff, and visitors required that State provide safe food. A duty for safety of others cannot normally be delegated.

Therefore, the Court will likely conclude that Patrick can hold State liable for the torts of

Cook's Catering Service because the duty to ensure Cook's compliance with the safety code that applies to hospitals could not be delegated.

(2) DOES STATE HOSPITAL OWE PATRICK A DUTY TO PROTECT FROM FRANK?

DUTY

The question of whether a duty exists is one for the Court to decide. In most jurisdictions, a defendant owes a duty to act in a reasonable manner and this duty extends to everybody. However, a minority of jurisdictions have adopted the duty rule from *Palsgraf,* which limits the reasonable duty to only foreseeable plaintiffs.

Generally, there is no duty to protect from third-party tortfeasors / criminals. However, Patrick is a patient of the hospital and it is foreseeable that Patrick is a person that could be hurt if the Hospital is negligent. At common law, this would be a close call, but the court would likely find Patrick to be a foreseeable plaintiff.

The fact that the harm occurred due to a third-party tortfeasor will not be conclusive in determining duty

Premises Liability

Under the traditional approach, a person on premises is categorized as a trespasser, licensee, or invitee. The duty owed depends on the person's categorization. Here, Patrick will be categorized as an invitee and thus Hospital owed him a duty to ensure the premises were safe.

However, many jurisdictions, including California, have abolished categorizations and just hold that a landowner / possessor of real property owes a duty of reasonable care to everybody except **flagrant trespassers.** Here, Patrick would be owed a duty of care.

Inn Keeper

At common law, certain businesses that catered to providing transport and lodging services owed a heightened duty of care. This included businesses like common-carrier and inns. These businesses owed a duty to provide the utmost care.

Here, State is a hospital, which is similar to an inn because people stay at a hospital with the intent to leave. Thus, they are relying on the owner of the premises for basic protection. However, the Court will likely hold that the common law duty of utmost care does not extend to a hospital because there is a statutory basis to find duty.

Statutory Duty

In addition to duties provided by common law, the legislator can create duties via statute. Here, a state health code provides that food served in a hospital must never be left unattended before, during, or after meal service in order to prevent contamination or tampering. The legislation is clearly designed to protect those eating in hospitals.

Therefore, Patrick has a strong argument that the legislator created a duty for a hospital to provide safe food to all of those that would eat the food.

(3) WHAT DEFENSES MAY DAVIS ASSERT?

DUTY

See rule above. Here, Davis owes a duty to use reasonable care in managing the Hospital.

NEGLIGENCE / BREACH

Negligence occurs when a party fails to use reasonable care, and as a result, the party breaches the duty it owes to the plaintiff. Negligence is found when the benefits of acting reasonably outweigh the potential harm.

Here, Davis can defend her actions by claiming they were not negligent.

BPL Analysis

The BPL analysis from Judge Learned Hand provides a formula for determining if a party has acted negligently. Under the analysis, a party has acted negligently if the benefits from acting outweigh the potential costs.

Here, Davis will argue that she acted in a reasonable manner by reassigning a security guard. Davis reassigned the security guard after receiving emails about a "massive attack" at the hospital. Thus, Davis will say the reassignment was the prudent action to take given the threat. However, Patrick can argue against this by pointing to the fact that a reasonable CEO would still have security in the cafeteria even if a reassignment was required.

Under a traditional analysis, a jury could come out either way on determining if Davis was negligent.

Emergency Situation

In the event of an emergency, a party will be judged by the reasonable standard a prudent person would exercise *in an emergency situation.* If the Court finds that Davis failed to use reasonable care, Davis will attempt to get an emergency instruction to the jury which would require the jury to judge Davis' actions based on the fact he was acting in an emergency situation.

This argument will likely fail because there was **no present emergency.** Patrick will argue Davis received a series of emails over the course of a period of time. So, there is no reason to suspect that the attack is imminent because the emails keep on coming. Also, Davis did not tell anybody about these emails. If this were a true emergency, then Davis would have called in for backup by telling other hospital staff about the threat and potentially bringing in extra security. But Davis did none of that; all he did was reassign a security guard.

Therefore, Davis will likely be unable to get an emergency instruction to the jury.

CAUSE IN FACT

The breach must be a factual cause of the injury. This is usually easily satisfied with the but-for test. Here, Patrick will argue that but-for the reassignment of security, the food would not have been tampered with. Davis can try to argue that the true but-for cause is that but-for Cook's staff going on a bathroom break, the food would not have been tampered with.

PROXIMATE CAUSE

Proximate cause requires the harm that flows from the breach of duty be foreseeable.

Like with the factual argument above, Davis can further argue that the proximate cause to the incident is the lack of kitchen staff. Davis will argue that the security in the kitchen is not designed to secure the food -- that is Cook's job.

Superseding intervening cause

A superseding, intervening cause is an outside event that cuts one’s liability off from the breach. Here, Davis will argue that the reassignment was not a proximate cause for the harm experienced by Patrick. Instead, Frank's criminal actions are a superseding, intervening cause.

DAMAGES

Patrick can show damages because of his allergic reaction.

Answer B

1. Is State Hospital liable for Cook's negligence?

Employers are generally liable for the torts of their employees conducted within the scope of their employed duties. On the other hand, a party is not generally liable for the torts of independent contractors, unless it concerns a non-delegable duty.

Employee vs. Independent Contractor

First, a court will need to determine whether Cook's is more similar to an employee of State Hospital or an independent contractor. The principal factor a court considers in determining whether a party is an independent contractor or an employee is whether, and the degree to which, that party was subject to the control of the employer. The more control, the more likely that party is to be an employee. Courts also consider whether the party conducts business regularly in the area in which it was contracted to perform, whether the employer supplied the tools and equipment, and other factors.

The facts do not indicate with sufficient detail the level of control that State Hospital had over Cook's. If State Hospital dictated the menu, for example, that would indicate an employer-employee relationship. But the facts only indicate that Cook's was to provide on-site meal service. Presumably, Cook's could decide which meals to prepare. On the other hand, if the hospital dictated meal- times, when staff had to arrive or leave, etc, that would indicate greater control.

The fact that Cook's Catering is in the business of catering (as evidenced by its name) and providing meals, indicates that it might be more of an independent contractor. On

the other hand, State Hospital seemed to have provided the kitchen that Cook's Catering used, since Cook's Catering was operating in the hospital kitchen. Moreover, the staff used the hospital restrooms. This seems to indicate more of an employer-employee relationship.

The question as to whether Cook's Catering is an employee or an independent contractor is a close one. But on balance, Cook's Catering is likely to be an independent contractor.

However, just because Cook's Catering is an independent contractor does not mean that State Hospital is not liable for the negligence of Cook's. Some duties are non-delegable. In such situations, a party will be liable for the breach of its non-delegable duties because it cannot delegate those duties away to an independent contractor to insulate itself from liability. For example, when a property owner invites the public onto its property, it is responsible for the safety of the public on its property, and for the negligence of independent contractors that create unsafe conditions on the property.

Non-Delegable Duty

Here, it is likely that State Hospital's provision of food to its patients is a non-delegable duty. Although the patients do not constitute the "public," by accepting the patients, the hospital has accepted them into its care, including providing them food. It is therefore likely that the hospital cannot delegate this duty to a catering company in order to avoid its duty of care to its patients.

Moreover, a statute may establish a duty, and here, the state health code likely established a non-delegable duty (see analysis below).

Eleventh Amendment

The Eleventh Amendment prohibits suits by citizens against the states without the states' consent. It embodies the concept of sovereign immunity. Thus, if the State Hospital can be properly characterized as an arm of the state, it likely cannot be liable in tort to Patrick unless the State has consented to such suits (e.g. with something similar to the Federal Tort Claims Act).

Here, the State Hospital likely can be characterized as an arm of the state. It is a public hospital, and it is funded and managed by the State. The funding and management are prime indicators that it is not separate from the State (e.g. compare with a municipality, which may be sued if its funding does not come from the state).

Therefore, unless the state has consented, State Hospital is not to be liable on a negligence claim. It is unlikely that the state health code, which imposes a duty on hospitals (see below) constitutes an acquiescence to liability. The Supreme Court has held that any consent to be sued under the Eleventh Amendment must be clear and unequivocal. The statute is not such an unequivocal statement of consent. It can easily be interpreted to allow liability only for private hospitals.

2. Does State Hospital owe Patrick a duty to protect him from Frank?

General Duty

By taking in Patrick as a patient, State Hospital assumed certain duties with respect to Patrick. In general, hospitals owe patients a reasonable standard of care in medical treatment. More generally, they owe patients a duty to act reasonably to protect them from foreseeable harms.

Here, whether State Hospital owed Patrick a duty to protect him from Frank likely turns on whether Frank's actions were foreseeable. Frank was a former patient. If Frank had a propensity to try to harm other patients and the hospital knew about it, or if Frank had come to the hospital in the past to harm other patients, then the hospital would owe its patients a duty to protect them from Frank. Even if the hospital was not aware that Frank, in particular, would likely attempt to harm its patients, but was aware that former patients or others in general have in the past tried to tamper with the hospital food, the hospital would have such a duty.

A minority of jurisdictions will find that the hospital had a duty to act reasonably to prevent harm that occurred, regardless of whether the harm was ultimately foreseeable (although the foreseeability of the harm affects proximate cause analysis in a negligence action).

Statutory Duty

But independent of the above analysis, a statute or other law can give rise to a duty. A statute may give rise to a duty to protect a certain class of plaintiffs against a certain class of harms. If the statute is silent as to tort liability, then most jurisdictions will allow a finding of negligence per se based on the violation of the duty laid out in the statute if: a plaintiff in the class of plaintiffs the statute was designed to protect is harmed, and the harm is in the class of harms that the statute was designed to prevent.

Here, the state health code provides that food served in a hospital must never be left unattended before, during, or after meal service, in order to prevent contamination or tampering. The statute was likely designed to protect consumers of the food, e.g. the

patients. Here, Patrick was such a patient who ordinarily consumed the hospital's food. So, Patrick was in the class of plaintiffs the statute was designed to protect. Second, the statute was likely designed to protect against poisoning or other effects caused by "contamination or tampering." Here, Patrick suffered an allergic reaction, and this is likely in the class of harms that the statute was designed to protect against. So, the Hospital likely owed Patrick a duty to protect him from food contamination, whether from Frank, or someone else. This duty is also likely non-delegable (see above for analysis).

3. What defenses may Davis reasonably assert against the claim that she was negligent for her decision to reassign the security guard?

Eleventh Amendment

The Eleventh Amendment prohibits suits by citizens against a state without a state's consent. However, state officials performing official duties may be sued under the stripping doctrine. But this doctrine only allows suits for an injunction, applying prospectively, and not for retrospective damages.

Davis will argue that since she is the CEO of State Hospital, she is an employee of the state. Her decision to reassign the security guard was made as part of her official duties. She will therefore argue that a negligence suit against her is really a negligence suit against the state, that any damages would be paid out of state coffers since she was acting in her capacity as an employee of State Hospital (State Hospital is funded by the State), and that the Eleventh Amendment immunizes her against a suit for damages.

Public Necessity

Davis may further argue that her actions in reassigning the security guard was in response to a public necessity. Where a party has a reasonable belief that actions need to be taken to protect the public interest, and reasonable actions are taken in response to such a belief, the doctrine of public necessity is a complete defense against negligence (as opposed to private necessity, which only provides a partial defense).

Here, Davis received email messages threatening to carry out "a massive attack" at the hospital. Davis will argue that there was a public need to re-assign the security officer to prevent or mitigate the consequences of such an attack. The harm arising from "a massive attack" could far exceed food contamination or tampering. And the re-assigning of a security officer was a reasonable response to such a threat.

However, Patrick will counter that the threats were all anonymous and therefore Davis' belief of a massive attack was not reasonable. Moreover, Patrick will argue that it is much more likely for food contamination or tampering to occur, since such occurrences are more frequent than "massive attacks."

It is unclear how a court would rule on this defense, but the court will likely side with Davis.

No Breach of Duty

A breach of duty requires that the benefits of an action are outweighed by the risk and magnitude of the harm caused by the action. Using similar reasoning to the public necessity argument above, Davis can argue that she did not breach any duties at all. The benefits of preventing a "massive attack" likely outweighs the risk of re-assigning a

security officer, because presumably the people from Cook's Caterer would still be in the hospital kitchen. Moreover, any harm from food tampering is likely to be small. So, Davis did not believe she was leaving the hospital unattended and was justified in acting reasonably in doing so.

Comparative Fault

Davis can also further argue Cook's Caterer was contributorily negligent. Most jurisdictions allow a reduction of damages for the comparative fault of another party, e.g. if that party's negligence contributed to the damages. Davis' re-assigning of the security guard was not the sole contributor to Patrick's injury, Cook's Caterer also contributed by leaving the hospital kitchen unattended. In fact, Cook's Caterer was found negligent. Davis may therefore be able to seek contribution against Cook's Caterer against any award against her.

Davis can further argue that Frank's intentional tort constitutes an intervening action that was not foreseeable. If anything, Frank was the most culpable, having committed an intentional tort, while David and Cook's were only negligent. Most jurisdictions will allow a reduction for an intervening intentional tort, and some jurisdictions will eliminate negligence liability altogether for another's intervening intentional tort if it was not foreseeable. Because Frank intentionally contaminated and tampered with the food, leading to Patrick's injury, Frank is at least partially, and possibly fully liable.

Q4 Criminal Law and Procedure

Detective Anna was about to subject David, who was lawfully in custody, to interrogation because she had received a tip from an anonymous informant that David was involved in transporting heroin. Detective Anna advised David of his *Miranda* rights and asked him if he knew anything about heroin shipments. David replied, “I am not sure if I need a lawyer or not.” Detective Anna next asked David how he was transporting the heroin. David responded, “If I had anything to do with it, I would use my car.” Detective Anna released David from custody when he refused to answer any more questions. Detective Anna then sent a message to all police officers, describing David’s car, stating that it was believed to be involved in transporting heroin.

Later that day, Officer Baker, who had heard Detective Anna’s message, saw the car described in the message. Officer Baker decided to follow the car to see if the driver would do anything that could justify stopping the car. When the car ran a red light, Officer Baker stopped the car and ordered the driver, who was in fact David, out of the car. Officer Baker then did a pat-down search of David and found a cell phone in his pocket. Officer Baker turned on the cell phone, saw a text message icon, clicked on the icon, and found a message to David stating, “The heroin is in the trunk; deliver it to the warehouse.” Officer Baker then searched the trunk of the car, where he found 30 pounds of heroin. He arrested David and arranged for the car to be taken to the police impound lot for processing.

David is charged with transportation of heroin. David moves to suppress:

1. His statement, “If I had anything to do with it, I would use my car”;

2. The text message that stated, “The heroin is in the trunk; deliver it to the warehouse”; and

3. The heroin found in the trunk of the car.

How should the court rule on each of the motions to suppress? Discuss.

Answer A

The defendant in a criminal case may bring a motion to suppress evidence asserting a violation of his Fourth, Fifth or Sixth Amendment rights. These amendments are incorporated against the states through the Due Process Clause of the Fourteenth Amendment. The exclusionary rule provides that evidence obtained in violation of these constitutional rights in inadmissible in the state's case-in-chief against the defendant, unless an exception to the exclusionary rule applies. The purpose of the exclusionary rule is to deter illegal police conduct and the Supreme Court has decided there are certain exceptions to the exclusionary rule where the social costs to society outweigh the deterrence value in prohibiting illegal police conduct. The exclusionary rule prohibits the admissibility of all evidence directly obtained in violation of a defendant's constitutional rights and evidence later derived from such evidence as "fruit of the poisonous tree."

1. Statement, "If I had anything to do with it, I would use my car"

Fifth Amendment

At issue is whether David had a viable argument for suppression of his statement under the Fifth Amendment. The Fifth Amendment protects the right of defendants to be free from compelled self-incrimination. The Supreme Court has decided that *Miranda* warnings are necessary to protect this right so that a defendant is made aware of his right to invoke his privilege against self-incrimination and his right to counsel. Waivers of a defendant's *Miranda* rights must be knowing and voluntary. *Miranda* attaches at "custody." A defendant is in custody based on the

"freedom of movement" test, or when a reasonable person would not feel that he is free to leave police custody. Here, the facts state that David was "lawfully in custody," so we must accept that David was in custody for *Miranda* purposes, and we will not analyze whether that custody was lawful.

Miranda only applies to interrogations. Interrogations include express questioning by police officers as well as any statements or conduct by the police that may reasonably lead to inculpatory statements by a defendant. However, statements that are spontaneous or voluntary by the defendant are not obtained in violation of *Miranda.*

In analyzing whether a defendant has properly invoked his *Miranda* rights, the critical question is whether he did so *unequivocally*. To assert his right to maintain silent, the defendant must unequivocally state that he wishes to maintain silent; even sitting there in silence for long periods is insufficient to expressly invoke. To assert his right to counsel, a defendant must unequivocally assert his right to speak to a lawyer.

Here, it appears that David was lawfully in custody and was about to subject David to interrogation, so both prongs of *Miranda* apply. Detective Anna properly advised David of his *Miranda* rights so there was no problem with the advisement. Once she did that, she did not need to wait for David to invoke his rights; she could ask him a question and then in response, David could waive or assert his right to silence or counsel. Therefore, asking David if he knew anything about heroin shipments was valid. David then replied, "I am not sure if I need a lawyer or not." While it is possible to suggest that David was uneasy about engaging in interrogation, that was almost certainly insufficient to invoke his right to counsel, because it was an equivocal statement. He would have needed to

say something like, "I would like to speak to a lawyer" or even "I'm not sure it's a good idea to speak to you so let me talk to a lawyer first." Detective Anna then properly asked him another question because she was allowed to do so since David had not yet asserted his right to counsel or silence and thus waiver was still in effect. David then made the inculpatory statement at issue here. Therefore, because David had waived his *Miranda* rights and not asserted his right to counsel or silence unequivocally, the statement is inadmissible both in the prosecution's case in chief and for impeachment purposes. (Evidence obtained in violation of *Miranda* is still admissible for impeachment purposes but that's not at issue here since it's admissible in the prosecution's case in chief, too).

The fact that David *then* said he did not want to answer any more questions does not retroactively make his earlier inculpatory statement involuntary or inadmissible and so it is still properly admissible in court. The court should deny the motion to suppress the statement.

Sixth Amendment

A defendant has the right to counsel at all critical stages of the criminal case. The Sixth Amendment right to counsel attaches when a defendant is formally charged with a crime. Here, the facts state that David was only in custody and do not suggest that he had been charged with a crime at the time that he was interrogated. Therefore, even though interrogations are a critical stage, the right to counsel only applies to interrogations conducted *after* formal charges have been filed against the defendant, and so no Sixth Amendment rights were violated here.

2. Text message, "The heroin is in the trunk, deliver it to the warehouse"

At issue is whether the text message that Office Baker saw on the cell phone was admissible against David.

At the outset, we will note that any possible fruit of the poisonous tree argument that the stop was actually made as a product of the knowledge Detective Anna earlier obtained illegally should be denied because a) the police did not violate David's rights earlier in the interrogation and so it was totally proper for Detective Anna to tell her fellow police officers about the car and the information concerning it and b) the Supreme Court has actually said that information obtained in violation of *Miranda,* unless the police do so intentionally, is not subject to the fruit of the poisonous tree doctrine.

Stop of car

The first issue is whether the stop of the car was valid. A stop of a car is a "seizure" under the Fourth Amendment, because a reasonable person under the circumstances would not feel free to leave when he is pulled over by the police, generally until the police tell him he is free to go. The Fourth Amendment protects the right to be free from unreasonable searches and seizures. The warrant requirement is the heart of the Fourth Amendment and the Supreme Court has held that warrantless searches and seizures are presumed to be unreasonable unless an exception to the warrant requirement applies.

To begin, we must note that a defendant only has standing to assert violations of his own constitutional rights in a suppression motion. When a car is stopped by the police, the driver (and actually the passengers, too) will have standing to challenge the validity

of the stop. Here, David is the driver of the car, so he has standing to challenge the stop.

One of the canonical exceptions to the warrant requirement is that the police may pull over a car without a warrant provided they have at least reasonable, articulable suspicion that an offense has been committed or is being committed. This can include any traffic violation. The point of this exception is that cars freely move throughout the world and so it would be wholly impractical for the police to obtain warrants to stop and search cars of automobiles. That is the rationale behind the basis for stops of cars as well as searches for cars that we will get to shortly.

Under *Whren*, a police offender's subjective intent for conducting a search or seizure is irrelevant; as long as the officer had an objectively reasonable basis for the search or seizure, whatever subjective motivation he had in addition, would not make it unreasonable. Additionally, people do not have a reasonable expectation of privacy when they drive around the world in their cars, so David can't claim that Officer Baker tailing him for some time already violated his right to privacy.

Here, Officer Baker heard Detective Anna's message and then saw the car described in the message. He therefore decided to follow the car for as long as it took for the driver to commit some kind of violation that would justify it. This is a pretext stop and as mentioned is completely valid provided that the officer had an objectively reasonably basis for the stop. Here, the car ran a red light, which is obviously an objectively reasonable basis for stopping the car, giving rise to far more than reasonable suspicion that an offense had been committed (in fact, probable cause). Therefore, the stop was

reasonable.

Search of David

The next question is whether the pat-down search of David was reasonable. Again, David has standing to assert a violation of his rights here because he personally was searched. Officer Baker had a right to order David out of the car, so that is okay. The facts suggest that Officer Baker then did a "pat-down search of David." Under the *Terry* doctrine, a *Terry* stop is valid if the officer had reasonable suspicion that the person has committed a crime or is committing a crime or is about to commit a crime. The pat-down search is only valid if the officer had reasonable suspicion based on specific, articulable facts that the defendant was armed and dangerous. Here, the facts that are known to Officer Baker are that 1) there is an anonymous informant who said that David was involving in transporting heroin. Tips of anonymous informants alone do not give rise to reasonable suspicion unless they are corroborated by other evidence indicating their reliability. 2) That corroboration was likely sufficient because of the inculpatory statement David made about the transportation of heroin which indicated that he probably had something to do with transporting heroin and that if he did, he would use his car. So, there was reasonable suspicion that David was transporting heroin at the time and it was possible that that heroin or some other illegal material may have been contained in his pockets. The bigger problem is that the officer may not have had reasonable suspicion that David was armed and dangerous. There are no specific facts about guns here. The best the officer can likely say is that heroin traffickers are very likely to carry guns in their pockets because drug trafficking is a violent industry.

That may be sufficient for some courts and maybe not for others.

The even bigger problem for the officer is that a *Terry* frisk only allows the officer to seize material that he "immediately" recognizes as contraband or evidence of a crime. The officer here simply felt a cell phone, which would clearly not be immediately recognizable as contraband. Therefore, it was likely illegal to take the phone at all at this point.

An alternate theory for which this search could be justified is a search incident to an arrest. An officer may search the person's body and the area within one lunge of his body, but the search incident to arrest exception only applies when the officer has actually made an *arrest*. Here, the officer actually could have arrested David at this point under *Atwater* because he's got probable cause that David just ran a red light. But he clearly did not arrest David at this point so that is not a valid basis for justifying the search. Therefore, the pat-down exceeded the scope of *Terry,* which means the evidence obtained thereafter would be illegally obtained, too.

No other exception to the warrant requirement applies so far.

Search of phone

Even if the officer's conduct so far had been reasonable, what he did next violated David's rights. David has a reasonable expectation of privacy in his phone because he is the owner of the phone and it was on his person at the time of the search.
Under *Riley*, officers need to get a warrant to search the electronic contents of a cell phone because people have an astonishing amount of private information stored on their cell phones and thus have a reasonable expectation of privacy in them. Warrants

must be based upon probable cause, or sufficient facts to convince a reasonably prudent person that a crime has been committed by the defendant and that evidence or instruments of the crime will be obtained in the place to be searched. However, officers do not need to get a warrant to simply physically handle the phone or to analyze the physical properties of the phone; e.g. an officer could pull off a phone case and see if there was any cocaine hiding in between the phone and the case. But here, Officer Baker did far more than that: he turned on the cell phone, saw the text message icon, clicked on the icon, and then found the message at issue here. That went far beyond physical examination of the phone because he began to scrutinize the electronic contents of the phone.

David did not consent to this, so that would not be a basis for searching the phone.

Therefore, the statement obtained on the phone was obtained illegally and should be suppressed under the exclusionary rule.

3. Heroin found in the trunk of the car

At issue is whether the officer could validly search the car after finding the text message. David has standing to challenge the search of the car because it's his car - he owns it.

Automobile exception

If the search of the phone had been legal, there is no doubt that the search of the car would then be legal. Under *Carroll*, a core exception to the warrant requirement is that cars may be searched based upon probable cause, or sufficient facts to convince a reasonably prudent person that evidence of a crime or contraband will be found within

the car to be searched. The parts of the car that can be searched depend on what the probable cause is for, analogous to the "particularity" requirement of the warrant requirement: PC to search for machine guns will not justify opening up a tiny container in the car because machine guns can't fit in tiny containers. There is no doubt that once the officer has seen the text message he has probable cause to search the trunk; the text message says that heroin is in the trunk. It's hard to get much more probable than that.

However, under the fruit of the poisonous tree doctrine, evidence obtained from an illegal search cannot then be used to find other evidence of a crime, subject to certain exceptions. Various exceptions to this rule under *Wong Sun* include attenuation (where the illegal police conduct that led to discovery of the originally illegally obtained evidence is very far removed in the causal chain from the subsequent search or seizure at question) or independent source, where the police could have independently obtained the evidence from a different source. Those do not apply here because the search of the phone was immediately followed by the search of the trunk. Additionally, there is no independent source for the information that would give rise to searching the trunk.

Search incident to arrest

Another possible exception here would be search incident to arrest. Under *Gant,* when a police officer searches a car after arresting a defendant, the police officer may also search the passenger compartment of the car if 1) the defendant is unsecured and capable of reaching into the car or 2) the officer believes that evidence of the offense of

arrest may be found in the car. Here, though, the exception does not apply because David again was not arrested; he was only arrested after the heroin was found. Additionally, the search incident to arrest exception only applies to the passenger compartment of the car, not the truck, which is where the heroin was found. So that exception is not valid either.

Inevitable discovery / impound search

Because the search of the car was likely illegal based on the above arguments, the prosecution could argue that the heroin found in the car would have been inevitably discovered by the police. The police arrested David after finding the heroin and then the car would have been taken to a police impound lot for processing. When cars are taken to police impound lots, the police conduct an "inventory search" which is meant to protect the police from allegations that any material that has gone missing was done by the police. The police look through the car and write down the items found in the car on an inventory search. Inventory searches are valid as long as they are conducted according to routine, they are based on valid authority to actual impound the car in the first place, and they are not actually abused by the police in a "pretext" to search for evidence.

Here, the car would have inevitably been subjected to an inventory search, where the police would have almost certainly found 30 pounds of heroin in the truck. Therefore, the prosecution could argue that evidence would have been inevitably discovered. The problem for the prosecution is that there likely was not probable cause to search the car until the illegal search of the phone, and so it was not inevitable that the evidence would

have been discovered. However, if a court found that there was probable cause to search the car for heroin even before the text message was discovered, that would be a basis for not suppressing the evidence under the inevitable discovery rule.

If a court did not reject the suppression motion on that basis, the heroin found in the trunk of the car should be suppressed as it was obtained in violation of David's Fourth Amendment rights.

Answer B

1. David's Statement "If I had anything to do with it, I would use my car."

Fifth Amendment Privilege Against Self-Incrimination

The Fifth Amendment of the US Constitution guarantees people the right against self-incrimination. Miranda is a judicially-made doctrine that requires certain warnings when a defendant is in a situation of custodial interrogation. The Sixth Amendment guarantees criminal defendants the right to assistance of counsel and attaches at the time a defendant is formally indicted or charged. Here, David (D) can challenge the introduction of his statement on Fifth Amendment grounds, but the facts do not indicate that he has been formally charged with transportation of heroin. A only has an anonymous tip that he was involved in transporting heroin, which does not suffice for probable cause. Moreover, the facts do not indicate that he has been formally arrested, but rather that he is simply in lawful custody of the detective agents. Therefore, D must look to the Fifth Amendment when seeking exclusion of the elicited statement.

Miranda Rights

Miranda warnings must be given when a defendant is (1) in custody and (2) being interrogated by police or government agents. Custody is given a functionalist definition: a court will ask whether a reasonable person under the circumstances would have felt his freedom of movement restricted to the degree we associate with a formal arrest. Interrogation is the deliberate elicitation by the government of incriminating information. Here, D was "lawfully in custody" at the time that Detective Anna (A) was about to subject him to interrogation. These facts are sufficient to trigger Miranda. A discharged

her Miranda duties when she advised D of his Miranda rights, and then proceeded to ask him if he knew anything about heroin shipments.

Invocation of Miranda Rights

After a defendant is Mirandized, he must either invoke his Fifth Amendment right to silence or his Fifth Amendment right to an attorney. Invocation must be clear and unambiguous, as the Supreme Court held in *Davis*, and must clearly indicate that the defendant intends to either (a) remain silent, or (b) seek counsel.

Invocation of Edwards Right

If the defendant clearly and unambiguously invokes his right to counsel, this right must be scrupulously honored under *Edwards*: the interrogation must cease until defendant has an attorney present. If the interrogators fail to scrupulously observe invocation of this right, the interrogation will be the fruit of an Edwards violation, and inadmissible under the exclusionary rule. Here, after D was Mirandized and interrogated, he replied, "I am not sure if I need a lawyer or not." This is an ambiguous statement and is not a clear invocation of the right to counsel. A court will likely find that D did not invoke his Fifth Amendment right to counsel. A's persistence in interrogating D, given the ambiguity of D's statement, was not an Edwards violation. D's response that "If I had anything to do with it, I would use my car, was therefore not the fruit of an Edwards violation. It is admissible against him.

Invocation of Moseley Right

If the defendant clearly and unambiguously invokes his right to silence, this right also must be scrupulously honored. The interrogation must cease unless either the

defendant voluntarily re-initiates contact, or a reasonable break in Miranda custody has occurred such that the coerciveness of the interaction has dissipated due to lapse of time and custody. Here, D refused to answer any more questions only after his statement, "If I had anything to do with it...". Detective A ceased the interrogation at this point. A has therefore not violated D's Moseley rights, and the statement is not the fruit of a Moseley violation, because D said it voluntarily before invoking his right to remain silent.

Waiver of Miranda Rights

A defendant's waiver of Miranda rights must be knowing and voluntary, meaning it must be the product of his free will rather than the coerciveness of the interrogation setting. It is not necessary here to inquire as to whether D waived his Miranda rights, because he failed to clearly invoke his right to counsel or silence at any point prior to giving his statement that he now seeks to exclude. In the "grey space" in between invocation and waiver, interrogation is not prohibited.

In conclusion, A did not violate Miranda, Moseley, or Edwards, and so D's statement is not subject to the exclusionary rule.

2. Text Message Stating, "The heroin is in the trunk; deliver it to the warehouse."

The Fourth Amendment

The Fourth Amendment grants people the right to be secure from unreasonable search and seizure of their person, homes, papers, and effects; and provides that no warrant shall issue except on probable cause, supported by oath and affidavit, and describing

with reasonable particularity the place to be searched and the people or things to be seized. When challenging the admission of evidence on Fourth Amendment grounds, a defendant must show (1) state action; (2) that he has standing to challenge the search; (3) that a Fourth Amendment search or seizure occurred; and (4) that the search was conducted without a warrant and probable cause, and no exception to the warrant requirement applies.

State Action Requirement

The Fourth Amendment requires state action, which is official conduct by the government or governmental agents. Here, the detectives are agents of law enforcement, so the state action requirement is met.

Standing

A defendant has standing to challenge a search when he has a reasonable expectation of privacy in the place searched. Here, the text message was found by means of a pat-down search of David's person. The Constitution confers the greatest protection upon an individual's person (their body), and so D has challenging to challenge this search.

Search or Seizure

Supreme Court caselaw provides two methods of defining a Fourth Amendment search or seizure. The first involves a two-pronged inquiry, set forth in Harlan's opinion in Katz. First, the court asks whether the individual had a subjective expectation of privacy in the place searched. Second, the court asks whether this expectation of privacy is one which society is prepared to accept as reasonable. The second method

is a property-based approach, whereby the court asks whether there was an intrusion into a constitutionally-protected area. Here, there are two searches: Officer Baker's pretextual stop and pat-down of D, and his search of D's cell phone. Each will be analyzed in turn.

(1) Pretextual Stop and Pat-Down

Under the Fourth Amendment, pretextual traffic stops are permissible. A court will not inquire into the officer's subjective motivations when conducting traffic stops and policing traffic violations. Here, Officer Baker (B) saw the car described in A's message, decided to follow the car and conducted a pretextual arrest of D. He had probable cause to stop the car, because he witnessed the car running a red light. This was sufficient evidence of wrongdoing to allow B to pull D over and order D out of the car. D can therefore not challenge the introduction of the cell phone evidence on the grounds that it was the fruit of a pretextual stop.

A pat-down of a person, however, requires reasonable suspicion that the individual has weapons on his person. Reasonable suspicion is articulable facts that would lead a reasonable officer to believe that the person possessed a dangerous weapon, but is a standard short of probable cause. Here, B based his pat down on a message he received from A, describing D's car and stating that it was believed to be involved in transporting heroin. This message in turn was based on an anonymous tip, and D's statement he made in interrogation. These facts likely fall short of probable cause, because they do not suffice to create a reasonable probability that D has been or is guilty of possessing or transporting heroin. However, they do suffice to create

reasonable suspicion for the pat-down. Heroin dealers are often armed due to the nature of the trade. B could point to his personal experience that those who possess and deal drugs often are armed, and justify his pat-down of D on this basis.

Given that B's pat-down of D's person was permissible under the Fourth Amendment, the issue at this point was whether B could seize the cell phone. An officer conducting a reasonable pat-down can seize items that are evidently contraband under the "plain feel" doctrine. Here, however, B felt a cell phone in D's pocket. A cell phone is not contraband, and it feels markedly different from a gun or packet of drugs. The plain feel doctrine therefore does not operate to justify B's seizure of the cell phone. This was a Fourth Amendment violation.

(2) Cell Phone Search

The issue was B's search of the cell phone after he had seized it wrongfully. The Supreme Court held in Riley that certain types of information are entitled to greater protection under the Fourth Amendment. In Riley, the Court held that Cell Site Location Information, obtained by means of cell phone searches by officers, were a type of information that was so broad, of such depth, and of such a personal nature that it was entitled to extra protection under a property-based conception of the Fourth Amendment. Officers need probable cause and a warrant in order to search a suspect's cell phone. Here, Officer B took a number of actions that together constitute a search: he (a) turned on the phone; (2) saw a text message icon, (3) decided to click on the text message icon; and (4) read the message therein. This is the message D now seeks to exclude from evidence. These actions are an unreasonable intrusion on D's Fourth

Amendment rights under Riley, because a cell phone contains a great degree of highly personal information that is entitled to Fourth Amendment protection.

In conclusion, B violated D's Fourth Amendment rights when he wrongfully seized D's cell phone from his pocket, and when he proceeded to search the contents of his cell phone. D has standing to challenge the fruit of this search--namely, the statement found in the text message.

3. Heroin found in trunk of car

D seeks to challenge the evidence of 30 pounds of heroin found in the trunk of his car. We must first ask again whether has standing, and also whether the heroin was the fruit of a Fourth Amendment violation.

Standing

See above rule for standing. D has standing to challenge the search, because he had a reasonable expectation of privacy in the trunk of his car.

Fourth Amendment Violation

When an officer seeks to search an automobile in the course of a lawful traffic stop, he may search the person and "grabbable area" around the driver and passenger compartments, provided that (1) the suspect is unsecured and could reach said areas; and (2) the officer has reasonable suspicion that these areas contain weapons. He may not search other inaccessible areas of the car unless he has probable cause to believe that they contain weapons or evidence of criminal wrongdoing. Here, B proceeded from searching D's person and cell phone to searching the trunk of the car. B will claim that

he had PC at this point to believe that the trunk of the car contained either weapons, or more likely, evidence of heroin. However, this probable cause was based on an unlawful search of D's cell phone (see above). Therefore, even if B had probable cause to search the trunk, which is all that is required for an automobile search (as automobiles are an exception from the warrant requirement), D can challenge the heroin as the fruit of an unlawful search.

Fruits Doctrine

The exclusionary rule is a judicially-crafted remedy that seeks to enforce the Fourth Amendment right against unreasonable search and seizure. Courts have also crafted the "fruits" doctrine. Under this doctrine, fruits of unlawful searches and seizures are to be excluded from evidence. Evidence does not qualify as "fruit" of an unlawful search if (1) it is significantly attenuated from the wrongful search or seizure; (2) there are independent intervening acts, including voluntary acts by the defendant, that cut off the chain of causation; (3) law enforcement would have inevitably discovered the evidence; (4) law enforcement had an independent source to discover the evidence.

Here, D seeks to challenge the heroin found in the trunk as the fruit of the unlawful search of his cell phone. Indeed, but for the search of his cell phone and discovery of the incriminating text message, B would not have had probable cause to search the trunk. However, B may contend that law enforcement would have inevitably discovered the evidence, because it is common practice to impound a vehicle and conduct an inventory search of its contents upon arrest of the driver.

Inevitable Discovery and Inventory Searches

An inventory search is a search done to account for the defendant's property; it must not be conducted pretextually for law enforcement purposes. However, evidence discovered in a lawful (non-pretextual) inventory search is admissible against the defendant. Here, B would have arranged for the car to be taken to the police impound lot for processing, and law enforcement would inevitably have uncovered the thirty pounds of heroin in the trunk. B therefore has a strong argument for the inevitable discovery of the heroin. D therefore will be prevented from invoking the fruits doctrine to exclude evidence of the drugs.

Conclusion

In conclusion, D cannot challenge the first statement because it is not the fruit of a Miranda or other violation. The second statement will be excluded, because it was the fruit of an unlawful Fourth Amendment search. Finally, the third piece of evidence (the drugs) will not be excluded even though they are the fruit of an unlawful search, because of the inevitable discovery doctrine.

Q5 Wills / Community Property

In 2016, while single and living in State X, Hank downloaded a form will and filled it out, stating, “Because I have no children, I leave all my property to Sis.” Hank signed his will in the presence of only two disinterested witnesses. Hank did not realize that a valid will in State X requires three witnesses.

In 2017, while still living in State X, Hank married Wendy. After the marriage, Hank kept land he had inherited from his mother titled in his name alone. Hank started working at a construction job, and kept all of the wages he received from the job in a bank account that he opened in his own name. Daughter was born to Hank and Wendy while they lived in State X.

State X is not a community property state.

In 2021, Hank and Wendy moved to California. Hank suffered a fatal injury on the first day of his new job in California. Hank never wrote any will after the State X will.

At the time of Hank’s death, there was $100,000 from his wages in his bank account, and he still owned the land inherited from his mother. In the probate of Hank’s estate in 2021, claims have been made by Sis, Wendy, Daughter, and Son, a ten-year-old child who has proved by DNA testing that he is Hank’s son, although Hank never knew of Son’s existence.

1. Is Hank’s will valid? Discuss.

2. What rights, if any, do Sis, Wendy, Daughter and Son have in Hank’s estate? Discuss.

Answer according to California law.

Answer A

1. **Is Hank's will valid?**

California courts will probate a will that was 1) validly executed as per the laws of California, 2) validly executed as per the laws of the state where the decedent was present at the time the will was executed, 3) validly executed as per the laws of the state where the decedent was domiciled at the time of the will's execution or death.

Here, opponents of this will might argue that the will should not be probated because it was not validly executed as per the laws of State X, which was the state where Hank was living at the time the will was executed. Note that nothing in the fact pattern tells us that Hank was not domiciled in the state where he was living in 2016, when the will was executed, so we can assume that the state where Hank was living in 2016 was also his state of domicile.

However, even if the will was not validly executed as per the laws of State X, California courts will probate it if the will was validly executed as per California law.

Was the will validly executed as per California law

A will is validly executed according to California law if: 1) the testator has testamentary capacity, 2) the testator has present testamentary intent and 3) the will complies with applicable formalities.

Testamentary capacity?

The testator has testamentary capacity if (1) the testator was at least 18 years or older, 2) the testator understands the nature and situation of her property, 3) the testator understands the natural objects of her bounty, and 4) the testator understands the significance of the testamentary act.

1) The testator was at least 18 years old – here, Hank is likely to be over the age of 18 in 2016 because we are not told otherwise and usually a person does not leave his property to his sister because he has no children if he himself is a child. The presumption people under the age 18 have is that they might have children later on in life. Also, people under the age of 18 rarely ever care about their own mortality enough to make a testamentary disposition of their wealth, assuming they have any wealth.

   Thus, Hank is likely over 18.

2) The testator understands the nature and situation of her property-here,

   Opponents of the will might argue that Hank does not mention any of his property and so we cannot really be certain that he understood what property he owned. However, the bar for testamentary capacity is not that high and the fact that somebody will, who had not children, might want to simply leave all his property to his sister would suggest that he knows that he has property and wants to leave it to a sibling.

   Thus, this requirement is likely satisfied.

3) The testator understands the natural objects of her bounty – Here, Hank displays that he understands natural objects of his bounty because generally we think of our family members, especially our children, as the people who we want to leave something to after we die. Since Hank states that he has no children at the time he is executing the will, it is fairly natural that he would leave his property to his sibling.

   Thus, this requirement is likely satisfied.

4) The testator understands the significance of the testamentary act. Here, Hank downloaded the form and filled it out, assuming it was a will-writing form, rather than something silly with the fact pattern would likely inform us of, it would be fair to presume that he understood that he was making a will. Furthermore, Hank had two disinterested people witness the signing of his will, suggesting that he knew that he was doing a solemn testamentary act rather than just writing something out for fun.

   Thus, this requirement is also likely satisfied.

   Based on the above, I would conclude that Hank had testamentary capacity.

Present testamentary intent.

Present testamentary intent exists if the testator intends to presently make a disposition of his property that will be effective upon his death.

Here, Hank downloaded a form will and signed it in the presence of two disinterested witnesses. In that form, he also stated that since he has no children, he is leaving all his property to Sis. This suggests that he does have the

intention to make a will and leave his property to Sis upon his death.

Thus, Hank had present testamentary intent.

Compliance with applicable will formalities

In California, you can have an attested will or holographic will. California does not allow you to make an oral will.

Attested will?

An attested will is what we think of as a formal will or witnessed will, and it requires 1) a writing that is 2) signed by the testator or by someone at the testator's direction and presence, 3) in the simultaneous presence of two disinterested witnesses, 4) who understand the testamentary nature of the act, and 5) the witnesses sign the document within the testator's lifetime.

A writing that is signed by the testator.

Here we are told that Hank downloaded a form, filled it out, and signed it. Thus, we have a writing that was signed by the testator. Note that there is no subscription requirement in California, which means that the testator can sign anywhere on the will.

Thus, both of these requirements are satisfied.

In the simultaneous presence of two witnesses.

The rule is that the testator must either sign in the simultaneous presence of two witnesses or the testator can acknowledge his signature in the simultaneous presence of two witnesses.

Here, Hank signs in the presence of two disinterested witnesses.

Thus, this requirement is satisfied.

Witnesses who understand the testamentary significance of the act.

The witnesses must understand that what they are witnessing is the execution of the will. It is not required that the witnesses know exactly what is in the will, as long as they know that it is a will.

Here, Hank downloaded the form will, filled it out, and signed it in the presence of two disinterested witnesses, so even though we are not expressly told that the witnesses knew that they were witnessing the execution of a will, it is likely that Hank would've informed him that is what he was up to. Having two people standing in front of you watching you sign the document will likely make the two people ask what exactly are you citing and why are we there to watch it. The answers to those questions would likely be provided by Hank.

Thus, this requirement is likely satisfied.

The two disinterested witnesses sign the document within the testator's lifetime.

The two disinterested witnesses do not have to sign the document right after they witness the ceremony or in each other's presence; however, they must sign it while the testator is still alive.

There is no mention of this happening and none of the facts were actually leading us to presume that the two disinterested witnesses signed anything. Just because you're witnessing something being signed does not mean that you will naturally want to sign it yourself.

Thus, this requirement is likely not satisfied.

California clear and convincing evidence standard.

For deaths that occur on or after 1/1/2009, California allows a will that was not perfectly executed to still be probated if the proponent can show by clear and convincing evidence that the testator intended the document to be his will. For deaths prior to that date, California had a substantial compliance standard for an attested will to be probated.

One might argue that the fact that the disinterested witnesses did not sign the document creates a significant risk that this is not really Hank's will. However, here there is fairly strong evidence that Hank intended the document he executed in 2016 to be his will. He not only took the effort to download the form, fill it out, state why he was leaving his property to Sis, but also went into the trouble of getting two disinterested witnesses to be present while he signed it. The proponent can further strengthen his case and likely satisfy the clear and convincing evidence standards if he can get the two witnesses who witness the signing of the will to either testify to that or submit a sworn affidavit to that fact. Thus, there is likely to be clear and convincing evidence that the document is the will.

Therefore, it is likely that the will may be produced in California.

Holographic will?

In California, a holographic will is a will that is not witnessed by two witnesses but it is 1) in writing, 2) with material terms handwritten by the testator (e.g. gifts and recipients), 3) is signed by the testator, and 4) expressly states the present testamentary intent of the testator.

If he had failed to establish that the will complied with the formalities of an attested will, then we might want to have considered whether it would comply with the formalities for a holographic will.

However, we don't know whether Hank wrote out the beneficiary's name and the fact that she would be receiving all his property by hand or whether he typed it. Thus, it is unlikely to meet the requirements of a holographic will.

The overall conclusion is that the will is likely to be probated by the court in California as an attested will.

2. **What rights, if any, do Sis, Wendy, and him and his daughter and Sam have in Hank's estate?**

California is a community property state and so community property law applies. Community property is all property acquired during marriage, other than separate property, while domiciled in California. Separate property is all property acquired either before marriage or after the end of the marital economic community. Separate property also includes all property acquired during marriage through gift, devise, bequest or descent. All profits, rents and issues of separate property also remain as separate property. All wages earned during marriage while domiciled in California is community property.

Quasi-community property is all property acquired during a valid marriage while not domiciled in California, that would have been community property had the acquiring spouse lived in California at the time of acquisition. During the lifetime of the acquiring spouse, quasi-community property is treated like separate property. However, upon the death of the acquiring spouse, quasi-community

property is treated like community property.

Hank's estate

As Hank's is that we are told that he had $100,000 from his wages in his bank account and that he also owned the land that he inherited from his mother.

Character of the $100,000

See above for rule regarding community property and separate property.

Here Hank died while on the first day of his new job after moving to California. This means that all the wages he had earned were earned while he was living in a non-community property state. As per the rules above, that makes this quasi-community property because had Hank been domiciled in California all the wages would be community property. The fact that Hank kept all the wages in a bank account that was in his name alone does not defeat the community property character of his wage income.

Thus, the $100,000 is quasi-community property.

Character of the land inherited form his mother

See above for rule regarding community property and separate property.

Here, the land was an inheritance; this means that it is Hank's separate property and moving from a non-community property to a community property state does not change this. Furthermore, the land was always held in Hank's name so there is no issue as to whether Hank gifted the property to the community or whether he took any action that would lead to a transmutation, which is a change in the nature of the property from community property to separate property or vice versa.

Thus, the land is Hank's separate property.

Is Wendy an omitted spouse?

An omitted spouse is the spouse who was married after the execution of the last testamentary instrument by the testator and the spouse is not mentioned or provided for in those testamentary instruments. An omitted spouse will receive an intestate share of the decedent's estate- half of the community property and an interstate share of the separate property not to exceed 50%. However, an omitted spouse will not receive an interstate share if 1) if the omission was intentional and appears on the face of the instrument, 2) the spouse is provided for outside of the testamentary instruments, or 3) there was no voluntary and knowing waiver by the spouse.

Here, Hank executed the will in 2016 and married Wendy in 2017. There is no mention of Wendy anywhere in the will and there is nothing telling us that he provided for her outside of the testamentary instrument. There is also nothing in the will that tell us that the omission was intentional. In fact, there is no mention of Wendy at all in the will. As for whether there was voluntary and knowing waiver by Wendy, we don't know anything about that. What it appears from the facts is that Hank made a will in 2016, and forgot all about it, so he never updated the will.

Thus, Wendy is an omitted spouse and will receive an intestate share as described above.

Is Daughter a pretermitted child?

A pretermitted child is one who was born after the execution of the last testamentary instrument and is not mentioned or provided for in the testamentary instrument. A pretermitted child receives an interstate share of her parent estate unless: 1) the omission is intentional and appears on the face of the instrument, 2) the child is provided for outside of the testamentary instrument or 3) the testator had other children at the time of the execution of the will and transferred substantially all of the assets to the child's other parent.

Here, Hank executed the will in 2016 and Daughter was presumably on board after 2017 since that is the year when Hank and Wendy got married and Daughter is their child. As with Wendy, there is no mention of Daughter in the testamentary instrument and omission does not appear intentional but seems to be due to Hank forgetting to update his will. The fact that Hank died from a fatal injury that must have happened suddenly probably is the reason why Hank had not updated his will before dying since a lot of people think that they have more years to live than they actually do and don't plan for really bad accidents happening. There is also no mention of Daughter being provided for outside of the will and as mentioned above, the will transfers everything to Sis, and not to Daughter's other parent.

Thus, Daughter is likely to be a pretermitted child as described above.

Is Son a pretermitted child?

See above for rules regarding pretermitted children. Additionally, note that the child born before the execution of the last testamentary instrument may still qualify as a pretermitted child if the testator did not know about the child's existence.

Here, some would argue that Son is not a pretermitted child because he was born in 2011 and Hank executed his will in 2016. However, the rule mentioned above is likely to result in Son being classified as a permitted child since Hank never knew about his existence. As well as the court is satisfied that the DNA evidence establishes son as Hank's child and declares it so, then son will likely qualify as a permitted child and take a pretermitted child share.

Thus, Son is likely a pretermitted child.

Share of the following individuals:

Wendy

A spouse's intestate share includes the half of the community property plus and intestate share of the separate property, not to exceed 50% of the separate property. In a situation where the decedent leaves more than one issue, the spouse takes one third of the separate property.

Here, since quasi-community property is treated as community property at death, Wendy will end up with the entire $100,000 since she already owns $50,000 as her share of the community property and will get the remaining half as well. As for Hank's separate property, Wendy will end up with one-third of the land.

Daughter and Son

When there are two children and a surviving spouse, intestate share of the child will be half of the separate property that is left after the spouse takes her one-third share of the decedent's separate property.

Thus, here, Daughter will take one-third of the land and Son will take the other one third of the land.

Sis

Here, unfortunately Sis ends up with nothing because of abatement. The intestate share of the spouse and both the children will come out of her share and she ends up with nothing.

Answer B

1. Is Hank's will valid?

The issue is whether Hank's (H) will is valid. California, through the full faith and credit clause, will recognize a will that is validly executed in the state in which it is executed or the state in which the testator is domiciled when he makes the will. If the will is not valid under the state laws in which it was executed or in the state in which the testator was domiciled, CA will still recognize the will as valid if the testator is domiciled when he dies and the will conformed to CA requirements.

Here, H executed the will in State X and was domiciled in State X at the time. If the will is valid under the laws of State X, H's will will be treated as valid in CA probate. However, the facts clearly tell us that H signed his will in the presence of two disinterested witnesses, and that State X law requires three witnesses. Thus, the will is not valid under the laws of State X. However, because H was domiciled and died in CA, CA will recognize the will as valid if it conformed to CA requirements.

CA requirements for a valid will.

In order for a will to be valid in CA, it must be written and signed by the testator (T). It also must be witnessed by two disinterested witnesses. Finally, the T must have a valid testamentary intent when executing the document.

Written and Signed by T

The will must be in writing and signed by the testator, who has capacity. There is no question that H signed the will as the facts tell us this. It also appears that H had capacity, which means that he is at least 18 and of sound mind. Although the facts don't tell us he is definitely 18, the circumstances of him creating a will and the fact he married the next year means he probably was and, thus, this analysis will assume it. There are also no facts indicating that he was not of sound mind, suggesting he has capacity.

The main issue with this requirement is whether the fact H downloaded a form will and filled it out meets the written requirement. Although handwriting or typing a will counts as written, form wills are a closer call. However, even if it does not quite meet the written standard, CA adheres to the substantial compliance doctrine. That means that if the testator substantially complies with the wills formalities but does not quite adhere to them, a court will still allow the will to be probated if it was in substantial compliance with the wills' formalities. As a result, the court will likely recognize that this at least met the substantial compliance, if not the written requirement on its own

Two Disinterested Witnesses

CA wills, to be properly attested, require the signature of two disinterested witnesses. The witnesses do not need to be aware of the actual contents of the will, such as which people get which devices, but they must be generally aware that the document they are signing is a testamentary instrument and that the T has signed it. This is known as the conscious presence test, that the witnesses are generally aware that what they are signing is a testamentary instrument.

Here, H signed his will in front of the witnesses, so there is no question of whether they knew he had signed it (if he had signed it previously, he would have had to acknowledge his signature to the witnesses). Although the facts do not quite indicate whether the witnesses knew it was a will, the fact they were in H's presence when he signed and they signed it themselves, is likely satisfactory evidence that they were consciously present of the fact that the instrument was a will and that they were signing it.

Testamentary Intent

The final element that a will needs in CA is that it is signed by the T with testamentary intent. The fact H downloaded a will and filled it out and went to the trouble of getting two disinterested witnesses to sign it is pretty clear evidence that he knew he was signing a testamentary instrument. He also wrote that he was giving his property to his sister, which is further evidence he knew he was signing a testamentary instrument.

Based on the analysis above, the will appears to have met all of the CA requirements. Even though it would not have been valid in State X, a CA court will recognize it as valid because it met the CA requirements and he died in CA while domiciled in CA.

Holographic Will

In the unlikely event a CA court finds that the will was not valid (potentially because a form will may not have met the written requirement) and that substantial compliance doctrine will not save it, it may be viewed as a holographic will. A holographic will must have the material provisions in the testator's handwriting and be signed by the testator. There is no witness or date requirement. There is a requirement that the testator intend

the document constitute a testamentary instrument.

Although H downloaded a form will, it appears he handwrote the material provisions, such as how to dispose of his property. He also signed the will. As discussed above, his testamentary intent is also obvious. As a result, even if the court found it was not a valid will (although as explained above, this is very unlikely), it could still be probated as a holographic will.

Conclusion

Because the will likely conformed to CA standards and H was domiciled in CA when he died, the will is valid. In the unlikely instance that it is not considered valid, a court can still probate it as a holographic will.

2. What rights do Sis (S), Wendy (W), Daughter (D), and Son (S) have in H's estate?

California is a community property (CP) state. The marital economic community begins at marriage and ends upon divorce, death of a spouse, or permanent separation (constituted of one spouse indicating to end the marriage permanently and conduct consistent with that intent). Earnings, property, and debt acquired during the marriage are presumed CP. Earnings acquired before the marriage, by gift or inheritance during the marriage, or after divorce, death, or permanent separation are considered separate property (SP). Property that would have been classified as community property had the couple been domiciled in CA at the time they acquired it is considered quasi-community property (QCP).

Effect of moving to CA on the classification of property

H's Land

Presumption and tracing: Because the facts appear to show that H had already received the land from his mother via inheritance before his marriage, the presumption is that the land is H's SP. In addition, there is a special title presumption at death. If the land is only in one spouse's name, there is a special presumption the property was intended to be that spouse's SP. W may try to argue that the property should be QCP, or property that would have been considered CP if they had been domiciled in CA when H received it. However, because the land was inherited, the land would have been classified as SP. Absent a transmutation or act of titling the property jointly, the property will remain H's SP. There is no indication a transmutation occurred, because there is no writing signed by H, the adversely affected spouse, either converting it to CP or W's SP.

As a result, H's land is SP. As discussed below, it will be devised to W, Son, and Daughter in equal shares. Because co-tenancy is the default type of co-ownership, they will each receive a 1/3 share as co-tenants.

H's Wages

Presumption and tracing: Because H did not start the job until after he married W, all of his wages he earned during this time are presumed to be QCP. H's estate may try to argue that the wages should be considered SP, because he put it in a bank account in his name alone. However, the mere fact the bank account was titled in H's name alone is not enough to change the nature of the property from QCP to SP. There is also no indication H and W entered into a premarital agreement that would have changed the

nature of their earnings. As a result, all of the wages he earned during are considered QCP, because they would have been CP had they been living in CA. The fact the account was titled in his name only is not enough to change the source, and tracing clearly shows all of this money is wages from during the marriage, and thus is QCP.

Conclusion

H's entire bank account, consisting of $100,000, is QCP.

Assuming will is valid:

Sis

Assuming the will is valid, it clearly leaves all of his property to Sis (S). However, as discussed below, Sis will end up receiving nothing, because W, Son, and Daughter will be treated as omitted spouses and children. As a result, they will all receive an intestate share, which will leave nothing for Sis.

Wendy

Omitted Spouse: A spouse who does not take under a will is considered an omitted spouse, unless the omission was intentional, or the testator substantially provided for the spouse outside of the will. Because H never made another testamentary instrument after the 2016 will, the omission was not intentional, because he was not married at the time. In addition, H did not provide for W outside of the will. As a result, W will be treated as an omitted spouse. An omitted spouse is entitled to receive what they would have had the testator died intestate. When a decedent dies intestate in CA, the spouse is entitled to the decedent's 1/2 of the CP and QCP (meaning that the spouse will

receive all of the CP/QCP) and 1/2 of the decedent's SP if the decedent has one lineal descendant and 1/3 of the decedent if the decedent has more than one lineal descendant. As discussed below, Son and Daughter will each be treated as omitted children, and thus W will receive 1/3 of H's SP and Son and Daughter will split the remaining 2/3 of H's SP.

Conclusion

Because the wages are QCP, W already owns half of that as her share of QCP. Because she receives an intestate share, she will receive the remainder, so she will get all $100,000. She will also receive 1/3 of H's SP, which means she will get 1/3 of H's property that he inherited from his mother and take it as co-tenants with Son and Daughter.

Daughter

Omitted child: A child who is omitted under a will is entitled to an intestate share, unless the omission was intentional, the decedent had other children when the will was made and left substantially all of his assets to their surviving parent, or provided for the child outside of the will, or did not know the child existed. Here, the omission was not intentional for two reasons: first, in his 2016 will, H prefaced his devise to his sister based on the fact "because I have no children." Second, he never made another testamentary instrument after D was born. If he had, and then omitted D, it might be considered intentional, but because she was not alive at the time, it is pretty clear that the omission was not intentional. In addition, because H only had one child that he knew of, the exception that occurs when the decedent had other children at the time the

will was made and left substantially all of his assets to the surviving parent does not apply. (plus he did not leave anything to W in his will). Finally, he did not provide for D outside of the will.

Because none of the exceptions apply, D will be treated as an omitted child and will receive an intestate share. As discussed above, when a decedent in CA dies intestate, the decedent's 1/2 of CP/QCP goes to the surviving spouse. If there is more than one lineal descendant of the decedent, the spouse receives 1/3 of the decedent's SP and the lineal descendants split the remaining 2/3 of SP. As discussed below, Son will also be treated as an omitted child, and thus H had two lineal descendants at the time of his death. Therefore, D will split the 2/3 of H's SP with the son, leaving them each with 1/3 of H's SP.

Conclusion

Daughter will receive 1/3 of H's SP, or 1/3 of the property he inherited from his mother. Daughter will take the land as a co-tenant with a 1/3 interest.

Son

Omitted Child. See rule above. W, D, and Sis may claim that Son should not be considered an omitted child because it appears he was born before the will was written in State X, and they will therefore argue he was intentionally excluded. However, the facts make it clear that H never knew of Son's existence. The facts also make it clear that Son has established by a paternity test that H is the father, so he will be treated as his child. Because H never knew of Son's existence, Son will be treated as an omitted child. There is also no indication that either of the other exceptions apply, because H

did not leave substantial assets to whoever Son's mother is, since his only will left it all to his Sis. Therefore, Son will be considered an omitted child and entitled to receive an intestate share. As described above, because the decedent has two lineal descendants (Son and Daughter), W will get 1/3 of H's SP and Son and Daughter will split the remaining 2/3 of H's SP, leaving them with 1/3 of H's SP total.

DRR: Dependent Relative Revocation--alternatively, Son could argue that H had a mistake of fact when he made the will because he wrote "because I have no children," when in fact he did, and that if it weren't for this mistake of fact H would have devised his property differently. However, he won't need to make this argument.

Conclusion

Son will receive 1/3 of H's SP, or 1/3 of the property he inherited from his mother. Son will take the land as a co-tenant with a 1/3 interest.

If the will were not considered valid:

Even if the will were not considered valid, the disposition of property would remain the same. Because W, Son, and Daughter are all treated as omitted spouses or children, they receive intestate shares. In this circumstance, as described above, the spouse is entitled to all of the QCP/CP plus 1/3 of the H's SP if more than one lineal descendant. Son and Daughter are then entitled to split the remaining SP. As a result, the disposition would be the same regardless if the will were valid, and in neither case would Sis take anything.

Feb 2021

California Bar Examination

Essay Questions and

Selected Answers

The State Bar of California

COMMITTEE OF BAR EXAMINERS
OFFICE OF ADMISSSIONS

180 Howard Street, San Francisco, CA 94105 415-538-2300
845 South Figueroa Street, Los Angeles, CA 90017 213-765-1500

ESSAY QUESTIONS AND SELECTED ANSWERS
FEBRUARY 2021 CALIFORNIA BAR EXAMINATION

This publication contains the five essay questions from the February 2021 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	Subject
1.	Evidence
2.	Contracts/Remedies
3.	Community Property
4.	Professional Responsibility

ESSAY EXAMINATION INSTRUCTIONS

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little or no credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

Q1 Evidence

On January 15, Paul fell down the stairwell of Dell's Department Store ("Dell"). Paul sued Dell for personal injuries, alleging he fell because one of the steps was broken. The following occurred at a jury trial in the California Superior Court while Dell's manager, Mark, was being examined by Dell's attorney:

QUESTION: Where were you when Paul fell down the stairs?

ANSWER: I was standing nearby with my back to the stairs talking to Carol, a store customer, when I heard the noise of the fall.

(1) QUESTION: Has Paul sued Dell before?

ANSWER: Yes, five times that I personally know about.

(2) QUESTION: No one saw the accident. Right?

ANSWER: That's right. A thorough investigation was unable to find anyone who saw Paul fall on the stairs.

Mark was then cross-examined by Paul's attorney as follows:

(3) QUESTION: Isn't it true that you used to be employed by Paul as a cashier in his grocery store and that he fired you for stealing money from the cash register?

ANSWER: That is what he claimed.

(4) QUESTION: The stairs were repaired the day after Paul fell. Weren't they?

ANSWER: Yes.

(5) QUESTION: Didn't Carol, the store customer, exclaim at the time of the accident: "Oh no! A man just fell on that broken step"?

ANSWER: So, what?

QUESTION: Is this the report that Dell's insurance company prepared following an investigation of the accident?

ANSWER: Yes. That is the report the insurance company gave me. They always prepare a report in case we get sued.

Paul's attorney then moved to enter into evidence the insurance company's report. The report states: "Steps on the stairs at the store are in very poor condition."

A. What objections could Paul's attorney and Dell's attorney reasonably make to the questions or answers to Mark's testimony numbered **(1)** to **(5)** above, and how should the court rule on each objection? Discuss.

B. What objections could Dell's attorney reasonably make to the motion to enter the insurance company's report into evidence and how should the court rule? Discuss.

Answer according to California law.

Answer A

Relevance

Under California law, evidence is admissible if it is relevant and competent. Evidence is relevant if it pertains to an element of a claim or defense and is probative of that element. Probative means that the evidence has some tendency to prove or disprove a particular element of a claim or defense. Evidence is competent if it is not otherwise barred by some exclusionary rule. A court may nonetheless exclude otherwise relevant and competent evidence if there is a risk of prejudice to the party against which the evidence is being offered and the prejudice substantially outweighs the evidence's probative value.

Q1

The question is relevant in that it tends to prove that Paul has a prior motive for suing Dell other than the cause of his personal injury. Moreover, Mark is asserting that he has personal knowledge of the prior suits, which means that this testimony is competent, because a witness must generally have personal knowledge of the matters to which they are testifying.

Character Evidence

Paul's attorney should object to this question on the grounds that it is inadmissible character evidence. Character evidence is evidence that tends to establish a particular trait of one party. Character evidence may take the form of reputation testimony about the party's reputation in the community, the testifying witness's opinion of the party's

character, or prior acts of the party. Generally, character evidence is inadmissible unless character is directly in issue. Here, the question appears to be establishing that Paul's prior suits against Dell were frivolous or lacked some sort of sound basis. Moreover, because this is a personal injury tort claim, Paul's character is not directly in evidence. Therefore, under the general rule, the question should be objected to on the basis that it is improper character evidence.

There are several exceptions to the general rule against the introduction of character evidence. These exceptions include (1) establishing motive; (2) establishing the identity of a party; (3) establishing lack of mistake; (4) establishing intent; or (5) demonstrating a common plan or scheme. Here, Dell's attorney should argue against the objection that the question establishes Paul's motive for suing Dell; that it also establishes Paul's intent to sue Dell, thereby undercutting the argument that Dell was negligent in maintaining its stairs; and that Paul's previous suits establish a common plan or scheme against Dell through the use of multiple, potentially frivolous suits. It appears that potentially multiple exceptions to the general rule against character evidence apply to this question, and the court should therefore overrule the objection that this is impermissible character evidence.

The court should also weigh in favor of admitting the evidence because its probative value tends to outweigh its prejudicial conduct. The evidence is clearly prejudicial to Paul, but the fact that Paul has sued this particular store five times in the past is highly probative of Paul's intent to sue the store and perhaps contributory negligence or recklessness. Therefore, the court should overrule this particular objection.

Q2

Paul's attorney should object to this question on the grounds that it is irrelevant and leading. Paul's attorney should also object to the part of the answer that affirms that "no one" saw the fall actually happen.

Relevance

As noted above, evidence must be relevant to be admissible. Here, while Paul's attorney could argue that the question is not relevant, he likely will fail on this point. The fact that no one else saw the fall happen is not relevant to the issues in a personal tort claim. Dell's attorney, however, should argue that this testimony is relevant because it tends to undercut the validity of Paul's claim, i.e. that there are no corroborating witnesses to the fall.

Leading Questions

An attorney directly examining a witness may not ask leading questions unless the witness is hostile. A leading question tends to assume its answer in the form of the question. Here, the question assumes that no one saw the fall happen and then asks the witness to confirm this. Moreover, Mark is being directly examined by Dell's attorney and is clearly not hostile to Dell's attorney. Therefore, the form of the question was improper. The proper remedy here would be to strike the leading question for Dell's attorney to rephrase the question in a way that is not leading.

Lack of Personal Knowledge

Paul's attorney should object to the portion of the answer that asserts that "no one" saw the fall actually happen. In order for a witness's testimony to be admissible, he must

have personal knowledge of the matter being testified to. Here, it is likely impossible that Mark could identify all possible bystanders in a department store. Therefore, this portion of the answer is outside the scope of Mark's knowledge and therefore should be inadmissible. The proper remedy here would be to strike the offending portion of the statement.

The remaining portion of the statement is admissible, because Mark has personal knowledge of the investigation and can attest that the persons interviewed in the investigation.

Q3

Dell's attorney should object to this question because it improperly references the consequences of a prior bad act by Mark.

The question is relevant because it tends to undermine Mark's credibility for truthfulness and a possible motive against Paul. The court should not exclude the testimony under the normal balancing test because Mark is a key witness and his truthfulness is probative of the validity of the rest of his testimony.

As noted above, character evidence in the form of prior bad acts is generally inadmissible. A witness's credibility may be impeached, however, by an attorney asking a good-faith question about a prior bad act if the act is probative of the witness's truthfulness. Extrinsic evidence of the prior bad act is not admissible, and the attorney may not reference any consequences of the prior bad act. The act in question here is theft, which is probative of truthfulness. Paul's attorney likely has sufficient grounds to ask the question in good faith, because Paul is his client and likely mentioned Mark's

firing to the attorney. The form of the question, however, is improper, because the attorney references the fact that Mark was fired for stealing from Paul. Dell's attorney should object, and the question should be stricken. Paul's attorney may, however, rephrase the question to remove the reference to the consequence.

As noted above, the form of the question here is not objectionable because Paul's attorney is cross-examining a witness for the opposing party. Therefore, a leading question is permissible.

Answer to Q3

At issue in Mark's answer is whether his statement constitutes hearsay. Hearsay is an out of court statement that is offered as proof of the matter asserted. Here, Mark is repeating a statement made by Paul ("That's what he says."). The statement is being offered as proof of the matter asserted because the question is whether Mark stole money from the cash register. Therefore, the statement is hearsay under the general rule.

A hearsay statement may be nonetheless admitted under one of the exceptions to the hearsay rule. An admission by a party-opponent is admissible as an exception to the hearsay rule in California. Here, Paul is an opposing party and therefore his statement may be admitted under this exception to the hearsay rule.

Q4

Dell's attorney should object that this question is impermissible because it includes subsequent remedial measures.

The evidence here is relevant because it tends to show that the stairs were, in fact,

broken, thereby establishing a breach of duty by Dell.

While nonetheless relevant, public policy excludes evidence of subsequent remedial measures, except in cases of products liability. Here, there is no products liability question involved, and the question falls squarely within the subsequent remedial measures rule. Therefore, the question should be objected to and stricken from the record.

Q5

Hearsay Objection

Dell's attorney should object to this question because it is clearly hearsay. The statement by Carol is an out of court statement and it is being offered as proof that Paul fell and that the stairs were broken. Therefore, under the general hearsay rule, the testimony is not admissible. Note that the statement is relevant because it is probative of both breach (the stairs are broken) and causation (Paul fell down the stairs).

Paul's attorney could potentially argue that the statement constitutes an excited utterance and is therefore admissible as a hearsay exception. An excited utterance is one that is made by a person who is still under the stress of an exciting event and for which there is no time to reflect on the statement. Here, seeing a person fall down broken stairs likely qualifies as a startling event and the statement was made contemporaneously with the event in question. Therefore, the question and its answer are likely proper under this exception to the general rule against hearsay.

Note that Paul's attorney cannot successfully argue that the statement is a present sense impression. In California, a present sense impression is only admissible when

the hearsay declarant makes a statement about her actions while she is performing the act. Here, there is no action by the hearsay declarant and therefore this exception does not apply.

Lay Opinion Objection

Paul's attorney could object to the answer in the question because it constitutes a lay opinion that goes to one of the ultimate issues in the case (whether there was a breach of duty because of the broken stairs). In California, a lay witness may testify to her opinion as to sensory matters, speed of an automobile, whether a person is drunk or insane, or other matters within her personal knowledge. Note that California also allows a lay witness to testify as to scientific or technical knowledge that the lay witness has. Here, it is likely within the lay witness's knowledge that the stairs are broken because Carol can observe that the stairs were broken. Therefore, this objection should likely be overruled.

Insurance Report

Dell's attorney should object that the insurance report is (1) privileged work product; (2) that it is hearsay; (3) that it is improper evidence of liability insurance; and *[sic]*

The first issue is whether the work product privilege would attach. The work product privilege is a qualified privilege that allow documents made in anticipation of litigation to be excluded from discovery and evidence. Here, the work product doctrine likely applies because an insurance company making a report likely anticipates that its insured will be sued because of an accident that happened on the store's premises. Moreover, Mark indicated that the report was prepared "in case we get sued." Paul's attorney could

argue here that the work product doctrine should not apply because there is substantial need for the document. This argument may succeed because the stairs were repaired shortly after the fall, and therefore Paul's attorney could not inspect them or have an expert inspect them.

The second objection would be that the document constitutes hearsay because it is an out of court statement being offered to prove that the stairs were in fact broken. This argument will fail because the report likely constitutes an exception to the hearsay rule known as the business records rule. Where a business normally keeps a particular type of record within the ordinary course of business and the record is made by a person with knowledge of the event and a business duty to record the event, the business record may be admitted under an exception to the hearsay rule. Here, the insurance company always prepares a report when there is an accident and the insurance company likely has a duty to keep such records for when it is required to issue liability payments. Therefore, the business records exception to this evidence applies and the report will not be excluded on the grounds that it is inadmissible hearsay.

Finally, Dell's attorney may attempt to argue that the report is inadmissible evidence of liability insurance. Generally, evidence of liability insurance is not admissible to prove guilt or ability to pay. Here, however, the report is not being offered to prove guilt. Instead, it is likely being offered to show the condition of the stairs at the time of the accident. Therefore, the liability insurance exclusionary rule likely does not apply.

The court should also balance the introduction of the report against unfair prejudice to Dell. While the report is prejudicial to Dell, it does not appear to be unfair to Dell.

Moreover, the insurance company likely has an interest in accurately representing the material in its reports. Therefore, the balancing test weighs admission.

The court may consider excluding the evidence on the grounds that it is protected work product, but should likely rule for its admission on the ground that there is substantial need for the report.

Answer B

Under Proposition 8 of the California Constitution (Prop 8), all relevant evidence is admissible in a criminal trial. Prop 8 makes an exception for California Rules of Evidence Code Section 352, which prohibits the introduction of evidence whose relevance is substantially outweighed by the risk of unfair prejudice, confusion of the issues, or misleading the jury. As this is a civil case, Prop 8 will not apply.

A.1. Prior suits

Logical relevance

To be admissible in CA, evidence must be relevant to an issue in dispute. Here, Paul's previous lawsuits against Dell are relevant because they show potential bad faith by Paul (P) in constantly bringing lawsuits against Dell (D). This fact makes it more likely that the lawsuit is without merit, and may have been brought for the purpose of harassing D.

Legal Relevance

In CA, evidence should be excluded if its relevance is substantially outweighed by the risk of undue prejudice. Here, the evidence is prejudicial in that it does not address the issue here - D's negligence for P's injuries, but instead seeks to introduce extraneous evidence about P's previous actions against D. This must be weighed against the relevant bias that this evidence introduces. In balance, it is likely that the court would find that the relevance would not be substantially outweighed by the prejudice of this statement.

Form of the question

Assumes facts not in evidence

The question states that Paul fell down the stairs. This has not been established in the fact pattern. If there is no basis for the statement, it is improper to include this fact in the question. However, if it has previously been established that P fell down the stairs, then the question is proper.

Personal knowledge

To testify, a witness must have personal knowledge about the facts being described.

Here, although Mark (M) may not have been involved in the previous lawsuits, he has testified that he is personally aware of five previous lawsuits. Therefore, this testimony is based on personal knowledge.

Character evidence

Character evidence is evidence about a party's previous actions or dispositions that are introduced to establish that the party acted in conformity with their purported character. Character evidence is generally inadmissible. Character evidence is inadmissible in civil cases unless a party's character is part of the cause of action.

This case, a negligence suit does not have a party's character at issue. The question and answer introduce evidence about P's previous actions in suing D. This does not relate to the suit, but instead relates to P's previous actions with respect to D. Therefore, it will be inadmissible character evidence, and should be excluded for substantive purposes.

Habit

Although character evidence is inadmissible, habit evidence is admissible. Habit evidence are a party's actions that always occur with respect to certain stimulus. Habit evidence may be introduced to show that a party acted in conformity with the habit.

Here, P's prior suits do not rise to the level of a habit. They are isolated instances of actions that P has taken, but they are not a reaction to a stimulus. Therefore, this evidence is not admissible as habit evidence.

Impeachment

Although character evidence may be inadmissible for substantive purposes, it may be used to impeach a party or witness. Bias may always be raised to impeach a party to a suit.

Here, P's previous suits show a pattern that may indicate bias against D. Therefore, this evidence is admissible to impeach P, but may not be used for substantive purposes.

A.2. No witnesses

Logical relevance

See rule above. This evidence is admissible because it shows that there were no witnesses to the accident. This makes it less likely that the accident occurred since no other person can corroborate P's version of events. Therefore, it is logically relevant.

Legal relevance

See rule above. As stated above, the statement is relevant. It is not unfairly prejudicial to P. P can contradict this testimony by producing a witness.

Form of the question - leading question

Leading questions are questions that contains the answer. It is improper to ask a leading question in direct examination.

Here, this question is a leading question. D's attorney states that no one saw the accident, and merely asks for concurrence. M is an employee of D and is being called as D's witness. Because this is D's witness, and this is direct examination, this question is an improper leading question. P's attorney should have objected to this question as leading, and the court should sustain that objection.

Personal knowledge

See rule above. M's answer talks about a thorough investigation but does not state who engaged in the investigation. It is unclear whether M has any personal knowledge about this testimony. Therefore, P's attorney should object to the response, and the court should either (1) sustain the response, or (2) order some clarification to identify M's basis for the statement.

A.3. Mark's firing

Logical relevance

See rule above. The question is relevant because it tends to show a potential basis for M's bias. This evidence throws into question M's previous testimony. Therefore, it is logically relevant.

Legal relevance

See rule above. The question is relevant as described above. It is prejudicial in that it

does not precisely go to a disputed fact, but merely throws into question M's truthfulness. Still, the court will likely find it more relevant than prejudicial.

Form of the question - leading question

See rule above. While leading questions are not allowed in direct examination, they are allowed in cross examination. Here, P's attorney is cross examining M. Therefore, this question form is appropriate.

Form of the question - compound

When questioning a witness, a lawyer may only ask one question at a time. Compound questions are disallowed.

Here, this question is composed of two questions: (1) did P fire M, and (2) was the firing for stealing money. Because it is a compound question, D's lawyer should object, and the court should sustain the objection.

Form of the response - nonresponsive

A witness must respond to the question asked. A response that does not answer the question can be stricken, and the witness will be instructed to answer the question.

Here, M's response does not respond to the question. P's attorney asked M if P fired M for stealing money. M does not answer the question, but instead states that M claimed these things. Therefore, P should object to the answer, and the court should sustain the objection and order M to answer the question.

Character evidence

See rule above. This evidence is a past act being introduced to show that M's testimony

is false because he was previously fired by P, and therefore has an axe to grind. As this is character evidence it is inadmissible as substantive evidence.

Impeachment

See rule above. This evidence is proper impeachment evidence because it shows M's bias. Therefore, it will be admitted for impeachment purposes.

A.4. Repair of the stairs

Logical relevance

See rule above. The fact that the stairs were repaired after the accident tends to show that there was something wrong with the stairs previously - during the time of the accident. Therefore, it tends to show that the stairs were negligently maintained by D, and that P's claim has merit. Therefore, this evidence is logically relevant.

Legal relevance.

See rule above. As stated above, this evidence is relevant. However, it is prejudicial because it uses a subsequent repair against D. The prejudice of this use is the reason for the rule against its use, as described below. Therefore, it is prejudicial. The court may exclude it on these grounds, but there is a specific rule on point.

Subsequent remedial measure

Where a defendant makes a subsequent repair, such repair may not be used to show the fault of the defendant. This is because it would make it less likely that defendants would make subsequent needed repairs. Subsequent repairs may be used to show ownership or control over the property.

Here, the ownership or control of the stairs does not appear to be at issue. Instead, this is being introduced to show that the stairs were in bad repair at the time of the accident. Therefore, it is inadmissible because it is a subsequent remedial measure. D's attorney should object to this line of questioning, and the court should sustain it.

A.5. Store customer's statement

Logical relevance

See rule above. Here, this statement tends to show (1) that P in fact fell on the stairs and (2) that the step was broken. Therefore, it shows both that P fell, and that D was potentially at fault. As such it is logically relevant.

Legal relevance

See rule above. Here, the evidence is relevant as described above. There is little risk of prejudice because M can say whether this did or did not occur.

Form of the answer - nonresponsive

See rule above. M does not respond to the question either affirmatively or negatively, and instead questions the relevance of the question. As M did not respond to the question, P's attorney should object to the response. The court should sustain the objection and order M to respond.

Hearsay

Hearsay is an out of court statement being introduced for the truth of the matter asserted. Hearsay is generally inadmissible.

Here, Carol's statement, made out of court, is being introduced for the truth of the

matter asserted. It is being introduced to show that P fell on D's broken step. Therefore, it is hearsay, and D's attorney can object to it on those grounds. It will be inadmissible unless an exception applies.

Contemporaneous statement

A contemporaneous statement is a statement that a witness makes while an event is occurring. A contemporaneous statement is admissible as an exception to hearsay.

Here, Carol's statement was made immediately after the event. It was not made while the event was occurring, but a contemporaneous statement may be admissible if the statement was made immediately after the event. Here, it is likely that the court would find that this is admissible as a contemporaneous statement.

Excited utterance

An excited utterance is a statement made while a person is under the stress of an exciting event. Such a statement is admissible as an exception to hearsay.

Here, Carol's statement was made while witnessing a person fall down the stairs. This is an exciting event and would startle a reasonable person. Therefore, this statement was made due to a startling event. In addition, it was made immediately after the event, and likely while Carol was still under the stress of the event. Therefore, it will be admissible as an excited utterance.

B. Insurance company's report

Logical relevance

See rule above. The insurance report describes an investigation of the accident. It likely

provides background and a determination of fault. Therefore, it will be logically relevant.

Legal relevance

See rule above. The insurance report is relevant as described above. It will likely not be deemed to be prejudicial. There are no facts that indicate that the report is prejudicial to D.

Authenticity

To be admissible, the proponent of tangible evidence must establish that the thing is what it purports it to be. This may be done through the testimony of an individual with knowledge of the evidence.

Here, M was able to identify that the report that P proffered was what it purports to be - an insurance report that D's insurance company prepared. Therefore, it has been properly identified.

Hearsay

See rule above. The insurance report, a report that was prepared and contains statements made out of court, is being introduced for the facts set forth in the report. Therefore, it is hearsay, and will be admissible unless it is non-hearsay or an exception applies.

Vicarious statement

A statement that a party's agent makes out of court may be imputed to the party. A party's out of court statement is always admissible as non-hearsay. Similarly, a

vicarious statement made by a party's agent may similarly be admissible. Admissibility will depend on whether the agent is an employee or an independent contractor, and whether the statement is made in the course of employment.

Here, the insurance company is not an employee of D, but is instead an independent contractor. The insurance company provides insurance to D, and D does not control the insurance company's actions. Therefore, statements that the insurance company makes cannot be imputed to D. Therefore, the insurance report will not qualify as a vicarious statement.

Business record

A record made in a business's regular course of business is admissible as an exception to hearsay. The record must be part of a regularly conducted activity, must be regularly recorded, and must be made at or near the time by a person with knowledge of the items being recorded.

Here, the insurance company's report may be a business record. However, P's attorney has failed to establish a foundation for its status as a business record. P's attorney has failed to show that it was the insurance company's regular practice to prepare these reports, and that it was made at or near the time of the events by a person with knowledge of the items being recorded. Instead, P's attorney is seeking to introduce the record through M, who did not prepare the report. While M stated that the insurance company always prepares the report, he does not know how or by whom it was prepared.

In addition, if a record is created in anticipation of litigation alone, it is not a business

record. Here, the record is only created when the insurance company believes that D will be sued. Therefore, it does not constitute a business record.

Q2 Contracts / Remedies

Bright Earth Solutions ("Bright"), an agricultural services business that employed 10 people and had over 100 clients, purchased a new commercial tractor mower (not suitable for personal, family or household purposes) from Stercutus Mowers ("SM") for $15,000. In concluding the sale, SM presented a one-page contract that contained the following language:

> SM undertakes, affirms and agrees that this mower is free of defects in material and workmanship at the time of its delivery to the buyer. If the mower or one of its component parts fails within one year of delivery to the buyer because the mower or its component part was defective when installed, SM shall repair or replace at its sole option any such mower or component part at its own cost or expense. Other remedies are excluded.

The contract also stated in bold, 12-point font:

> **THERE ARE NO WARRANTIES EXPRESSED OR IMPLIED AND PARTICULARLY, THERE ARE NO WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE MADE BY SM IN CONNECTION WITH THE SALE OF THIS MOWER.**

Authorized representatives of Bright and SM signed the contract and Bright took delivery of the mower.

Over the next six months, Bright experienced numerous problems with the mower. The bolt holding the mower blade in place broke five times under normal usage. The steering system was faulty, causing unsightly and uneven lines in mowing jobs. The gas tank installation was defective, causing intermittent gas leaks. Several times the mower would not start due to various electrical faults and Bright had to cancel planned jobs. As a result, Bright lost clients and $5,000 in profits.

Bright took the mower to SM each time it malfunctioned. SM effected repairs and the mower would work for a while and then malfunction again. Sometimes the replacement part would fail, other times a different part would fail. The mower was returned to SM for repairs 12 times in the first six months after purchase.

At the beginning of the seventh month after purchase, the mower's steering wheel came off during a job. At that point, Bright communicated to SM that it wished to return the mower and be refunded the purchase price. SM refused, pointing to the clauses above in the original contract. Bright then sued SM for breach of contract and warranty.

1. Is Bright likely to prevail in its suit against SM? Discuss.

2. If Bright prevails, what remedies, if any, would likely be available? Discuss.

Answer A

1. Success of Bright in its suit against SM

Governing Law

Contracts for the sale of goods are governed by Article 2 of the UCC. All other contracts are governed by the common law. Goods are things moveable when identified in the contract. Here, we have a contract for the sale of a commercial tractor mower, which is moveable. Because the tractor is a good, the contract is governed by Article 2.

Statute of Frauds

While contracts generally need not be evidenced by a writing, some contracts require a writing if they fall within the Statute of Frauds. A contract for the sale of a good over $500 falls within the Statute of Frauds and requires a writing signed by the party against whom enforcement is sought, and expressing the quantity involved.

Here, the contract is for the sale of one $15,000 commercial tractor mower. The contract is in writing and signed by both parties, so it complies with the formalities of the Statute of Frauds.

Breach of Contract

A contract for the sale of goods (governed by Article 2) requires that the seller of goods tender perfect goods. This means that goods have to be exactly what the buyer contracted to purchase under the terms of the contract. If the seller fails to tender perfect goods, the buyer is entitled to not accept delivery of the defective goods. However, once acceptance is made, a buyer cannot revoke the acceptance unless

there is a latent defect later arising (whereby the defect was not easily identified, but with subsequent use becomes clear).

Here, the contract is for a commercial mower, and the mower has to run perfectly and like an ordinary good of that type operates. After the contract was signed, Bright took delivery of the mower. The assumption would be that the mower, at first glance, seemed to conform to the good that was purchased and as such it was accepted. However, over the next six months, Bright experienced numerous problems with it. The bolt holding the mower blade broke five times under normal usage, the steering system was faulty, the gas tank installation was defective, and on several occasions the mower failed to start due to electrical faults.

Because these defects were latent and could not have easily been discovered the buyer, Bright, is entitled to revoke its acceptance of this nonconforming good by stating that the defect was a breach of the contract.

With this type of defect and breach, Bright would be entitled to a refund of the full contract price of the mower - $15,000.

Express Warranty and its Disclaimer

Moreover, Bright will be able to argue that the contract included an express warranty which stated, "this mower is free of defects in material and workmanship at the time of its delivery to the buyer." An express warranty is one which sits on the face of the contract and entitles the buyer to rely on such warranty. Express warranties cannot be disclaimed by a subsequent statement in the contract saying that there "are no warranties expressed or implied."

Here, SM made an express warranty in promising that it would be free of defects at the time of delivery and failure to abide by such warranty will subject SM to damages. There is no direct evidence that mower was defective at its delivery but it is unlikely that all the problems that arose were a result of negligence on the part of Bright (especially given that it malfunctioned under "normal usage"). Rather the logical inference is that the mower was defective at delivery and SM will be liable for violating the express warranty - the disclaimer will be irrelevant.

SM might argue that the express warranty was specific to defects in material and workmanship and not related to defects in the component parts or in installation. However, where there are vague terms in express warranties, they will be read in favor of the non-breaching party and as such, Bright will win in arguing that the types of defects that occurred were a result of defects in material and workmanship - in breach of the express warranty.

** Note: SM's disclaimer of an implied warranty of merchantability or fitness for a particular purpose was likely proper. It was in bold and on the same page as other contractual terms.

Limits to Relief

While disclaiming express warranties is improper, SM was able to limit the relief that could be sought if the mower was not defective upon delivery. Here, a term of the contract stated that in bold 12 point font that "If the mower or one of its parts fails within one year of delivery to the buyer because the mower or its component part was defective when installed, **SM shall repair or replace at its sole option any such**

mower or component at its own cost or expense. Other remedies excluded."
Accordingly, SM properly limited Bright's relief to repairs or replacement at its sole discretion.

The facts state that Bright took the mower to SM each time it malfunctioned and SM effected repairs. Thus, SM would argue that it was abiding by its contractual duty to repair the mower and was under no obligation to replace the mower or offer a refund. Further, SM would argue that the fact that the mower would work for a while and then malfunction again is of no relevance, because SM was willing to repair each time as evidenced by the fact that the mower was returned to SM for repairs 12 times in the first six months after purchase and repairs were made each time.

Note: If the suit was for personal injuries sustained by the defective condition, then the limit to relief would not be abided by and the plaintiff would be entitled to damages for his/her injuries. Here, the suit is not for personal injuries so the limit to relief would have been proper but for the express warranty saying the mower would be free from defects.

Conclusion

Bright will be successful in its suit against SM both on a contractual and express warranty suit. Contractually, SM breached by failing to tender perfect goods, and under the express warranty by failing to deliver a mower free of defects in material and workmanship.

2. Remedies available for Bright

Damages

Compensatory Damages

Bright is entitled to recover the purchase price of the defective mower. The mower was purchased for $15,000 and based on the breach of contract, Bright will argue that he is entitled to a full refund of the purchase price. Assuming the court finds that SM did in fact breach by providing a defective product, then the breach will entitle Bright to a refund of the purchase price plus any other damages sustained as a result of the breach.

Incidental Damages

Bright will also be able to recover any incidental damages that resulted from SM's breach. Incidental damages are those that arise in dealing with the breach. Here, Bright took the mower to get repaired a total of 12 times. He will be able to recover any costs associated with taking the mower to get repaired such as the cost of the salary for the employee who had to go take it in or the gas money spent, etc.

Consequential

Bright will also argue he is entitled to consequential damages for the lost profits he sustained as a result of the breach. Consequential damages will be awarded if both parties (especially the breaching party) was aware of the lost profits that would be incurred as a result of a breach and that those losses were foreseeable.

Here, as a result of the mower being so defective (that sometimes it wouldn't even start), Bright had to cancel planned jobs and lost both clients and $5,000 in profits. Bright has a good claim here because SM knew that Bright was an agricultural services provider and that if the mower failed consistently it would cause Bright to lose both

clients and profits. As such, the court should award the consequential damages. SM will argue that it was not foreseeable that the losses would be incurred as a result of the breach because it was not foreseeable that Bright would not have other mowers it could use while the mower they purchased was being repaired. Assuming it was clear that this is the only mower Bright owned, the consequential damages will be awarded at least in the amount of $5,000.

Conclusion

Bright will likely be able to recover the initial purchase price, anything expended as incidental damages, and at least the $5,000 in consequential damages.

Defenses

SM might argue that Bright is not entitled to the tender of perfect good because it was a contract for goods not suitable for personal, family or household purposes. However, this argument will fail because nothing indicates that the goods were made specifically for Bright.

Additionally, SM might say that Bright consented to the repairs or took too long to demand refund. Also fails.

Answer B

Governing law is UCC Art. 2

Where a contract is for a sale of goods, Article 2 of the UCC applies. For all other types of contracts, the common law applies. Here, the contract was for Bright Earth Solutions (A) to purchase a commercial tractor mower from SM. This is a contract for a sale of goods, therefore Art. 2 of the UCC applies to the contractual analysis set out below.

1. Is B likely to prevail in its suit against SM?

The issue here is whether B has a claim against SM for breach of contract and breach of warranty.

Valid contract

The Statute of Frauds requires that any contract for the sale of goods worth more than $500 be in writing and signed by the party against whom it is sought to be enforced, and UCC Article 2 requires that the essential term of quantity be included. This is not an issue here as a contract was entered into in writing and signed by both representatives of B and SM and it referenced "this mower", being the particular mower that B purchased from SM. There is, thus, a valid written contract for SOF and UCC purposes.

Breach of contract

Article 2 of the UCC requires a perfect tender where sale of goods is concerned; this means that the seller must tender the right number of conforming goods as required

under the contract. The standard for determining "conforming goods" is that they are fit for their ordinary purposes. Failure to delivery conforming goods entitles the buyer to reject all the goods, accept some and reject the rest, or accept all and sue for damages. However, Article 2 also permits a buyer to reject a good *after acceptance*, where there are defects that are subsequently discovered. Acceptance of defective goods does not preclude a buyer from subsequent rejection where (i) the defect could not have been discovered at the time of delivery and the buyer relied on the seller's assurance that there were no defects; or (ii) the defect was apparent but the buyer accepted in reliance on seller's assurance that the defect would be cured.

Here, B took delivery of the mower upon signing the contract and there is nothing on the facts to suggest that the mower was not conforming at the time of delivery. However, B can argue that it was not possible to detect any defects at the time of delivery because of the nature of the good (i.e. that any defects could be discovered only after operating the mower for some time) and additionally that B relied on SM's undertaking that the mower was "free of defects in material and workmanship at the time of its delivery". In addition, B could argue that SM's undertaking to repair or replace any mower or component part that failed within 1 year of delivery constituted an assurance to cure a defect discovered after delivery. As such, B will be able to argue that the subsequent defect constituted a breach of the perfect tender rule thereby allowing it to remedies (discussed in part 2 below).

<u>Breach of warranties</u>

B may also argue that SM breached the express warranty set out in the contract.

Express warranty

An express warranty is a statement of fact, description of a good, or a sample or model relating to the quality of the product, where such statement, description, sample or model formed as part of the bargain into and made at such time that the buyer could have relied on the same when entering into the bargain. Here, B will argue that the statement in the contract where SM affirmed that the mower was "free of defects in material and workmanship at the time of its delivery" constituted an express warranty, that was breached when the mower subsequently broke down multiple times over the next 6 months. It is clear that this statement constituted an express warranty. On the other hand, SM will argue that the contract also contained a disclaimer that "there are no warranties express or implied...in connection with the sale of this mower", which precluded B from being able to sue on the express warranty. However, SM's argument is likely to fail. The general rule is that it is very difficult to disclaim express warranties because of the nature of the inconsistency between the disclaimer clause and the express warranty, and the court is likely to construe the interpretation of both in favor of B, the consumer who acted in reliance on the express warranty by entering into the agreement.

As such, B will be able to sue for breach of the warranty if it can be shown that the numerous problems experienced were a result of a defect in material and workmanship at the time of delivery. On the facts, it is stated that the bolt holding the blade in place broke 5 times under normal usage, the steering system was faulty, and that the gas tank installation was defective. It will be for a trier of fact to determine if this evidence shows that the defects existed at delivery, but on balance it seems like this is the case

here such.

Implied warranties

B may also sue for breach of implied warranties of merchantability and fitness for particular purpose. A warranty of merchantability is provided by a commercial seller of the goods in question and warrants that the goods are fit for their ordinary purpose. A warranty of fitness for particular purpose can be provided by any seller and provides that the goods are fit for the particular purpose of the buyer, where the seller knew of the buyer's purpose and that buyer was relying on the seller to help select a suitable good. Here, SM is a commercial seller of mowers and thus can provide both types of implied warranties. B will argue that on the facts, the mower was not fit for ordinary purpose (given that the blade broke down 5 times on normal use, as well as the gas leaks and steering issues). B will also argue that it was not fit for the particular purpose which was for B to use on customers' lawns which required that the mowing lines be satisfactory, since the steering system was faulty and caused unsightly and uneven lines in mowing jobs) and that SM knew of B's particular purpose as B was an agricultural services business.

However, SM will likely be able to succeed that the implied warranties were validly disclaimed by the language. The rule is that a disclaimer must be fair and in conspicuous font and writing so that it is clear to the buyer. Here, the disclaimer clause was stated in bold and 12- point font and will likely meet this requirement. As such, B is unlikely to succeed in arguing breach of implied warranty.

2. B's remedies

If B prevails, it might be entitled to damages or rescission, provided it can argue against the validity of the disclaimer clause.

Validity of limitation of remedies clause:

A commercial contract may include a clause limiting the remedies available, provided that such clause is not unconscionable. A limitation clause may not purport to limit remedies for personal injury or operate in such a way where it limits the remedy to a one that is essentially unworkable under the circumstances. Here, the contract seeks to limit B's remedies to repair or replacement by SM, at its sole option, any mower or component part. However, B can show that the mower simply could not be repaired; on the facts, the mower was returned to SM for repairs 12 times in the first 6 months after purchase and finally that at the beginning of the 7th month, the steering wheel came off during a job, As such, B can argue that the limitation of remedies clause was unfair and should not be enforceable to limit the types of remedies available to B.

Damages

As B can demonstrate breach of contract and express warranty (discussed above), B can sue for damages, namely expectation damages, consequential damages, and any incidental damages. The expectation damages are to place B in a place it would be in had the contract been properly performed (i.e. receiving a mower that functions for ordinary purposes) and would be the cost of cover or market cost of a functioning mower. In addition, B can sue for any consequential damages (the lost $5000 in profits) as it was reasonably foreseeable to SM that any defect in its mower would cause a loss

in business to B (being an agricultural services company) and lost profits. Finally, B can sue for any incidental damages such as the cost of sending the mower back and forth to SM for repair.

Rescission

B may also look to sue for rescission and obtain its money back. To succeed, B will need to show grounds for rescission such as mistake, misrepresentation, undue influence, duress and further that SM has no valid defenses such as laches, unclean hands etc. Here, B may argue that there was a misrepresentation of statement by SM as to the mower being free of defects. Misrepresentation is an untrue statement of fact regarding the product, that the buyer was objectively justified in relying on and actually relied on. If the statement was made intentionally to induce the buyer's reliance, then it is intentional misrepresentation. Here, B can show that it was justified in relying on SM's statement regarding the defect free nature of the mower and did actually do so. This serves as grounds for rescission. In addition, SM has no valid defenses in equity such as laches (e.g. that B did not sue within a reasonable time thereby causing prejudice to SM) or that B had unclean hands (i.e. acted wrongfully in relation to the matter at hand). As such, B can sue for rescission of the contract, which would entitle it to unwind the contract as if it had not been entered into, and to obtain a refund of the purchase price paid.

Q3 Community Property

Prior to her 1990 marriage to Hal in California, Wendy helped operate an antiques and rare book business owned by her father.

During the marriage, Wendy continued to work with her father in operating the business. Over the years, Wendy and her father jointly operated the business and in 1995, they signed an agreement whereby Wendy became the owner of a ½ interest in the business. Wendy had developed an exceptional talent for buying antiques and took over that part of the business in 1995. The business doubled in value from 1995 to 2000. In late 1999, Wendy's father died and by his will left his interest in the business to Wendy, including all of the business's real property and inventory.

Wendy and Hal separated early in 2014. They have lived separate and apart since then and are now involved in divorce proceedings.

How should the court allocate the value of the business between Hal and Wendy? Discuss.

Answer according to California law.

Answer A

California is a community property state (CP). In a CP state, the marital economic community begins at the time of marriage and ends with (a) separation, (b) divorce or **(a)** the death of a spouse. Income, property and debts acquired during the marriage are presumed to be CP. Income, property and debts acquired (a) prior to marriage, (b) during marriage but pursuant to a gift or inheritance and (c) after separation or divorce are presumed to be separate property (SP). Property acquired while the couple are living in another state that would be CP if the couple had been living in a CP state is called quasi-CP and is distributed according to CP principles upon divorce or the death of a spouse.

Marriage: In California, marriage requires the consent of two individuals with the capacity to enter into the contract of marriage, along with adherence to certain formalities. Here, the facts indicate that that H and W married in California in 1990. We presume that they met all of the above requirements. As the marriage took place in California and it appears that H and W still live in California, the entirety of their marital economic community is subject to CP principles.

Separation: In California, separation requires (1) an expression of intent by one or both spouses to end the marital relationship and (2) action in conformity with that intent. Prior to 2017, a valid separation ending the marital community also required that the spouses live separate and apart. That requirement no longer holds, and this applies retroactively. Here, the facts indicate that W and H separated early in 2014 and that they have been living separate and apart since. Though the separate and apart element

is no longer necessary, it certainly evinces an intent to end the marital relationship. There has therefore been a valid separation since 2014 and that is when their marital economic community ended.

1990-1995: Prior to marriage W helped operate an antiques and rare book business owned by her father. During the marriage, W continued to work with her father in operating the business.

Presumptions: As noted above, income acquired during marriage is presumed to be CP. During this period, though the business was owned by W's family, W did not own it. Therefore, it was not W's SP business. Rather, she worked for her father and probably derived an income from her work. W's income during this period would be CP but would not be incorporated into the calculations further discussed below.

Distribution: As with any other income accrued during the marriage, W's income from this period would be CP and, as such, would be split 50/50 with H upon divorce.

1995-1999: In 1995, W and her father signed an agreement whereby W became the owner of a 1/2 interest in the business.

Presumption: Property acquired during marriage is presumed to be CP. As the 1/2 interest in the business was acquired during marriage, it is presumed to be CP. However, it is not clear that W paid any consideration for her 1/2 interest. If she did not, then the 1/2 interest would be considered a gift and therefore W's SP. Though the business was SP, W's efforts invested in the business would be considered CP and therefore the community would have an interest in the business and be allotted a portion at divorce using either the Pereira or Van Camp formula. The following

discussion assumes that the business was SP.

Pereira Formula: The Pereira formula applies to the allotment to CP when the increase in the value of the SP business comes from the efforts of the spouse. Here, the Pereira formula fits because the facts indicate that W had developed an exceptional talent for buying antiques and took over that part of the business in 1995, so her efforts probably contributed to the subsequent increase in the value of the business.

Under the Pereira formula, the SP is calculated as (fair market value (FMV) of the business at marriage) + [(FMV of business at marriage) * (fair rate of return) * (years of marriage)]. Here, we do not have the numbers to do the calculation. While we know that the value of the business doubled from 1995 to 2000, that is not necessarily reflective of the actual fair rate of return. Note also that the years of marriage would be 1990 to 2014, at time of separation, rather than 1990 to now.

The CP is then calculated by subtracting the SP calculated above from the FMV at time of separation.

Van Camp: The Van Camp formula applies to the allotment of CP when the increase in the value of the business is due to reasons other than the spouse's efforts, such as market forces or characteristics inherent in the business, rather than the efforts of the spouse. Here, the Van Camp formula may fit because (1) the facts indicate that the entire value of the business doubled, but we know W was only involved in 1/2, so her father's efforts probably also contributed and (2) antiques and rare books naturally go up in value over time.

Under the Van Camp formula, the CP is first calculated as [(FMV of spouse's efforts in

business) minus (family expenses paid from business)] multiplied by years of marriage. Again, we do not have the numbers to do the calculation but note that the years of marriage are 1990 to 2014.

SP is then calculated as the FMV of the business at separation minus the CP calculated above.

If the spouse was under-compensated - that is, the salary she drew was lower than the actual value of her work - then the court may choose to calculate CP by removing family expenses from actual salary paid on the theory that the community has already been compensated for the spouse's efforts.

Disposition: Assuming the 1/2 interest in the business was a gift, then the formulas above would apply. If W paid consideration for her 1/2 interest, however, then she would have likely used CP and therefore the 1/2 interest would be CP. This is because the concept of tracing dictates that property takes on the character of the property used to acquire it.

1999-2014: In late 1999, W's father died and by his will left his interest in the business to W. Presumably this would be the book end of the business.

Presumptions: Property acquired during marriage is generally considered CP. However, property acquired during marriage by gift or inheritance is presumed to be SP. Here, H and W had not separated at the time W's father died. However, as W's father left W his 1/2 interest in the business by will, the interest would be S's SP.

Disposition: As this 1/2 interest in the business was definitely SP, the formulas outlined above would apply again to the CP allotment.

2014-2021: During this period H and W were separate, which ended the marital economic community.

Presumptions: Property acquired after separation is presumed to be SP. Any earnings W had from the book side of the business would then be entirely SP. If the antiques side of the business is SP, then any earnings from that side of the business would also be SP. If, however, W paid for that interest and used CP, then that interest would be CP. This is because the property acquires the character of the property used to buy it; so property acquired using CP would continue to be CP. If the antique side of the business is CP, then the community would be entitled to allotment even after separation. The following calculations presume that the antiques side of the business was CP.

Reverse Pereira: As with the regular Pereira formula, the reverse Pereira formula applies to the allotment of CP when the increase in the value of the business comes from the efforts of the spouse. Again, the reverse Pereira formula would apply because the facts indicate that W's knack for the antiques business contributed to the business's earlier success.

Under the reverse Pereira formula, the CP is calculated as (FMV of the business at separation) + [(FMV of business at separation) * (fair rate of return) * years of separation)]. Here, we do not have the numbers to do the calculation. Note also that the years of separation would be 2014 to 2021, or 2020 since it is so early in 2021.

The SP is then calculated by subtracting the CP calculated above from the FMV at time of divorce.

Reverse Van Camp: As with the regular Van Camp formula, the reverse Van Camp formula applies to the allotment of CP when the increase in the value of the business is due to reasons other than the spouse's efforts, such as market forces or characteristics inherent in the business, rather than the efforts of one spouse. Here, this may fit because antiques and rare books naturally go up in value over time.

Under the Van Camp formula, the SP is first calculated as [(FMV from spouse's efforts from business) minus (family expenses paid from business)] multiplied by years of separation. Again, we do not have the numbers to do the calculation but note that the years of separation are 2014 to 2021, or 2020 since it is so early in 2021.

CP is then calculated as the FMV of the business at divorce minus the SP calculated above.

Disposition: The book side of the business, which W inherited from her father at death is definitely SP and W will be able to keep it. It is not clear whether the antique side is SP or CP, and the court will allocate the value of the business as discussed above. If it is CP, there may be a question as to whether H will be able to maintain a 1/2 interest in it (i.e., a 1/4 interest in the whole business). It is possible that he will and that W will have to buy him out. She will be able to keep the business for herself, however, despite the usual rule of equitable division at divorce. The court will consider that the business is identified more with her than with H and that her means of income would be severely affected if she lost it.

Answer B

General Community Property Principles

California is a community property (CP) state. All property and earnings that are acquired during marriage that do not come from inheritance, gift, or devise, is considered CP. Property that a spouse acquires before marriage, after divorce or permanent separation, or during marriage via gift, inheritance, or devise is considered separate property (SP). Property acquired in a non-CP state that would be CP if the spouses were living in California is considered quasi-community property (QCP) and treated like CP upon divorce or death.

Here, Hal (H) and Wendy (W) were residents of California and married in California, so the general CP principles of California would apply to this case.

Marital Economic Community

The marital economic community is defined as the time between the formation of a valid marriage and ending with death, divorce or permanent separation. Property acquired during the marital economic community is CP, as discussed above.

Here, H and W were married in 1990 and separated in early 2014. They have lived separate in the interim and now have initiated divorce proceedings. The community begins in 1990 when the marriage was entered into, and potentially ended in 2014 if there is the requisite intent attached to their separation to not re-instate the marital economic community. Seemingly their separation in 2014 was permanent because the facts mention they lived separate and have been apart since, which has led to their

divorce proceedings. There's no other mention of them rekindling any romance in between or making any other remedial measures to re-instate the marital economic community, so likely the community ended in 2014 upon their permanent separation.

Thus, the community lasted between 1990 when they got married and 2014 when they permanently separated.

VALUE OF THE BUSINESS

Character / Source of the Business

As discussed above, property acquired before marriage or during marriage through a gift, inheritance or bequest is considered SP. Property acquired during marriage or acquired from CP assets, is considered CP.

Here, W helped operate the antique business owned by her father before she and H got married. However, she did not acquire the property until after they got married and she took jointly with the operations in 1995. W would argue that the business is her SP because the business was owned by her father and her father granted her 1/2 of the business in 1995. There's no mention of her father granting H any stake in the business and no mention of H even working there. Further, W would argue that the business is hers because in 1999 when her father died, she inherited the entire business through his will. So while she and H were married in 1999 at the time she inherited the business, because the business was hers through inheritance and not through purchase or any other acquisition, means that would result in it being CP, that the business is her SP and her SP alone.

H would likely counter this and say that even though W acquired her father's interest in

the business through his will in 1999, that her becoming owner of 1/2 of the business in 1995 means that the business is a CP asset. The 1/2 interest was not a result of any inheritance or gift, and seemingly the inheritance in the will only was to give her the other half she didn't own already. While the 1/2 she inherited in 1999 would be her SP because it came from an inheritance, the fact that he obtained a 1/2 ownership to the business during marriage would result in 1/2 of the business being a CP asset. However, the court would have to determine the exact circumstances surrounding the 1995 acquisition and whether it was a purchase with CP funds, SP funds or a gift.

There's no mention of whether W paid for this 1/2 interest or whether the business was a gift from her father, but all the facts mention is that they "signed an agreement" where W became 1/2 owner of the business and took a 1/2 stake. Depending on whether W paid for this 1/2 stake and where the money came, potentially this could result in 1/2 of the business being a CP asset. If she paid for the 1/2 interest with her earnings during marriage, then that 1/2 stake would be a CP asset because funds earned during marriage are a CP asset and anything bought with them would also be considered a CP asset. If the court finds that this was a gift from her father to W, then potentially this is an SP asset because it could be a gift in lieu of money or some other repayment that was specifically directed at W and not at H and gifts acquired during marriage are the SP of that spouse. While the facts are ambiguous as to what the 1/2 ownership stake came from, W clearly owns 1/2 of the business as her own SP from the inheritance from her father because inheritance during marriage is an SP asset.

Thus, depending on whether the court finds the 1/2 ownership interest W took in 1995 via the agreement with her father was purchased or a gift, potentially that 1/2 interest

could be a CP asset, or an SP asset. The other 1/2 interest W took in 1999 under her father's will would be considered an SP asset because property acquired via inheritance during marriage is an SP asset.

CP Contributions to SP Business

When one spouse owns an SP business and there are CP contributions to the business, the CP acquires an interest in the SP business. The court has discretion to apply one of two formulas when determining how to apportion the CP share of the business: the Pereira formula, and the Van Camp formula.

Here, W would likely argue that the court should apply the Van Camp formula to apportion the CP share because the increase in the business was not due to her own work, but rather the work of her father and the inherent value of the business itself. The business was an antique shop that also sold old rare books. Her father owned the business and started it and even though she continued to work there, her father was really what got the business off the ground. There's no mention of how long W's father owned it, but potentially he was a mainstay in the community and someone that was very valued in the community. He could have had the business for a very long time before W began helping him out in 1990 and potentially the business was already on an upwards trajectory before she joined the team and started helping him out. Further, depending on where they live in California, W could also argue that the business was successful because of the local area. Potentially people in that area were attracted to the store because of its items and because the local population valued such a store in their community and not because of W's own contributions to the store. Even though W

worked there, she would argue that the value of the business and the increase was due to her father and the business that he created and not any of her own doing.

H would certainly counter this and say that the increase in the business between 1995 and 2000 was due to W's contributions. She developed "an exceptional talent for buying antiques" and took over that part of the business in 1995. Even if the local community valued the store, it was because of W's own contributions. She had worked at the store for over 5 years and had been helping her father out with running the business. He would argue that potentially she did not have this skill before they were married because she hadn't been working there for that long, but rather developed the skill after they were married through her continued work, and the fact that she developed it after they got married would result in it being a CP asset. She did not come into the marriage with this, but because of her constant work and time spent with her father she learned these skills and trained her eye for antiquing which increased the value of the business based on her work alone and her own time spent developing her craft. That much experience and that much exposure contributed to her having an eye for antiquing and for collecting valuable items and it was this eye and expertise that increased the value of the business. Even if the 1/2 stake W acquired in 1995 was a SP interest, her own contributions through her labor and time and expertise increased the business, so much so that she solely took over the antiquing part of the business from her father because she was so good in that area and had such a skill set that H would argue she developed during the marriage meaning it is a CP asset. She was married during that time so her labor would be a CP asset and the exceptional and business savvy labor was the reason that the business doubled in value from 1995 to 2000 and no market

forces could have pushed that drastic increase in value.

Likely the court would apply the Pereira formula to determine the CP share of the increase in value. While there's no mention of any outside market or economic factors that drove the increase in the business from 1995 to 2000, seemingly W's own acquired skill and expertise in this area had a huge impact on the business. While it is in the court's discretion to apply either formula, likely they would apply the Pereira formula to determine the CP share of the business.

Pereira Formula

The Pereira formula attributes the increase in value of the SP business to the labor, skill, and work of the spouse, which is considered a CP asset. The Pereira formula is more favorable to the CP because it views the labor and skill and work of the spouse as the factor behind the increase and the reason the business is doing so well.

Here, as discussed above, if the court applies the Pereira formula to determine the CP share in the SP business, it would determine that the increase in the value of the business was due to W's own experience, skill, and mastery in the area of antiquing. The SP would still have its ownership interest, but the CP share would likely be greater because the Pereira formula is more favorable to the CP interests. Thus, the court would determine the CP and SP share of the business as shown by the formula below.

Formula

Under the Pereira formula, the court determines the two shares as follows: SP = value of business at marriage + (value of business at marriage X fair rate of return [10% in California] X years of marriage). CP = fair market value of the business at divorce - the

SP share.

Here, there are no specific numbers to determine the value of the business when W started working there or acquired her interest. The two were married for 24 years so that would be applied at the end of the formula, and presumably the fair market value at marriage versus at divorce would be different because of the increase in the business during marriage, but without the specific monetary figures it is all speculative. Dependent on the discussion above and whether the interest she acquired in 1995 was an SP or a CP interest, potentially the value at marriage would be different because those were four years apart. Without the numbers and actual concrete monetary figures of the increase it is impossible to know the actual numerical figures associated with the business value, but likely the CP would have a sizable stake based off of W's contributions because her contributions seem to have drastically increased the value of the business.

Thus, if the court applies the Pereira formula, likely the CP interest would be greater because of Pereira's favoring of the CP interest.

Van Camp Formula

The Van Camp formula attributes the increase in the value of the business to market forces, the economy, the inherent business value, and all other factors not related to the hard work of the spouse. Because this formula does not consider the work of the spouse to be the reason for the increase, this formula and approach tends to favor the SP of the business owner spouse.

Here, if the court determines the Van Camp formula applies, it will be because the

increase in the value of the business was due to the market forces and inherent business qualities of the business and not of W's hard work or expertise. Thus, the court would determine the CP and SP share based on the formula as described below.

Formula

Under the Van Camp formula, the court determines the shares as follows: CP = (reasonable rate of services - annual family expenses) X years of marriage. SP = fair market value of the business at divorce - CP share.

Here, as discussed above, there are no corresponding monetary values to show the actual expenditures. Likely W's reasonable rate of services was substantial because she seemingly was the sole operator of the business outside of her father and was the only person running it as there is no mention of any other employees or any other helpers, especially after her father died. There's also no mention of the family expenses or no other mention of them having any children, but depending on how much they spent annually on the family expenses, this would be factored in. Further, they were together for 24 years, so the interest would be determined by multiplying that figure at the end. Presumably the fair market value at divorce would be substantial because the business doubled in value from 1995 and 2000 and there's no mention of any other decrease in value. Without any other facts to support the numbers it is pure speculation, but likely the SP would have a more favorable interest here because the Van Camp formula more heavily favors the SP interest.

Conclusion

Likely the court would find the Pereira formula to be more appropriate for determining

the SP and CP interest of the business, but without any concrete monetary values it is impossible to determine the actual percentage of both interests.

Goodwill of CP Business

Goodwill of a CP business refers to its community reputation and future business prospects and earning potential. If the goodwill of the business is earned during marriage, then it will be a CP asset.

Here, potentially the goodwill of the business could be a CP asset. If the court finds that W's acquisition of the business in 1995 was a CP acquisition and that 1/2 was a CP asset, then any other increase in goodwill from the business from there on out could be a CP asset as well. The business seemed to be doing well, saying it increased in value substantially from 1995 to 2000 and W had seemed to develop quite a specialty in that area. W's own expertise and the business's success would likely result in high projected future earnings and a good reputation throughout the community. If this comes from W's own hard work and labor, which is a CP asset, then the resulting growth of the goodwill of the business would also be a CP asset. There's no mention of any future contracts or earnings or deals that the business has lined up, but if the business is successful in the community which it seemingly is, then the goodwill and local good reputation of the business would be a CP asset and the court would have to attribute a value to this in order to distribute it evenly at divorce.

Thus, the goodwill of the business could also be factored into its value and be distributed at divorce between H and W if the court finds that the goodwill comes from CP contributions.

Distribution

W owns at least 1/2 of the business as her own SP from when her father devised it to her in his will. An increase in the business and its value would at least be half of her own SP as attributed to that 1/2 of the business. Depending on whether the court determines the 1995 acquisition of the other 1/2 was a purchase with CP funds or an SP acquisition through a gift or other SP funds purchased, then potentially 1/2 of the business is CP or SP. Further, the CP will have an interest in the SP business and its increase because of W's work there while they were married. The court will likely apply the Pereira formula to determine this interest because of the mention of W's expertise and growing skill in antiquing. However, the court has the discretion to apply either the Van Camp or Pereira formulas and the resulting CP or SP share will be different depending on which formula is applied. Further any earnings W had from her time at the business while married would be CP assets.

Q4 Professional Responsibility

Linda Lawyer is just starting out in practice. She arranges with Chiro, a chiropractor, to give Linda's name to his patients who have been in car accidents or falls. When Linda recovers money in contingent-fee lawsuits for Chiro's patients, she gives Chiro a gift, which they have agreed will be 5% of Linda's fee. If Linda recovers nothing, Chiro receives no gift. They also form a partnership, in which Chiro's services are described as "marketing."

Pete is one of Chiro's chiropractic partners. Chiro sends Pete to Linda because Pete is seeking a divorce from his wife Alice.

Pete tells Linda he can never forgive Alice because she was unfaithful. Pete tells Linda that he's having money problems and asks that she take the case on a contingency basis. Linda tells him she'll consider it if he'll have drinks with her. Pete feels he has little choice, and goes out with her. Linda initiates a sexual relationship with Pete, and agrees to take the case. Linda is increasingly distracted from Pete's case by her desire to spend time with him, sometimes filing papers hurriedly and narrowly avoiding deadlines.

Tom, Alice's divorce lawyer, calls Linda one day and says, "I know you're having sex with Pete. Either you settle this case cheaply, or I'll report you to the Bar." Linda decides to beat Tom at his own game and, without telling him, calls the Bar herself and reports his threat.

1. What ethical violations, if any, has Linda committed with respect to her:

    a. Financial arrangement with Chiro? Discuss.

    b. Partnership with Chiro? Discuss.

    c. Relationship with Pete? Discuss.

    d. Accepting Pete's case on a contingency basis? Discuss.

2. What ethical violations, if any, has Tom committed? Discuss.

Answer according to California and ABA authorities.

Answer A

Q1. What ethical violations, if any, has Linda committed with respect to her:

a. Financial arrangement with Chiro?

Fee for referral

Under ABA and California rules, a lawyer may not arrange referral agreements with non-lawyers for a fee unless it is a qualified reciprocal referral service.

Here, Linda made an arrangement with Chiro, a chiropractor who gives Linda names of his patients who have been in car accidents. This is not a qualified referral service and it involves procuring clients from a chiropractor who would see patients who come following car accidents. Their names would then be given to Linda who would then presumably contact the clients.

Thus, Linda violated the rules by engaging a non-qualified referral arrangement.

Gifts

Under ABA rules, lawyers are not permitted to solicit substantial gifts. Under California rules, gifts for past referrals are permitted as long as there is an understanding that the gift is **not a consideration** for future referrals and the gift is "fair".

Here, Linda gives the gift of 5% for the names. They do have an understanding that Chiro will continue to receive "gifts" if he keeps giving her name and she recovers fees from those representations. Thus, the arrangement with "gift" is prohibited under California rules.

Solicitation

Under ABA rules, solicitation, whether personally or through an agent, is prohibited. Solicitation is direct communication with a person in order to gain representation for a **financial gain**. Under California rules, direct solicitations in hospitals and medical facilities are **presumed** unethical.

Here, Chiro is referring the clients to Linda. In effect, Linda is soliciting injured clients directly after she gets their names from Chiro, knowing that they might need a lawyer following an accident for a financial gain of representing them in a case for a fee. This is especially egregious as recognized by California rules because the clients are vulnerable in these situations when they were involved in a car accident and are easily manipulated, especially when the clients are not aware of the arrangements.

Thus, Linda violates both ABA and California rules by soliciting these patients.

b. Partnership with Chiro?

Partnership with a non-lawyer

Under both ABA and California rules, a partnership with a non-lawyer is strictly prohibited to **avoid** any improper influence on a lawyer.

Here, Linda has formed some sort of partnership with Chiro, who is a non-lawyer that they call "marketing" whereby Chiro would provide Linda with the names of the patients that Linda would then contact in order to win representing them. Because partnership would involve both partners having a say in a strategy of the law firm, influencing strategic and legal decisions and otherwise influencing legal services, such arrangements are violative of ethical rules.

Thus, Linda violated both ABA and California rules by engaging in such partnership.

Sharing fees with non-lawyers

Under both ABA and California rules, sharing fees with non-lawyers is **prohibited**, unless it is for employees within a firm as part of a compensation plan.

Here, as Linda is sharing a fee with Chiro, a non-lawyer, whereby he acquires 5% of the fee for giving her names of the clients. Because Chiro is not an employee of Linda and it's not part of a compensation plan and is otherwise for an improper purpose, such fee sharing is prohibited under both ABA and California rules.

Thus, Linda violated both ABA and California rules by sharing fees in this "partnership".

c. Relationship with Pete?

Sexual relations with a client

Under ABA rules, sexual relations with a client are prohibited, unless they **pre-date** the lawyer-client relationship. Under California rules, lawyer is prohibited from coercing or otherwise **unduly influencing** a client into sexual relations.

Here, Linda started dating Pete after she took him on as a client. Their relationship started at the same time and did not pre-date the lawyer-client relationship. Additionally, Pete felt like he "had no choice" indicating that there was a coercion and the relationship was not entirely voluntary. This is especially egregious because she knew that Pete and Alice were divorcing, and he would be in a vulnerable situation from his wife being unfaithful. These circumstances in total show that sexual relations resulted from an improper influence and coercion.

Thus, under both ABA and California rules, sexual relations with Pete was a violation of ethical duties by Linda.

Competence

Under both ABA and California rules, a lawyer must represent a client and act with a **skill, effort, preparation** and diligence of a r**easonable attorne**y in the like circumstances. If the lawyer cannot competently represent a client, s/he must 1) withdraw from representation, 2) acquire knowledge and skill before performance arrives, or 3) associate him/herself with a competent lawyer or seek advice from an experienced lawyer.

Here, Linda let her relations with Pete affect her performance as an attorney. She was distracted by Pete and because she wanted to spend more time with him, she frequently underperformed, filing papers in a hurry and only narrowly avoiding deadlines. That would be below what a reasonable attorney would do under the circumstances. Thus, Linda violated her duty of competently representing a client. Additionally, she likely should not have taken the case in the first place. She is a new attorney, she is taking accident cases and Pete's case was a divorce case. Ordinarily, it would not be a violation if she acquired the knowledge and expertise. However, she is frequently missing deadlines and otherwise not engaging in an exemplary competence.

Thus, Linda violated her duty of competent representation under both California and ABA rules.

Current conflict

Under ABA rules, a current conflict exists if 1) representation is adverse to one of the clients, or 2) representation is **materially limited** by responsibilities to other clients, third parties, or l**awyer's own interests**. Lawyer may still continue to represent despite a conflict, if 1) the lawyer reasonably believes that s/he may still competently represent a client, 2) obtains written consent from a client. California rules are similar but do not have a "reasonableness" requirement.

Here, Linda's own interest in sexual relations with Pete are likely in conflict with Pete's divorce case. Her own interest in him is likely to be in conflict with a representation in a divorce case where she would have to be impartial. She has a personal interest in the case, creating a conflict.

Thus, Linda likely violated her duty to Pete under both California and ABA rules.

d. Accepting Pete's case on a contingency basis?

Contingency fee agreements

Contingency fee agreements are agreements whereby a lawyer recovers a percentage fee of the recovered amount. Generally, contingency fee agreements are permitted. They must be in writing and clearly indicating how the fee is calculated. However, contingency fees are **prohibited in domestic relations** cases for policy reasons because there is a danger that such agreements would promote divorces. There are certain exceptions such as recovering alimony judgment due.

Here, Linda said that he would take a case on a contingency basis because Pete is having money problems. Because the case involves divorce, such arrangement is

prohibited.

Thus, Linda violated ethical rules under both ABA and California rules.

Q2. What ethical violations, if any, has Tom committed?

Threatening with administrative action to gain advantage in a current litigation

Under California rules, threatening with administrative action or any other civil action or prosecution to **gain advantage** in a current litigation is prohibited. Under ABA there are no such rules.

Here, Tom threatened that he would report Linda to the Bar about her relations with Pete in order to gain advantage in the current divorce proceedings where Linda is an adversary attorney. Such threat is strictly prohibited under California rules.

Thus, Tom violated California rules by making such threats.

Reporting violations of the rules to the authorities

Under ABA, a lawyer must report violations of the ethical rules. Under California, there is no such reporting requirement. However, under California rules, the lawyer him/herself must report to the bar of any own professional misconduct.

Here, it would be a violation for Tom not to report Linda's misconduct to the bar under the ABA rules but not under California rules.

Thus, Tom violated ABA rules by not reporting the misconduct.

Answer B

1. Ethical Violations of Linda

In California, lawyers are obligated to comply with the ethical rules promulgated by the Rules of Professional Conduct (RPC) and the State Bar Act (SBA). The ABA also promulgates the Model Rules (MR) which CA will take under advisement in conjunction with the CA rules.

a. Financial arrangement with Chiro

Referral fees

Under the MR, lawyers are prohibited from engaging in exclusive referral arrangements that result in a pecuniary gain for the lawyer, absent participation in an approved attorney referral program. Here, L has made an agreement with C to give L's name to his patients when they suffer personal injuries and when L recovers for these patients, she will pay him a gift of 5% of Linda's fees. Under the MR, referral fees are strictly prohibited and as such, L is in violation of the rules regarding referral fees as they are prohibited under the MR.

Under the CA rules, lawyers may not engage in straight referral fee arrangements; however, they may provide a gift as a gesture of thanks when a referral is provided. The gift must be given as purely a gesture of thanks and not for the purpose of a quid pro quo or for securing future referrals. Here, L has arranged with C to give him a gift that amounts to 5% of L's fee in contingent fee lawsuits. Even though they

call this a gift, it is clearly not a gift. There is a clear quid pro quo arrangement whereby L is paying C for referring business. L is likely to argue this as well. She will argue that it is a gift pure and simple and she has called it as such, but this argument will not succeed. A referral fee disguised as a gift is not permitted under the CA rules. As such, L has violated the CA ethical rules by agreeing to pay a referral fee to C in exchange for his referral of clients.

Additionally, any referrals cannot be exclusive. It is not clear that the arrangement is exclusive, but to the extent that it is, it is not permitted. L may also attempt to argue that there is no quid pro quo because she is not offering to send patients to C, but this will fail because the exchange of money for the referral of patients is the quid pro quo and thus, is a violation of the rules.

Fee Splitting

Under the MR and the CA rules, lawyers are strictly prohibited from splitting fees with non- lawyers. The exception to this rule is where fees are paid to non- lawyers for compensation, as retirement benefits, and the like. Here, L is purporting to split the fees she earns as a lawyer with a non- lawyer, the chiropractor, C. This is strictly prohibited under the MR and the CA rules. L will likely attempt to argue that she is permitted to compensate staff for wages and earnings resulting from the work they perform on behalf of her and in assisting her in her cases, but this argument will fail. C is a chiropractor and even though it seems that L and P have agreed to form a partnership, it does not change the fact that lawyers are not permitted to split fees with non- lawyers.

Solicitation

Under the MR and CA rules, solicitation is prohibited when it is in person or live direct telephone or internet chat in nature. Here, the facts indicate that C's services are described as marketing services, meaning that C is likely conducting in person solicitation of L's services as a result of the in person patients C meets as part of his job as a chiropractor. While L might argue that C is merely a conduit and there is no guarantee that C's clients will turn to L for legal services, C will be deemed to be engaging in solicitations on L's behalf. As such, this marketing/solicitation agreement will be another of L's violations of ethical rules.

b. Partnership with Chiro

Formation of Law Partnership

Under the MR and CA rules, lawyers are not permitted to form law partnerships with non-lawyers. Here, the facts indicate that L and C formed a partnership and C's services are described as marketing. While law firms do typically have marketing departments whereby they market themselves outside of the firm, a law partnership between a lawyer and a non-lawyer is strictly prohibited.

Here, the facts indicate that C is a chiropractor, not a lawyer. There is no information to suggest that C is a lawyer and as such, the joining of L and C as partners as a lawyer and marketer is a violation of the ethical rules under both MR and CA analyses.

Splitting Fees

As discussed above, L and P's partnership, which by implication means they are sharing in the profits and losses of their respective businesses, is a violation of the fee

splitting rules promulgated by the CA rules and the MR. C and L's partnership is improper between a lawyer, and also due to the fact that C is sharing in the profits of L's cases potentially, L's partnership arrangement is a violation of the ethical rules under both CA and MR.

c. Relationship with Pete

Duty of Loyalty

A lawyer has a duty of loyalty to act in the best interests of their clients and exercise independent professional judgment. When a personal conflict of a lawyer may materially limit their ability to represent a client to the best of their ability, they may be in violation of their duty of loyalty. A lawyer may represent a client when there is a personal conflict if he or she believes objectively and subjectively that he can provide representation that is not limited, it is not prohibited by law, it is not in violation of the ethical rules, and the client gives informed written consent (CA) or informed consent, confirmed in writing (MR). Here, while it is highly unlikely that a lawyer engaged in sexual relationship with a client can give objectively solid representation, this representation is likely in violation of the ethical rules that prohibit sexual relationships with clients.

Sexual Relationships with Clients

Under both the MR and CA rules, lawyers are prohibited in engaging in sexual relationships with their clients, unless the sexual relationship existed prior to the attorney client relationship. California also has a specific exclusion that applies to lawyers who are married. The conflict of interest that arises due to a sexual relationship

with a client is not waivable.

Here, the facts indicate that L met P through a referral from C. As such, P and L did not have a relationship prior to commencing their relationship as attorney and client. They clearly were not married; in fact, L was hired by P to help him secure a divorce and as such, the married couple exception is not applicable. Additionally, L may argue that P will agree to sign a waiver and indicate that he is fine with the concurrent sexual relationship and representation, but this prohibition cannot be waived by client consent. As such, L will be in violation of the ethical rules by engaging in a sexual relationship with her client that began after the representation had started.

Start of Attorney Client Relationship

The attorney client relationship begins when the client reasonably believes that the attorney client relationship begins. Attorneys and clients may meet prior to deciding to formally engage as attorney and client, but to the extent that the relationship is confirmed, the conversations that took place prior to a formal engagement will likely be deemed to comprise the start of the attorney client relationship.

Here, the facts indicate that P confided in her regarding his relationship with his former spouse, A. This initial meeting whereby P clearly gave L confidential information and conducted himself such that the relationship was likely to have started, would probably be deemed to have begun the attorney client relationship between L and P. Although L states that she'll consider the case if he has drinks with her, P's actions indicate that he believed the attorney client relationship had already begun. After the drinks outing, L initiated a sexual relationship with P, who at that point, after drinks and an initial

consultation, likely believed he was her client, even though those acts occurred before she agreed to take the case.

L will attempt to argue that she began her relationship with P prior to the attorney client relationship, but this argument will likely fail. The facts seem to indicate that P likely believed the relationship had already begun and, thus, the exception for preexisting sexual relationships is likely not applicable. As such, L likely abused her position of power and is in violation of the ethical rules to not engage in a sexual relationship with a client.

Even if L was successful in arguing that the attorney client relationship began after the sexual relationship, there are no facts indicating that P, as the client, disclosed in writing that he was comfortable to continue with the representation in light of their sexual relationship. As such, L is likely in violation of the ethical rules.

Duty to Decline Representation

A lawyer is under a duty to decline representation if the representation would lead to a violation of the ethical rules of conduct. Here, by representing P, a client L is in a sexual relationship with, L is violating the rules of professional conduct under MR and CA principles as discussed above. As such, L is under an obligation to decline representation in accordance with the expected violation of ethical rules. L is in violation of her duty to decline representation when she is in a sexual relationship with P before, in her mind, she formally undertakes the representation. She should not have undertaken the representation of P and has violated her ethical duty by doing so.

d. Accepting Pete's case on contingency basis

Interest in Cases

Under the MR and CA rules, an attorney may only obtain a financial interest in a case to the extent that it doesn't involve criminal or divorce matters. Here, the case is a divorce matter and this i *[sic]*

Contingency Fee Arrangements

Under the MR and CA rules, contingency fee arrangements are permissible so long as they are not unreasonable or unconscionable and they are not for compensation related to criminal cases or conditioned upon fees that would be awarded in securing a divorce. To be valid in CA, a contingency fee arrangement must be in writing, must include the duties and responsibilities of the lawyer and the client, must set forth the details regarding the calculation of the fee, and the fee must be reasonable. Here, L has agreed to take P's divorce case on a contingency fee basis and as such, this is a violation of the MR and CA rules. P's case is a divorce case and L is clearly working to secure a favorable divorce settlement.

L might argue that P having money problems and as such, she agreed to take on his case on a contingency fee basis to help him, but under CA rules, this is not permissible. Under CA rules, lawyers may not advance costs or fees. As L has engaged in a contingency fee agreement for P's divorce, this is a violation of both CA and MR.

Duty of Competence

Under the MR, a lawyer is under a duty to represent a client with the appropriate

knowledge, skill, and experience such that they can provide the client with competent representation. A lawyer may become competent by putting in the time necessary to gain competence or by associating with a competent lawyer. In CA, a lawyer must not knowingly, recklessly, or intentionally fail to represent their client with competence. Here, all of the other relationship issues aside, it is necessary that a lawyer be competent in the representation of the client. Here, the facts indicate that L is just starting out in practice and she seems to have perhaps some experience in the field of personal injury. She agreed to take on P's case for a divorce and it is not clear that she has any experience in this field. The facts are silent as to whether she had undertaken any steps to gain competence in the field of divorce law and whether she has associated with an experienced lawyer. Unless L becomes competent in this field or associates herself with a competent lawyer in this field, she will be in violation of her duty of competence to P under both MR and CA rules. Additionally, L is being distracted by her relationship with P, which means she is not providing the most competent representation possible. She clearly is not undertaking time and efforts necessary to competently represent P.

L might argue that P doesn't mind and will waive her incompetence, but unfortunately, waiver of competence is not permitted under either CA rules or MR. L has clearly violated the duty of competence to her client, P.

Duty of Diligence

Under the MR, a lawyer is obligated to perform their duties in a diligent and timely manner such that the lawyer is a zealous advocate for the client. Under CA rules, a

lawyer is obligated to not knowingly, recklessly, or intentionally fail to act with diligence. Here, the facts indicate that L is increasingly distracted by her desire to spend time with P and files papers hurriedly and narrowly avoiding deadlines. Due to her inability to act as a zealous advocate for P, filing his papers in a concerted manner and giving his case the appropriate time needed to ensure he is adequately represented, L is breaching her duty of diligence under both the MR and CA rules.

2. Ethical violations of Tom

Duty Not to Threaten

In CA, lawyers are not permitted to threaten opposing parties or other clients with a claim that lacks merit to gain some kind of strategic advantage. Here, T, who is A's divorce lawyer, has called L and threatened to report her for having sex with her client, P. This is forbidden under the ethical rules as it is clearly based on T's statements that he is intending to use this information to induce L to convince her client that he should settle the case. As such, T is in violation of his ethical duty not to threaten with the prospect of influencing the result of a case.

T will likely argue that he is threatening L with a meritorious breach of duty, L's personal relationship with P that she has engaged in with her client. And while this may be true, it is an inappropriate use of the information as it is clearly being used to threaten L and P regarding the outcome of the case. As such, T has violated his ethical duties by threatening L.

Duty to Report

Under the MR, lawyers are under a duty to report misconduct of other lawyers when it pertains to matters of clear and weighty importance, like truthfulness or honesty, that would impact a lawyer's ability to practice law. Under the CA rules, there is no such duty to report misconduct of others. Rather, there is a duty to self-report conduct. Here, under a MR analysis, it must be determined whether L's relationship with T is a matter of clear and weighty importance that weighs on L's ability to practice law. While it is certainly a violation of ethical duties for L to engage in a sexual relationship with her client, as discussed above, she will likely argue that it does not in any way relate to her ability to practice law or her truthfulness or honesty. T will likely argue that any violation of the ethical rules is of clear and weighty importance and L's behaviors are report worthy. It is possible that under the MR, T violated his duty to report by not reporting L's misconduct to the state bar.

In CA, as discussed above, only lawyers have a duty to self -report their ethical misgivings. As such, under CA law, T is not under a duty to report L's relationship with P.

Q5 Real Property

Ed owned a parcel of land on the north side of a rural highway. A lane connected the highway to the small country inn Ed operated on the land. Ten years ago, Ed entered into a signed written agreement conveying a right-of-way easement over the lane to Fran, his neighbor north of his parcel. Fran operated a commercial farm with a small bunkhouse for farm workers on her land. She often used Ed's lane to access the farm and bunkhouse from the highway.

Recently, Fran announced that she was converting her farm into a 50-lot residential subdivision and the bunkhouse to a computer server center. She informed Ed that she wanted to run new electric lines and a fiber optic cable along the lane.

Fifteen years ago, Ed and Gloria, his then-neighbor on the south side of the highway, had entered into a signed written agreement in which Gloria covenanted that she and her successors in interest would use her property only as a commercial organic garden and, in exchange, Ed would purchase produce from Gloria for use in his country inn. Soon thereafter, Gloria sold her land to Henry. Ed continued to buy produce from Henry.

Recently, Henry informed Ed that the more intense development Fran had planned for her parcel and the increased traffic along the highway justified the conversion of Henry's garden into a combination truck stop and diner.

Ed objected to Fran's and Henry's intended changes and decided to sue both of them to enforce his rights.

1. What rights and interests do Ed and Fran each have in the lane, and may Fran, over Ed's objection, carry out her plans for the lane? Discuss.

2. What rights and interests do Ed and Henry each have in the garden property, and may Henry, over Ed's objection, carry out his plans for that property? Discuss.

Answer A

Easements

An easement is a property right that grants the use of land to someone who does not otherwise own the property. It can either be tied to anther parcel of land (appurtenant) or be tied to the person who has the easement (in gross). Typically, easements are appurtenant, but it does not appear to matter for the controversy here.

Ten years ago, Ed and Fran entered into an agreement for an express easement. Fran's property benefited from the easement, so it is the dominant estate, while Ed's was burdened, so he has the servient estate. This was a signed document, so it appears that it has satisfied the requirement that it comply with the Statute of Frauds. There is a valid express easement.

With that easement, Fran has the right to use the lane as she has been doing for the past ten years (as they agreed). She also has the right to make minor changes to her use so long as it is reasonable under the circumstances. Her right to use the lane is not exclusive (Ed can use it too). And Fran has the obligation to pay or make repairs necessary to the easement.

Change in use

When easements are established, they are typically limited to the use that was agreed upon. Establishing the use of the lane does not give Fran the absolute right to use it however she sees fit. A court will judge whether a change in use of an easement is allowable based on a test of reasonableness.

Fran says that she needs to run new electric lines and a fiber optic cable along the lane because she is converting her farm into a 50-lot residential subdivision. While needing the additions to the lane, given the changes to the property she is making, is reasonable for Fran, the court will question whether it is a reasonable accommodation based upon the agreement that was made between the parties.

Given these circumstances, it does not appear to be reasonable. This is transforming the use of the easement into something it never was before. Before it was used to access the small farm and bunkhouse from the highway. Now Fran wants to install significant electrical infrastructure. Importantly, this is inconsistent with how Ed, one of the signatories to the easement, uses his land. He runs a small country inn. While Fran's old farm and bunkhouse, along with a path used to reach it, did not affect Ed's enjoyment of his land, his inn will be materially hurt if he is forced to place cables and electric lines along the path. Ed does not have a right to tell Fran what she does with her property (changing the farm and bunkhouse into large residential lots), but he will convince the court that her attempt to add the lines (and potentially the cable, although it may be allowed if the court believes it can be underground and not an eyesore, resulting in minimal harm to Ed) is not reasonable under the circumstances.

Ed will be able to enforce his rights to maintain the easement as to its current use with Fran.

Real Covenants

Real covenants occur when owners of property covenant to engage or refrain from certain behaviors with their property regarding one another. That is what appeared to

happen between Ed and Gloria 15 years ago. Here, Ed now seeks to enforce the rights under the covenant to prevent Henry, a successor in interest from Gloria, from changing his land into a truck stop and diner, in violation of the agreement Ed had struck with Gloria.

While Ed could have simply enforced his contractual rights with Gloria, since Henry is not a party to that contract, Ed will try to enforce his rights under a real covenant. In order to enforce the burden of a covenant you must show that there is privity, intent for the covenant to run with the land to successors in interest, notice, the covenant touches and concerns the land, and that it complies with the Statute of Frauds. I will address each below.

Privity

While for the benefit to run with the land in a real covenant, it only requires minimal vertical privity, for the burden to run with the land, there must be horizontal and complete horizontal privity. Here, the burden is running because it is Ed who is trying to enforce the rights, or burden, under the real covenant on Henry, who was not a party to the original contract (and therefore is only subject to the covenant if it runs with the land).

Horizontal privity occurs when the covenant was involved in the actual establishment of the horizontal transaction of the real property between the landowners. A common way to see if this is the case is to see if the covenant is in the deed. Here, Ed and Gloria simply entered into an agreement to use their property in specific ways, without the required transaction relating to the land. Therefore, the requirement for horizontal

privity is not met.

Complete vertical privity is also required to enforce the burden of a real covenant. Complete vertical privity means that the entire property interest, nothing short of that, must be passed along to the successor in interest against whom the burden is sought to be enforced. Here, it appears that Gloria sold her entire interest, so vertical privity is met.

While complete vertical privity exists, horizontal privity does not. Therefore, the requirement of privity has not been met.

Intent

It must be the intent of the parties to the contract that the covenant run with the land. Here, the facts state that the agreement stated the covenant applied to Gloria and her successors in interest. This is sufficient evidence to show that the requirement of intent is met.

Notice

A purchaser of land, such as Henry, must be on notice that the covenant exists as well, or else it will not be enforceable. Here, the facts are unclear. On one hand, they state that Ed did continue to buy fruit from Henry and Henry informed Ed, giving him a chance to evaluate his legal obligations, before going ahead with the change. On the other, Henry may have simply been giving a kind of heads up to Ed, and Ed's actions do not serve as evidence to what Henry knew. These facts do not cut one way or the other definitively, but it seems likely that Henry was indeed aware of the agreement between Gloria and Ed.

The requirement of notice is met.

Touch and Concern

Real covenants must also touch and concern the land. That means that each party enters into the agreement to benefit their land, rather than entering into unrelated contractual relations regarding personal conduct that have nothing to do with the property. Here, Ed benefits from having a consistent supplier of produce to serve his country in, while Gloria benefits by having a consistent buyer of goods for her business. These are both tied to the pieces of property.

The touch and concern requirement is met.

Statute of Frauds

As will all contracts regarding real property, the contract must comply with the Statute of Frauds. Here, the facts state that they entered into a signed written agreement, demonstrating compliance with the Statute of Frauds.

Conclusion re Real Covenant

As the above demonstrates, Ed has satisfied the requirements of intent, notice, touch and concern, and Statute of Frauds that are necessary to enforce his rights against Henry. However, he has fallen short of establishing the final prong of privity necessary, meaning he will not be able to enforce his rights as a real covenant. However, the remedy available when enforcing a real covenant is damages. Ed appears to want to maintain the status quo, meaning he may have another option.

Equitable Servitude

An equitable servitude is similar to a real covenant but has two important differences. First, while it requires a showing on intent, notice, touch and concern, and compliance with the Statute of Frauds (things Ed has shown), it does not require privity. Privity is the one issue Ed was missing, meaning that he will be able to enforce his rights under an equitable servitude.

Second, while damages are not the available remedy under an equitable servitude, an injunction is. Here, Ed objects to Henry's change, and an injunction preventing Henry from changing the land from its use as an organic garden is exactly what he wants. Therefore, Ed will be able to prevent Henry from carrying out his plans for the property.

Changed Circumstances Doctrine

Henry may counter that he should not have to abide by the contract because of the changed circumstances doctrine. This applies in situations where there have been drastic changes to the land and the surroundings such that it makes it unreasonable to comply with the former restrictions placed by covenants/equitable servitudes/implied reciprocal servitudes. However, this is a very high bar to establish. The facts do not suggest that it is infeasible, or even close to it, for him to continue operating as a commercial organic garden. Rather, it appears that due to external factors, he may have a better commercial option if he switches to being a truck stop and diner. The existence of a better commercial opportunity on its own is not sufficient to release Henry from his legal obligation.

Ed will still be able to enforce his rights via injunction under the equitable servitude.

Answer B

Easements

Express Easement

An easement is the right to enter the property for a particular purpose, but it does not grant any right of possession or enjoyment in the land.

An express easement is an easement given in writing signed by the party to be charged in order to satisfy the Statute of Frauds.

Here, Ed gave signed written agreement to Fran over the lane going to the highway. Therefore, this was a valid express easement.

Termination of An Easement

Easements are presumed to last forever. However, they can be terminated by a writing, oral statement, and act of abandonment, selling of the servient estate to a bona fide purchaser without notice, or merging of the dominant and servient estate (the benefited and burdened estate, respectively).

Here, there is no indication that there has been any attempt to terminate this express easement. Fran did not say or write that she was abandoning the easement and Ed (the servient owner) has not sold his land.

Therefore, Fran will successfully argue that the easement is still valid.

Use of an Easement -- Surcharging the Easement

An easement can be used in a reasonable way for the purpose that it has been given. If the dominant estate owner exceeds the reasonable use of the easement and thus surcharges the easement, the servient estate holder can sue to enforce an injunction and prevent the use beyond what is reasonable.

Additionally, the user of the easement can do what is reasonably necessary for the maintenance of the easement even if it burdens the servient estate owner.

Here, Ed will argue that he gave Fran this right of way easement so she could access her farm and bunkhouse from the highway, not to run electrical lines and cables across it. Therefore, she is surcharging the easement by going beyond the scope of its use. Additionally, these additions of cables are not maintenance of the easement, that would be adding something to the easement.

Here, Fran will argue that the right of way easement was not conditioned on the fact that she continue to use the property as a farm and bunkhouse. Therefore, running the cables along the lane is now reasonable for the use of her property and thus the easement should still apply to it.

Here, the court will likely find that the right of way express easement was intended for the use of Fran having *access* to her property, not to run lines and cables across it or along it. Therefore, by wanting to install cables along the lane, Fran is exceeding the reasonable use of the easement. Therefore, Ed can likely get an injunction to prevent Fran from carrying out her plans with the lane.

Covenants and Servitudes

A covenant or servitude is a condition on the use of land. A covenant is when the person seeking to enforce the covenant is seeking damages. An equitable servitude is when they are seeking an injunction.

Here, Ed and Gloria entered into an agreement when Gloria covenanted that she and her successors would use the property as a garden and Ed would purchase produce from her in exchange. However, Gloria sold the land to Henry, but Ed continued to be able to buy produce from Henry.

Now, Henry wants to get out of this covenant.

Covenants

Burden to Run

For there to be a valid covenant to enforce for damages the subsequent owner of the burdened estate must have 1) notice 2) in writing 3) horizontal privity 4) vertical privity 5) intent 6) and the covenant must touch and concern the land.

Notice

The owner must have notice (actual, constructive, or inquiry).

--Actual

Actual means that the new owner has actual knowledge of the covenant at the time of conveyance.

Here, it appears that Henry has actual knowledge of the covenant because he continued to sell Ed produce after he bought the land and there are no facts suggesting

that he learned this later. It is likely that Gloria informed Henry of this in the sale of the land considering her contract with Ed that her successors in interest would also be bound.

--Constructive

Constructive notice means that the covenant is recorded in the chain of title.

There is no indication here that anything is in the title to the property because this covenant was just in a signed written agreement, not the deed itself.

--Inquiry

Inquiry notice is when there are facts or circumstances that would lead a reasonable person to further inquire about the property.

Here, Henry is selling product to Ed, so he seems to be aware of the covenant and thus inquiry notices doesn't apply.

Thus, Henry had actual notice of the covenant.

Writing

Here, the covenant was set out in a signed writing.

Horizontal Privity

Horizontal privity means that the covenant was set out in the conveyance of the land between the original grantor and grantee.

Here, there is no indication of that.

Facts indicate that Ed and Gloria were merely neighbors who signed a written agreement. Thus, this was not a covenant set out between a grantor and grantee, but

just a contract between to neighbors, so there is no horizontal privity.

Vertical Privity

Vertical privity means that the new owner owns the same interest as the original owner. Here, it appears that Gloria sold all of her land to Henry and there are no facts to the contrary.

Thus, Henry likely has the same interest in the property that Gloria did and therefore there is vertical privity.

Intent

Intent means that there is an intent that the subject matter of the covenant be affected.

Here, there was clearly an intent for Gloria/Henry's land to be subject to this produce covenant that limited her use to a garden in exchange for Ed buying her produce because they explicitly put that in the written agreement.

Touch and Concern

Touch and concern means the covenant is valuable to the benefitted party.

Here, the covenant is valuable to Ed, who is the benefitted party because, he gets to buy organic produce for his country inn which he runs on his property. Additionally, it also benefits Ed's "country inn" by being right next to a garden which is likely more appealing to guests out in the country than a truck stop/diner combination would be.

Thus, this covenant touches and concerns the land.

However, since there is no horizontal privity, Ed does not have a right to seek damages for breaching this covenant.

Benefit to Run

To determine if the benefit to run for a subsequent owner of the benefitted parcel requires 1) notice 2) intent 3) vertical privity 4) and for it to touch and concern the land.

Here, Ed was the original party to the covenant, and he is the one trying to enforce it; therefore, there is no need to analyze whether the benefit runs. That only applies to subsequent owners of the benefitted estate.

Here, Ed can seek to enforce the covenant without showing this.

Equitable Servitude

Burden to Run

Ed may also seek an injunction for this equitable servitude and prevent Henry from changing the land from a commercial organic garden into a truck stop and diner.

For the burden to run for an equitable servitude there must be 1) notice 2) a writing 3) intent 4) and it must touch and concern the land. There is no requirement for privity.

Notice

See above for rule statement.

See above for discussion as to why Henry likely had actual notice of the covenant.

Writing

See above for discussion how this equitable servitude is in writing because it was set forth in the written agreement between Gloria and Ed.

Intent

See above for rule statement.

See above for discussion on why there was intent.

Touch and Concern

See above for rule statement.

See above for discussion for why this equitable servitude likely touches and concerns the land.

Therefore, since all four of these elements are likely met, Ed is able to enforce this equitable servitude and get an injunction that prevents Henry from operating the land as anything other than the commercial garden.

Benefit to Run

For the benefit to run for an equitable servitude it requires 1) notice 2) intent 3) and that it touch and concern the land.

Here, see above for discussion as to why Ed does not need to show the benefit to run because he is the original party to the servitude.

Termination of a Covenant/Servitude

A covenant or equitable servitude can be terminated based on abandonment, change in circumstances, estoppel, written release, and merger of the dominant and servient estates.

Change of Circumstances

Here, Henry is asserting that this covenant/servitude is terminated and thus cannot be

enforced because of change of circumstances. Henry will argue that Fran's change to her parcel and increased traffic change the circumstances of the area such that this covenant no longer should apply.

Fran used to use the land as a farm and bunk house, but now, Henry will argue, she is changing that to 50 residential homes and a computer server center, thus changing the nature of the area from agricultural and farmland. Thus, since there will be more people and less farms. a truck stop and diner now fit within these new circumstances. Additionally, many more people will be in the area because instead of one farm with some workers on Fran's land, it will be 50 residences with people living in them.

Ed will argue back that she is changing her land into majority residential housing which is different in nature to a truck stop or diner which are entirely different types of establishments for commercial uses. Ed will argue that keeping the garden is still applicable and should be enforced because this is an agricultural area and thus a truck stop and diner do not fit in the area. This is a "rural" area, even with additional residential homes.

Here, because of the likely massive construction changes that will take place on Fran land, the increase in traffic due to 50 residential houses being used, and the change from using the land for agriculture/farming to a different use, the court could likely find that the circumstances have changed enough that the covenant/servitude should no longer apply to Henry's land even it was previously enforceable.

Therefore, Henry can likely carry out his plans over Ed's objections.

Oct 2020

California Bar Examination

Essay Questions and Selected Answers

The State Bar of California
180 Howard Street, San Francisco, CA 94105
845 South Figueroa Street, Los Angeles, CA 90017

COMMITTEE OF BAR EXAMINERS
OFFICE OF ADMISSIONS

415-538-2300
213-765-1500

ESSAY QUESTIONS AND SELECTED ANSWERS

OCTOBER 2020 CALIFORNIA BAR EXAMINATION

This publication contains the five essay questions from the October 2020 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	Subject
1.	Professional Responsibility
2.	Business Associations
3.	Real Property
4.	Criminal Law and Procedure
5.	Remedies

ESSAY EXAMINATION INSTRUCTIONS

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little or no credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

Q1 Professional Responsibility

Mary is a lawyer and represents Peg in a lawsuit alleging sexual harassment against Doug. Doug's lawyer is Len and the case is set for trial in Superior Court. Mary and Len dated and were intimate in the 1990s while in law school. They remain good friends, but are no longer romantically involved. Mary has not told Peg anything about her relationship, past or present, with Len.

Mary has determined that Doug will have to pay Peg damages after trial and that the primary issue in the litigation is the amount of damages. Mary estimates that, at trial, a court could award as little as $50,000 or as much as $150,000.

Doug testified in a deposition a month ago that he had never been unfaithful to his wife. Peg confided to Mary that she has solid evidence confirming that, for the past year, Doug has been engaging in an extramarital sexual affair about which his wife is unaware. Peg instructed Mary to use the information about the affair as leverage in settlement discussions to get the maximum amount in damages.

Mary agrees that, if she uses the fact of the affair in her negotiations with Len, the case will likely settle for a larger amount to Peg than if she doesn't mention the affair. Mary, however, strongly dislikes the idea of using that information. She is especially uncomfortable using this tactic in a case involving her good friend, Len.

1. What ethical violations, if any, has Mary committed by not telling Peg about her past and present relationship with Len? Discuss.

2. Should Mary use the fact of Doug's affair in settlement negotiations? Discuss.

3. If Peg persists, can Mary ethically withdraw from representing Peg? Discuss.

Answer according to California and ABA authorities.

Answer A

Mary's Past and Present Relationship with Len

Duty of Loyalty

Under both the ABA rules and the California rules, an attorney has a duty of loyalty to her client. This duty includes an obligation to avoid conflicts of interest between current clients, current and former clients, clients and third parties, clients and the attorney herself, and organizational conflicts when representing an entity such as a corporation. There are two duties relevant to Mary's past relationship with opposing counsel. First, an attorney cannot represent a client when one of her personal interests materially conflicts with an interest of the client in a way that could impair the attorney's representation of the client. However, if the attorney reasonably believes -- that is, subjectively believes in an objectively reasonable way -- that she can diligently and competently represent the interests of the client, she can still represent the client as long as she discloses the issue and receives informed consent. Under the ABA, informed consent may be oral and confirmed in writing, while under the California rules there must be written informed consent. Second, there is a specific duty with respect to relationships involving opposing counsel. If the attorney has a close personal relationship with opposing counsel such as a familial relationship or close friendship, the attorney must disclose that potential conflict to the client. As with the general rule, in order to press forward with the representation, the attorney must reasonably believe that she can adequately represent the interests of the client. Under the ABA, the attorney must receive informed consent, while under the California rules the attorney

must provide the client with a written disclosure of her relationship to opposing counsel.

Here, Mary previously dated Len and was intimate with him during law school. She also considers him a "good friend." Under both the ABA and California rules, this arguably qualifies as a close personal relationship with opposing counsel akin to a familiar relationship or close friendship. As a result, out of an abundance of caution in attempting to comply with the "close relationship with opposing counsel" rule, Mary should provide Peg with written disclosure of this potential conflict under the California rules and receive informed consent under the ABA rules. Further, even if her former relationship with Len does not constitute a close relationship with opposing counsel (say, because it is less close than a best friend or parent), Mary must still receive informed consent under the broader and more general personal interest rule. Under the broader rule, she must receive informed consent confirmed in writing for the ABA rules, or informed written consent for the California rules.

Another problem worth mentioning is that Mary may not be permitted to represent Peg in this matter whatsoever, as it appears she may not be able to competently and diligently represent Peg. The problem states that Mary is deeply uncomfortable with mentioning Doug's affair even though this maneuver would likely lead to a better settlement award for her client. Specifically, it says she doesn't want to use this tactic against her good friend, Len. This suggests that even if Mary does believe that she can adequately represent Peg, that belief may be objectively unreasonable. Unless she is able to overcome her personal misgivings and zealously represent Peg, then Mary should withdraw from the representation. Further, given that litigation is ongoing, Mary would need to seek approval from the court in order to withdraw from the

representation.

Using Doug's Affair In Settlement Negotiations

Candor to the Tribunal

Under both the ABA rules and the California rules, an attorney owes a duty of candor to the tribunal. This means that an attorney may not knowingly offer false evidence and must correct any material misstatements or misrepresentations on the record. While an attorney may offer evidence to the tribunal if they worry, but are not certain, that the evidence may be false, in general an attorney should strive to represent their clients with candor and honesty to the court. That said, an attorney must balance this obligation against a duty to zealously represent the interests of their client within the ethical bounds of the law.

Here, it is possible that Peg's claim about the affair is true. It does not appear that Mary has investigated the truth of this claim. This means that Mary does not know for certain that the evidence is false, and she likely can offer the evidence to the tribunal without violating her duty of candor to the tribunal. That said, some courts interpret the duty of candor to the tribunal to include properly investigating the factual basis for any assertions. If so, Mary would need to look into the validity of Peg's assertion before bringing it up in court in order to comply with her duty of candor to the tribunal.

Duty of Fairness

Under both the ABA rules and the California rules, an attorney owes a duty of fairness to opposing counsel. This means that the attorney may not suppress evidence she is required to disclose, and ought not to lie to opposing counsel or make dishonest

representations to opposing counsel with the goal of misleading opposing counsel.

Here, as mentioned, there is no reason to think that Peg's discussion of Doug's affair is false. As a result, it would not violate the duty of fairness to bring up the affair during settlement negotiations. Thus, discussing the affair during settlement negotiations would not violate the duty of fairness to opposing counsel (unless there is reason to think Peg is lying, or Mary investigates the claim and discovers it is false).

Duty of Honesty

Under both the ABA rules and the California rules, an attorney owes a general duty of honesty to those they interact with in their role as an attorney. This means the attorney must not make material misrepresentations or state falsehoods within the scope of their role as an attorney.

Here, Mary needs to investigate the foundation of Peg's claim that Doug has had an affair. Once she investigates the claim and determines whether it is certainly false or may be true, she can rely on the evidence during settlement negotiations without violating the duty of honesty. But if it turns out that Doug is not having an affair, then Mary could not rely on this assertion without violating the duty of honesty.

Duty to Avoid Frivolous Claims

Under the ABA rules, an attorney ought not press a claim or argument unless there is a good faith basis in the law (or a good faith argument for extending or changing the law) in support of the claim or argument. In contrast, under the California rules an attorney must not press a claim when she lacks probable cause for the claim and has a purpose of harassment for pressing the claim. Part of this duty is investigating claims to ensure

that they have a proper foundation under the law.

As mentioned above, Mary needs to investigate the foundation of Peg's claim about Doug having an affair. If it turns out that the alleged affair is not real and Peg's allegation is false, then pressing this claim in order to increase a potential settlement award would be a frivolous claim or an argument without a good faith basis. That would violate the ABA rules. It may also violate the California rules, if the court believes that Mary lacks probable cause (given that she did not investigate the claim or she did or that she did and it turned out to be false or highly unlikely) and that she had a purpose of harassing opposing counsel in order to raise the settlement award. Thus, Mary needs to investigate the claim and ensure she has a good faith basis and probable cause to support bringing up the alleged affair during settlement negotiations.

Duty of Competence

Under both the ABA rules and California rules, all attorneys have a duty of competence to their clients. This includes having the relevant skills, knowledge, and preparation to adequately represent the client. In California, this also includes having the relevant mental and physical capacity, and an attorney must not recklessly, intentionally, grossly negligent, or repeatedly violate this duty.

Here, the idea that Mary must investigate Peg's claims goes in two directions. If she fails to investigate the claim, then she is not competently representing the client under the ABA rules and she is arguably reckless or grossly negligent with regard to her duty to investigate, and is thereby failing to adequately represent Peg under the California rules as well. On the other hand, if she investigates the claim and it does have a factual foundation in the truth, then Mary would arguably be incompetent if she did not raise

this claim during settlement negotiations as she would be failing to zealously represent the interests of her client within the bounds of the ethical rules. Thus, Mary must investigate Peg's claim and if it is true, she must press the claim in order to avoid violating the duty of competence.

Scope of Representation

Under both the ABA rules and California rules, an attorney must follow the bounds of the scope of representation. Some issues are solely up to the discretion of the client, including whether to accept a settlement offer, whether to testify, and whether to waive a jury trial right. The client also has full control over the goals and ends of the representation. However, the attorney has control over the means of representation, subject to a duty to consult with the client and communicate with the client about the means of the representation.

Here, whether to bring up the affair during settlement negotiations is arguably a "scope of representation" issue that falls within the means of representation, much like what questions to ask during a deposition and what witnesses to call during a case. However, Mary must consult with Peg and must communicate with Peg about this strategic issue. Thus, in order to comply with her ethical duties, Mary must discuss and consult with Peg regarding this issue.

Duty of Communication

Under both the ABA rules and the California rules, an attorney has a duty to communicate with the client. This includes keeping the client apprised of any

developments in the case, letting them know about written settlement offers or other major settlement offers, and generally consulting with the client and keeping in regular contact.

Here, Mary must communicate with Peg regarding whether to disclose the affair during settlement negotiations, as this is a strategy that she must discuss with Peg and consult with Peg given her duty of communication.

Duty Involving Leverage in a Civil Case

Under the California rules, an attorney must not threaten criminal or disciplinary action in order to obtain an advantage or leverage in a civil case. Here, if it is possible that Doug's affair could subject him to disciplinary or criminal risk, then Mary must not leverage that risk in order to obtain a larger settlement award for Peg. On the other hand, if the affair would not subject Doug to criminal or disciplinary risk, then Mary must leverage these facts in order to fulfill her duty to zealously represent her client.

Duty to "Tattle" On Opposing Counsel

Under the ABA rules, if an attorney has actual knowledge that another attorney has violated the ethical rules or has taken some action that materially reflects poorly on their fitness as an attorney, they must disclose these facts to the state bar association or other ethical authority. In contrast, the California rules do not have a similar provision except that an attorney must disclose certain issues related to their own ethical standing. For example, an attorney must disclose if three or more malpractice suits have been filed against them within one year, or if they have been convicted of fraud or a felony involving moral turpitude.

Here, Mary has not violated the California rule, but she may violate the ABA rule if she thinks that Len allowed his client to knowingly lie during his deposition testimony when he said that he had never been unfaithful to his wife. If Mary knows that Len was aware of Doug's affair, then she also knows that Len violated his duty of candor to the tribunal and his duty of fairness and honesty, and she must disclose that fact to comply with her duty to "snitch" or "tattle" on other attorneys.

Withdrawal From Representation

Mandatory Withdrawal

Under the ABA and California rules, an attorney must withdraw from representation in a few circumstances. First, an attorney must withdraw from representation if their health impairs their ability to represent the client. Under the California rules, that impairment must make the representation "unreasonably difficult," while under the ABA rules it must materially impair the attorney's ability to represent the client. Second, an attorney must withdraw from representation if the representation would necessarily lead to or facilitate a crime or fraud. Third, an attorney must withdraw from representation if the representation would violate an ethical rule (in California) or would violate an ethical rule, a civil law, or a criminal law (under the ABA). Fourth, an attorney must withdraw if they are fired by the client. Finally, an attorney must withdraw if the client is asking them to press a frivolous claim, under the definitions provided above (e.g., probable cause and harassment in California, or lack of good faith under the ABA).

Here, none of the mandatory bases for withdrawal have arisen as of yet unless Mary cannot competently represent Peg given her prior relationship with Len, in which case she must withdraw from representation. Additionally, if Mary investigates Peg's claim

about the affair and it turns out to be false, but Peg insists on raising it during settlement negotiations, then Mary must withdraw if continuing would lead to fraud. She must also withdraw if continuing would violate the duty to avoid frivolous claims, or any other ethical duty (under California rules) or ethical duty, criminal law, or civil law (under the ABA rules). If any of those scenarios occur, then Mary must withdraw from representation.

Permissive Withdrawal

Additionally, there are circumstances where an attorney may withdraw from representation permissively. These include when the client materially violates the retainer agreement and the attorney provides a warning that they will withdraw if the client does not cease their violation, lesser forms of crime or fraud such as if the client is seeking to commit a crime or fraud in the future or if the client is trying to force the attorney to engage in a crime or fraud, if the attorney's health impairs the representation to a lesser degree, if there is good cause shown, if representing the client has become unreasonably difficult (including under the ABA if the client and attorney have a fundamental disagreement), and for a variety of other reasons. Under the ABA, an attorney can withdraw for financial reasons or for any reason that won't materially harm the client, and under the California rules an attorney can withdraw if they have a serious disagreement with co-counsel such that withdrawing is in the best interest of the client, or if the client wants to press an unwarranted claim or argument.

Here, even if the mandatory withdrawal criteria outlined above are not met, Mary could withdraw from representation if she feels too morally conflicted about raising the affair during settlement negotiations, assuming this is a fundamental disagreement (under the

ABA) or means that the client has made representation unreasonably difficult (California rules). She can also withdraw if she investigates the affair claim and believes it does not have a strong basis in the truth and may therefore represent a crime or fraud. If she is so overwhelmed with her own guilt, she might also be able to withdraw permissively if she feels her personal mental health is so affected that her ability to represent Peg has been impaired. She also might be able to withdraw from representation if the court believes that a disagreement on this point with the client represents "good cause." And under the ABA, if she can show that withdrawal would not harm Peg, then she can also permissively withdraw on that basis alone.

Steps After Withdrawal

After withdrawing from representation, an attorney must take four steps under both the ABA rules and the California rules. First, an attorney must return any unearned fees, although in California they may retain any true retainer fees or referral fees. Second, an attorney must return all of the client's personal property and papers, which they must have carefully safeguarded in the meantime. Third, an attorney must mitigate any potential harm to the client. Finally, an attorney must give the client proper notice and a reasonable amount of time to find new counsel.

Further, during ongoing litigation, an attorney must seek leave from the court before withdrawing. If the court denies the request, then the attorney must continue to zealously represent the client.

Here, if Mary does withdraw from representation, then she must comply with these requirements.

Answer B

Mary and Len's Relationship

Duty of loyalty--conflict of interest in accordance with both the ABA and CA rules

A lawyer owes their client an undivided duty of loyalty. This includes the duty to avoid conflicts of interest. A conflict of interest can be actual or potential, and arises when the representation is directly adverse to the interest of another client whom the lawyer represents in the same or substantially similar matter, or when there is a significant risk that the representation will be materially limited by the lawyer's own personal interests, the interests of a former client, or a third person.

Significant risk of material limitation--Mary and Len's Past relationship

Here, the case does not involve a situation where Mary is representing one who has an interest directly adverse to another client of hers, but rather there is a situation where there could be a significant risk of material limitation in Mary's ability to represent Peg due to Mary's own personal interests with having previously been romantically involved with Len.

Because Mary could be inhibited by her prior romance with Len by not representing Peg with the utmost loyalty, and because it could potentially cause issues with Mary's ability to effectively represent Peg, Mary had a duty to disclose the conflict to Peg.

Significant risk of material limitation--Mary and Len's current relationship

In addition to the prior romance, there is also likely an actual conflict of interest here and

thus likely an actual significant risk of material limitation in her ability to represent Peg as the facts tell us that despite not being romantically involved anymore, Mary and Len remain "good friends". The facts further evidence this later on by Mary's discomfort in using the facts and tactic that Peg is suggesting (to be discussed further below) due to the case involving her "good friend Len."

Once again, because Mary's relationship with Len is likely impacting her ability to zealously represent Peg and causes her to not have her sole focus and attention on loyally and faithfully representing Peg, Mary had a duty to disclose the conflict to Peg.

Waiving the conflict--ABA rules and CA rules

Even though a conflict persists, a lawyer still may be able to represent the client if they take the proper measures in addressing the conflict and waiving it. The lawyer may only continue the representation if: (1) they reasonably believe they can diligently and competently represent both clients; (2) the representation is not prohibited by law; (3) the claims do not involve a direct assertion by one client against the other; and (4) the client gives informed consent, confirmed in writing. The California rules are the same, except that it requires both the disclosure and the consent to be in writing, as opposed to just 'confirmed' in writing like the ABA.

Here, Mary may argue that she was able to diligently represent both clients since she was still assessing the case, determining that Doug would have to pay Peg damages after trial, and that the primary issue was the amount to be given, and was making estimates etc. Although, there is also a counter to this in the sense that Mary was considering how Len would feel when considering tactics to use in settlement negotiations (to be discussed more below.)

Although there are no facts that the representation is prohibited by law, regardless, Mary had a duty to disclose the actual and potential conflicts to Peg and to get her informed consent, confirmed in writing (ABA) or to disclose in writing and get Peg's consent in writing. Mary failed to do this.

Conclusion

Mary violated the ABA rules and committed an ethical violation when she did not disclose her past and current relationship with Len and did not get Peg's informed consent, confirmed in writing, to continue the representation.

Mary violated the CA rules for not disclosing the same issues, as well as not disclosing in writing and getting Peg's consent in writing.

California duty to disclose despite no significant risk of material limitation

California has a specific rule that despite when there is no significant risk of material limitation in the representation, the lawyer still must disclose, in writing, to the client, when they or someone at their firm, has a personal, professional, financial or business relationship with another party or witness, or the lawyer of the other party or witness is a family member, spouse, or lives with the lawyer, or the lawyer has an intimate or sexual relationship with the other party or lawyer.

Here, even if Mary wanted to argue that her past or current relationship with Len did not raise any significant risk of material limitation in her representation of Peg, under the CA rules, because Mary has a past and current relationship with Len, this constitutes a 'personal relationship' with the other party, specifically the other party's lawyer, and in addition she had a prior intimate relationship with him.

Thus, regardless of what Mary felt about the risk, she still had a duty to disclose her relationship with Len, in writing, to Peg.

Conclusion

Because Mary did not disclose her relationship with Len in writing to Peg, she committed an ethical violation of the CA rules.

Mary's use or non-use of the facts of Doug's affair in settlement negotiations

Duty of care/diligence in accordance with both ABA and CA rules

A lawyer has a duty to pursue a case with the care and diligence that one would bring to their own personal matters. This includes the duty to: (1) research facts; (2) investigate matters; and (3) put in the time needed to present an adequate representation of their client's case.

Here, Mary would have a duty to investigate the facts of the evidence that Peg is presenting to her. Mary should not ignore what Peg is saying to her, as discussed below. Mary has a duty to pursue all legally available avenues in the representation, and because Mary has a duty not to present dishonest or frivolous or lies to opposing parties, Mary should look into what Peg is disclosing to her in order to make sure she is doing her due diligence.

Mary agrees that the fact of the affair would help Peg in settlement negotiations, and further, as discussed below, Doug alleged under oath that he has not been unfaithful to his wife which goes directly to the claim of his sexual harassment of Peg because that could be construed as the same thing as him saying he did not sexually harass Peg.

Mary had a duty to research the facts that Peg is presenting to her and investigate it, and take the time needed to adequately prepare the case for Peg.

Conclusion

Mary should take the care and diligence to pursue the use of the facts of the settlement negotiations, and as long as she has no reason to believe it is something made up by Peg in order to just humiliate and embarrass Doug (something which would be in violation of the professional rules), Mary should use the facts in settlement negotiations.

Scope of representation

A lawyer has a duty to pursue all legally available avenues in representing the client and defending their case. The client has authority to decide whether or not to accept a settlement, whether or not to take a plea deal in a case, etc. The client controls the objectives of the case, while the lawyer decides the tactics and the strategic moves of the case.

Here, Peg is telling Mary that she has 'solid' evidence confirming that, for the past year, Doug has been engaging in an extramarital sexual affair about which is wife is unaware. The facts tell us that this is a claim about sexual harassment by Peg against Doug, and in addition, the facts tell us that Doug testified in a deposition (thus under oath) that he has never been unfaithful to his wife. This statement by Doug goes directly to Peg's allegation because if Doug had never been unfaithful, that means he would have never sexually harassed Peg. Thus, the fact regarding whether or not Doug has been unfaithful to his wife is relevant. Mary has determined that Doug is going to owe Peg damages, but it is just a matter of how much, and agrees that using the facts of the affair in her negotiations with Len will likely result in a larger amount, which as the

lawyer for Peg, should be what Mary wants to pursue.

Further, because the facts are actually relevant to the litigation, it would not be unethical for Mary to use the facts. Doug put it at issue by stating under oath he has not been unfaithful to his wife. Although Mary has the authority to control the tactics for litigation, Peg as the client determines the objectives and the theory of the case and Mary should be pursuing all legally available matters, and it is not a violation to use the facts.

Conclusion

Mary should use the facts (subject to the above conclusion that she reasonably believes there is some merit to them) since it is a legally available avenue that would help defend her client's case and provide her with the best results in a way that does not violate the rules.

Mary's ability to withdraw if Peg persists

Withdrawal

One only needs to mandatorily withdraw from representation, in accordance with both ABA and CA rules, if the representation will result in a violation of the ABA or CA rules or statute, if the lawyer's physical or mental ability will impair the representation, or if the lawyer is discharged. In addition, in CA, a lawyer must withdraw if they know the client does not have probable cause for their case and it is solely malicious.

Here, none of those facts are present so we must look to permissive withdrawal. Permissive withdrawal

Under the ABA, a lawyer may withdraw if they reasonably believe the representation will result in an ethical violation, if the client has already used their services to commit a

crime or fraud, if the client has failed to substantially fulfill an obligation to the lawyer, such as pay their fee, if the client is insisting on pursuing a matter in a way the lawyer finds morally repugnant or fundamentally disagrees with, or if they can do so without material adverse effect on the client, or any other good cause.

California is similar except it does not allow withdrawal solely because the lawyer fundamentally disagrees with the way the client wants to pursue the case, or even if they can do so without causing material adverse effect on the client. However, it does allow the lawyer to withdraw for good cause.

Here, Mary agrees the facts would help the settlement negotiations, but she strongly dislikes the idea of using that information, and especially feels uncomfortable because of her relationship with Len. “Strongly disliking” is likely not sufficient under the ABA rules as it has to be a fundamental disagreement or something she finds morally repugnant, and it is certainly not sufficient for withdrawal under CA rules. Further, the fact that she is especially uncomfortable because of her friendship with Len is not grounds under either rule.

There are not a lot of facts about whether Mary can withdraw without causing Peg material adverse effect, which is only allowed under ABA, however, it seems they are already well into litigation and have already taken depositions and Mary has already determined what is needed for the case, it would likely be difficult for Peg to find effective new and efficient representation.

Further there is ultimately no good cause to withdraw at all.

Conclusion

Mary likely cannot ethically withdraw under either ABA or CA rules as there is no good cause to withdraw under either rule, and Mary disliking a course of representation is not sufficient under the ABA rules.

Q2 Business Associations

Acme Inc. is a corporation that has been profitable for several years and now holds $20 million cash in its treasury.

Acme's board of directors consists of Brown (Acme's Chief Executive Officer), Chase (Acme's Chief Financial Officer), and ten other non-employee ("outside") directors.

Acme's board of directors recently met to consider the best course of action with regard to the cash in its treasury. At this meeting, Brown and Chase strongly recommended that Acme pay a dividend to its shareholders. The board then heard a report from an outside consulting firm regarding the favorable prospects for Acme's expansion into a new line of business. After a lengthy discussion, the ten outside directors voted in favor of a resolution not to declare a dividend and instead to hold the accumulated cash for the corporation's future use. Brown and Chase voted against this resolution. The entire board of directors also voted unanimously to make a $100,000 cash contribution to a private university. Brown is a graduate of this university and a member of its board of trustees. The other Acme board members knew these facts at the time the board unanimously authorized the contribution.

One of Acme's many shareholders, Davis, is upset about the board's decision not to declare a dividend. He sent a letter to Acme's board demanding inspection of Acme's records relating to this decision.

Another Acme shareholder, Evan, filed a lawsuit against Acme and its board seeking orders that Acme pay a dividend to its shareholders and be enjoined from contributing $100,000 to the university.

1. Did Acme's outside directors possess the authority to reject Brown's and Chase's recommendation to pay a dividend from cash in the treasury? Discuss.

2. Does Davis have a right to inspect Acme's records relating to the board meeting described above? Discuss.

3. Is Evan likely to prevail in his suit for an order that the corporation pay a dividend? Discuss.

4. Is Evan likely to prevail in his suit to enjoin Acme from paying $100,000 to the private university? Discuss.

Answer A

A corporation is an entity distinct from its owners, the shareholders. A corporation can sue or be sued.

Here, Acme Inc. is a corporation and can sue and be sued.

Pay Dividends:

The first issue is whether Acme's outside directors possessed the authority to reject Brown's and Chase's recommendation to pay a dividend from cash in the treasury.

The board of directors in a corporation manages the internal affairs of the corporation. In order to make decisions, the board must either call a meeting with the required quorum and vote on the matter, decide using unanimous written consent, or they must ratify the matter after the fact with proper board approval. A board meeting either occurs annually, at which the time and place and date are set out in the articles or bylaws, or through a special meeting, which requires at least two days' notice stating the time, date, and place of the meeting. A director can be an officer or shareholder, but they are not required to be.

Here, Acme's board of directors recently met to consider what to do with their cash in the treasury. Brown and Chase recommended that Acme pay a dividend to its shareholders, but then ten outside directors voted in favor of a resolution not to declare a dividend instead. It is unclear whether this was an annual meeting or a special meeting, but assuming that the proper notice was given if it was a special meeting, the next issue is whether the decision was properly voted on.

In order for the board to make a valid decision, there must be a quorum. Unless the bylaws or articles of incorporation state otherwise, a quorum is a majority of the directors on the board. In addition, for a proper vote, there must be a majority of the quorum voting in favor of the decision.

Here, there are twelve directors, including Brown and Chase. It appears that all of the directors were present at the meeting, and thus had a proper quorum. Next, ten of the outside directors voted in favor of a resolution to not declare a dividend and instead hold the cash for the corporation's future use. This vote was ten out of twelve directors, and thus was a proper board approval.

Therefore, this decision by the outside directors was proper. The fact that they were outside directors does not affect their ability to vote.

In addition, the decision as to whether or not to declare a dividend is in the complete discretion of the board, subject to limitation rules pertaining to the corporation's solvency. A dividend is a distribution that is given to shareholders who have rights to dividends. The board may not permit a dividend distribution if either the corporation would not be able to pay their debts as they come due, or if the corporation's assets are lower than their liabilities, including the preference payment required to be given to preferred shares upon dissolution.

Here, the board decided to not give dividends out and thus the limitation rules do not apply. The decision to not give dividends was in the board's sole discretion, absent an abuse of discretion. This decision was proper and the directors possessed the authority to reject Brown and Chase's recommendation to pay a dividend from cash in the treasury. Although Acme had $20 million in its treasury, the board was not required to

give out a dividend. Davis's

inspection Rights:

The next issue is whether Davis has a right to inspect Acme's records.

A shareholder has an unqualified right to inspect the corporation's books and records in regards to the bylaws and articles, the communications that the board has made to the shareholders in the last three years, the annual report that the corporation files in the last three years, the minutes at shareholder meetings, and other ordinary records pertaining to their rights as a shareholder. In addition, a shareholder, with five days written notice, may request to inspect other books and records relating to the finances and other records of the corporation upon a showing of a proper purpose. This proper purpose must be related to their rights and duties as a shareholder. Typically, after showing a proper purpose, the board should approve the request. Either the shareholder may inspect the records or have an attorney inspect the records for them.

Here, Davis is requesting a right to inspect Acme's records relating to the board meeting described above. The board's minutes from the meeting likely relates to Davis' rights as a shareholder, because as described below, Evan may assert that the board violated its fiduciary duties to the corporation in the meeting. A shareholder has a right to bring a derivative suit on behalf of the corporation if they satisfy the required procedures and the court finds that the suit should go forward. Therefore, having these minutes from the board meeting where the board decided to not declare a dividend can be offered as proof that thee directors possibly violated their duties as directors. However, shareholders do not have a right to demand a dividend distribution. Therefore, if Davis is simply upset about the dividend distribution, then getting these records may not relate

to his rights as a shareholder. Davis may argue that the board abused its discretion. Nevertheless, if Davis does in fact show a proper purpose then he must make a written demand to the board with five days' notice.

Dividend:

The next issue is whether Evan is likely to prevail in his suit for an order that the corporation pay a dividend.

A shareholder may sue a corporation either in a direct action in order to obtain judgment personally or a derivative suit in which the shareholder sues to vindicate a claim on behalf of the corporation. In a derivative suit, the corporation collects the judgment.

Here, Evan would be suing in a direct action because he is suing on behalf of his right to receive a dividend.

However, as described above, the decision as to whether or not to declare a dividend is in the complete discretion of the board, subject to limitation rules pertaining to the corporation's solvency. The board may not permit a dividend distribution if either 1) the corporation would not be able to pay their debts as they come due, or if 2) the corporation's assets are lower than their liabilities, including the preference payment required to be given to preferred shares upon dissolution.

Here, Acme Inc.'s cash in the treasury amounts to $20 million. Therefore, Acme Inc. likely would be able to give out a cash dividend to its shareholders. However, as described, this decision is within the board's discretion and the board decided to not make distributions. Therefore, Evan would likely fail in his suit against the corporation for not giving out a distribution.

However, Evan may assert in a derivative action that the directors violated their duty of care in making the decision.

Derivative Action:

In order to file a derivative action, the shareholder must be a shareholder at the time of commencement of the suit, and a shareholder at the time of the alleged wrongful conduct or a shareholder by operation of law.

Here, Evan is currently a shareholder. Further, it appears that Evan was a shareholder when the decision was made to not distribute dividends. Therefore, standing is satisfied.

Further, a shareholder must make a written demand on the board to bring suit on behalf of the corporation. The shareholder must then wait 90 days before bringing the suit unless the shareholder can show that the corporation will suffer irreparable injury or the board has already objected to bringing suit. Further, some jurisdictions permit a shareholder to not bring demand if it would be futile. A demand may be futile where the majority of the directors are interested in the transaction.

Here, it is unclear whether Evan made a demand on the corporation. There is no indication that it would be futile to bring a written demand in relation to the dividend distributions because there do not seem to be interested directors in the decision to not declare dividends. Further, there is no indication that the board has objected to bring suit. Further, there likely would not be irreparable injury to the corporation in waiting 90 days to bring suit because the suit is solely based on the decision to not make a dividend distribution, which as described, is in the board's discretion.

Therefore, Evan must first make a written demand and must wait 90 days to bring suit.

Duty of Care:

Evan may assert that the board breached its duty of care in deciding to not distribute dividends. Each director has a duty of care to act in good faith, act as a reasonably prudent person would under the circumstances, and act in a manner that a reasonable director would believe is in the best interest of the corporation. Where there is no indication that there is a lack of good faith or self-dealing or conflicts of interest, the burden is on the shareholder to prove that this duty was breached. Further, directors are permitted to rely on outside reports in making their decisions where they are prepared by officers of the corporation, attorneys, accountants, or other professionals that the director believes is competent.

Here, Brown and Chase strongly recommended that Acme pay the dividend but the outside directors decided that it was not in the corporation's best interest. While the ten directors did not go with their recommendation, they did not have to. The ten directors made a reasonable inquiry into the decision after hearing a report from an outside consulting firm regarding the favorable prospects for Acme's expansion into a new line of business. Therefore, as long as the directors reasonably believed that the firm was competent, the ten outside directors could reasonably rely on this outside consulting firm in making the reasonable decision that the corporation should instead hold the accumulated cash for the corporation's future use, including expanding to a new line of business. Further, it states that there was a lengthy discussion before the directors decided to not vote in favor of the distribution which indicates reasonable diligence in their decision-making procedures. Further, there is no indication of a lack of good faith. Therefore, the court will defer to the board's decision in the matter based on the

business judgment rule - the board made a reasonably inquiry into the facts related to making the decision to not distribute the funds, there was no bad faith or conflict of interest, or self- dealing. Therefore, the burden was on Evan to prove the duty of care standard was breached. As described above, he likely cannot prove that it was breached, especially because the decision to declare a dividend is in the board's discretion.

Therefore, Evan's suit will likely not succeed against the board for the dividend decision.

Payment to the Private University:

The next issue is whether Evan is likely to prevail in his suit to enjoin Acme from paying $100,000 to the private university.

As described above, this would be a derivative action in which Evan would be bringing the suit on behalf of the corporation due to the directors' breach of their fiduciary duty. The board makes the managerial decisions as to the internal affairs of the corporation. Therefore, this decision was solely in the board's discretion and Evan does not have a personal direct suit against Acme Inc.

Duty of Loyalty:

Evan may assert that the board breached its duty of loyalty when it decided to give a cash contribution to a private University that Brown graduated from and is a member of the board of trustees.

Each director of the board owes a duty of loyalty to the corporation to act in the corporation's best interests. A breach of the duty of loyalty may occur where a director engages in self-dealing. Self- dealing occurs where the corporation enters into a

transaction where a person or entity on the other side of the transaction is a director, or a director's family member, someone the director has a personal or professional relationship with or an organization in which the director is a director, shareholder, or officer.

Here, the private university that Acme gave the money to was a university in which Brown graduated and is a member of the board of trustees. Therefore, there may be a duty of loyalty violation. Where there is a self-dealing transaction, the director that is interested, here Brown, may satisfy his duty of loyalty by disclosing all material facts fully and adequately to the board and the board votes in a proper board vote to engage in the transaction. The quorum required for the board vote excludes any interested directors and there must be a proper vote based on disinterested directors. In the alternative, the interested director may fully and adequately disclose the information to the shareholders who must conduct a proper vote with the disinterested shareholders voting in favor of the transaction with more votes in favor than against. In the alternative, the terms must be fair to the corporation.

Here, Brown graduated and is a member of the board of trustees and is also on the board of Acme Inc. Therefore, Brown would be considered an interested director. There is no indication that there was a shareholder approval of the decision to make the contribution. However, it states that the Acme board members knew of these facts at the time that the board unanimously authorized the contribution. Therefore, Brown may have fully and adequately disclosed his interests in the contribution before the board voted. However, Brown was not permitted to vote in the transaction because he was an interested director. However, without Brown counted in the quorum or in the vote, the

quorum would have been 11 out of 12 directors for a proper quorum - more than the majority. Further, the vote required would be a majority of the disinterested directors. Here, all 11 of the disinterested directors voted in favor of the contribution. Therefore, there is an adequate vote in favor of the transaction.

In the alternative, the terms of the transaction may be fair to the corporation, even if the decision was not validly disclosed and voted on. The court will consider alternatives, the corporation's assets, the corporation's need to engage in the transaction, and other factors. There are no facts here that indicate that this transaction to the university was not fair to the corporation. A corporation is permitted to make charitable contributions and all of the directors unanimously agreed that the decision was a good decision.

Therefore, if the fact that Brown actually voted in the transaction does not defeat the validity of the vote, the contribution was validly approved. Further, Brown did not violate his duty of loyalty to the corporation because Brown disclosed the facts of his interest and board voted with the proper amount of disinterested votes. Further, the terms appear fair to the corporation.

Therefore, Evan likely will not prevail in a suit against the Acme directors for paying $100,000 to the private university.

Duty of Care:

Evan may also assert a derivative action on behalf of the corporation alleging that the directors violated their fiduciary duty of care to the corporation in giving the distribution to the university. Using the standard described above, there is no indication that there was a lack of good faith on behalf of the board of directors. Further, the duty of loyalty does not appear to have been breached. Further, under the circumstances it may have

been reasonable to give $100,000 to the university under the circumstances. This amount of money is not much compared to the $20 million that Acme has in its treasury. All of the directors voted unanimously which indicates that a director would reasonably believe that this decision was in the best interest of the corporation.

Therefore, the duty of care was likely not breached.

Improper Distribution:

Evan may also assert that the $100,000 contribution was an improper distribution due to the solvency standards described above. However, as indicated, $100,000 out of $20 million in the treasury does not appear to be enough money that would make the corporation unable to pay its debts as they come due. Further, it likely will not make it so the corporation's liabilities outweigh its assets, including the preferences required upon dissolution.

Therefore, Evan likely will not succeed in asserting that the distribution to the corporation was an improper distribution.

Answer B

1. Did Acme's outside directors possess the authority to reject Brown's and Chase's recommendations to pay dividend?

The board

In a corporation, the board of directors run the big picture of the corporation. They appoint the officers and managers as well as vote on major corporate transactions. Board of directors can be comprised of two types of directors. Inside directors and outside directors. Outside directors are those who are otherwise disinterested in the day to day operations because their only relationship to the corporation is their board position. Inside directors however are directors that work in the corporation as managers. These are often the CEO and CFO as the case is here with Brown (B) and Chase (C).

Power of the board

The board of directors votes on major corporate transactions. These include mergers, acquisitions, partial or whole assets sales, dividend distributions, and new large investments. The board of directors, unless specified otherwise in the bylaws, must approve all the matters before it by a majority vote. Inside directors and outside directors votes are equal. In order to have a proper vote, there must be quorum.
Quorum requires a majority of disinterested directors. Disinterested directors are those directors that do not have a personal stake in the matter at hand.

Quorum

Here, Acme has 12 directors. Two inside and two outside directors. The vote at issue is a vote regarding the distribution to pay a dividend. Since all 12 directors voted, we assume that quorum was met as all 12 were present.

Majority vote

In order to pass a vote, the board must pass it by a majority. 10 voted against the dividend and 2 voted for the dividend. A majority clearly voted against the dividend. Therefore, the dividend was properly rejected. The fact that the outside directors voted is of no consequence. An outside director possesses the same amount of voting power as any inside director.

Conclusion

The board properly voted on a corporate transaction that was within its power to either institute or reject. The board had quorum to vote on it because all 12 directors were present. Finally, the board rejected it by a majority vote. The fact that dividend was the recommendation of the CEO and CFO means nothing. The entire point of the board is that they are people unrelated with the day to day operations of the corporation that give an outside view. The CEO and CFO salaries may depend on stock price. Issuing a dividend may increase stock price. Therefore, the CEO and CFO have an incentive to increase the stock price via dividend. The board was under no requirement to accept their recommendation and properly rejected it with a majority vote.

2. Does Davis have a right to inspect Acme's records relating to the board meeting described above?

Shareholder inspection rights are a keystone right of shareholders. Shareholders, if certain conditions are met, have the right to inspect the books and records of the corporation including board meeting minutes. In order for a shareholder to have inspection rights, they must show that they are indeed a shareholder and that they have a proper purpose in asking for inspection.

Shareholder

Only a shareholder can inspect a corporation's records. The amount of shares held is irrelevant. The only requirement is that the person is a current shareholder of the corporation. Here, Davis is a shareholder of the corporation. Therefore, this requirement is met.

Proper purpose

A shareholder must have a proper purpose. A proper purpose can be many things including investigating potential fraud, reviewing financial statements, making sure corporate formalities were followed properly. A proper purpose is anything that has to do with a shareholder's interests in the health of the corporation as it relates to their ownership of the corporation. An improper purpose arises when a shareholder is attempting to inspect the records for personal benefit or with the goals to harm the corporation.

Here, Davis is upset about the board's decision not to declare a dividend and wants to inspect the records. Davis will argue that he has a proper purpose because he wants to

know the reasons why a dividend was not declared. Perhaps once he looks at the meeting minutes and realizes that the money was saved for better business opportunities later on he will be satisfied. Also, Davis may argue that he wants to make sure the board was properly informed or had no conflicts. The corporation may argue that Davis is just trying to harass them. However, there is no indication of any ill will on the part of Davis. Davis has a right to understand how and why the board came to its decision. Overall, Davis likely has a proper purpose.

Conclusion

Davis has a right to inspect the corporation's records. Davis is a shareholder of the corporation and he has a proper purpose related to his interests as to why a dividend was not declared.

3. Is Evan likely to prevail in his suit for an order that the corporation pay a dividend?

Evan is suing the corporation in an attempt to order the corporation to pay a dividend. Evan may be able to do this through either a direct suit or a derivative suit.

Direct suit

In a direct suit, Evan is suing the board of directors himself as a shareholder. A direct suit involves a board infringing on the rights of individual shareholders. Evan will argue that the board is infringing on his right as a shareholder to pay him a dividend. On the other hand, the board will argue that they are under no obligation to pay out dividends. Evan will argue that the corporation has $20 million in cash reserves and the shareholders are entitled to see some of that profit. The board however will ultimately prevail. The board will be correct in that the board has ultimate power to make decisions

for the corporation. This includes whether to give dividends or not give dividends. The board has complete discretion and Evan's direct suit will fail.

Derivative suit

A derivative suit is a lawsuit where a shareholder demands that the corporation sue the board of directors directly for some violation. Usually a fiduciary duty violation. Here, Evan may argue that it was a violation of the duty of care not to issue a dividend and improper for the board of directors to use an outside consulting firm and therefore the money should be distributed to shareholders instead of saved for later.

In order to bring a derivative suit, a shareholder must make a demand on the board, be a shareholder at the time of the harm, hold shares throughout the suit, and adequately represent all the shareholders. There is no evidence if demand was made but to proceed it must be made or shown to be futile. Evan was a shareholder at the time of the harm and the assumption is that he will hold throughout the suit. Finally, there is nothing to indicate that Evan does not adequately represent the shareholders.

Duty of care

The duty of care requires a director to act as a reasonably prudent director under the circumstances. The duty of care requires that a director act with the requisite skill, knowledge, and care of an ordinary director and employ their personal skills in their care. As part of the duty of care, directors must make sure that they are properly informed in regard to the corporate decisions that they make. Evan will argue that the directors violated the duty of care when they followed the recommendation of an outside consulting firm in deciding to save money instead of giving a dividend. The board however will argue that they are entitled to rely on outside sources such as attorneys,

consultants, and accountants in coming to informed decisions. The whole purpose of those outside sources is to provide directors with better knowledge and understanding. Additionally, the directors will stress that they are under no obligation to give the dividend even if using an outside consultant was a violation. Overall, the directors are unlikely to be in violation of the duty of care in this situation.

Business Judgment Rule

The business judgement rule (BJR), is a presumption that directors acted in an informed matter in the best interests of the corporation. The BJR presumes that directors acted in good faith and protects them from liability for basic corporate decisions. For a shareholder to succeed in arguing the duty of care violation, they must rebut the BJR. The BJR can be rebutted through a showing of bad faith, self-dealing, gross negligence towards their duties, and more. Here, Evan will argue that the BJR should be rebutted because the directors failed to make their own decision and therefore acted in bad faith. The directors on the other hand will argue the opposite that bringing in the consultants was in good faith because it helped them make an informed decision. Overall, the BJR is unlikely to be rebutted here because there is no bad faith.

Conclusion

Evan is unlikely to succeed in any suit against the corporation. Evan will not succeed in a direct suit because the board is under no obligation to issue a dividend. He will also not succeed in a direct suit because the board acted in good faith and did not breach the duty of care.

4. Is Evan likely to prevail in his suit to enjoin Acme from paying $100K to the private university?

Derivative suit

In this case, Evan will only be suing via derivative suit because he is challenging a corporate transaction that doesn't independently involve shareholders. See rules above for derivative suit. Here once again, Evan held the shares during the harm, will likely hold throughout, and will adequately represent the shareholders. Once again, Evan will have to make a demand on the board or show that demand is futile. We have no evidence that he made demand but to proceed with the suit he will have to.

In the derivative suit, Evan will be alleging that the board violated their duty of care by giving $100,000 to a university and also the duty of loyalty by giving it to the university of the CEO.

Duty of care

See rule above. Evan will argue that the directors failed to act as reasonably prudent directors because they are spending money outside of the company. The $100,000 could have gone to shareholders but instead it went to a university. Assuming that the university is not within the business ACME runs, Evan will argue that this was equivalent to setting corporate funds on fire. The board will argue that it is well accepted that a corporation may make donations where it sees fit without violating the duty of care. The board will argue that there are a lot of intangible benefits of donating money, especially to a university. It helps with recruiting and getting good new employees.

Additionally, public image of being a caring corporation is important. Finally, the board will argue that it has been ruled by courts that general corporate donations purely out of

good will are within the board's discretion. Finally, the board will argue that $100,000 out of $20 million is a very small amount that is not going to create a negative financial impact on the corporation. Overall, the board will succeed in arguing that the donation was valid.

Business judgment rule

See rule above. Evan will argue that the board should not be protected by the business judgment rule because of the conflict of interest since the CEO wanted to give money to his alma mater where he is a member of the board of trustees. The board however will argue that they did not act in bad faith because a majority of disinterested directors approved the transaction. There was no self-dealing here because 11/12 directors who did not go to the school voted in favor of it. Further, 10 of those 12 directors were outside directors. Overall, Evan may have some ground arguing that the business judgment rule should not invoke protection because of the interest of the CEO. However, the board also has a strong argument that they acted in good faith.

Conclusion

The board likely did not breach the duty of care. Even if Evan can rebut the BJR, Evan is unlikely to show that the actions actually amounted to a duty of care violation given the circumstances.

Duty of loyalty

Under the duty of loyalty, a director has to act in the best interests of the corporation. Evan will argue that the Brown violated the duty of loyalty by giving money to his own school. Evan will further argue that the board overall violated the duty because money

given outside the corporation and outside their corporate interests is a waste of money. Similar to the discussion above for duty of care, directors had valid, corporate and moral reasons for giving money outside the corporation. The board will argue that the directors were actually acting in the best interests of the corporation by giving money to the university. Overall, the board is unlikely to have failed to act in the best interests of the corporation. However, Brown may have violated the duty of loyalty because of his conflict of interest.

Conflict of interest

A director may not enter into the transaction that the director has a conflict of interest with. Here, Evan will argue that Brown has a conflict of interest in the transaction and therefore the transaction is improper. The conflict of interest arises because Brown is attempting to give money to an organization that he is not only affiliated with, but that he sits on the board of. Brown will likely concede that this in fact a conflict of interest because Brown sits on one board that is giving money to another board. However, Brown will argue that a safe harbor applies.

Safe harbor

A conflicted transaction may nonetheless be valid if the conflict is disclosed and either 1) a majority of disinterested shareholders approve 2) majority of disinterested directors approve or if the transaction is fair.

Here, the second two both apply. The fact pattern indicates that the entire board knew of the conflict of interest. The entire board then unanimously voted to approve it. That means that 11 directors voted in favor of it. All those 11 directors are disinterested so the transaction is valid under the safe harbor.

Additionally, Brown is likely to argue that the transaction is fair. A corporation has a lot to gain from donating to universities as discussed above and $100K for a corporation that has $20 million in cash reserves is an insignificant amount.

Conclusion

Evan will likely fail in his suit because the board did not violate any fiduciary duty to the shareholders by giving $100K to the corporation.

.

Q3 Real Property

Andrew, a widower with three adult children (Bobby, Carol, and Dylan), owned a forty- acre parcel of wooded land called Havenwood. In 1988, Andrew by written deed validly conveyed the north half of Havenwood to his brother Elmo.

In 1989, Andrew died, leaving a valid will that gave “all my real estate to Bobby, Carol, and Dylan as joint tenants with right of survivorship.” Carol and Dylan lived out of state. Bobby lived near Havenwood.

In 1990, without permission from anyone, Bobby cut down some trees and prepared a number of campsites on both the north and south halves of Havenwood. He sometimes used one campsite himself and rented out the other sites during the spring and summer each year. Bobby paid taxes on the entire property using the rental fees he collected, keeping the remaining profits.

In 2017, Dylan asked Bobby about the land and Bobby told Dylan that it was none of his business. Bobby said, “I’ve improved the land and, anyway, I’m the youngest and it will be mine in the end.” Dylan then by written deed validly conveyed his interest in Havenwood to Fred, his friend, as a gift. Dylan told Carol what had happened, and she had a written deed drawn up validly conveying her interest in Havenwood “from Carol as a joint tenant to Carol as a tenant in common.”

In 2018, Bobby died leaving a valid will that gave his entire estate to Sam, his son. Sam continued renting the campsites and paying taxes, keeping the remaining profits, and occasionally using one campsite himself, just as his father had done.

1. What right, title or interest in Havenwood, if any, are currently held by Elmo, Fred, Carol and Sam? Discuss.

2. Are any claims available to or against Sam for payment of taxes or recovery of rental fees? Discuss.

Answer A

Will Requirements

An attested will must be (1) in writing, (2) signed by the testator with testamentary capacity and intent, and (3) jointly witnessed by 2 witnesses who understand the testator's act.

Here, the facts state that A's and B's wills were valid. These requirements are met.

Deed Requirements

To be valid, a deed conveying real property must (1) be in writing, (2) be signed by the grantor, (3) identify the land to be transferred, (4) identify the grantee, (5) contain language of the grantor's present intent to transfer, and (6) be delivered to and accepted by the grantee.

Here, the facts state that all of the deeds at issue were valid, so there is no problem with the above requirements.

Adverse Possession (AP)

An individual may acquire ownership of land through AP if (1) their possession of the land is exclusive; (2) their possession is continuous for the statutory period; (3) their possession is hostile, i.e., under a claim of right; and (4) their possession is open and notorious. These elements are discussed below.

1) Interests in Havenwood (H)

The parties' interests in H changed as a result of several events from 1988 to 2018. Each event is discussed in turn.

1988 - Transfer of North Half (North H) to Elmo

In 1988, A - who appeared to own H in fee simple, executed a written deed validly conveying North H to his brother Elmo.

After this action, A held the southern half of H (South H) in fee simple. Elmo held North H in fee simple.

1989 - A's Transfer to Bobby, Carol, and Dylan

In 1989, A transferred "all of [his] real estate to Bobby, Carol, and Dylan as joint tenants with a right of survivorship."

As discussed above, all A had to transfer was his fee simple interest in South H.

Joint Tenancy

A joint tenancy is a form of joint ownership of property. To create a joint tenancy, the tenants must have the unities of possession, interest, time, and title. The deed conveying the property must also state that it is with the right of survivorship.

Unity of possession exists when all joint tenants have an equal right to possess the land. Here, A's will gave Bobby (B), Carol (C), and Dylan (D) the land and did not indicate that they would have anything but equal possessory rights, so this unity is met.

Unity of interest means that all joint tenants have the same interest in the land. Here, A's will conveyed the land to Bobby, Carol, and Dylan equally so they each have the

same interest in the land as joint tenants.

Unity of time and title require that the joint tenants' interests must have been created at the same time and in the same conveyance. Here, Bobby, Carol, and Dylan all received their interest at the same time via the same conveyance in A's will.

Finally, A's will expressly stated that the joint tenancy would have a right of survivorship. Thus, A's will created a valid joint tenancy.

Conclusion

At the end of 1989, A had no interest in H. Bobby, Carol, and Dylan held South H as joint tenants.

1990 - Bobby's Actions

In 1990, Bobby cut down some trees and prepared campsites on North H and South H. He sometimes uses one campsite himself and rented out the others during spring and summer.

North H

As stated above, Elmo owned North H at this time, so Bobby had no right to enter into North H absent an easement (a nonpossessory right to enter property) or profit a prendre (a nonpossessory right to enter property and remove specific natural resources from the land). As discussed below, B's use of the land was thus hostile at this point, which is important for purposes of adverse possession (AP).

South H

As a joint tenant of South H, B had the right to equal possession of South H. His cutting down the trees and earning rental fees was relevant for purposes of contribution

(discussed in Question #2). But because B's entrance and use of the land was not hostile to Carol and Dylan's rights, it did not have an effect on their rights of possession and ownership.

2017 - Bobby's Statement to Dylan

A joint tenant's use of property, although usually not hostile to the other joint tenants, may become hostile if the joint tenant denies the other joint tenants access to the land. This is called ouster.

Here, one could argue that B's statement to Dylan that the land was "none of his business" and that it would be B's land in the end because he was the youngest was sufficient to make B's use and possession of the land hostile to C and D. But as discussed below, to be hostile, an adverse possessor's possession must be under a claim of right. Here, B was probably just being rude to D by saying the land was "none of his business" and by saying it would eventually be his (which actually did not turn out to be true). B never claimed that South H *was* his at that time. Thus, B's statements were not sufficiently hostile to put D or C on notice of an AP claim.

2017 - D's Conveyance to Fred

Also in 2017, D conveyed his interest in South H to Fred (F). A joint tenancy is severed as to a joint tenant whenever that joint tenant conveys his interest to a third party. At that point, the third party becomes a tenant in common. A tenancy in common requires only unity of possession. Here, D severed the joint tenancy in South H as to himself when he conveyed his interest in it to Fred.

Thus, at this point, B and C held 2/3 of South H as joint tenants; F held 1/3 of South H

as a tenant in common.

2017 - C's Conveyance to Herself

Finally, in 2017 C conveyed her interest in South H to herself as a tenant in common. Some jurisdictions permit an individual to convey land to themself via a deed. If so, then C would become a tenant in common under the rules stated
above. But if not, the severance was ineffective and the ownership interests remained unchanged. But under the general rule that a property owner may do what they please (subject to some exceptions) with their property interests, C's conveyance was likely valid. This is bolstered by the fact that the facts state that C drew up the deed *validly* conveying her interest as a joint tenant to herself as a tenant in common.

Assuming that C's conveyance was valid, it severed her joint tenancy with B. Thus, at this point, B, C, and F each held a 1/3 interest in South H as tenants in common.

2018 - B's Death - North H

In 2018, B died and left his entire estate to his son Sam (S). Sam continued to rent the campsites and pay taxes, keeping the profits and occasionally using the site himself.

At this point, B had been operating a campsite on North H at least seasonally since 1990, or for 28 years. This raises the issue of whether B had acquired North H through adverse possession. If he did, then his will conveyed that interest to S.

See rule above for adverse possession.

Exclusive

First, Sam will argue that B's possession was exclusive. To be exclusive, the possession cannot be shared with the rightful owner. Here, there is no evidence that Elmo ever even visited the property or shared possession with B in any way. Elmo will respond that B's possession was not exclusive because he rented out the campsite to other campers. But B did so based on his belief that North H was his exclusively to rent out. Thus, this element is met.

Continuous

Second, Sam will argue that B's possession was continuous for the statutory period. The facts do not list a statutory AP period, but in most jurisdictions it is between six and twenty years. Here, B's possession was for 28 years, so it probably satisfies this requirement.

If not, S can continue to possess the property under a claim of right via his inheritance from B. Under the rule of "tacking," a court would then "tack" the time of B's possession to S's possession because he was B's successor in interest. The court would then conclude that the continuity element was met if S and B's combined possession satisfied the statutory period.

Elmo may respond that B's possession wasn't actually continuous because B only sometimes used the campsite himself. But courts have held that if a property is of the type that is appropriate for seasonal use, then seasonal use is sufficient to satisfy the continuity requirement. Here a campsite is not something that is used year round. Thus, assuming that B used the campsite seasonally, this requirement is met.

Hostile

S will next argue that B's possession was hostile. To be hostile, the possession must be made under a claim of right. Here, B used North H like it was his own, cutting down trees, building a campsite, and renting out the site to campers. Thus, B acted as though North H was his and his only. This requirement is met.

Open and Notorious

Finally, S will claim that B's possession was open and notorious. There is no evidence that B attempted to hide his possession of the land. Elmo will argue that he didn't have notice of the possession. But if Elmo had visited North H, he would have seen the chopped-down trees and the campsite. His failure to visit doesn't make B's possession less open. This element is met.

Conclusion

B adversely possess North H. He thus obtained Elmo's fee simple interest. After B's death, because B's valid will gave his entire estate to Sam, Sam had a fee simple interest in North H.

2018 - B's Death - South H

As stated above, B had a right to possess South H as a joint tenant and then as a tenant in common, so his use of the property was not exclusive or hostile for AP purposes.

It could be argued that his possession became hostile in 2017, when he told Dylan that the land was none of his business and B would get it anyway in the end. But as discussed above, this statement was not sufficiently hostile to meet the AP

requirements.

Thus, after B's death, his 1/3 interest in South H as a tenant in common will pass to Sam. The right of survivorship that applies to joint tenancies will not preclude this because, as discussed above, the joint tenancy was completely severed before B's death.

CONCLUSION

Based on the above events, Elmo has no interest in Havenwood. Sam owns North H in fee simple. Fred, Carol, and Sam each have a 1/3 interest in South H as tenants in common.

Claims Regarding Taxes and Fees

North H

As discussed above, S now owns North H in fee simple. Because none of the other parties has no interest in North H, S is not liable to them for any rental fees that B earned. S also cannot seek payment for taxes that B paid on North H.

South H

South H is different. The parties may have claims against each other based on events during the joint tenancy and during the tenancy in common.

Joint Tenancy

From 1989 to 2017, B, C, and D held South H as joint tenants. Joint tenants are all responsible for payment of taxes and entitled to the profits on the land they jointly hold. Thus, S can seek reimbursement on behalf of B's estate for the parties' pro rata share of taxes paid. B and C can also seek their pro rata share of the profits that B

earned on South H from 1989 to 2017.

Tenancy in Common

From 2017 to 2018, F, C, and B held South H as tenants in common. When B died, his tenant in common interest went to S.

A tenant in common is entitled to possession of the premises. However, a tenant in sole possession of the land is required to pay taxes on the land to the extent that the land produces income. Here, B paid taxes on the entire property using the rental fees he collected and kept the remaining profits. Thus, S cannot seek reimbursement from any parties for the taxes B paid.

With respect to the rental profits, F and C can seek contribution from S for a pro rata share of the net profits that B received from 2017 to 2018 as a result of running the campsite on South H.

Partition

If F and C do not wish to be tenants in common with S anymore, they may also seek a partition. This will not require S's consent: any tenant in common may unilaterally partition the property. Courts prefer a partition in kind as opposed to a forced sale of the property.

Here, C lives out of state. Given that D also lives out of state and is friends with F, it is likely that F lives out of state, too. Thus, a court may partition the property to give the campsite portion to B and split the other 2/3 between C and F, since they live out of state and evidently do not wish to use the campsite portion of the land -- or even visit the land.

Upon partition, the court can order S to pay contribution for C and F's pro rata share of B's after-tax profits from the property.

C and F may also argue that B owed them a duty as a tenant in common and seek damages for his renting out their property for their involvement. But given the partition and contribution remedies outlined above, this argument will fail.

Conclusion

S is probably not entitled to any net payments from C or F because the income B, as sole possessor, derived from the property exceeded the taxes that he paid. However, C and F can seek contribution from S for their pro rata share of B's net profits from renting out the land as a campsite.

Answer B

Havenwood Property

A property is held in fee simple absolute if it is fully under the control of an individual, with no interests of reverter or reentry. Property owned in fee simple absolute may be freely transferred according to the wishes of the property owner. A property owner may transfer part of their property pursuant to a valid deed, creating two estates.

Andrew conveyed the northern half of Havenwood, pursuant to a valid deed, to his brother Elmo. Elmo was the owner, in fee simple absolute, of the northern half of the parcel as of 1988.

Joint Tenancy

Joint tenancy is the holding of a property by multiple parties with equal rights to possession of the entire property and a right of survivorship. Thus, if any of the joint tenants die, their heirs will not receive their share, but instead will go to the surviving joint tenants. A joint tenancy is created by the express intention of the creator in a valid document. Under the common law, devise of property in common ownership was automatically presumed to be a joint tenancy. Under modern law, devise of a property in common ownership is presumed to be a tenancy-in-common unless there is evidence of the grantor's intent to convey a valid joint tenancy. Creation of a right of survivorship alone is usually not enough to show an intent to create a joint tenancy. Instead, the words joint tenancy are usually required. Creation of a joint tenancy requires traditionally the four unities, that of time, title, interest, and possession. First, the joint tenants must take at the same time. Second, the joint tenants must take title through

the same document. Third, the joint tenants must take the same interest in the property. Finally, the tenants must have equal right to possession of the entire property. If a joint tenancy fails the four unities, it will instead be a tenancy-in-common. Any conveyance of an interest in property requires satisfaction of the statute of frauds. A valid written will satisfies the Statute of Frauds, as it requires the signature of the testator (whether attested or holographic).

Andrew created a valid joint tenancy in Bobby, Carol, and Dylan as of 1989. Andrew's express intent was demonstrated in his valid will that gave "all my real estate to Bobby Carol and Dylan as joint tenants with right of survivorship." The use of the term "with right of survivorship" and "as joint tenants" clearly demonstrated this intent. The conveyance met the four unities. The parties took at the same time, at Andrew's death in 1989. The parties took through the same document, the will. The parties took the same interest, an equal third share. Finally, the parties took an equal right to possession of the entirety of the property. Because the joint tenancy met the four unities and was created with the express intent to create a joint tenancy, a valid joint tenancy existed in 1989. There is no issue with the statute of frauds because the will was valid and thus signed by Bobby.

Ouster

Tenants may commit ouster when they take possession of the entire property that was once in common ownership with an intent to oust the other tenants. Ouster requires notice to the ousted tenants, whether that be constructive or actual notice, and intent to oust the other parties, and the taking of full possession of the property. Once ousted,

the ousted parties may seek to partition the property. The ousted parties also lose their right to possession of the property.

Bobby's actions do not amount to an ouster, as he did not demonstrate a clear intent to oust both Bobby and Carol. While Bobby and Carol may have been put on notice of a potential ouster in 2017, when Bobby told Dylan that Havenwood was none of his business and when Dylan told Carol about the encounter, Bobby did not demonstrate enough of an intent to oust his siblings. He simply stated that the land was none of Dylan's business and that he both improved the land and would eventually get it anyway. These statements are consistent with Bobby simply telling Dylan that, though he is a joint tenant, he has not been around to manage the property and should just trust Bobby. At no point did Bobby exclude either Dylan or Carol from entering the property. As such, he has not met the requirements for ouster.

Tenancy-in-Common

A joint tenancy is terminated and replaced by a tenancy-in-common upon the severance of the joint-tenancy arrangement, such as by the conveyance of a joint tenant’s possession to another. Severance of a joint tenancy does not require the consent of both parties and can be done unilaterally. A tenancy-in-common exists when multiple parties hold equal interests to a property and have the right to possession of the entire property. A tenancy in common gives the right to possession of the entire property but does not include a right of survivorship. The interests can be transferred without breaking the tenancy in common. If a tenant-in-common conveys their interest to another, a new tenancy-in-common is created with the owner of the

conveyance. Creation of a tenancy in common does not require the four unities.

Dylan terminated the joint tenancy by conveying his interest in the property to Fred. Thus, Fred took a 1/3 interest in the southern half of Havenwood, and Carol and Bobby maintained a joint tenancy for the other 2/3. Carol attempted to also convey her interest but did so to herself. Because severance of a joint tenancy does not require the consent of all parties, and can be done through voluntary acts like conveyance to a third party, Carol likely severed the joint tenancy and took a 1/3 share of the southern half of Havenwood as a tenant in common. She indicated an intent to sever the joint tenancy and did so through a conveyance to herself as a tenant-in-common, which does not require compliance with the four unities. Thus, she now has a 1/3 interest as a tenant in common.

Adverse Possession

A party may establish adverse possession, in which they obtain legal title to the land of another, when they meet the requirements. First, their possession must be open and notorious. Second, the possession must be hostile. Third, possession must be exclusive. Fourth, they must show continuous use. Finally, possession must meet the statutory period (many states have a 7- year or 10 -year period). The possession period of a predecessor in interest may be tacked onto the claims of a successor in interest to meet this statutory period if there is privity of estate. Some states also require that an adverse possessor pay taxes on the property they claim. If a party can establish the elements of adverse possession, they may obtain title to the entirety of the land they have openly and notoriously possessed through a quiet title action. To adversely

possess land held in common or by joint tenancy, one must first oust the other tenants, otherwise they have not established exclusive possession.

Bobby has not established a claim for adverse possession against his siblings. Because he has not ousted the other siblings (or even if he had ousted in 2017, he would not have met the statutory period starting then), he has no claim of adverse possession for the southern half of Havenwood. However, Sam has likely established a valid claim to adverse possession of the northern half of Havenwood. Sam and Bobby's possession was open and notorious, as Bobby cut down trees and prepared several campsites on the northern half of Havenwood. He also paid taxes on the entire property. Elmo had constructive notice that Bobby was adversely possessing his property and should have discovered it through reasonable inspection. Second, neither Sam nor Bobby received permission to construct campsites and thus possessed with hostile intent. Third, they had exclusive possession because they collected rents from others who used the property, and thus did not allow others to maintain possession without permission and license. Fourth, there are no facts suggesting they did not continuously use the property. In fact, the facts suggest that Sam continued to rent the campsites, use his own, and pay taxes. Finally, their possession would likely meet any statutory period.

Sam, as a successor in privity through devise, may tack Bobby's period of possession onto his own. Thus, they have established 28 years of possession, which is enough to meet the statutory period in most states. The facts suggest that Sam and Bobby used the entire northern half of Havenwood. As such, Sam is not only owner of a 1/3 share of the southern half of Havenwood, but also the total owner of the northern half of Havenwood.

Remaining Interests as of the Present

Because Dylan and Carol severed the joint tenancy in 2017 through their conveyances, Carol maintains a 1/3 interest in the southern half of Havenwood. Dylan validly conveyed his interest to Fred, and thus Fred maintains a 1/3 interest in the southern half of Havenwood. Sam retains the other 1/3 interest in Havenwood through devise from Bobby, using a valid will that conveyed his entire estate. Sam has also established a full claim to the northern half of Havenwood by adverse possession, which he may exercise through quiet title. As such, Elmo has no interest remaining.

Payment of Taxes or Rental Fees

Joint tenants and tenants in common have an equal right to possession of the entirety of the property. Thus, they are equally responsible for the payment of taxes, maintenance, and other obligations arising from possession of the property. They are also entitled to the profits from the property, including any rental fees accrued. Tenants will not be reimbursed for improvements made to the property, though they may recover the increase in value from those improvements if the property is sold. Tenants may sue for contribution to recover payments they made in excess of their obligations or to recover payments not properly distributed to them.

Sam may seek contribution from Dylan and Carol for the payment of taxes by Bobby for their shared property. Sam may also seek contribution from Fred, as a new tenant-in-common for payment of taxes he made after conveyance of the interest to Fred in 2017. Dylan and Carol may seek contribution from Sam for the profits from the property, namely the rental fees for their period of ownership. Fred may seek payment of rental

fees beginning in 2017, when he took possession.

Q4 Criminal Law and Procedure

Needing money and willing to do anything to get it, Don, who is tall, and Al, who is short, set out for Vic's house around midnight to steal from him. On the way, Al said that he did not want to get involved, but Don slapped Al's face and responded: "If you don't come along now, I will break your legs tomorrow." At Vic's house, Don opened the unlocked front door and he and Al went inside. Don took a wallet on a table in the foyer, and he and Al ran away.

Wanda, who happened to be walking in front of Vic's house at the time, caught sight of both men running out of the house. That night, Wanda described the taller man to police as clean-shaven with short hair, but couldn't describe the shorter man.

Don and Al were soon arrested. The next day, a newspaper printed a recent photo of Don, showing him with a large beard and long hair. When Wanda saw the photo in the newspaper, she immediately went to the police station and told Officer Oliver that she was concerned that Don might be the wrong man. Officer Oliver told Wanda that Don had Vic's wallet in his pocket when he was arrested. Before Don was arraigned, Officer Oliver arranged for Wanda to view a lineup of six bearded men with long hair, including Don. After viewing the lineup for 20 minutes, Wanda identified Don as one of the men she saw running out of the house. At trial, Al stipulated that he had run out of Vic's house with Don.

1. With what crime or crimes, if any, may Al reasonably be charged; what defenses, if any, may he reasonably assert; and what is the likely outcome? Discuss.

2. Under the Fifth and Fourteenth Amendments of the United States Constitution, on what basis, if any, may Don move to suppress evidence of Wanda's identification at the lineup, and what is the likely outcome? Discuss.

Answer A

Al's (A) crimes

Conspiracy

There is a conspiracy when two or more people agree to commit a crime with the specific intent to commit the crime. Under the common law, there must bilateral conspiracy, whereby both parties to the agreement specifically intend to commit the crime. There is also no overt act requirement under the common law. However, more recently, the MPC, federal law and majority of jurisdictions all require that there be an overt act in addition to the agreement for a conspiracy to be found. The MPC also allows for there to be unilateral conspiracy, when a party can be guilty of conspiracy for a crime even though the other party did not actually want to commit the act (i.e. in the case of an agreement with an undercover police officer.) Conspiracy does not merge with the actual crime committed -- and thus, even if the substantial crime is performed, a person could also be guilty of conspiracy of that crime.

Here, the facts indicate that D and A intended to commit the crime of stealing from V. D and A agreed to steal from V and "set out for V's house" together at midnight to steal from him. Thus, under the common law, A was guilty of conspiracy for larceny and burglary (the substantive crimes will be analyzed in more detail below), when A agreed with D to steal from V.

Then under the majority/federal/MPC rule, there was also arguably an overt act performed when D and A set out for V's house. A could argue that simply going towards V's house was insufficient to constitute an overt act. A could argue that they didn't have

special equipment or tools on them with the intent to break in. However, here, D and A set out towards V's house around "midnight." Heading to someone's home at midnight (well passed reasonable hours) would probably be sufficient to show that there has been an overt act sufficient to find conspiracy.

Pinkerton

Under the Pinkerton Rule, all co-conspirators are responsible for all substantive crimes that are committed by co-conspirators that are foreseeable and are in furtherance of the crime.

So, here, A would also be liable for all substantive crimes that D committed in the process of committing the theft crime that they intended to commit together. Therefore, even though it was D who opened the unlocked door and then took the wallet on the table in the foyer, A would also be liable for those crimes, even if A argued that he himself did not commit those crimes. Opening a door and taking a wallet are all foreseeable crimes in furtherance of the crime of stealing from someone's home.

Accomplice Liability

Accomplice liability will attach when an accomplice aids a principal in performing a crime with the specific intent that the crime be performed. (Note: under the common law, the accomplice needs to only aid intentionally and knowingly.) An accomplice will also be liable for all the substantive crimes that the principal has done.

Here, A may try to argue that he wasn't a principal in the crime because he didn't commit the actus reus for the crimes. However, based on the facts, the court would likely find that he was very much a principal to these crimes -- given that he went to V's

house and also entered the property.

Larceny

Larceny is the taking and moving of another person's property without their consent with the intent to deprive them of it permanently.

Here, D took and moved the wallet from the table on the foyer, with the intent to deprive V of the wallet permanently. After D took the wallet, both D and A ran from the home. And there is no indication that D or A intended to return the property. In fact, quite to the contrary, at least D intended to keep the money given that he was in need of money and "willing to do anything to get it."

As such, absent any defenses (discussed below) D and W would both be guilty of larceny here.

Robbery (no threat of force)

Robbery is larceny from another person's presence or person through threat or intimidation. Though the taking of the wallet happened in the person's home (and maybe arguably in the person's presence if V were there) -- there was no threat or intimidation and thus, there was no robbery here.

Burglary

Burglary is the breaking and entering into a dwelling at nighttime with the intent to commit a felony inside. The requirements for dwelling and nighttime have been relaxed in many jurisdictions.

Here, D broke and entered into V's home at nighttime with the intent to steal from V. All the elements are met. They "broke" into the house when they unlocked the door. Even

though the door was unlocked, this was not a place open for the public (but someone's home) and thus the court would find that there was a breaking. Then, they entered into the place of the home ("entering"). The building they broke into was indeed V's home (and thus a dwelling). And then broke in with the intent to steal from V (and thus commit a felony inside).

As such, there was burglary here. And thus, A could be charged with burglary. A's defenses

Withdrawal

A co-conspirator could withdraw from a conspiracy depending on the jurisdiction. Under the common law, a co-conspirator cannot withdraw from a conspiracy because the conspiracy occurs when the agreement is made. However, even under the common law, a co-conspirator could withdraw from the conspiracy even after the agreement is made so as to not be held responsible for future crimes. However, such withdrawal must be made clearly to the other co-conspirator or also typically requires informing the police.

Under the majority rules, a co-conspirator can withdraw from a conspiracy provided that it is before an overt act has taken place -- and the co-conspirator either makes an affirmative declaration of intent to withdraw to the co-conspirator or alternatively, informs the police. Under the MPC/minority rule, a co-conspirator could withdraw even after the overt act, provided that they take actions to thwart the crime.

Here, A would argue that he properly withdrew from the conspiracy. He would argue that he withdrew from the conspiracy when he told D that he did not want to get

involved. However, the court is unlikely to be receptive to his argument in any jurisdiction. Under the common law, he could not withdraw at that point because he had already agreed to the commit the crime with D. And under the majority rule, he had already committed to the overt act of walking to V's home at midnight D and thus could not withdraw at that point. Even under the minority rule, A could not have effectively withdrawn because he did nothing to thwart the crime. Instead, he actually "went inside" the home after D had unlocked the front door.

Duress

Duress is a defense whereby the defendant argues that they had to commit a crime because they or a third party were under an imminent threat that threatened serious bodily harm or death.

Here, A would argue that he was forced to commit these crimes because of duress. He would argue that D slapped him on the face and told him that he would "break [his] legs" if he didn't come along. However, A is unlikely to win on this defense. For a defense of duress, the threat must be imminent. In this case, D did threaten A but said that D would break his legs tomorrow. Also, there is no indication that A, if he wanted to, couldn't have run away or left the scene after he decided that he did not want to get involved. As a result, the court is unlikely to find for A on his defense for duress.

For these reasons, A could reasonably be charged with the substantive crimes of larceny and burglary and with conspiracy to commit those crimes. His defenses for duress and withdrawal are unlikely to be successful in any jurisdiction.

Question 2

State Action

The 5th and 14th Amendment of the US Constitution protects people against state action. In this case, there is clear state action. The issue here involves police action and thus there is state action.

Exclusionary Rule

Under the exclusionary rule, all evidence that is obtained in violation of the 4th, 5th, or 6th amendments must be excluded from evidence. There are a few exceptions to the exclusionary rule (i.e. knock and announce, attenuation and the causal chain, etc.) but they are not relevant here.

Lineup

D's strongest argument would be to move to suppress the evidence of Wanda's (W) identification on the basis that it was impermissibly suggestive. Under the rules concerning lineups, police cannot use lineups that are impermissibly suggestive that have a substantial likelihood of resulting in misidentification.

Impermissibly Suggestive

D could present a strong argument that the lineup was impermissibly suggestive. He would argue that by the time the W was shown the lineup, she had already seen his picture in the newspaper. Moreover, he would argue the lineup was impermissibly suggestive because when W went to the police after seeing his picture in the newspaper, the police confirmed that they had the correct person because they had found V's wallet on D. As a result, not only had W seen his picture in the newspaper, but

also had confirmation from the police that the person in the picture was the person who had committed the crime.

Substantial likelihood of resulting in misidentification

D would then argue that the above caused a substantial likelihood of resulting in misidentification. He would argue that, in fact, had W not seen the picture (and had the picture not been confirmed by Officer Oliver) she would still be looking for a taller man that was "clean-shaven with short hair." He would argue that it was only because she had seen the picture and heard the police officer's statement that she identified him.

In response, the police would argue that they ensured that the lineup was not impermissibly suggestive. They would argue that they purposefully only chose six bearded men with long hair (presumably, all tall too) -- and that they provided W a lot of time to inspect each. Indeed, they would argue that W only identified D after 20 minutes.

Despite the police's efforts, D could probably successfully move to suppress evidence of W's identification at the lineup on the basis that it was impermissibly suggestive. Even though the police had chosen other tall, bearded men -- the police had already prejudiced W by confirming that the person in the newspaper picture was the person who had committed the crime.

Answer B

Al's Crimes

Crimes

Principal and Accomplice

Al may be liable for Don's crime as an accomplice to his crimes as the principal. The principal of a crime is the one who performs the actus reus of the crime, the perpetrator of the crime in other words. Here, Don is the one who actually opened the front door and picked up the wallet and took it with him. Therefore, Don is the principal of the crime. An accomplice is one who aids or abets the principal in the completion or cover- up of a crime. An accomplice is liable for all crimes he aided and abetted the principal in. Here Al went along with Don, entered Vic's house, watched Don take the wallet, and ran away with Don. Presumably, Al was serving as a lookout for Don and not merely tagging along. Therefore, to the extent any of Don's actions while Al was there are crimes, as discussed above, Al will be liable for them, unless he can claim withdrawal as discussed below.

Conspiracy

A conspiracy is an agreement between two or more persons to commit an unlawful act. Although at common law, an overt act was not required for the agreement to be a conspiracy, the modern law also requires an overt act. The agreement for a conspiracy may be written or oral and may be assumed from circumstantial evidence if there is a common plot or scheme among the potential co-conspirators. Here, although the facts are silent as to any written or oral agreement between Al and Don, the evidence

suggests there was a common scheme. Al and Don were both desperate for money and willing to do anything to get it and they set out together to enter Vic's house and steal from him. Therefore, unless Al can argue that he withdrew from the conspiracy, as discussed below, Al will be liable for conspiracy. He will also be liable for the substantive crimes committed in furtherance of the conspiracy and any additional crimes if they were the foreseeable result of the conspiracy under the majority Pinkerton rule.

Larceny

Larceny is the trespassory taking and carrying away of another's personal property with the intent to permanently deprive them of it at the time of the taking. Don likely committed larceny and therefore under accomplice and conspiracy liability, Al will also be guilty of larceny, subject to the defenses below.

Trespassory

In order to be trespassory, the taking must have been without the owner's permission. Here, Al and Don took Vic's wallet from his house without his knowledge at night. Therefore, it seems very unlikely that they had Vic's permission to take the wallet and no facts suggest that they did. Therefore, this element is met.

Taking

The taking is any action that removes the personal property from the possession of the owner. Here, the wallet was in Vic's house and therefore in his possession before the time of the taking. When Don picked it up, he satisfied the taking requirement by removing it from the possession of the owner into his own possession. Therefore, this

element is satisfied.

Carrying

Carrying away is any movement even slight movement away from where the property was taken. Here, this element was clearly met because Don took the wallet and ran out of the house and away from the house.

Another's Personal Property

The property must also be in the possession of another. Here, the wallet was in Vic's possession before the taking and therefore this element is met.

Intent to Permanently Deprive

The person committing larceny must have the specific intent at the time of the taking to permanently deprive the owner of the property. Here, Don and Al were desperate for money. Therefore, it is unlikely that Don took the wallet with the intent to give it back to Vic and therefore likely intended to permanently deprive Vic of the property. Therefore, this element and all elements required for larceny have been met.

Robbery

Robbery is larceny from the person of another by force or intimidation. Here Don's actions did not amount to robbery and therefore Al will not be liable for robbery even through accomplice and co-conspirator liability.

Larceny

As discussed above, larceny has been committed by Don.

From the Person of Another

Here, the wallet was taken off a table in the foyer not off of Vic's person. There is no evidence that Vic was even aware or present when the wallet was taken and therefore this element is not met.

By Force or Intimidation

To be a robbery, more force than is necessary to effect the taking is necessary or there must be intimidation through threat of imminent bodily harm. Here, neither of these is met. Don took the wallet off the table with only the force necessary to take the wallet and Vic was nowhere to be found so there was no intimidation through threat.
Therefore, because the taking was not from the person of another or by force or intimidation, Don did not commit robbery and therefore Al cannot be liable for it as an accomplice or co-conspirator.

Burglary

Burglary is the breaking and entering into a dwelling at night with the intent to commit a felony at the time of the entering.

Breaking

Breaking is use of force, for example breaking a window or kicking down a door. The force used must be more than required to enter. Here, Don opened an unlocked front door. This is sufficient to be considered a breaking because there was more force than necessary to enter, ie the door was not wide open and force was used to open it, however slight.

Entering

Entering is physically crossing the plane into the dwelling. Here, Don and Al both entered the house by going inside.

Dwelling

A dwelling is a structure regularly used for habitation. It does not have to be currently inhabited, but it cannot be abandoned. All states have statutes now that expand the common law definition to other structures and buildings and some to cars. Here, this was a dwelling because it was Vic's house. It is unclear whether Vic was home at the time, but he is not required to be at home if it is a place he regularly inhabits. Thus, this element is satisfied.

Night

Night is the time between sunset and sunrise. Modern statutes eliminate the need for a burglary to be at night but may impose higher penalties when it is at night. Here, Al and Don went at midnight to steal from Vic's house so the nighttime element is clearly met.

Intent to Commit a Felony

At the time of the breaking and entering, the person must have had the specific intent to commit a felony inside to be a burglary. Here, Al and Don went to Vic's house with the clear purpose of stealing from him. This is a felony and therefore at the time of the entry, they had the requisite intent. Therefore, Don is guilty of burglary and Vic is guilty as his accomplice or co-conspirator unless one of the defenses below applies.

Defenses

Duress

Duress is an improper threat that meaningfully deprives a person of actual choice. In the criminal context, the threat must be of imminent serious bodily injury or death to the person asserting duress or to another person that the person knows. Here, Al will argue that when Don slapped his face and said "If you don't come along now, I will break your legs tomorrow" that he was deprived of any meaningful choice and can assert the defense of duress. However, the threat to Al was that Don would break his legs *tomorrow* not at the time. Therefore, the threat was not imminent and Al cannot assert duress as a defense. Al will also argue that the fact that Don slapped him was an imminent threat; however, Don slapped him before he made the threat and a slap is not imminent serious bodily injury or death and it was done before the threat so it was not a threat of serious bodily injury or death.

Withdrawal as Accomplice

The common law did not allow any withdrawal when a person had already aided and abetted a principal. The modern law allows withdrawal and therefore relief from liability only when the accomplice clearly states that he does not want to help anymore and attempts to thwart the principal in the commission of the crime. Here, Al will argue that he withdrew from the accomplice liability when he said he did not want to get involved anymore. However, Al still went along with Don and served as a lookout and therefore he cannot escape accomplice liability.

Withdrawal from Conspiracy

Al will also try to argue that he withdrew from the conspiracy. At common law the conspiracy was achieved when there was an agreement to commit a crime without an overt act. Under this standard there is no withdrawal from the conspiracy once the agreement has been made. Here, Al has already set out with Don to steal from Vic so the agreement has already been made. Under the modern law an overt act is required before there is conspiracy liability. An overt act may be lawful or unlawful. Setting out at midnight to go somewhere may be lawful, but in this case it was an overt act in furtherance of the conspiracy to steal from Vic. Therefore, Al had already committed conspiracy before he said he did not want to get involved. In addition, he continued aiding Don and finished carrying out the crime so he will still be liable for conspiracy. A conspirator may be able to escape liability for substantive crimes, but only if he attempts to thwart the success of the conspiracy. Here, Al did not do that so he will also still be liable for the underlying crimes.

Don's Motion to Suppress

Under the Due Process Clauses of the Fifth and Fourteenth Amendments, a court will take two steps in deciding whether a police lineup violates the defendant's rights. First, the court will decide whether the lineup was impermissibly suggestive. Second, the court will decide whether even if the lineup was impermissibly suggestive if the identification is still nonetheless reliable.

Impermissibly Suggestive

A lineup is impermissibly suggestive if the form or substance of the lineup unduly biases the person making the identification. Here, Wanda described to the police that the taller man, presumably Don, was clean-shaven with short hair, but could not describe the shorter man. When Don was arrested with a large beard and long hair, Wanda thought Don might be the wrong man. Officer Oliver told Wanda that Don had Vic's wallet in his pocked when he was arrested. Officer Oliver than arranged for lineup of six bearded men with long hair including Don. After 20 minutes, Wanda identified Don as the man.

Four aspects of this lineup are impermissibly suggestive. First, Wanda saw Don's picture in the newspaper before the lineup. Thus, she already knew that he was the man that the officers thought was the one who came out of the house. Second, Officer Oliver told Wanda that the man they had arrested, Don, had Vic's wallet in his pocket. In addition to having seen the picture in the newspaper, now Wanda has been told Don had the wallet on him. These facts would make Wanda seriously doubt her description the night of the crime that the taller man was clean-shaven and had short hair. Third, the police lineup only included long haired and bearded men. Wanda believed the man she was looking for had short hair and was clean shaven, but Officer Oliver only provided her options with long hair and beards to choose from. As such, Wanda may have felt limited to those choices that were impermissibly suggestive.

Still Reliable

If it nonetheless is still reliable, then it can be used still. Here, it is likely not reliable because it is inconsistent with what Wanda said when the identification was fresh the night of and because it took her 20 minutes to identify Don.

Q5 Remedies

Daniel's house is for sale. In his living room are two valuable original paintings by Artist, one of the California coastline and the other of a field of Golden State wildflowers. Daniel recently refused an offer from Museum to purchase the paintings for $10,000 each.

Pam went to Daniel's house hoping to buy it before she left on a business trip. As Pam, Daniel and his real estate broker, Bill, inspected the house, Pam noticed the paintings in the living room, commenting that they were beautiful and seemed designed to fit in the house. Pam then offered $400,000 for the house and another $50,000 if the sale included the two paintings. Daniel agreed and asked Bill to draft a contract for the sale of the house and the two paintings for $450,000. Bill promised to have the contract ready before Pam left town the next day.

Bill drafted a written contract, which Daniel signed even though he noticed that Bill had mistakenly omitted from the sale the painting of the California coastline.

Daniel met Pam at the train station, as her train was about to depart. Daniel gave the contract to Pam, telling her, "This is what we agreed to and I've already signed it." Pam's train started to move, so she quickly signed the contract without reading it and jumped on board the train.

When Pam returned from her trip, she was horrified to find that the California coastline painting was not in the house. She immediately telephoned Daniel to ask about the painting, but he told her, "That's what the contract we signed provides," and hung up.

Six months after Pam moved into the house, she noticed in a local newspaper advertisement that Daniel was offering to sell the Artist painting of the California coastline to the highest bidder at an auction two weeks later.

1. What remedy or remedies can Pam reasonably obtain against Daniel? Discuss.

2. What defense or defenses can Daniel reasonably raise? Discuss.

Answer A

REMEDIES AVAILABLE TO PAM AGAINST DANIEL

In order for Pam successfully to seek a remedy against Daniel, she must first demonstrate that he was in breach of a valid contract.

Governing Law

Contracts for goods, that is, tangible moveable items, are governed by Article II of the Uniform Commercial Code. All other contracts, including contracts for the sale of real property, are governed by the common law. Where a contract covers both goods and real property, courts look at the primary purpose of the contract to determine whether the UCC or the common law applies. Here, the primary purpose of the contract was the sale of Daniel's home. Accordingly, this contract will be governed by the common law.

Formation

A valid contract requires mutual assent, in the form of an offer and acceptance, and bargained for consideration.

Offer

Here, when Pam went to inspect Daniel's home, she offered to purchase Daniel's home for $400,000 and the paintings for $50,000. To be valid, an offer must be directed to a particular offeree and contain the essential terms of the deal. Under the common law, the essential terms are the parties, the subject matter, the quantity, and the price. Pam's offer to purchase the home with the paintings at a total of $450,000 constituted a valid offer because it was made to an identifiable offeree, Daniel, and it contained the

essential terms of the deal, including the subject matter (the home and paintings), price ($400,000 + $50,000), parties (Pam and Daniel), and quantity (1 home and 2 paintings).

Acceptance

A party accepts an offer by objectively manifesting an intent to be bound by the terms of the offer. Here, when Pam made the offer, Daniel agreed to it and asked his real estate broker, Bill, to draft a contract in accordance with the parties' agreement. By taking these actions, Dan manifested intent to be bound by the terms of Pam's offer and, thus, there was an acceptance.

Consideration

Consideration is bargained for legal benefit or detriment. Courts do not typically look to the value of the consideration. Here, Pam offered consideration in the form of $450,000: $400,000 for the home and $50,000 for the paintings. Daniel offered consideration in the form of conveying Pam the home and the paintings.

Because there was an offer, acceptance, and consideration, the parties formed a contract.

Terms of the Contract

The issue is what the terms of the contract are. Even though the parties orally agreed that Daniel would provide the home with the two paintings, the written terms of the contract omitted the requirement that Daniel convey the painting of the California Coastline. It is the written contract that the parties signed.

Remedy for Unilateral Mistake - Reformation of Contract

Where a contract is based on the mistake of one party, sometimes the party may seek reformation of the contract to correct the mistake. Thus, if Pam can demonstrate the required elements of unilateral mistake, then she may seek the remedy of reformation.

To persuade a court to reform a contract based on a unilateral mistake, the plaintiff must show the following: (1) that the plaintiff was mistaken about the terms of the contract; (2) that the mistake went to a material term that was a basic assumption of the contract; (3) that the defendant-party knew of the plaintiff's mistake; and (4) the defendant failed to correct the mistake or even took advantage of the mistake.

Plaintiff Was Mistaken

Here, Pam mistakenly believed that the written contract conformed to the terms orally agreed to, specifically, that the contract conveyed to Pam both the painting of the California coastline and the painting of the field of Golden State wildflowers.

Material Term

This mistake was a material term of the contract. To be material, the mistake must be about an issue that affected whether the parties would agree to enter into the contract. Here, Pam made clear that she thought the paintings were beautiful and were a perfect fit for the design of the home. Indeed, she was "horrified," when she saw that the California coastline painting was missing. Moreover, she was willing to pay an extra $50,000 to have the two paintings. Without the paintings, she would have paid much less for the home. Accordingly, this was a material term.

Defendant Knew of the Mistake and Took Advantage of It

The next issue is whether Daniel knew of and took advantage of Pam's mistake. Here, the facts show that Dan noticed Bill's drafting mistake. When Dan met Pam at the train station, he assured her that the contract reflected the terms Daniel and Pam had agreed to. Thus, not only was he aware of the mistake, Daniel told Pam that the mistake did not exist. He likely told her this in order to obtain her signature on the contract and avoid having to convey the painting of the coastline. Indeed, Dan took advantage of the fact that Pam was in a hurry to get on a train that was about to depart. The fact that her train was about to depart made Pam feel as though she needed to sign quickly without reading, and Dan took advantage of this situation and told Pam the contract conformed to their oral discussion.

Conclusion

Because Dan took advantage of Pam's unilateral mistake and that mistake went to a basic assumption of the contract, Pam can seek reformation of the written contract as a remedy.

Reformation

Reformation is an equitable remedy that courts provide when a party has shown the elements of unilateral mistake. When a party successfully seeks reformation, the court will re-write a contract in order to conform to the parties' intent sans the mistake. Thus, based on the foregoing discussion of unilateral mistake, Pam may seek a court order reforming the contract to convey the house with both paintings.

Mutual Mistake

It should be briefly noted that Pam would not be able to base a claim on mutual mistake. The elements of a mutual mistake claim are similar to those of a unilateral mistake, except that both parties must be mistaken. Here, the facts make clear that Dan was not mistaken. Accordingly, there was no mutual mistake.

Fraud

Pam might also be able to show that Dan committed fraud. A party commits fraud when, with scienter, he lies about a material term of a contract in order to induce reliance on that lie. Here, as discussed above, Dan knowingly told Pam that the contract contained the terms in accordance with their oral discussion even though he knew this was not true, and he did so with the intent to induce Pam to sign the written agreement. Accordingly, Pam might succeed in showing that Daniel committed fraud. As discussed above, one remedy for fraud would be reformation.

Specific Performance

Pam might seek specific performance of her contract with Dan, including that he convey both paintings. To demonstrate entitlement to specific performance, a plaintiff must show as follows: (1) that the subject of the contract is unique; (2) that legal damages would not suffice to remedy any breach of the contract; (3) that the conditions triggering the defendant's performance have been met; (4) that there are no defenses to formation; and (5) that the court can reasonably enforce the order of specific performance.

Unique Contract Subject Matter

Courts will almost always hold that land sales contracts are unique. The question is whether the paintings are also unique.

Here, the paintings are valuable. Indeed, Daniel recently refused to sell them to a museum at a price of $10,000 a piece, and Pam valued them at a total cost of $50,000, or $25,000 a piece. Moreover, demonstrating their uniqueness, Pam commented on the paintings' beauty and the fact that they seemed as if they were designed to fit in the house. Thus, they provide a unique design fit for the home. Accordingly, the paintings are unique.

Damages Are Not Sufficient

Next, Pam would need to show that money damages would not suffice to remedy her injury. Given the uniqueness of the paintings and the fact that these paintings seem specifically well-suited for the design of her home, this element is met.

Conditions for Performance Satisfied

The conditions to require Dan's performance were satisfied. Specifically, the contract was executed and Pam has presumably began making payments towards the agreed- upon price of $450,000.

No Defenses to Formation

Defenses to formation are discussed below, in the answer pertaining to Dan's defenses. For reasons explained below, Dan will not likely succeed on any defenses to formation.

Court Can Reasonably Enforce Order of Specific Performance

The last factor is whether a court could reasonably enforce an order requiring Dan to specifically perform the contract. Factors courts consider are whether the order would require ongoing supervision and whether it is a subject matter that is complex to oversee.

Here, performance would be simple. All that would be required is that Dan give Pam the painting. Accordingly, this requirement is satisfied.

Conclusion - Specific Performance

Because the requirements for specific performance have been met, provided that Pam can show that there are no defenses to contract formation (which is discussed in Part II below), Pam could seek specific performance.

Temporary Restraining Order

Pam found out that Dan is planning to auction off the painting in two weeks. To prevent this from happening, Pam should seek a temporary restraining order ("TRO"). The requirements of a TRO are as follows: (1) the plaintiff must show irreparable harm absent a TRO; (2) the plaintiff must demonstrate a likelihood of success on the merits;

> **(2)** the plaintiffs must demonstrate that the equities weigh in her favor against the defendant; and (4) the plaintiff must demonstrate that the TRO is in the public's best interest. A plaintiff should seek to notify the defendant that she is seeking a TRO, rather than proceed ex parte. If the plaintiff cannot reasonably contact the defendant first, she must certify to the court that she has made reasonable efforts to contact the defendant or that she would be injured by contacting the defendant.

Irreparable Harm

Here, Pam can show irreparable harm because if Daniel auctions the painting to a bona fide purchaser for value, it is unlikely that Pam will ever be able to obtain the painting. And, as described above, this painting is unique.

Balancing of Equities

Pam can show that the equities weigh in her favor, and not Dan's. Pam signed the contract innocently. Although she should have done her due diligence and read the contract before signing, she signed relying on Dan's representation that the contract conformed to their oral agreement. Dan, on the other hand, caused Pam to be mistaken about a material element of the contract and he took advantage of her mistake. Accordingly, the equities weigh in Pam's favor.

Likelihood of Success on the Merits

The inquiry of whether a plaintiff is likely to succeed on the merits at the TRO stage is lower than at later stages in the litigation, such as whether she should receive a preliminary injunction. Here, Pam will likely succeed on the merits because, for reasons explained above, she can show that Dan caused a unilateral mistake or even fraudulently induced her to sign the contract.

Public's Interest

The public has an interest in contracts being enforced fairly and according to the terms that the parties assented to. The public also has an interest in preventing fraud. Accordingly, Pam can meet this element.

Notice to Defendant

Although, as explained above, it is not always required, Pam should seek to give Dan notice of her application for a TRO so that he can be heard, unless she can show that he might try to get rid of the painting if he is aware of her application for a TRO, which would cause irreparable harm.

Length of TRO

TRO's typically can only last for fourteen days. The auction is 14 days away. Accordingly, Pam should also seek a preliminary injunction.

Preliminary Injunction

Pam should seek a preliminary injunction, which can last for the duration of the litigation. The requirements are similar to that of a TRO. The difference is that Dan must be given notice and an opportunity to be heard. For reasons described above, Pam is likely to obtain a preliminary injunction.

Permanent Injunction

The difference between the requirements for a preliminary injunction and a permanent injunction is that the plaintiff must actually succeed on the merits. Because Pam will likely succeed on her fraud and undue influences, a court should order a permanent injunction against the sale of the painting at an auction.

Damages

If, for some reason, the court finds that the painting is not unique and that damages would suffice, Pam should seek damages.

Restitution

One form of damages P could seek is restitution. Restitution gives back a plaintiff the value she conferred on a defendant. Here, that amount is $25,000, which represents the value of one painting.

Consequential Damages

In lieu of restitution, she can seek consequential damages.

DAN'S DEFENSES

Statute of Frauds

Under the Common law, contracts for the conveyance of real property must be in writing, signed by the party to be charged, and must contain all essential terms of the deal. If this contract were governed by the UCC, the UCC requires that any conveyance of goods for over $500 must also satisfy the Statute of Frauds. Here, the paintings were valued by the parties at $25,000 each. Thus, regardless of the governing law, the contract must satisfy the statute of frauds.

The contract is in writing and signed by the party to be charged, Dan. However, the essential term of the deal at issue here, the conveyance of the coastline painting, is not included. Dan will thus argue that this term does not meet the Statute of Frauds.

Exceptions to Statute of Frauds - Partial Performance

However, there are some exceptions to the Statute of Frauds. One is partial performance. In a sale of real estate, courts usually require two of the following three types of partial performance: (1) payment for the property; (2) possession of the property; and (3) making improvements to the property. Here, the disputed portion of

the contract pertains to a painting, not real estate. Pam will argue that by paying the price for the paintings, she has fully performed and thus, the exception to the Statute of Frauds has been met. Moreover, she has moved into the house and has taken possession of one of the paintings. However, she has not yet taken possession of the coastline painting. Thus, this is a close call, and a court might find for Dan if it finds that Pam's performance is not sufficient to trigger this exception to the Statute of Frauds.

Exceptions to the Statute of Frauds - Unique Goods

There is an exception to the Statute of Frauds for unique goods. Here, the paintings were unique and the price paid for the goods supports a reasonable inference that Pam paid for two of the paintings. Moreover, depending on the character of the paintings, it may appear that they were painted as a set that would reasonably be bought and sold together.

However, this exception to the Statute of Frauds typically only applies when the unique goods were manufactured for the buyer. Here, Pam purchased the goods well after the paintings had been created, and this exception is unlikely to apply.

Parol Evidence Rule

Dan might also argue that the parol evidence rule ("PER") bars any external evidence of the terms of the contract. For the PER to ban all external evidence, there must be a fully integrated writing. Where there is a partially integrated writing, courts will consider external evidence that supplements the contract. Here, it is not clear whether there was a "merger clause" stating that the writing was fully integrated or whether the contract contained all of the necessary terms, which might lead a court to conclude that it was fully integrated.

Pam will argue that the contract was only partially integrated and that the conveyance of the coastline painting is only an additional term that merely supplements the contract. Courts usually make this determination with reference to the four corners of the agreement, asking whether the disputed term is one that would naturally be left out of the agreement. It is unlikely that the conveyance of the coastline painting would naturally be left out of the agreement, as it is a material term. Thus, the contract is likely fully integrated. But, to satisfactorily make this determination, we would need to know more about the contents of the written contract.

However, courts will consider evidence that the parties did not actually make a contract because there was no meeting of the minds, or that the contract as written does not conform to the mutual meeting of the minds. Thus, courts will consider evidence of fraud in the inducement of a contract or unilateral mistake because this is a defense to formation, that is, fraud and unilateral mistake are an argument that the contract is not valid as written because where was no meeting of the minds. Accordingly, a court is likely to hear evidence of the agreement that Daniel convey the painting of the coastline.

Laches

The defense of laches applies when a plaintiff who seeks relief in equity has delayed bringing her cause of action in such a substantial fashion that it causes prejudice to the defendant.

Here, Pam learned of the fact that Dan kept the coastline payment six months before she saw Dan's newspaper advertisement. Dan will argue that Pam waited so long that he now has relied on her not pursuing an action and has set up an auction in reliance

on that fact.

However, having to cancel an auction is not likely to amount to serious prejudice to Daniel because, if Daniel were to win on the contract claim, he could simply hold an auction later. And while Pam probably should have brought the action sooner, six months is not an unreasonably long time.

Accordingly, Dan's defense of laches will not succeed.

Answer B

GOVERNING LAW

The UCC governs contracts for the sale of goods, while all other contracts are governed by the common law. When a contract is mixed, the law that governs is based on the predominant purpose of the contract. If the predominant purpose of the contract is a sale of property, the common law governs, for example.

Here, the contract between Daniel and Pam included both goods (the paintings) and property (the house). However, it appears that the predominant purpose of the contract was the house, as Pam went to the house with the purpose of buying it and only happened to notice the paintings. Thus, the common law governs this contract.

PAM'S REMEDIES

Pam and Daniel signed a contract which, by its terms, only contained the sale of the house and the artwork of the Golden State wildflowers. Thus, Daniel was bound to deliver possession of those things to Pam. The facts imply that he did so, as Pam was in the house when she discovered the California coastline painting wasn't there.

However, Pam will argue that the contract also included the California coastline painting, even though it was not in the writing. Pam will likely posit two theories as to why the California coastline painting should be included in the contract: mistake and misrepresentation.

Mistake

Contracting parties can obtain remedies on a contract such a rescission or reformation if they show that the contract as written does not embody the full, actual terms of the agreement. To prevail on mistake, a party must be able to show either a mutual mistake or a unilateral mistake. A mutual mistake occurs when both parties were mistaken as to a material fact of the underlying subject matter of the contract, or the parties themselves. In addition, the party suing on mistake must not have assumed the risk of the mistake. Mistakes as to collateral facts will not support reformation or rescission of a contract.

Here, no mutual mistake was made. Daniel was not mistaken as to the contents of the contract, he knew that the contract did not include the California coastline painting. Pam, on the other hand, did not. Thus, this is not a mutual mistake.

Traditionally, a unilateral mistake, even to a material term of the contract, did not allow for relief. However, if the other party knew or should have known of the mistake then a unilateral mistake provides sufficient cause for relief--as long as the mistaken party did not assume the risk of mistake. To be clear, if reformation is sought as a remedy, the non-mistaken party must have known that the other side was mistaken; but for rescission, the non-mistaken party can either have known or should have known of the mistake.

Here, there was a unilateral mistake. Pam believed that the contract included the California coastline painting -- a material mistake as to the subject matter of the contract. But, according to the facts, Daniel knew of the mistake but did nothing to

prevent it. Furthermore, nothing in the facts tends to show that Pam assumed the risk of the mistake as that was not bargained for by the parties and she took no other actions showing that she assumed the risk -- her negligence in not reading the contract is not sufficient to show assumption of the risk of mistake (see immediately below).

Additionally, it should be noted most courts will not find that a party's negligence in failing to read a contract will void their argument of unilateral mistake. Thus, the fact that Pam did not read the contract carefully before signing will not affect her argument for mistake.

Given that a sufficient unilateral mistake exists here, one that Daniel **knew** about, Pam will be entitled to multiple remedies such as reformation, rescission, and specific performance.

Misrepresentation

Contracting parties can also obtain remedies like reformation and rescission where one party made a material misrepresentation to another, such as altering a contract so that it does not contain the same language as was originally agreed upon. Although usually mere nondisclosure of a material fact is not enough to rise to the level of actionable misrepresentation, affirmatively altering a contract and representing it as unaltered is sufficient for actionable misrepresentation.

Here, although the omission of the California coastline painting was originally accidental, Daniel's knowledge of that fact and subsequent representation that nothing had changed in the contract likely rises to the level of an actionable misrepresentation. Daniel's statement that "This is what we agreed to" lends further credence to Pam's

argument that the misrepresentation was intentional and more than just a mere omission.

Thus, although not as clear of a case as the "mistake" analysis above, a court would likely find that Pam could also obtain remedies like reformation, rescission, and specific performance on a misrepresentation theory

Preliminary Injunction

Since Daniel is attempting to sell the California coastline painting in two weeks, Pam should attempt to obtain a preliminary injunction against the sale of the painting. Preliminary injunctions are meant to keep the status quo in place while the merits of the case are adjudicated. Pam could request a Temporary Restraining Order (TRO) which has the same requirements as the preliminary injunction but can issue quickly and last for two weeks (in federal court). The TRO can be obtained ex parte if the lawyer for Pam shows that he attempted in good faith to notify Daniel of the TRO or that notice wasn't practicable in this case.

To obtain a preliminary injunction, a plaintiff must show (1) irreparable harm if the injunction isn't issued, and (2) a likelihood of success on the merits. Courts usually require the plaintiff to post a bond to cover costs for the defendant if the preliminary injunction was wrongfully issued. Courts will also often balance the hardships between defendant and plaintiff, weighing the costs of the injunction to the defendant and the public, against the benefits of the injunction to the plaintiff.

Here, Pam will likely be able to show irreparable harm since the piece of art she is seeking to obtain from Daniel is unique. The facts aren't too specific on this point,

however the fact that a museum is attempting to buy the two paintings suggests that they in high demand. It is unlikely that just awarding Pam damages will allow her to obtain the painting or a substitute painting, since this painting is an original, as stated in the facts. However, there is a small chance that if Pam was awarded enough damages that she would be able to buy the painting from the person that won it at Daniel's auction. Practically speaking, this is an incredibly small chance as the buyer at the auction is not likely to part with it so soon. On balance, the hardships clearly favor Pam as she will lose the painting if the injunction doesn't issue, while Daniel will only lose the opportunity to sell the painting immediately, as opposed to after the case has been settled.

Pam must also show a likelihood of success on the merits. Here, Pam has a clear argument for mistake and a possible argument for misrepresentation. Either way, she is almost certainly entitled to the painting under the contract. See analysis above. Thus, she is likely to convince a court that she will succeed on the merits in showing that the California coastline painting was part of the original contract.

Thus, if Pam is able to post a bond covering the cost of issuing a mistaken injunction, she will likely prevail in obtaining a preliminary injunction barring Daniel from selling the painting at auction until the merits of the case are resolved.

Reformation

A contracting party can obtain reformation based on mistake if an enforceable contract existed first, but that did not include the entirety of what the parties agreed to because of a mistake in typing up the contract. Usually a contract is reformed in such cases

when there is a mutual mistake but can be reformed when there is a unilateral mistake that the non-mistaken party **knew** about and did nothing to prevent.

Here, the contract between Pam and Daniel was enforceable as written but did not include the entirety of the bargain. Pam's unilateral mistake as to the California coastline painting is sufficient to allow for reformation of the contract to include the painting since the facts show that the California coastline painting was clearly a part of the original agreement between the parties and was only left out by a mistake in transcribing the contract.

Thus, Pam can reasonably obtain reformation of the contract to include the California Coastline painting.

However, once that is included in the contract, she must be able to claim the property itself. She can do this by either specific performance or replevy.

Specific Performance of Reformed Contract

To obtain specific performance, a contracting party must show five factors: certain, valid and definite terms, the plaintiffs contract conditions are fulfilled, inadequacy of legal remedies, feasibility of enforcement, and lack of defenses.

Certain, Valid and Definite Terms

To allow for specific performance the court needs to be able to understand the exact terms of the contract in order to be able to issue orders as to how the contract is to be carried out. Thus, the contract must have terms that are more certain than what it required in a case for damages.

Here, the contract between Pam and Daniel, as reformed, clearly states the amount of

consideration, the parties, and the pieces of property at stake, including the California coastline painting. Thus, the court should have no problem in ordering specific performance based on these terms.

Plaintiff's contract conditions fulfilled

A plaintiff must show that she is either ready and willing to perform, has already performed, or is excused from performing.

Here, the facts imply that Pam has already tendered her payment since she is in the house that used to be Daniel's. However, even if she has not tendered performance, she is clearly willing and able to do so based on these facts.

Inadequacy of Legal Remedies

A plaintiff must show that compensatory damages are not enough to remedy her injury.

Here, since the property -- the painting -- is original and apparently unique, as well as being sought after (as shown by the museum's prior bid to Daniel) it is unlikely that compensatory damages will suffice since it is very unlikely that Pam would be able to take her monetary award and purchase the exact same painting on the market.

Feasibility of Enforcement

Although mandatory injunctions, as would be the case here, can present enforcement problems since they are requiring a person to do something, such problems likely won't be present here. Daniel is likely under the personal jurisdiction of a court with contempt power and thus can be forced by the court to transfer the painting to Pam without much effort.

Defenses

Defenses to specific performance include unclean hands, laches, Statute of Frauds, and hardship/sharp practices. None of these equitable defenses really apply here. The contract is in writing and signed by the party to be charged, as required by the Statute of Frauds. Pam has taken no wrong actions towards Daniel with respect to this transaction as to constitute unclean hands. Pam has not unreasonably delayed in bringing a suit so as to prejudice Daniel and give rise to a claim of laches. Finally, sharp practices and hardship usually require an unconscionable contract coupled with inadequate consideration. Neither of those things are present here.

Thus, given that Pam can easily fulfill all five factors for specific performance, a court will likely grant her specific performance of the reformed contract between her and Daniel, forcing Daniel to transfer Pam the California Coastline painting.

DAN'S DEFENSES

Pam's Negligence

Dan will likely raise the defense of negligence on the part of Pam for failing to read the contract. He will argue that Pam should be charged with the knowledge of whatever contracts she signs and therefore, her mistake in thinking that the contract included the California coastline painting is only attributable to her own negligence. Additionally, he will argue that Pam was not forced to sign the contract right then as the train was leaving but could have read it and then returned it to him later, and that she was negligent to not do so.

This defense is unlikely to succeed. As mentioned above, most courts find that for

mistakes and misrepresentations entitled to reformation and other remedies, a plaintiff's failure to read the contract does not prevent them from obtaining remedies like reformation.

Parol Evidence Rule

Daniel will also likely assert the parol evidence rule as a defense. The parol evidence rule bars introduction of evidence of prior or contemporaneous oral or written statements that were not included in a fully integrated contract.

Daniel will argue that the written contract was fully integrated since he told Pam that it included what "we agreed to" and both parties signed it. However, firstly, a court would be unlikely to find that this contract was a fully integrated agreement since it was hastily written down and forced on Pam as she was leaving on a train.

More importantly, however, the parol evidence rule does not apply to cases where a mistake in the transcription of the contract allows for reformation.

Here, the mistake of Bill in transcribing the original agreement between Pam and Daniel -- which included the California coastline painting -- was the sole cause of it not being included in the contract. This allowed for reformation and also precluded the parol evidence rule from applying. If the parol evidence rule was allowed to apply in cases like this, no contracts could ever be modified for mistake or misrepresentation since the parol evidence rule would bar the evidence of the original agreement. Thankfully, this is not how the parol evidence rule is applied by the courts.

Therefore, Daniel's defense of the parol evidence rule will fail here.

Daniel's other possible equitable defenses to specific performance were discussed above.

Since Daniel has no viable defenses to reformation or to specific performance, a court will

most likely reform the written contract between Pam and Daniel to include the California coastline painting, and force Daniel to perform by transferring the painting to Pam.

Feb 2020

This publication contains the five essay questions from the February 2020 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	**Subject**
1.	Torts
2.	Professional Responsibility
3.	Contracts
4.	Evidence
5.	Business Associations

ESSAY EXAMINATION INSTRUCTIONS

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little or no credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

Q1 Torts

Paul, an actor, had small but memorable roles in two recent Hollywood blockbusters. Paul was also a first-year law student. He began having difficulty keeping up with his studies and became increasingly anxious about failing. He told his Legal Research and Writing professor, Dan, about his anxiety and doubts about his ability to timely complete a research paper Dan had assigned. Dan noticed that Paul appeared unusually anxious and suggested he go see the school counselor.

Paul returned to the apartment that he shared with Jack, who was also enrolled in Dan's Legal Research and Writing class.

The day before the research paper was due, Jack looked for his paper in his room but could not find it. Later, after Jack returned home from school, he found the paper on his desk where he thought he had originally placed it. After submitting the paper, Jack became suspicious that Paul might have copied parts of Jack's paper on the day that it seemed to be missing. Jack went to Dan's office and told him about his suspicions. Dan pulled from a stack of submitted papers what he thought was Paul's paper. When Jack saw the paper, he recognized the footnotes and said that Paul had "copied all of the footnotes from my paper."

The next day, Dan told Jack and Paul's class that "I hope no other student has copied his footnotes from another student's paper like that two-bit actor Paul." Paul was in class and heard the statement. Deeply humiliated, Paul suffered a severe panic attack, but did not seek medical treatment.

Dan later discovered that he had inadvertently shown Jack his own paper and not Paul's paper and that Paul had not copied Jack's or any other person's materials.

Paul has sued Dan based on his statement to the class.

What claim(s) may Paul reasonably raise against Dan; what defenses may Dan reasonably assert; what damages, if any, may Paul recover; and what is the likely outcome? Discuss.

Answer A

Paul's Claims Against Dan, Dan's Possible Defenses, and Paul's Potential Damages for Each Claim

Defamation

Paul (P) may bring a defamation claim against Dan (D). To prevail on a defamation claim, the plaintiff must prove: (1) defamatory statement; (2) concerning the plaintiff; (3) published to a third party. Additionally, if the defamation claim involves a matter of public concern or a public figure, there are two additional elements that the plaintiff must prove in order to not run afoul of the First Amendment. The plaintiff must also prove: (4) the statement is false; and (5) the intent of the defendant, which will vary depending on the type of plaintiff.

Here, D will argue that the two additional elements—falsity and intent—must be proven because P is a public figure. D will point to P's memorable roles in the two recent Hollywood blockbusters. On the other hand, P will argue that he is not a public figure. P will point to the fact that his roles were small. P may also argue that he's going to law school, which shows that his acting career is not taking off, and, thus, he is not a public figure. Other factors may also impact the court's analysis—the media coverage of P generally, whether P is a household name, and other things about the nature of P's status as a celebrity.

There are no facts to indicate that P's cheating was a matter of public concern. It is not that P has cheated to win a Nobel peace prize or nationally recognized marathon, which might constitute a matter of public concern. Whether P qualifies as a public figure is likely a close call, but given that P was in two blockbuster movies, the court will likely find that P is a public figure, which means that P will need to prove the two additional elements to prevail on his defamation claim.

Defamatory Statement

A defamatory statement is a statement that is reasonably likely to harm another's reputation. The statement generally must be one of fact. Statements of opinion may be actionable if they imply facts about the plaintiff.

Here, D said "I hope no other student has copied his footnotes from another student's paper like that two-bit actor Paul." P will argue that D's statement is a factual statement where D indicates that P copied another student's footnotes. P will argue that this statement constitutes a defamatory statement. P will argue that in the legal profession where honesty and integrity are essential, an allegation of plagiarism and cheating are extremely damaging to one's reputation. P may also try to argue that referring to P as a two-bit actor was also defamatory because it is a disparaging comment about P's acting skills, which impacts P's reputation.

In response, D will argue that the two-bit actor comment is his opinion and, thus, cannot be a defamatory statement. D has the stronger argument here and will likely prevail. D will also argue that his statement, which implied that P cheated, was just that—an implication that is not sufficient to give rise to a claim for defamation. However, D's statement implies the assertion of facts that P cheated. P has the stronger argument here and a court is likely to find that the party of D's statement that implies that P cheated constitutes a defamatory statement.

Concerning the plaintiff

A defamatory statement does not need to name the plaintiff specifically, as long as a reasonable person would know that the statement is referring to plaintiff.

Here, D used P's name in the sentence. And, although D did not specifically say P cheated, he said that he hoped no other student copied another student's paper like Paul. D also made this statement during Jack's and P's class, so the students in the class reasonably knew that D was referring to P. Additionally, although D did not use P's last name, D did refer to P as a two-bit actor, making it even more clear who D was referring to. This is sufficient to notify a reasonable person that D was referring to P. Thus, P is likely to succeed on proving this element.

Published to a Third Party

The defamatory statement must also be published to a third party, which means that a third party must hear or read or perceive the statement. There are two types of defamation: libel and slander. Libel is when the defamatory statement is in a permanent format. Traditionally, libel included defamatory statements that were printed, but modernly, statements that are captured on television or the radio are also considered libel. Slander are spoken statements, not captured in a permanent format.

Here, D said the defamatory statement to the class. If P heard the statement, it is reasonable to conclude that other students in the class also heard the statement. Because the statement was not in a permanent format, like in print or on television, it is considered Slander.

Falsity of Statement

When the plaintiff is a public figure or the statement concerns a matter of public concern, then plaintiff also needs to prove falsity of the defamatory statement. As discussed above, P will likely be considered a public figure.

Here, P will argue that the statement was false. P can prove this through a comparison of P and Jack's paper. The facts indicate that D mistakenly showed Jack Jack's own paper, so there are no facts that definitively prove P copied Jack's footnotes.

D may argue that he had a reasonable belief that the statement was true, so that is sufficient to defeat this claim. However, while that may be relevant for the intent element, as discussed below, it is irrelevant to the falsity of the statement. There could also be an argument that although P did not copy Jack's footnotes word for word, he did use ideas from Jack's paper. D could call Jack as a witness to discuss Jack's missing paper on the day in question and D could

testify about P's anxiety and doubts about finishing the paper.

However, the issue will likely come down to a comparison between the two papers. Since there are no facts to indicate that P actually copied Jack's footnotes, it is likely that P will prevail on proving that the defamatory statement was false.

D's Intent

If the person is a public figure or the matter is of public concern, the plaintiff will need to prove that the defendant acted with malice, which means that the defendant intentionally made the false defamatory statement or made it with reckless disregard for the truth. If the plaintiff is a private figure and the matter is of public concern, the plaintiff will need to prove that the defendant acted negligently when making the false defamatory statement. Here, as discussed above, since P is a public figure, P will also have to prove that D acted with malice—intentional or reckless disregard for the truth.

P may argue that D's defamatory was intentionally false, but the stronger argument is that P acted with reckless disregard for the truth. P will argue that D was reckless because he did not take the care to show Jack the proper paper. P will also argue that D was reckless for not conducting any further due diligence to determine whether P actually did copy Jack's footnotes. D simply took Jack's word for it, after briefly showing Jack the paper in D's office. Based on this inadequate amount of information, D then accused P in front of the whole class of cheating. P will also try to highlight how reckless D was by highlighting how it would have been very simple for D to confirm that P cheated: D could have simply compared P's paper to Jack's paper. And, because D did not take this simple step, D acted with reckless disregard of the truth when he made the false defamatory statement.

On the other hand, D will argue that he was not reckless, but rather had a good faith belief that P cheated. D will say that Jack's statement was sufficient to cause him to believe that P cheated. D will also point to the fact that he knew P was anxious about the assignment and did not think he would be able to complete, which gives P motivation to cheat. D will also point to the fact that Jack explained his suspicions of why he believed P cheated off of Jack's paper to D, which supported Jack's claim that P copied his footnotes. In sum, D will argue that based on the totality of the circumstances, he reasonably believed that P copied Jack's footnotes, and, thus, the statement was not in reckless disregard of the truth.

P has the stronger argument here given that it would have been so simple for D to determine whether P actually copied Jack's footnotes but D did not do that. Such a failure is a gross deviation from what a reasonable professor would do, and, thus, it is likely the trier of fact would find that D acted with reckless disregard of the truth when making the defamatory statement.

Damages

There are different rules regarding pleading of damages for libel and slander. General damages are presumed for libel. For slander, special damages are presumed where the defamatory

statement falls into a slander per se category: (i) about the person's profession or trade; (ii) infers that plaintiff suffers from a loathsome disease; (iii) accuses a woman of being unchaste. Otherwise, if the statement does not fall into the slander per se category, the plaintiff must specifically plead and prove damages.

Here, P will argue that D's statement falls into a slander per se category of being about the person's profession or trade. P will argue that the statement refers to his profession of actor, but since that statement is not considered a defamatory statement, that argument will likely be unsuccessful. P will also argue that the statement about cheating, although not directly about P's ability to be an attorney, is essentially about P's soon-to-be profession.

D, in contrast, will argue that the statement does not fall into the slander per se categories because P is not yet a lawyer so the statement was not about P's profession. And even if P's attending of law school makes lawyering his profession, the statement was not about P's ability to be a lawyer necessarily, but about P's cheating on a paper. This is a close call, but because the statement involves cheating on a law school paper, it seems that would be sufficiently close to pertaining to P's profession to fall into slander per se, and, thus damages will be presumed.

Intentional Infliction of Emotional Distress (IIED)

To prevail on an IIED claim, the plaintiff must prove: (1) defendant's outrageous and extreme conduct; (2) caused the plaintiff to experience severe emotional distress.

D's Conduct

Conduct qualifies as extreme and outrageous if a reasonable person would find that it is offensive and it would cause severe emotional distress in the reasonable person. Additionally, if the defendant has reason to know about the plaintiff's particular sensitivities, then the defendant's conduct even if not offensive to a reasonable person may still qualify as extreme and outrageous behavior.

Here, P will argue that D's behavior was extreme and outrageous because falsely accusing someone of cheating would be offensive to the reasonable person and would cause emotional distress for the reasonable person. Additionally, P will argue that even if the reasonable person standard is not met, D's behavior was extreme and outrageous considering P's particular sensitivities which D knew about. P will point to the fact that he told D about his anxiety and doubts about completing the paper and he was having increasing anxiety about failing. The fact that D noticed P appeared unusually anxious and suggested that P go see the school counselor will support P's argument that D knew of his particular sensitivities, thus making D's behavior outrageous even if not outrageous to the reasonable person. P may also try to compare D's behavior to the behavior of a typical professor and argue that D was acting unprofessionally by announcing P's alleged cheating to the class rather than following the formal channels of reporting a student's cheating.

D, in contrast, will argue that his behavior was not outrageous and extreme because it would not cause a severe panic attack in the reasonable person. D will argue that he made the

statement to a small class of people, not to a wide audience, so it was not reasonably likely to lead to severe emotional distress. P will argue that telling his classmates is even worse than telling a large group of people who don't know P well because his classmates' opinions are even more important than strangers.

D may also argue that he did not know of P's particularities that would make D's conduct particularly outrageous. D may argue that although P appeared unusually anxious, D assumed that P had heeded his advice and gone to see the school counselor. Based on D's belief that P sought treatment, D will argue he reasonably assumed that P no longer suffered from his anxiety.

This is a close call because it does seem that P's reaction may not be the reaction of a reasonable person. But given that D knew of P's increasing anxiety about failing, it is likely a trier of fact would conclude that D's conduct qualified as extreme and outrageous.

P Suffered Severe Emotional Distress

For an IIED claim, the defendant's conduct must not only cause emotional distress in a reasonable person, but plaintiff must have also experienced emotional distress.

Here, the facts indicate that P suffered a severe panic attack. This will likely be sufficient to qualify as severe emotional distress. Although P did not seek medical treatment, so he does not have medical records to back up his claim, P's testimony, if believed, about his panic attack will be sufficient to satisfy this element. However, since there are no medical records, that leaves P open to D's claims that the severe panic attack did not occur.

D's Conduct Caused P's Severe Emotional Distress

For causation to exist, there must be both actual and proximate causation. Actual cause means that the defendant's conduct was either the but for cause or substantial factor. But for cause means that but for defendant's conduct the injury to plaintiff would not have occurred. Substantial factor occurs when there are multiple contributing factors, so it is impossible to determine the but for cause and the plaintiff's injury and defendant's conduct was a substantial factor in causing the injury. Proximate cause exists when the plaintiff's injury was a reasonably foreseeable result of defendant's conduct.

Here, P will argue that D's defamatory statement was the actual cause and proximate cause of his severe panic attack. P will argue that but for D's false statement about cheating, he would not have been deeply humiliated which triggered his severe panic attack. P will also argue that P's panic attack was a foreseeable result of D's statement. P will make similar arguments about why the panic attack was a foreseeable result of making such an outrageous defamatory statement.

In response, D may try to argue that P was prone to anxiety so D's statement could not have been either the but for cause or the proximate cause of P's severe panic attack. D will point to P's increasing anxiety which P stated and D observed. But, that will not be enough to defeat P's claim. Under the eggshell doctrine, a defendant takes his plaintiff as they come. That P may

have been prone to panic attacks will not defeat P's causation element. Thus, it is likely a trier of fact will find that D's statement caused—both actual and proximate—P's severe panic attack given that it occurred close in time to D's statement and D's statement was outrageous. and would either produce a similar result in a reasonable person or D knew or should have known it would produce such a result in P given P's particular sensitivities.

Damages

If P is successful in proving his IIED claim, which is a close call but likely, then P will be able to recover damages from D. In a tort action, the plaintiff may recover compensatory damages, consequential damages and incidental damages. These types of damages must be reasonably certain, caused (both actual and proximate) by defendant's conduct, and unavoidable. A plaintiff has a duty to mitigate damages.

Here, P did not seek medical treatment for his panic attack. Seeking medical treatment is considered a necessary means of mitigating damages that a plaintiff must take if reasonable under the circumstances and would not result in undue burden or humiliation. If D can show that P's damages would have been reduced had P sought medical treatment, then D may successfully be able to reduce P's damages by the amount they would have been reduced had P sought medical treatment.

Negligent Infliction of Emotional Distress (NIED)

To prevail on an NIED claim, the plaintiff must prove that (1) defendant's conduct was extreme and outrageous; (2) plaintiff was in the zone of danger; and (3) although plaintiff did not suffer physical harm from defendant's conduct, plaintiff suffered physical harm as a result of emotional distress. (There is also another circumstance in which a plaintiff may bring an NIED claim that involves harm to the plaintiff's family member, but that is not applicable under these facts.)

Here, there is no evidence that P's severe panic attack caused him physical harm so it is unlikely he will be able to bring an NIED claim.

Conclusion

P will bring a defamation and IIED claim against D. D will argue against the specific elements of those claims as discussed in above in defense of P's claims. If P prevails in his claim, P will be able to seek damages subject to the arguments that D can make to decrease the amount of those damages.

Answer B

PAUL'S CLAIMS AGAINST DAN

Defamation

Paul (P) may assert a claim of defamation against Dan (D) based on Dan's statement. Defamation requires that (i) a defamatory statement was made, (ii) of or concerning the plaintiff, (iii) that was published to a third party, and (iv) that harms P's reputation.

(i) Defamatory statement

A statement is defamatory if it would cast the plaintiff in a negative light or to subject him to public ridicule.

Here, D's statement contains two aspects that would likely be defamatory. First, he states that P has copied the footnotes of another classmate, which is a negative imputation on P's character and would likely subject him to public ridicule as a person who cheats. Second, he directly calls P a "two-bit actor", which demeans and belittles P's acting career and talents, and is likely to subject to him to public ridicule as a bad professional actor.

(ii) Of or concerning P

The statement must be of or concerning the plaintiff such that they are identifiable.

Here, this requirement is met because D identifies P by name as the student who has copied another student and as the "two-bit" actor.

(iii) Published to a third party

In order to prevail, the defamatory statement must have been published to a third party.

In this case, Dan openly said the statement in front of his entire class, in which P was present. Even if P was not present, the statement is considered published to a third party because all of P's classmates in D's class would have heard the statement and understood that D intended to communicate that statement to each of them.

(iv) Harm's P's reputation

The statement must be such that it could harm P's reputation. P does not have to show that it actually harmed his reputation, only that the statement could have done so.

Here, D's statement insinuating that Paul copied another student is likely to be very harmful to his reputation. This is so because Paul is a first year law student, and truthfulness and honesty are critical attributes for law students wishing to join the legal profession. By casting him as a

cheater, D is directly attacking P's character for honesty and therefore may impact his reputation in the university and among his peers and professors.

Further, D's statement that P is a "two-bit actor" also harms P's professional reputation. Since P has made a living acting in two small, but memorable roles in Hollywood blockbusters, it is reasonable that P would consider his reputation as a professional actor important. By calling him a two-bit actor, Dan also directly attacked P's professional reputation.

Therefore, Paul is likely to establish the elements of defamation in relation to Dan's statement.

Matters of Public Concern

If the statement concerns a matter of public concern, then in order to prevail on a defamation claim, P must further show the relevant standard of fault of the publisher. A matter of public concern is one that the public or community would at large be reasonably expected to have an interest in learning about.

Here, D's statement may be of public concern because of P's standing as a Hollywood actor. He may be on the way to achieving celebrity. Therefore, the public may have an interest in how P carries himself and P's character as an honest person.

Assuming the matter is one of public concern, the standard that D will be held to as the publisher of the statement depends on whether P should be considered a public or private figure.

Public vs Private Figure

If the plaintiff is a public figure, the statement must have been made with malice. Malice requires an intention to publish a false statement, or reckless disregard for whether the statement was true or false. A person is considered a public figure if they are generally known to the public or performing a public function. If the plaintiff is a private figure, the standard is negligence such that the defendant is not guilty of defamation if the defendant reasonably believed that the statement was true.

Arguably, P is a public figure because of his status as a movie star in Hollywood blockbusters. Since he had memorable roles, he would likely be known to the public. If so, D's statement must have been made with malice. P might argue that D acted recklessly by failing to properly check whether Jack's paper was actually his. However, D could have the stronger argument if he reasonably believed that Paula's paper was the one he pulled from the stack of voluminous papers. For example, if he had hundreds of papers and Jack and P had very similar student numbers/surnames, it may be reasonable for D to have misidentified the papers.

On the other hand, P may be a private figure because the circumstances of the statement related to his performance as a law student, not a big Hollywood actor. The events occurred at university while P was attending school privately. Thus, P may also argue that P was a private figure and D acted negligently and unreasonably by making that statement without checking all

the facts. However, since D knew that P was feeling anxious about failing, and since another student Jack had alerted D to his suspicions, a court may find it reasonable for D to form the opinion that P was at risk of cheating. However, since D had inadvertently shown the wrong paper to Jack, P would have a stronger argument as a private figure and D's negligence. This is likely to be a stronger claim for P, since the standard for D to meet is lower.

DAN'S DEFENSES

Truth

Truth is a complete defense to defamation.

Here, D's statement was not true because P in fact had not copied Jack's or any other person's materials. Further, there is nothing to show that P was a poor actor, so D's statement as to Paul being a "two-bit" actor is also unlikely to qualify for the truth defense unless D can put on additional evidence to show this.

Consent

Consent by the P is a defense to defamation.

Here, P did not give D any consent, express or implied, to say the things that D said. Therefore, this is inapplicable.

Qualified Privilege

A qualified privilege exists if the publisher had a legitimate interest that it was furthering, or if he made the statement as part of a genuine public comment. This privilege usually applies to newspaper or broadcasters who have an interest in pursuing the truth.

Here, D may argue qualified privilege on the basis that he made the statement under a legitimate interest to discourage other students from cheating. However, this is not a particularly strong defense because it was not necessary to attack Paul in order do so.

DAMAGES RECOVERABLE FROM DAN

Slander

Slander is defamation via spoken word. Generally, special damages need to be proven by the P in order to prevail on a slander claim. Special damages require a showing of pecuniary damage.

Here, P has not suffered any pecuniary damage. He did not seek medical treatment so did (should he be added before did?) not incur any medical expenses. There is also nothing to show that he lost any income from acting based on the statement.

Slander per se

Slander per se are categories of slander where damages are presumed. This includes where a defamatory statement was spoken about P's business or profession.

Here, P may seek damages based on slander per se because D's statement defamed P's profession as an actor.

COMPENSATORY DAMAGES

Compensatory damages are awarded for personal injury or property damages, and aim to place the plaintiff in a position as if the tort had not occurred. These damages will be limited by foreseeability, causation, unavoidability and certainty.

P will likely obtain compensatory damages caused by D's defamatory statement by application of slander per se (see above).

NOMINAL DAMAGES

Nominal damages are awarded when there is no quantifiable specific loss or injury suffered, so it is awarded to the plaintiff as nominal. P would likely seek nominal damages because of his personal injury suffered by the panic attack.

PUNITIVE DAMAGES

P may also seek punitive damages if D's statement is found to be willfully malicious and wanton. A court may likely find that disparaging P's reputation as an actor was willful and wanton, since it was completely unjustified.

CAUSE OF ACTION: INVASION OF PRIVACY

False Light

P may argue that D breached P's privacy by intentionally casting a statement to put P under a false light and misattributing a characteristic of dishonesty to him. False light requires that the act be highly offensive to a reasonable person. The same standard of fault of publisher applies as in defamation (malice vs negligence) where the matter is of public concern.

Here, P would argue that, as a private person, D attributed a false character to him by saying he was a cheater and a bad actor. As a private person, D acted unreasonably and negligently when making the statement. Therefore, applying the standard of fault of a private person, D has breached P's privacy by acting negligently and unreasonably.

CAUSE OF ACTION: INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Intentional IED

P may claim D caused intentional infliction of emotional distress (IIED) when he made the

statement. IIED occurs when the defendant has made an extreme or outrageous conduct that causes severe emotional distress to the plaintiff. No physical injury is required for P to succeed in a claim for damages. The intention element is met if the defendant acted intentionally (with substantial certainty) that emotional distress would be caused, or if he acted with reckless disregard.

Here, P suffered a severe panic attack when hearing about D's statement. P would argue that D acted intentionally because D knew that P was in the room when he made that statement. He also knew that P had anxiety already about performing poorly on the paper. At the very least, P would argue that D acted recklessly because he should have double checked which paper he showed Jack before making such an allegation against P. The fact that P didn't seek medical treatment would not prevent him recovering damages against D.

Negligent IED

P may also argue that D negligently inflicted emotional distress. Negligent infliction occurs where D has negligently made a statement, which causes severe emotional distress. However, in most jurisdictions, the emotional distress must be accompanied or caused by some physical impact or injury.

Here, P suffered a panic attack directly as a result of D's statement. He did not appear to suffer any physical impact or injury, as proven by the fact that he did not seek medical advice. Therefore, this is unlikely to be established by P.

Conclusion

P is most likely to succeed on a claim for defamation by D. He may also bring claims of invasion of privacy (false light) or intentional or negligent infliction of emotional distress. Since P suffered no pecuniary damages, he may be able to seek compensatory damages based on slander per se. Given the nature of D's allegations, P may also be able to convince a court to award punitive damages.

Q2 Professional Responsibility

Linda is a lawyer with experience in representing small businesses, both for-profit and nonprofit. Nonprofit, Inc. (Nonprofit) is a newly formed California nonprofit corporation with few assets and limited income. Nonprofit is governed by a volunteer board of three directors, one of whom holds the position of board chair. Nonprofit's only employee is Ellen, who has no official title.

Ellen contacted Linda and said that Nonprofit would like to retain Linda to help it develop a formal employment agreement with Ellen, to make Ellen officially the Executive Director of Nonprofit. Ellen's position as Executive Director would be as an officer of the company, but not as a board member. Linda agreed to accept the matter. Linda did not memorialize her retainer agreement in writing.

Ellen drafted an employment agreement that included a proposed salary and sent the agreement to Linda. Ellen told Linda that her proposed salary was data-driven from a survey of similar positions, but based in the for-profit field. Ellen asked Linda not to tell the Board about the source of the survey data. Linda saw many other provisions in the draft agreement that were more favorable to Ellen than those in a typical employment agreement. Linda arranged a meeting with the Nonprofit board to discuss the terms of Ellen's employment agreement. The board chair asked Linda to invite Ellen to attend the board meeting and join their discussions.

1. With whom did Linda establish an attorney-client relationship and what ethical violations, if any, did Linda commit at the time the attorney-client relationship was created? Discuss.

2. What are Linda's ethical obligations with regard to:

    a. Ellen's employment agreement? Discuss.

    b. Ellen's request for confidentiality regarding the source of the survey data? Discuss.

Answer according to California and ABA authorities.

Answer A

1. In order to have an effective attorney-client relationship, particularly when dealing with business associations, identification of the client is critical. The fact pattern is unclear as to the identity of the client. The potential clients are (1) Ellenindividually, (2) Nonprofit, Inc., and (3) both.

Based on the facts presented, it is likely that Linda was representing Nonprofit only. Ellen said "*Nonprofit* would like to *retain* Linda to help it develop a formal employment agreement with Ellen." At the same time, Linda has experience representing "small businesses," and it does not indicate that she has experience representing employees individually in negotiations with such businesses.

Importantly, a lawyer representing a corporation does not represent that corporation's employees, including senior officers and even if there is only one employee. The corporation is a distinct legal entity entitled to independent and zealous counsel. Therefore, on the facts presented, Nonprofit is probably the only client at the inception of the attorney-client relationship.

It does not matter that Ellen was the company's only employee, because there is no merger in such a situation—not even when the sole employee is also the sole shareholder. Here, it was a nonprofit, and therefore it is all the more clear that the attorney-client relationship was with Nonprofit only.

A very important (but missing) fact is Linda's fee. The client can often (but not always) be identified based on who is paying the fee. There is no reference to any fee arrangement. It thus appears that Linda is doing this work pro bono. The ABA does not require written fee agreements. If Linda was receiving a fee and more than $1000, she might have violated the California rule requiring such agreements to be in writing if not for the fact that Nonprofit is a corporation, because that is an exception to the rule on written fee agreements (other, inapplicable exceptions include when the client in writing says it does not want a written fee agreement or there is a prior relationship and an exigent circumstance arises requiring prompt action by the lawyer to protect the client's interests). If Ellen paid the fee personally, however, that would materially alter the analysis and suggest either (1) an unethical dual representation of parties with an actual conflict without a waiver (which would have had to be obtained from members of the Nonprofit board since Ellen couldn't authorize that herself due to her own conflict), and also it would have required the fee agreement in writing as to Linda if over $1,000, or (2) improper payment of legal expenses by a third party, without taking adequate precautions to ensure independent representation and preservation of confidentiality.

Despite the fact that the representation is for the company and, the absence of a written retainer agreement clearly identifying the client and the scope of representation is problematic. Indeed, it is clear that Ellen is receiving personal legal advice from Linda. Ellen also asked Linda to advance her personal interests and withhold information from the board. Although this

happened after the initial attorney-client relationship was formed, it could arguably have created a reasonable expectation by Ellen that Linda was her personal lawyer, too. To the extent that this rose to the level of creating an attorney-client relationship with Ellen individually, as noted above, that would be unethical. It is an improper dual representation of clients with actually conflicting interests in the absence of an effective disclosure and consent. The ABA rules apply a reasonable lawyer standard that prohibits representing actually conflicting clients unless the lawyer reasonably believes that it will not materially impair their ability to perform the required legal services competently and diligently. That conflict waiver must be confirmed in writing by both clients affected by the joint representation, after receiving complete disclosure of the risks from the lawyer. In California, there is no reasonable lawyer standard; the rule applies to both potential and actual conflicts; in case of conflicts between clients (as here), the disclosure must be in writing as well as the clients' consent to it; and in case of personal and professional conflicts, the disclosure must be in writing. Here, no such waiver occurred. Again, Ellen could not have authorized it herself on behalf of the corporation, even though she was the only employee, because she was conflicted. Consent to the dual representation could only have come from the board (since it's a nonprofit, there are no shareholders to potentially consent instead).

Moreover, Linda should have advised Ellen to retain independent counsel (though Ellen was free not to do so if she chose). From the fact that Ellen drafted an employment agreement, it is unclear whether Ellen herself was a lawyer but it certainly suggests that she did not believe she needed a lawyer of her own. Still, especially in this situation, Linda should have told Ellen this suggestion.

In conclusion, on the facts presented (though some important ones are missing), the client was Nonprofit only and Linda did not *clearly* violate any ethical rules at the point when the relationship was created. Based on Linda's subsequent discussions with Ellen, however, it seems clear that Ellen did not understand the scope of Linda's duties and may have believed Linda to be her personal attorney, and therefore under the circumstances, Linda should have disclosed the scope of representation more clearly and ideally had a written retainer agreement making that clear to Ellen.

2.a. With respect to the employment agreement, Linda was obligated to zealously and competently represent Nonprofit's interests.

The fact that Ellen drafted the employment agreement is not necessarily unethical in and of itself. A lawyer is entitled to rely on their employees and independent contractors to perform services subject to their supervision. A lawyer can also allow a client (or in this case, the employee of a client) to prepare documents so long as the lawyer exercises diligent and competent review and independent legal judgment in rendering advice. Here, because Ellen was on the other side of the transaction, it was essentially her opening offer to Nonprofit.

Upon receiving the draft from Ellen, Linda was required to review the document carefully and to attempt to revise and negotiate the terms to benefit Nonprofit. Because it was drafted by a nonlawyer (presumably), Linda was also required to review the draft to ensure compliance with all applicable laws. (The most significant issue presented in these facts is the salary, based on

the source of the info, and that is discussed in part b.)

When Linda recognized that the terms were unusually favorable to Ellen, she should have pushed back on those provisions and attempted to at least get them to conform to what is standard in the typical employment agreement.

At the minimum, if Linda did not seek to negotiate or revise the draft herself, Linda was right to call for a board meeting because she is obligated to tell the board about the provisions that she has recognized as too favorable to Ellen. A lawyer has the duty to communicate with the client, and where, as here, the only employee is in an adverse position, the board represents the interests of the corporation.

As a lawyer, Linda is not obligated to make business decisions for her client. The decision about the terms and how much ultimately to pay to Ellen is one for the board, not Linda.

Linda is also required to inform that board that it cannot have a privileged conversation with her about the employment agreement if Ellen is present. Accordingly, Linda should probably recommend that the board chair retract his invitation to Ellen, or at the very least ensure at the outset of the meeting that they all understand that there will be no privilege between them.

2.b. The duty to communicate includes the duty of candor and honesty to the client. Here, Linda could not honor Ellen's request for confidentiality because Nonprofit is her client, not Ellen. Linda is obligated to ensure that Nonprofit has all material facts relevant to the contract when deciding whether to agree to Ellen's requested salary.

Even if this were a dual representation situation, where Linda represented both Ellen and Nonprofit, she would have a duty to disclose this fact to Nonprofit's board because the fact is material to the representation. It is one of the reasons why disclosures in such situations are so critical, because it puts the duty to protect confidentiality in tension with the duty to communicate, and in a joint representation, that means disclosing all facts material to the representation.

Linda should have told Ellen that she could not honor her request.

Linda would not have to tell the board that Ellen violated her duty of loyalty to Nonprofit, however, because the duty of loyalty is not implicated when negotiating employment agreements. That said, Linda should tell the Board that Ellen asked her to keep the information secret, as that is important for the board to know when making the decision about whether to expand Ellen's current untitled role.

Answer B

1. With whom did Linda establish an attorney-client relationship, and what ethical violations did Linda commit at the time the Attorney-client relationship was created

Attorney Client Relationship

Organizational Client

When a lawyer is hired to represent a corporation or organization, the lawyer's fiduciary duties are to the organization and not to the individual members, directors, or officers. A lawyer has a duty to act on the best interests of the organization and can, therefore, not engage in conduct which would benefit any individual or group of individuals at the expense of the organization.

Here, Linda was contacted by Ellen, who said that Nonprofit would like to hire her. Linda was further told that this was for the purpose of creating a formal employment agreement with Ellen, to make her the Executive Director of the Nonprofit. Therefore, Linda was hired by Nonprofit and as such, owed fiduciary duties to Nonprofit and not to Ellen.

Linda's Ethical Violations

Fee Agreement

Under ABA, a lawyer who agrees to represent a client must not put the agreement in writing, unless it is for contingency fees. However, California Rules of Professional Conduct, mandate that lawyers must put the agreement in writing if it is over $1000. However, when the client is an organization, or a repeat client (or if there is an emergency) a lawyer does not have to write up the agreement.

Here, since Linda is representing Nonprofit, which is an organization, Linda did not violate the ABA or CA rules by failing to put the retainer agreement in writing for the purpose of the fees.

Duty of Loyalty

A lawyer owes her client a duty of loyalty, which includes the duty to avoid a conflict of interest. A conflict can arise where the lawyer knows that her client's interest will be materially adverse to that of the lawyer's own interest, or another client. When such a conflict arises, a Lawyer might still be allowed to represent the clients so long as there is no claim by one client against the other, such representation is not prohibited by law, and the lawyer's lawyer gets the informed written consent of both clients. California also allows a lawyer who has a potential conflict of interest to continue to represent the clients so long as there is informed written consent.

Here, Linda is not officially representing Ellen. However, the fact that Ellen is the one who

reached out to Linda, and the fact that the representation was for the purposes of drafting up an employment agreement between Nonprofit and Ellen, suggests that Linda was at least informally also representing Ellen. This would create a concurrent conflict of interest. As such, Linda should have sought the informed written consent of the board of Nonprofit, before she agreed to represent t Nonprofit in the manner Ellen asked. There are no facts to suggest that Linda did this and therefore, she was likely in violation of her duty of loyalty to Nonprofit.

Duty of Diligence

Under both ABA and CA, a lawyer has to promptly, adequately and zealously represent her client.

Here, Linda failed to adequately represent her client, Nonprofit, when she failed to inform Nonprofit of the potential conflict of interest that could arise. Given the fact that Linda had experience in representing businesses, both nonprofit as well as for profit, further gives rise to the fact that she should have sought t the written consent of Nonprofit before agreeing to representing them in the matter regarding Ellen's employment agreement.

At this point, Linda should have informed both Ellen, as well as the Board of Nonprofit, that this might give rise to some conflict of interest issues as she was retained by Ellen, but to work on Nonprofit's behalf in forming a formal agreement with Ellen.

2.a. Linda's ethical obligations with regard to the Employment agreement

Duty to Report (loyalty)

When a lawyer represents an organization, and learns of conduct made by an individual in the corporation which materially harms the organization in terms of financial harm or even reputation harm, the lawyer has a duty to report up. Under ABA, the lawyer has to first report the individual's conduct up to a higher authority in the company, such as the board of directors. If the board does not do anything to remedy the harm, the lawyer has to report to a relevant authority outside of the corporation. CA rules differ slightly. Under CRPC a lawyer has the duty to first report up the chain to the board of directors ,for example. If the board fails to act, the lawyer may not report out but rather should seek withdrawal.

Here, the employment agreement which Ellen prepared would clearly cause financial harm to the nonprofit because it would pay Ellen based on the appropriate payment for a for-profit company. Linda's client, will therefore be forced to pay more than they should for Ellen's job. Linda should immediately report this to the board of directors. Although Linda did set a meeting with the board to discuss Ellen's financial compensation. she should refuse to allow Ellen to attend so that she could discuss the fact that the employment agreement contained a number of provisions that were more favorable to Ellen than those in typical employment agreements.

Duty to Communicate

Under both ABA and CA rules, a lawyer has a duty to communicate important material matters regarding the representation to her client.

Here, Linda has a duty to tell the board about the fact that Ellen drafted up the employment agreement herself. Furthermore Linda must tell the board that there are provisions in the agreements that are more favorable to Ellen than usual. These are all things that are material to Linda's representation because she is representing Nonprofit for the purpose of drafting up the employment agreement.

Linda's failure to promptly notify the board as to these matters will surely result in her committing an ethical violation.

Duty of Competence/ Diligence

(See rules above)

Under ABA, a lawyer must be competent, in terms of skill, knowledge and experience to represent her client. Under California rules, a lawyer may not intentionally, recklessly represent a client. California punishes repeated acts of incompetence in representing clients.

Here, although Linda seems to have plenty of experience representing businesses, she seems to have failed to.

(See rule above)

In addition to the rule above, a lawyer owes her client the absolute duty to act in the clients' best interest. A lawyer may not benefit herself or anyone else at the expense of her client

Here, Linda is allowing Ellen to draft up the agreement. She should not allow Ellen to do this as this would constitute a violation of her duty of competence and diligence because 3

2.b. Ellen's request for confidentiality regarding the source of thesurvey data

Duty to Report (loyalty)

When a lawyer represents an organization, and learns of conduct made by an individual in the corporation which materially harms the organization in terms of financial harm or even reputation harm, the lawyer has a duty to report up. Under ABA, the lawyer has to first report the individuals' conduct up to a higher authority in the company, such as the board of directors. If the board does not do anything to remedy the harm, the lawyer has to report to a relevant authority outside of the corporation. CA rules differ slightly. Under CRPC, a lawyer has the duty to first report up the chain, to the board of directors for example. If the board fails to act, the lawyer may not report out but rather should seek withdrawal.

Here, Linda should certainly not keep the source of the date confidential from her own client. As discussed above, she is representing the Nonprofit and, as such, owes it her duties of loyalty. Linda should immediately report the source of the data to the board. If, for some reason, the board decided not do anything with the information, then under ABA, Linda would have to report this to a relevant agency, such as the Secretary of the State in this case. Although the nonprofit might not have shareholders, it is a 501c3 corporation which is in essence not paying taxes precisely because of its nonprofit nature. Ellen, is seeking to have the nonprofit pay her the salary that she would have earned had it been a for profit. This would potentially be a violation of the nonprofit's tax obligations and could devastate the nonprofit if was caught doing it (not to mention the harm it causes on the taxpayers as a whole). Therefore, Under ABA authorities, Linda should have reported this first to the board, and if it failed to act,. to the Secretary of State. Under CA authorities, however, Linda would not be allowed to go the extra step of reporting outside of the organization if the board fails to act. She should then seek to withdraw from representing the nonprofit.

Duty to Communicate/Duty of Diligence

Under both ABA and CA rules, a lawyer has a duty to communicate important material matters regarding the representation to her client.

Here, again, Linda should communicate the source of Ellen's survey data to the board. Failing to do so will result in her being in violation of her duty to communicate as well as loyalty and diligence.

Q3 Contracts

Barn Exports hired Sam, an up-and-coming artist whose work was recently covered in Modern Buildings Magazine, to paint a one-of-a-kind artistic design along the border of the ceiling in its newly renovated lobby. After discussing the work, Ed, the president of Barn, and Sam signed a mutually drafted handwritten contract, which states in its entirety:

> Sam shall paint a unique design along the entire ceiling border of all public areas of the first-floor lobby. Barn shall pay $75,000 upon completion of the work.

When Sam began work, he was surprised that the new plaster ceiling in the lobby had not been sanded and sealed. Sam complained, but was told by Ed that preparation was part of his responsibilities. Although Sam disagreed, he spent four days sanding and sealing the ceiling. When Sam finished painting, he submitted a bill for $78,000, having added $3,000 for labor and supplies used in preparing the ceiling. In response, Barn sent a letter to Sam stating that, because he had not painted the borders in the two public restrooms in the lobby, no payment was yet due. Barn's letter also stated that it had recently spoken to several artists who perform similar work and learned that "surface preparation" was typically the responsibility of the artist.

According to Sam, before the contract was signed, he told Ed that the restrooms could not be included because his paints were not suitable for the high humidity in those locations.

Sam sued Barn for breach of contract in the amount of $78,000.

Barn countersued for specific performance to have the borders in the bathrooms painted.

1. Is Sam likely to prevail in his breach of contract lawsuit against Barn and if so, what damages will he likely recover? Discuss.

2. Is Barn likely to prevail in its lawsuit seeking specific performance against Sam? Discuss.

Answer A

I. Applicable Law

Contracts for the sale of tangible goods are governed by Article II of the Uniform Commercial Code. All other contracts, such as those for services or real property, are governed by the common law. Here, the contract between Barn and Sam (S) is to "paint a one-of-a-kind artistic design," Hence, this is a services contract. Accordingly, it will be governed by the common law.

II. Sam's Breach of Contract Claim

Valid Contract

In order to bring a successful breach of contract claim, there must first be a showing of a valid contract. To form a valid contract, there must be an offer, acceptance, and consideration. Additionally, there must be no grounds for a valid defense to formation.

(1) Mutual Assent

Parties to a contract must manifest mutual assent to be parties to the contract. This is typically shown through offer and acceptance. Here, there are no facts regarding a traditional offer and acceptance between Barn (through its president, Ed) and S. Instead, after discussing the terms, the parties entered into a "mutually drafted" handwritten contract that states "Sam shall paint a unique design along the entire ceiling border of all public areas of the first-floor lobby. Barn shall pay $75,000 upon completion of the work." This is likely enough to show mutual assent between the parties and, thus, this element is satisfied.

(2) Consideration

Consideration is necessary for there to be a valid contract. Typically, a showing of consideration is done by facts evidencing the parties have obtained a legal benefit or detriment through the contract. Some states, however, only look to legal detriment. In either regime, the consideration requirement is satisfied here: Barn's legal detriment is having to pay $75,000 when the work is completed; meanwhile, S's detriment is having to do the work.

(3) Mutual Mistake

A mutual mistake occurs when both parties have a belief not in accord with the facts as to a material fact underlying the contract which causes a material change in performance of the contract and for which neither party held the risk of mistake. Here, Barn may argue that S cannot recover because there was a mutual mistake as to what "all public areas" meant in their contract. Barn claims it includes the public restrooms, while S claims it does not. Because this outlines S's only obligations under the contract, this would have a material effect on performance. As such, under Barn's theory, no valid contract was formed.

This argument is likely to fail, however. There was no indication that parties had different understandings as to facts that exist out in the world. Instead, there is a dispute as to the obligations required under the contract. There is still a basis for a court to find the terms of the contract and can afford the parties the performance they anticipated under their original agreement.

Hence, because there is an agreement, consideration, and likely no valid defense to formation, S can show that a valid contract was formed.

Performance Due

Next, S will need to show establish the performance due under the contract so that a court may determine whether a breach has occurred. Barn's performance due under the contract is simple. It must pay S upon completion of the artwork. S's performance due, however, is less certain. There are two main disputes: whether S was obligated to perform surface preparation and whether S was obligated to paint the bathrooms.

(2) Surface Preparation

(A) Plain Meaning

Generally, when a court examines what is required under the contract, it looks to the plain meaning of the words therein. Traditionally, a court could not examine any extrinsic evidence to give meaning to those terms unless they were ambiguous. Here, the contract indicates simply that S "shall paint a unique design." On its' face there is nothing ambiguous about this statement. Barn will argue that the ambiguity arises when you consider that "several artists who perform similar work" stated that "'surface preparation' was typically the responsibility of the artist." The court will need to decide whether it really believes that the words as found in the contract are uncertain enough to consider this extrinsic evidence of trade usage. On balance, a court could find that the word "paint" could contain multiple obligations and so extrinsic evidence is required. Thus, a court could consider this trade usage in determining the scope of S's obligations. Because there is no evidence of course of performance or course of dealings between S and Barn, this would be the most dispositive evidence as to S's obligations.

(B) Modification

Under the common law, a good faith modification requires consideration to be valid. Here, Barn may argue that even if "paint" is not deemed to include surface preparation, the parties modified the contract after it was formed. Here, the modification would have placed an additional burden on S's performance and, thus, to be valid requires an additional burden on Barn. However, there is no indication that Barn took on that additional performance. Although S did submit a bill which included $3,000.00, Barn is claiming that it need only pay the originally agreed $75,000. Hence, there was likely no consideration for this modification to be valid.

On balance, however, because "paint" is likely to be found sufficiently ambiguous, S's

obligations included the surface preparation.

(3) The Bathrooms

(A) Parol Evidence

See above rule. Here, the parties argue that "all public areas of the first-floor lobby" include the two public restrooms. However, S states that "before the contract was signed, he told Ed that the restrooms could not be included because his paints were not suitable for the high humidity in those locations."

Under the parol evidence rule, when there is a written contract, the parties may generally not present evidence of prior or contemporaneous agreements made before the writing. If the writing is meant to be a the full and final expression of the parties' agreement, then no extrinsic evidence is permitted absent a finding that the term would have been "naturally omitted." The contract is said to be a complete integration. If, instead, the writing is simply part of the full agreement, then only extrinsic evidence that does not contradict the written terms may be admitted. Such a writing is said to be a partial integration.

Here, the parties' agreement is likely to be a partial integration. Firstly, there is no merger clause, which indicates that the agreement is the final and complete expression of the parties' contract. Although the existence or lack of a merger clause is not the sole factor in this analysis, it is a substantial one. Additionally, the brevity and lack of formality of the agreement (being handwritten) also support that this is merely a partial integration.

If the court finds a partial integration, then it must ask whether S's conversation with Ed before the contract was signed contradicts the written terms of the contract and should be excluded. Barn may argue that it does because the contract covers "all public areas" of the lobby, of which the bathrooms would be included. On the other hand, S will argue that the term does not contradict but merely delineates the meaning of "all public areas." S may also argue that "all public areas of the first-floor lobby" generally mean just the lobby area itself and not any rooms or hallways attached to it. Weighing the two, a court is likely to side with S and find that the term does not conflict with the contract.

Accordingly, S's performance likely did not include the bathrooms.

Breach

When a party fails to perform as contemplated by the contract there has been a breach. However, a breach does not necessarily excuse the other party's obligation to perform. When there has been substantial performance, i.e., the nonbreaching party has received the substantial benefit of its bargain, the nonbreaching party must still perform its obligations under the contract. Only when there has not been substantial performance, will the obligations of the nonbreaching party be suspended.

(1) S's Obligations

As noted above, S's obligations likely included the surface preparation but not the bathrooms. Because of this he has not breached his duties under the contract. However, even if he was required to paint the bathrooms, he has likely substantially performed. According to Barn's letter, S has painted everything in the lobby except "two public restrooms." This is likely to be a very small part of the overall size of the lobby and so Barn is likely to have received the substantial benefit of the bargain. Thus, under either interpretation, S has substantially performed.

(2) Barn's Obligations

Based on the constructive condition of exchange, once one party's obligations under a contract become due or are excused, the other party's obligations also become due (or must be excused). Here, because S likely completed his obligations under the contract, Barn's obligation to pay was incurred. Because he refused to do so, he breached the contract.

Damages

(1) Expectation Damages

Expectation damages are the default damages in contract. They are meant to place the nonbreaching party in the same position it would be in had the breaching party performed. Here, if Barn had performed under the contract, it would have owed S $75,000.00. S's injury here—the lack of payment—is caused solely due to Barn's breach. Thus, S is entitled to $75,000 in expectation damages under the contract.

(2) Consequential Damages

Consequential damages are those that arise as a result of the breach that are foreseeable to the parties (either expressly or when the parties contemplated the contract), caused by the breach, and reasonably certain. Here, S is not claiming anything that could be considered consequential damages; so he will not recover for these.

(3) Incidental Damages

Incidental damages are those damages that flow from the breach. This includes damagesfor expenses incurred to inspect goods, ship back nonconforming goods, or to warehouse nonconforming goods. Here, S is not claiming anything that could be considered incidental damages, so he will not recover those.

(4) Restitution

If the court finds that the surface preparation was not originally part of the contract, then S may be able to recover damages related to that under a unjust enrichment theory. Restitution is available when a plaintiff confers a benefit to the defendant, without gratuitous intent, and it would be unjust to allow the defendant to keep that benefit without compensation. Here, if S

did not have to prepare the surface of the lobby under the contract, then Barn benefited in not having to find another worker to do that for it. There is no indication that S intended to do this gratuitously, particularly because S charged Barn $3,000 for the labor and supplies used.

Restitution can be calculated either by the value of the benefit conferred on the defendant or the cost to the plaintiff in conferring that benefit. Here, there are no facts as to how much it would have cost Barn to hire someone else to do the surface preparation. Yet, we do know that Sam submitted a bill of $3,000 for labor and supply. Assuming this is a reasonable estimate of the labor involved with the surface preparation, S will likely be able to recover this amount.

(5) Duty to Mitigate

When a plaintiff suffers a breach, they have a duty to mitigate their damages. Here, there was no indication that S could mitigate his damages so this does not apply.

(6) Saved Costs

If the court does find that the bathrooms were part of the deal, then the court should offset S's damages award for any costs he saved by not painting the bathrooms as well.

(7) Conclusion

In total, S will likely be entitled to $75,000 in compensatory damages under the contract. If the court finds that he did not need to do the surface preparation, then he will also be entitled to $3,000 for restitution. Finally, S's compensatory damages should be reduced by any costs saved in not painting the bathrooms if the court finds that he was obligated to do so.

II. Barn's Claim for Specific Performance

To obtain specific performance, a claimant must show (1) a valid contract, (2) the contracts terms are certain, (3) there are no conditions precedent, (4) inadequacy of the legal remedy, (5) practicality of legal enforcement, and (6) the lack of equitable defenses.

Valid Contract

As analyzed above, there is likely a valid contract between S and Barn. Thus this element is satisfied.

Certainty of Terms

Although there is some ambiguity as to what "paint" and "all public areas" mean in the contract, the ambiguities are not so great as to make it impossible for the court to discover what performance was due under the contract, as analyzed above. Hence, this element is likely satisfied as well.

Condition Precedent

Here, Barn will need to show that it is willing and ready to pay the $75,000 required under the contract for S's performance. There is no indication in the facts that it is not able to do so; thus there are likely no outstanding conditions for performance.

Inadequacy of Legal Remedy

Specific performance is typically a rare remedy in contract. For most contracts, damages will be sufficient. S may argue that there is no inadequacy of legal remedy because Barn could simply obtain damages for the left over performance and hire another artists to do it. Barn will counter that it hired S because he is "an up-and coming artist" and he was hired to paint a "one-of-a-kind artistic design." These factors weigh in favor of Barn's argument.

That being said, Barn will still likely fail in its quest for specific performance because courts are loathe to award such relief in services contracts. Such a remedy would likely amount to indentured servitude in violation of the Thirteenth Amendment. Thus, even though S is an up and coming artist, Barn will likely be unable to require him to perform.

Practicality of Enforcement

Generally, practicality of enforcement in services contracts is another issue. The court does not want to be in charge of determining if performance is adequate. In this case, however, that is not likely to be an issue because the court can just match the work done on the lobby to that done in the bathrooms. Thus, this element will likely be met.

Defenses

(1) Laches

Laches occurs when the defendant unreasonably delays bringing suit and that delay prejudices the plaintiff. Here, there is no indication that Barn delayed in its request. It filed the countersuit as soon as S sued it for nonperformance, so this will not apply.

(2) Unclean Hands

Unclean hands occurs when the plaintiff has engaged in immoral or otherwise inappropriate behavior in relation to the contract. That again is not present here. S may argue that Barn's failure to perform constitutes "unclean hands" but generally more is required, such as intentionally making performance more difficult. Thus, that is not an element here.

Conclusion

Although most elements are found, because this is a service contract, Barn will not be successful in its countersuit.

Answer B

Governing Law

Common law generally governs contacts. The Uniform Commercial Code (UCC) however, governs contracts for the sale of goods, and has special rules for merchants. Goods are movable, tangible objects and merchants are those who deal regularly in the goods of the kind or hold themselves out as having special knowledge or skill regarding the goods.

Here, the contract (K) is a service K that requires Sam, an artist, to paint designs on Barn Exports' ceilings. As a service K, common law will govern.

Sam v Barn Exports

Formation

A K is a legally enforceable agreement between two or more parties. There must be a valid showing of offer, acceptance, and consideration for a K to be valid. Here, the facts state they entered into a mutually drafted handwritten K. The issue revolves not around whether a K was formed, but rather its exact terms and the respective parties' performance.

Breach of Contract

A breach of contract occurs when one fails to perform their obligation under the K. A breach can be material or minor. A minor breach is one where a party has substantially performed and the nonbreaching party gained a substantial benefit of the bargain, but the breaching party did not fully perform every obligation under the K. A minor breach does not dismiss the nonbreaching party from performing, but the nonbreaching party may recover damages caused by the minor breach, including cost to finish the performance. A material breach occurs where a party to a K does not substantially perform, and the nonbreaching party does not substantially gain the benefit of the bargain. A material breach dismisses the nonbreaching party from performing and the nonbreaching party can sue for damages, and specific performance in some instances.

Here, according to the written K, Sam was supposed to paint a unique design along the entire ceiling border of all public areas of the first-floor lobby. Barn shall pay $75k upon completion of the work. Sam finished the work, but Barn refused to pay, claiming Sam did not paint the border in two public restrooms in the lobby, so payment was not due. Barn's payment of $75k was conditional on Sam performing his end of the K, and whether Barn is excused from performing depends on whether Sam's alleged breach was a breach, and if so, if it was material or minor. Whether Sam breached the K depends on if the bathrooms were part of the K or not.

Parol Evidence

The parol evidence rule makes evidence of oral or written communications between K parties, made prior or contemporaneous to the written K, inadmissible if they contradict the K and the K was meant to be a complete integration of the K. Typically, to show a complete integration, the parties to the K will include a merger clause or specifically state in the K that the K is meant to encompass the entirety of their agreement.

Exceptions to the Parol Evidence rule include prior or contemporaneous statements that clarify terms of the K or show that conditions precedent exist. Statements made after the written K are also admissible.

Here, the written K does not include any mention of Sam painting the public restrooms in the lobby. Rather, it states that he will paint a unique design along the entire ceiling of all public areas of the first-floor lobby. Sam tries to introduce evidence that, before the K was signed, he told Ed the president of Barn, that the restrooms could not be included because his paints were not suitable for the high humidity in those locations. Because evidence of that conversation between Sam and Ed is offered to clarify or explain what is meant by "all public areas of the first-floor lobby" it may be admissible despite parol evidence.

Vague/Ambiguous Terms

Courts typically construe terms in the K in their plain and simple meaning. When there are multiple ways to construe a certain term, then the courts will look first to the prior history between the contracting parties, if any, to define how they treated the meaning of those vague and ambiguous terms in the past. If there is no contractual history between them, the courts will look to custom and usage in the industry to determine what was meant by the terms in questions.

Here, there are two parts of the agreement that are in dispute between the parties—whether or not the restrooms were included in the "all public areas of the first-floor lobby" and whether or not surface preparation is the responsibility of the artist or an extra that increases the Kprice.

Meaning of "all public areas of the first-floor lobby"

As mentioned above, Barn claims that the two public restrooms on the first floor were part of the public areas of the first-floor lobby, and Sam's failure to paint them constituted a breach of K. Strictly construed, there is some ambiguity or question regarding whether all public areas of the first floor lobby include bathrooms. Are bathrooms part of the lobby? Sam will argue they are not, and further, the conversation between he and Ed evidenced that the bathrooms were not intended to be part of the K. There is no prior history between Sam and Barn, so the courts cannot look to how they construed the meaning in the past. If Barn can introduce evidence showing that it is custom in the industry for all public areas of the lobby to include bathrooms connected to the lobby, he has a good argument that the bathrooms were part of the painting agreement.

Who has the responsibility of surface preparation?

Another issue with the terms/nonexistence of terms of the K include whether the added cost of surface preparation—$3k—was part of the contract or an unforeseen extra that Sam should be reimbursed for. In Barn's letter to Sam after they refused to pay on the K, they claimed that they had recently spoken to several artists who perform similar work and learned that surface preparation was typically the responsibility of the artist. As discussed above, there is no history between Sam and Barn to reference to see how they handled surface preparation in the past—this is the first time Sam has worked for Barn. As such, evidence of how the situation is traditionally and customarily handled in the industry will probably govern. The courts will look to the validity of Barn's claim that other artists shoulder the responsibility of surface preparation, and unless Sam has evidence to the contrary, he will likely not be reimbursed for the $3k he spent preparing the surface. It will come from the money he makes on the K.

Substantial Performance/Minor Breach

As discussed above, a minor breach does not excuse the nonbreaching party from performance. If Sam fails in his assertion that the bathrooms were not part of the K, and the court determines they were, then his breach is likely a minor one. He completed painting the rest of the ceiling of the lobby, conferring a substantial benefit of the bargain on Barn. The two bathrooms are likely small in comparison to the rest of the lobby that was painted, and not everyone who enters the building is guaranteed to go into the bathrooms. Everyone who enters will, however, enter the lobby and see the one-of-a-kind artistic design along the border of the ceiling of the newly renovated lobby. Sam has a good argument that failure to paint the bathrooms is minor compared to the work done in the lobby and Barn is not excused from performance—they owe him for the work he did in the lobby.

Barn's Breach

A party must perform their obligations under a K, and failure to do so is a breach. Here, as discussed above, the bathrooms likely were not part of the K, which would render Sam's performance complete. As such, Barn breaches by failing to pay the $75k K price.

If however, the restrooms were included, Sam breached by not painting them, but his breach was minor and Barn is not excused from performance. Barn will still be required to pay for the work done, minus the cost of having the bathroom painting completed by someone else.

Sam's Expectation Damages

Expectation damages are money damages awarded to the nonbreaching party that would put the nonbreaching party in the position they expected to be in had the breach. Here, if the bathrooms are not part of the agreement, then Sam is entitled to the full $75k from Barn. He will likely not get an additional $3k he spent on surface prep because evidence shows custom in the industry is for the artists to shoulder responsibility for surface prep.

Conclusion

Sam should be allowed to introduce evidence of his conversation with Ed prior to the K, where he told Ed the bathrooms were not part of the K. As such, his painting of the lobby is full performance and he is entitled to $75k, the K price, from Barn. He will likely not get an additional $3k.

If the courts conclude the bathrooms were part of the agreements, Barn still received the substantial benefit of the bargain and, to avoid unjust enrichment, the court should award Sam the fair market value of the work rendered.

Barn v Sam

Specific Performance

Specific Performance is an equitable remedy available to a nonbreaching party that would order the breaching party to perform on the K. Specific performance is only appropriate where there is an inadequacy of legal remedies, the nonbreaching party complied with any conditions to performance they were required to and were ready to perform, and enforcement of specific performance is feasible. Specific performance is only available on contracts for the sale of land, or for the sale of goods that are rare or unique. Specific performance is never an available remedy on a services contract.

Here, we have a services contract, so specific performance is not a remedy available to Barn. The courts will not force Sam to finish painting, even though his skills may be rare or unique. Barn will argue that he cannot find another up-and-coming artist whose work was recently covered in Modern Buildings Magazine to paint a one-of-a-kind artistic design along the border of the ceiling in the bathrooms in the lobby, but Barn's argument will be in vain. Again, courts will not specifically enforce a services K, nor should Barn want a begrudging Sam to complete the work, as there is a high likelihood he would not do his best work if forced to work against his will.

Q4 Evidence

Des is on trial in a California superior court for possession with intent to distribute hundreds of pounds of cocaine from January through October in 2019.

At trial the prosecution called Carol, a severed co-defendant, who had pleaded guilty to reduced charges in exchange for testifying against Des. Carol testified that through 2019, she had acted as a "distributor" for a ring of cocaine dealers. In that role, Carol had sold hundreds of pounds of cocaine to many people, including Des, during the period of the charged crime. Carol further testified that all her customers agreed to sell cocaine. The prosecutor asked Carol to identify a notebook, which Carol testified was hers, and which she used to keep track of income and expenses related to the cocaine sales as each occurred. Carol testified that on pages 1–2 of the notebook were notations of sales of cocaine from January through April of 2019 by Carol to various people other than Des. She further testified that on pages 3–4 were notations of sales from May through October in 2019 to various people, including Des. The court admitted pages 1–4 into evidence.

On cross-examination, Des's attorney asked Carol if the prosecutor, Pete, had offered her a reduced sentence in exchange for her testimony. Carol answered, "No." Des's attorney then called Carol's attorney, Abe, to the stand and asked him the same question. Pete asserted attorney-client privilege. The court denied the assertion of privilege, and Abe testified that the reduction of charges against Carol had been in exchange for Carol agreeing to testify against Des.

Des took the stand and denied the charge. On cross-examination, Pete asked Des if it was true that eleven years earlier he had been convicted of forgery, a felony. Des answered, "Yes."

1. Assuming all credible objections were timely made, did the court properly admit:

    a. Pages 1–4 of the notes? Discuss.

    b. Evidence of Des's conviction for forgery? Discuss.

2. Did the court properly deny the assertion of attorney-client privilege? Discuss.

Answer according to California law.

Answer A

To be admissible, all evidence must first be relevant. Evidence is relevant if it has any tendency to make a fact of consequence, which is in dispute, more or less likely.

Furthermore, the court has discretion to exclude evidence under CEC 352 if the unfair prejudice, confusion, or waste of time it would create, substantially outweighs its probative value.

In California, Prop 8 amended the California Constitution and makes all relevant evidence admissible in criminal cases. Prop 8 did not change, however, the rules of evidence relating to: (1) the U.S. Constitution; (2) hearsay; (3) character evidence; (4) the secondary evidence rule; and (5) CEC 352.

(1(a))

Relevance

The threshold question is whether this evidence is relevant. These pages are relevant because they show that Carol has knowledge of the ring of cocaine dealers, Des was involved in this ring and purchased cocaine from her. It also shows that Carol's oral testimony is more likely to be true, because it supports it.

Authentication

Nontestimonial evidence must be authenticated. Authentication requires the evidence's proponent to adduce sufficient evidence for the trier of fact to conclude that the nontestimonial evidence is what it purports to be.

These pages are nontestimonial evidence and thus, for them to be admitted, they have to be authenticated.

Here, Carol testified that the notebook the prosecutor showed her was her notebook and that it was the notebook she used to keep track of her cocaine business. This is sufficient evidence for the trier of fact to conclude that this notebook is, in fact, Carol's record of her cocaine sales and, thus, it has been properly authenticated.

Hearsay

Hearsay is an out-of-court statement offered for the truth of the matter asserted. Hearsay is inadmissible unless a hearsay exception applies. It does not matter whether a person is currently testifying at trial; what matters is whether the statement was made in or out of court. Thus if a witness seeks to testify about something she said earlier, out-of-court, for the purposes of proving the truth of that statement, it is hearsay.

Here, Carol's notations of sales in pp 1—4 of the notebook are hearsay. They are out-of-court statements: Carol wrote them in the book out-of-court and now the prosecutor is seeking to introduce them in-court. Moreover, the prosecution is introducing them to show that Carol sold the amount of cocaine to the people as she described in the notations. Thus, they are being offered for the truth of the matter asserted.

These statements, therefore, must fall within a hearsay exception to be admissible.

Statement of a Co-Conspirator

Des is accused of possessing cocaine with the intent to distribute from January through October 2019. In pp 1—2 of Carol's notebook, she notes sales to people other than Des from January through April 2019. In pp 3—4 of the other notebook, she makes notes of sales from May to October 2019, including to Des.

Statements made by a co-conspirator in furtherance of the conspiracy, offered against the opposing party, are exceptions to hearsay. The proponent of the hearsay must show by a preponderance of the evidence that there was a conspiracy between the hearsay declarant and the opposing party and that the statements offered were made in furtherance of that conspiracy. The hearsay itself can be used to show the conspiracy. (A conspiracy is an agreement between at least two people to commit a crime and at least one overt act in furtherance of that intent.)

Here, the notations in Carol's notebook are in furtherance of the conspiracy between her and the ring of cocaine dealers, including Des, to distribute drugs. She did not make these statements when she was cooperating with the police, but rather beforehand when she was working to further the conspiracy's goal of cocaine distribution.

The prosecution will be able to show sufficient evidence to establish that between May and October 2019, Des and Carol were co-conspirators. Carol's testimony about the ring of cocaine dealers, Des's involvement in the scheme, and everyone's agreement to sell cocaine, as well as the notes on pp 3—4 show that the two of them were part of a conspiracy to distribute cocaine. Thus, the notes on pp 3—4 fall within this co-conspirator exception to hearsay.

It is a closer call whether the notes on pp 1—2, which cover the time period from January to April 2019, fall within this exception. They do not mention Des and so cannot be used to showa conspiracy standing alone. However, Carol testified that she sold cocaine to many people including Des "during the period of the charged crime," i.e. starting in January 2019. This testimony may suffice to show a conspiracy existed between Des and Carol beginning in January, 2019. On the other hand, Des can argue that the fact Carol did not record any sale of drugs to him until May shows that they were not co-conspirators until that time (if at all), and thus this is a not a statement made by a co-conspirator falling within an exception to hearsay. Absent other evidence showing that Des entered into a conspiracy with Carol prior to April 2019, or Carol's explicit testimony about when she sold cocaine to Des or when he agreed to sell cocaine, the statements in pp 1—2 were not made in furtherance of the conspiracy between Carol and Des and therefore are inadmissible hearsay.

Business Records

These notes may also fall within another hearsay exception: business records.

Business records are excepted from the prohibition against hearsay. A business record is: (1) a record of facts, events, and/or activities of the business; (2) regularly recorded as part of the business's ordinary course; (3) by an employee with personal knowledge, or by an employee who learned of the information by an employee who had a duty to report this information; (4) is certified the business; and (5) there are no indications of untrustworthiness.

Arguably, Carol recorded the notations in her notebook as part of her business: selling cocaine. She did so based on personal knowledge and as a regular part of her business activities.

This exception will probably not work, however, because there is no indication the notebook was certified as accurate and there are indications of untrustworthiness: it is a record of an illegal enterprise and thus there is a strong incentive not to accurately record everything incriminating.

***

In sum, pp 3—4 are not hearsay because they fall within an exception but pp 1—2 most likely are inadmissible hearsay not falling within an exception.

CEC 352

Finally, the court must decide if the unfair prejudice, confusion, or waste of time caused by this evidence substantially outweighs its probative value.

With respect to pp 3—4, this evidence is highly probative of Des's involvement in this ring of cocaine dealers and therefore intent to distribute, and thus the prejudice arising out of it is not even unfairly prejudicial, let alone substantially outweighed by unfair prejudice. All evidence is prejudicial to some degree, but just because evidence shows that a defendant is more likely to have committed the charged crime does not make it *unfairly* prejudicial.

If pp 1—2 do fall within the co-conspirator exception, they should probably have been excluded as unfairly prejudicial. They are about sales to people other than Des and thus they may cause the jury to believe unfairly that this evidence shows that Des distributed more cocaine that he bought from Carol than he actually did. Furthermore, it may cause confusion about the conduct of these other dealers, who are not even defendants in this case, and Des's case.

Thus, the court correctly admitted pp 3—4 of the notes, but erred in admitting pp 1—2.

(1(b))

Relevance

Des's conviction was for forgery. Forgery is a crime of moral turpitude because it is a crime reflecting on the dishonesty of the defendant. Here, Des is being charged with intent to distribute cocaine. He has also testified in his own defense.

Thus, this evidence is relevant for two purposes. First, it shows that he is a convicted criminal and it thus has a tendency to show that he may have been more likely to have convicted another crime. Second, this evidence is relevant because it tends to show that Des is untruthful and, because he is testifying, his truthfulness is relevant.

This first potential relevance is impermissible, as discussed below. But the threshold question of whether this evidence is relevant is satisfied.

Character Evidence

Character evidence is evidence of a person's character that is being used to show that the defendant acted in conformity with this character in the present case. If the conviction forgery is admitted for the purposes of showing that Des committed this crime because he acted in conformity with his "criminal tendencies," then it is character evidence.

In a criminal case, a prosecutor generally cannot introduce evidence of a defendant's character unless the defendant opens the door. California recognizes several exceptions: (1) in a sexual assault/child molestation case; (2) in a domestic violence case; (3) in an elder abuse case; and (4) where the defendant has put on evidence of the victim's violent character, the prosecution can put on evidence of the defendant's violent character.

Here, Des has not opened the door to character evidence because he has not testified that he has any particular character trait, let alone one for being law-abiding. Furthermore, none of the exceptions apply.

Thus, this evidence is not admissible for the purposes of showing that, because Des was previously convicted of forgery, it is more likely he committed this crime.

Impeachment Evidence

The second purpose for which this evidence may be admitted, however, is to show that Des is a liar.

If someone testifies, then the opposing party can impeach the witness's testimony and show there is a reason for the jury not to trust his testimony.

Impeachment by conviction is permissible under certain circumstances. First, a party may introduce evidence of a prior felony conviction for a crime of moral turpitude. Additionally,

under Prop 8, the prosecutor may also introduce evidence of a prior misdemeanor conviction for a crime of moral turpitude in a criminal case. Unlike under the Federal Rules of Evidence, California does not impose a specific time limit for determining remoteness.

Here, Des testified and thus exposed himself to impeachment. The prosecutor then was able to introduce evidence of Des's prior felony conviction for forgery, which is a crime of moral turpitude, by asking Des whether he had committed the crime. (The prosecutor could have introduced extrinsic evidence instead of asking Des, but did not have to). This was proper impeachment evidence.

In addition, this was also proper impeachment via evidence of a prior bad act. In a criminal case, a prosecutor can ask a defendant if he previously committed a prior bad act in the past, that reflected the defendant's moral turpitude, if the prosecutor has a good faith basis for doing so. Prop 8 also allows the prosecutor to admit extrinsic evidence of this prior bad act. Here, Des's conviction for forgery is evidence of his prior bad act that reflects his moral turpitude, and thus was improper impeachment evidence under this rule as well.

CEC 352

Thus, this evidence was admissible to impeach Des and show that he was not a credible witness. The final gatekeeping question for the court was whether the unfair prejudice of this evidence substantially outweighed its probative value.

The age of the conviction—eleven years—weighs against admission because it is remote. However, it is quite probative of Des's credibility and he is denying the charge on the stand.

Thus, on balance, the unfair prejudice does not substantially outweigh its probative value and the court properly admitted the evidence.

(2)

Attorney-client privilege protects confidential discussions between a client and her attorney for the purposes of providing the client legal advice. If the privilege applies, absent waiver by the client, the attorney cannot reveal communications protected by this privilege. There are some exceptions to the privilege: (1) the client was using the attorney's services as part of criminal or fraudulent activity; (2) the client was in a joint representation with another client and the two clients are now suing each other over the subject matter of the joint representation; (3) the client and attorney are involved in a malpractice suit against one another about the representation; and (4) the attorney reasonably believes that the client is going to commit a criminal act resulting in death or serious bodily injury and the attorney could not talk the client out of it and told the client that she would reveal this privileged communication.

Here, Des's attorney asked Carol if the prosecutor had offered her a reduced sentence in exchange for her testimony. Carol said no (which was a lie).

Abe, Carol's attorney, was required to testify about the reduction of charges and the court

denied his assertion of attorney-client privilege. This reduction was offered by Pete the prosecutor. Pete's offer to reduce the proposed sentence in exchange for her testimony and Carol's acceptance of the deal would not be covered by the attorney-client privilege.

First, Pete is not Abe's client or an agent of Carol, so his statement does not fall within the privilege. Second, Carol's response was presumably communicated to Pete because the deal was reached. Thus her acceptance was not confidential or for seeking the provision of legal services. Thus, her acceptance of Pete's offer is not protected by the privilege either. In sum, the attorney-client privilege does not protect the fact that Carol and Pete entered into an agreement.

Carol's discussions with Abe in confidence about whether to accept this deal would fall within this privilege, but Abe was not required to testify about this. The question was whether Pete had offered Carol a reduced sentence and not about Carol and Abe's confidential discussions.

Thus, the court did not err in denying the assertion of attorney-client privilege.

Answer B

1. Admission of Evidence

Relevance. As a starting point, all relevant evidence is admissible in a criminal trial, subject to certain exclusions and privileges. Relevant evidence is that which has a tendency to make any fact at issue in the case more or less likely to be true.

Authentication. For documentary evidence, in order to be admissible the party offering the evidence must make a showing that the document is authentic—that it is in fact what it purports to be.

Here, Carol's notes were properly authenticated by the prosecutor before they were offered into evidence. It appears the prosecutor showed Carol the notebook and inquired whether she recognized it; Carol testified that she did, and that it was her own notebook, thus establishing Carol's basis of knowledge for authenticating the notebook.

Prop 8. In criminal trials in California state court, the law known as Prop 8 acts as a victim's bill of rights, and provides that all relevant evidence shall be admitted, subject to certain restrictions and exclusions, including hearsay rules, constitutional principles, evidentiary exclusions in place before 1982, and any exclusions adopted after 1982 that were ratified by a 2/3 vote of the legislature. Absent an applicable exclusion under Prop 8, evidence that is relevant will be admitted.

a. Pages 1—4 of Carol's Notes

Relevance. Pages 1—2 of Carol's notes are arguably not relevant to Des, because, as we are told, they reflect records of cocaine sales by Carol to various people other than Des. The sales do fit the time period with which Des is charged, however, including January through April of 2019. And the standard of relevance is fairly low. Does the fact that Carol sold drugs to many other people in a pattern that likely fits the later period, in which her records do reflect sales to Des, make any aspect of her narrative more probable? A jury could logically infer that laying a foundation of Carol's earlier sales makes it more likely that the pattern continued into the period in which she has records that include Des. By the same token, Des could well argue that because Carol's notes do not reflect any sales to him during this period, that there were none. (This strategy likely wouldn't do much good for Des, as it would tacitly acknowledge the potential credibility of the later sales records.) On balance, these records likely have some minimal relevance, although their probative value is not particularly strong, and will be subject to balancing under Section 352, as discussed below.

Pages 3—4 of the notebook are more clearly relevant to Des's alleged criminal conduct. They purport to reflect cocaine sales by Carol to him within the charged timeframe, and the sales from Carol to Des would show his possession of the cocaine. Carol's testimony further provided that those to whom she sold possessed the cocaine with intent to sell it themselves. Thus,

pages 3—4 of the records would be highly relevant evidence, and would be important to corroborate the testimony of the cooperating witness, Carol.

Hearsay. The notebook, however, remains subject to a hearsay objection. Hearsay is an out of court statement offered to prove the truth of the matter asserted. Here, the statements made in the notebook by the declarant, Carol, are offered as proof of what they purport to show—that Carol made cocaine sales in certain amounts and on certain dates to the defendant, Des. Thus, the statements are hearsay, and unless an exception applies, they will be excluded. As noted, the hearsay rules are an exception to Prop 8 and still apply.

Two primary hearsay exceptions are potentially applicable here. First, the statements may be deemed statements of a co-conspirator made during and in furtherance of a conspiracy. It bears mention that Des is not charged with the crime of conspiracy. That is no impediment to use of the evidentiary hearsay exception, however, so long as an adequate factual predicate for the exception is supplied. Here, Carol's testimony appears to have done so. She does not explicitly testify to an express agreement between the various retail drug dealers to whom she sold cocaine as a wholesaler. Therefore one could argue that no such agreement existed. More likely, however, a court could logically infer an implied conspiracy among the entire group, in which Carol acts as the hub of the conspiracy and the various retail dealers are the spokes. Courts have long acknowledged this type of hub and spoke conspiracy can exist, even when the individual spokes do not know each other directly and have their explicit understanding individually with the central hub, here Carol.

Were the statements during and in furtherance of the conspiracy? It appears that they were. Carol made the records to aid her in operating and keeping track of the business, and for the efficiency and effectiveness of the overall operation. Therefore they were likely "in furtherance" of the conspiracy's aims. And they reflect the time period for which Des is charged, and appear to have been contemporaneously made at the time of the events. For these reasons, if relevant, the pages are likely admissible as co-conspirator statements. As noted, the claim of relevance is stronger for pages 3—4, although the low standard of relevance may be met for pages 1—2 as well.

The pages could also potentially be admitted as records of regularly conducted business activity. This exception applies when records are made in the ordinary course of business, by one with personal knowledge, at our about the time of the recorded activity, and maintained by the business for a business purpose. Here, although Carol's business is unlawful, the requirements appear to be met here for the drug ledger, and therefore the records could properly be admitted as business records.

The records are likely not subject to exclusion under the Confrontation Clause of the Sixth Amendment. The records are not testimonial—they were not offered to law enforcement to assist them or in their effort to solve the crime—and hence they are not subject to exclusion and do not violate Des's right to confrontation.

The evidence is still subject to the overall balancing test that evidence can be excluded when the danger for unfair prejudice substantially outweighs its probative value. Here, the relevance

of pages 1—2 is slight, and potentially it's prejudicial to Des in that it paints Des as being part of a large drug organization. But not unfairly so. On balance, the evidence is likely still admissible as more probative than prejudicial.

Because the evidence is admissible, Prop 8 would not need to be reviewed here.

b. Des's Prior Forgery Conviction

Under the CEC, Des's prior conviction for forgery was likely properly admitted. Forgery is likely considered a crime of dishonesty or moral turpitude. Des has placed his credibility at issue by testifying in the case, and therefore his credibility is something jury will need to assess. Admission of a prior conviction in this way, when the prior conviction is for a crime of moral turpitude in California, will likely be admitted, subject to balancing its probative value against its danger of unfair prejudice.

Under the FRE, a question would arise as to whether the conviction is too old to be admitted, given that it is more than ten years old. The time period would run from Des's release from any prison term he served. However, there is no similar time limitation under the CEC. The purpose of the federal rule, however, does point to a potential issue that the probative value of a prior conviction is slight after so much time has passed. Thus, a court could potentially decide to exclude the prior conviction if it found that the danger that the jury would give undue weight to the prior conviction—in effect, branding Des as a convicted criminal and not paying careful enough attention to the more direct evidence at hand. Indeed, the evidence is relevant for the limited purpose of Des's truthfulness, and not his propensity to engage in criminal conduct generally. The danger of the propensity inference would provide a sound basis for excluding the conviction here. Any such ruling, however, would likely be reviewed for abuse of discretion, and this is a close enough call that the judge likely did not abuse her discretion in admitting the evidence.

The balancing test discussed above is one of the recognized exceptions to Prop 8, so that would not become an issue in this circumstance either.

2. Attorney-Client Privilege

The attorney-client privilege is owned by the client, and protects from disclosure confidential communications between an attorney and a client made for the purpose of seeking or providing legal advice, and that are kept confidential (i.e., not disclosed to third parties).

Here, although Abe and his client Carol have likely had many privileged conversations, the communications between Carol and the prosecutor, or between Carol, Abe and the prosecutor, are not privileged, because the presence of the third party (the prosecutor) destroys the confidential nature of the communications.

Here, even if the conversation were privileged, the "crime/fraud" exception" may well apply. It appears that Carol has given testimony that is false, and that the attorney would know is false, by stating that the prosecutor did not offer her a reduced sentence in exchange for testifying

against Des. It is possible, however, that as a result of privileged conversations with Carol, the attorney believes that Carol misunderstood this state of affairs, but under all the circumstances here that seems unlikely.

The duty of attorney-client confidentiality duty is broader than the attorney-client privilege. It is possible that if Abe had raised his professional duty of confidentiality to his client as an objection, and refused to testify on that basis, that the court would have viewed the matter differently. In California, Abe would not have been permitted to reveal client confidences unless the matter presented an imminent danger of serious bodily harm or death, circumstances not present here. But again, the conversations with the prosecutor are not privileged, and for the same reason not confidential—they took place with a third party present, and therefore it was likely Abe's obligation to testify truthfully to them after he had made the best valid objections he could. It does still raise the advocate-witness problem—by putting Abe in the position of being a witness and a lawyer in the same case—and unfortunately puts Abe in the difficult position of having to truthfully answer a question that will potentially be damaging to his client. For all these reasons, Abe should seek to withdraw from the representation, although he should do so in the way that is likely to be the least damaging to Carol'sinterests.

Q5 Business Associations

Andrew, Bob, and Christine are attorneys who formed a law firm. They filed no documents with the Secretary of State or any other state office. They equally share the firm's profits after paying all expenses and make all business and management decisions. Associate attorneys are paid a fixed salary, plus 25% of gross billings for any clients they bring to the firm. Senior attorneys are paid based upon the number of hours they bill plus an annual bonus if they bill more than 2,000 hours in a year. The senior attorney bonus pool is equal to 5% of firm profits, which is split equally by the number of qualifying senior attorneys each year. Andrew, Bob, and Christine agreed to bestow the title "nonequity partner" on senior attorneys even though senior attorneys have no management authority. The firm website and business cards for senior attorneys list their title as "partner."

Martha, a senior attorney, met Nancy at a social function. Nancy told Martha about her business's legal problems. Martha gave Nancy her business card. After looking at the card, Nancy asked Martha if as a "partner" she can agree to the firm handling her legal problems at a reduced hourly rate in return for a promise of future business. Martha was aware that the firm has a strict policy of not reducing hourly rates, but signed a written agreement for it to handle Nancy's legal matters at a reduced hourly rate.

1. What type of business entity is the firm using to conduct business? Discuss.

2. Are the associate attorneys employees, partners, members, or shareholders of the firm? Discuss.

3. Are the senior attorneys employees, partners, members, or shareholders of the firm? Discuss.

4. Is the firm bound by the agreement that Martha signed with Nancy? Discuss.

Answer A

(1) TYPE OF BUSINESS ENTITY

GENERAL PARTNERSHIP

A general partnership (GP) is formed when two or more persons associate to carry on a business for profit as co-owners. There are no formalities required to form a GP. The subjective intent of the parties to form a GP is also irrelevant. You don't even need a written or formal agreement. General partners are each personally and jointly and severally liable for the debts of a GP, whether arising in tort or contract. There is no limited liability for the partners of a GP.

A presumption arises that there is a GP and that the persons are partners when such persons share profits, unless those profits are shared due to being rent or repayment of a debt rather than true profit sharing. Other factors that may evidence a partnership (but these factors do NOT create a presumption) include the sharing of gross revenues, the sharing of losses, whether the persons call themselves "partners" and call their business a "partnership" and the extent of the business activities (greater extent of business activities suggests a partnership). Partners have no right to compensation (meaning wages/salary) absent an agreement to the contrary. Partners have equal rights to manage the business of the partnership and control its affairs.

Here, A B and C formed a law firm, so there is the intent to carry on a business for profit. They didn't file documents with the state, but that is not required for a GP. They share profits after paying expenses, which creates a presumption of a partnership and that they are partners. They also make all business and management decisions which evidences that they are running a business as co-owners. It is likely the firm is a GP.

CORPORATION

A corporation is formed when articles of association are filed with the Secretary of State. The articles need to have the name of the corporation, the names and addresses of the incorporators and registered agent, the authorized stock of the company and associated rights, and the purpose of the corporation which can be any lawful purpose. A de jure corporation comes into existence only when the secretary accepts the articles. There can also be a de facto corporation if the state has an incorporation statute, the persons make a good faith colorable attempt to comply with the formalities for forming a corporation (but fail to do so), and such persons assert the privileges of a corporation.

Here, there was no filing of articles with the state, so there is no corporation. Also, no de facto corporation because no good faith effort to file.

LIMITED PARNTERSHIP OR LIMITED LIABILITY PARNTERSHIP

In a limited partnership, there are general partners and limited partners. The limited partners

have limited liability, meaning they are only liable to make their capital contributions. A limited partnership is formed when a certificate of limited partnership is filed with the state, executed (signed) by the general partners and stating the name of the limited partnership, which must have L.P. or LP or "limited partnership" in the name. An LP comes into existence when that public document is filed or on the deferred date for existence to take place, if any.

A limited liability partnership requires filing of a certificate of qualification executed by at least 2 partners, and must have "LLP" or "limited liability partnership" in the name. An LLP comes into existence when that public document is filed or on the deferred date for existence to take place, if any. All partners in the LLP have limited liability.

Here, there was no filing with the state so the firm is not a LLP or LP.

LIMITED LIABILITY COMPANY

An LLC is a hybrid organization. Its owners (members) have limited liability like a corporation. However, LLCs get the pass-through tax treatment that partnerships get. On the other hand, corporations are subject to double-taxation (taxed once at the corporation level and then again when distributions are made to shareholders). To form a limited liability company, a certificate of formation must be filed with the state. Here, there was no filing with the state so the firm is not an LLC.

CONCLUSION: The firm is a GP.

(2) ASSOCIATE ATTORNEYS

See rules above as to when persons are considered partners. Here, the associate attorneys are paid a fixed salary, they do not share profits, so no presumption of being partners. They are not given the label or title of partners nor is there any indication they participate in management or control of the business, which would have been evidence of being partners. They get 25% of gross billings for bringing clients to the firm. The fact that this is only a share of gross billings, rather than net billings (which would be profits) is evidence they are not partners. Also the fact that they only get 25%, a relatively small percentage, of such gross billings also evidences they are not partners because this shows the firm is simply providing them with an incentive to bring in new billings. If they were co-owners (partners), they wouldn't need such incentive. Given all of this, the associate attorneys are not partners.

The owners of an LLC are called members and the owners of a corporation are called shareholders. Since the firm is neither an LLC or corporation (see above), the associate attorneys are not members or shareholders.

An employee is someone who is hired by an employer to provide services to the employer regarding the employer's business. An employee is an agent of the employer, who is the principal. Evidence of an employee-employer relationship can be found when the employee is paid a fixed salary or wages and where the employer has authority for managing the details and method of how the employee performs her job. Here, given the associates get a fixed

salary, they are likely employees.

CONCLUSION: The associates are employees of the firm.

(3) SENIOR ATTORNEYS

See rules above as to when persons are considered partners. Here, the senior attorneys are paid a salary based upon the number of hours they bill, they do not share profits, so no presumption of being partners. Their salary is "fixed" in the sense that it is based upon a unit charge per hour (e.g. $600/hour) and then that unit charge is multiplied against the number of hours the senior bills in every year. The annual bonus is part of the compensation package, but it is contingent—only applies if the senior bills more than 2000 hours a year, so such bonus does not take away from the fact that the senior is paid a "fixed" salary based on number of hours billed. While it is true that the bonus is equal to 5% of profits, split equally among the number of qualifying seniors, this is not evidence of the sharing of profits in the sense that it is not all seniors who get to participate in this share of profits—just the ones who are eligible for the bonus having billed the requisite number of hours. Put another way, it is not as though the position of being a senior automatically provides the right to share in the profits. While it is true that that the seniors have the title "nonequity partner" and that the website and business cards say "partner", the label or title of "partner" is not conclusive. The facts say that A, B and C "agreed to bestow" the title nonequity partner, which makes it seem as though this was just a concession on A, B and C's part to make the seniors feel their position in the firm was one of seniority or importance, rather than an intent for them to actually be partners in the firm. The fact that A, B and C had the power to decide what title seniors get also shows that A, B and C are in a superior position compared to the seniors rather than them all being equal partners. Furthermore, the seniors do not participate in management or control of the business, which would have been evidence of being partners.

The owners of an LLC are called members and the owners of a corporation are called shareholders. Since the firm is neither an LLC or corporation (see above), the senior attorneys are not members or shareholders.

See above for rules as to employees. Here, given the seniors do not get to participate in the management of the firm, and that all such business and management decisions are made exclusively by A, B and C, it is likely that seniors are simply employees of the firm.

CONCLUSION: The senior attorneys are employees of the firm.

(4) THE AGREEMENT WITH NANCY

A partnership is bound by the contracts entered into by its partners and employees (both of whom are considered agents) where such agents had actual authority, apparent authority or where the partnership ratifies the agreement.

Actual authority can be express or implied. Express actual authority is where the partnership expressly by words or writing provides authority. Implied actual authority exists where based

on the manifestations (words or conduct) of the partnership, the agent reasonably believes she possesses authority.

Apparent authority exists where based on the manifestations of the partnership, third parties reasonably believe the agent has authority to bind the partnership. The partnership statute says that apparent authority exists where the partner is acting within the scope of the partnership business or business of a kind conducted by the partnership, unless the partner lacked actual authority and the person knew or received notification of such.

Ratification is where the partnership agrees to the contract after it has been entered into, either formally and expressly through a formal decision or impliedly by accepting the benefits of the contract.

Here, Martha is an employee of the firm and thus is an agent of the firm. She does not possess actual authority (express nor implied) to bind the firm to a contract providing for reduced hourly rates because the firm has a strict policy of not allowing for reduced rates and Martha knows this is so (therefore, she could not have reasonably believed she had such authority).

It is questionable whether Martha possessed apparent authority. On the one hand, she did because the firm gave her a business card that refers to her as a "partner". A third party in the shoes of Nancy upon seeing such an official business card bestowed upon Martha by the firm, and that Martha was given the title "partner" on that card, would reasonably believe that Martha possesses the authority to bind the firm into contracts regarding legal business and to negotiate rates for legal services in exchange for future business. Those kinds of matters are apparently within the regular business of a law firm. Most people would believe that the title "partner" carries with it great seniority and authority. A reasonable third party in Nancy's shoes would have no idea or knowledge of the behind-the-scenes compensation package of persons like Martha which would otherwise reveal that such persons are not really partners. They also would have no idea of the firm's strict policy of not allowing reduced hourly rates because it is likely that policy is just internal and not disclosed to the public. Furthermore, the fact that the website also refers to Martha as a partner also would give third parties the reasonable belief that senior attorneys had authority to negotiate fees and fee agreements with prospective clients.

In addition, Nancy specifically asked Martha if she could agree to the reduced hourly fee arrangement and in response Martha went ahead and signed a written agreement. Presumably, therefore, Nancy responded to Martha in the affirmative and represented that she did in fact possess authority. She might even have signed her name as "partner" on the agreement or used official firm letterhead. However, it should be noted that under agency-principal law, apparent authority exists based on the actions of the principal, not the agent, so here the unilateral actions and representations of Martha alone would not be enough to imbue Martha with apparent authority as those are not actions or manifestations of the firm.

While it is true that Nancy and Martha met a social function, this is of no moment to the issue of whether the firm is bound by the agreement. Persons regularly form business relationships at social functions. It is not as though the agreement was signed at the social function. Probably

it was signed afterwards in the office of the law firm.

As to ratification, there is no indication that the law firm ratified the agreement.

CONCLUSION: The firm is bound by the agreement Martha signed with Nancy because Martha possessed the apparent authority to enter into such agreement on behalf of the firm.

Answer B

2. Business Entity

First, we assess what type of entity the firm is.

Limited Partnership

A limited partnership is formed when it is filed with the Secretary of State, signed by all general partners. A limited partnership has general partners, which manage the partnership and are personally liable for the partnerships acts, and limited partners who are not liable for the partnerships acts, do not have management duties, and are only liable for their contribution/investment. Here, the business filed no documents with the Secretary of State or any other state office, and none of the partners signed such agreement. Therefore, it is unlikely that the firm is a limited partnership.

Limited Liability Partnership

A limited liability partnership must also be filed with the Secretary of State. In a limited liability partnership, all partners have limited liability and are not liable for the acts of the partnership. Here, nothing was filed with the Secretary of State, and there are no facts that suggest that they, Andrew, Bob, and Christine are limited partners or that anyone in the firm is a limited partner.

LLC (Limited Liability Company)

A limited liability company is also filed with the Secretary of State, with an agreement, and agents for service selected. Here, no facts suggest an LLC was formed or anything was filed with the Secretary of State, therefore, it is unlikely that the firm is an LLC.

Corporation

A corporation is formed when its articles of incorporation arefiled with the Secretary of State, stating the corporation's purpose. Here, there were no articles of incorporation filed with the Secretary of State with anything related to the purposes of a corporation, so the firm is not a corporation.

General Partnership

A general partnership is the default form of partnership, where partners share profits, co-own, and manage the business together. No writing is required and it does not need to be filed with the Secretary of State. Here, Andrew, Bob, and Christine equally share firm profits after paying all expenses and make all business and management decisions together. This is likely a general partnership as they are co-owners of a business they run and manage together, and they share profits.

3. Classification of the Associate Attorneys

Next, we assess the classification of the associate attorneys

Employees

An employee is a person who works for the company that does not share profits, and works under the management and direction of partners/directors. At this firm, associate attorneys are paid a fixed salary, plus 25% of gross billings for any client they bring to the firm. It could be argued that associate attorneys are employees as they receive a fixed salary and are paid for their performance, 25% of gross billings for anyone they bring to the firm. They do not share profits or partake in any management of the firm, so it is likely that the associate attorneys are employees.

Partners

As mentioned above, partners run and manage a business and share profits. The associate attorneys do not have management authority and they do not share profits, two of the most crucial factors that determine whether someone is a partner. Likely, they are not considered partners.

Members

Members are people who are part of an LLC. Here, an LLC is not established, so it is unlikely that they would be considered members.

Shareholders

Shareholders are people who own stock or equity in a corporation. Here, no facts suggest they own any stock or shares in the firm or if the firm is a corporation. Likely, they would not be considered shareholders either.

4. Classification of the Senior Attorneys

Another issue is what the senior attorneys are classified as.

Employees

As mentioned above, an employee is a person who works for the company that does not share profits, and works under the management and direction of partners/directors. Here, senior attorneys are paid based upon the number of hours they bill plus an annual bonus if they bill more than 2000 hours in a year. The senior attorney bonus pool is equal to 5% of the firm's profits, which is split equally by the number of qualifying senior attorneys each year. In addition, Andrew Bob, and Christine agreed to bestow the title nonequity partner on senior attorneys even though they have no management authority. Also, the firm website and

business cards for senior attorneys list their title as "partner." Here, the senior attorneys are paid upon the numbers of hours they bill, a bonus if they reach more than 2000 a year, and an attorney bonus pool is equal to 5% of the firm's profits. They are paid based on their performance, but they do get their bonus from 5% of the firm's profits. It could be argued that the senior attorneys share profits, which is something not in the realm of what employees get to do. However, they do not have management authority. If this was a limited partnership, it could be argued that the senior associates are limited partners because they have no management authority but get to share some profits. However, no limited partnership was established here, and even though the senior attorneys have titles as partner, and share a small sum of profits, they have no management authority and are paid based on performance, so it is likely that the senior attorneys are also employees of the firm.

Partners

Here, senior attorneys are paid based upon the number of hours they bill plus an annual bonus if they bill more than 2000 hours in a year. The senior attorney bonus pool is equal to 5% of the firm's profits, which is split equally by the number of qualifying senior attorneys each year. They also have the title of partner on the firm website and agree to bestow the title of nonequity partner. However, they have no management authority, and only share as mentioned above, they lack management authority and are paid on performance rather than share all of the profits, so it is likely that the senior associates are still employees. The title and small share of profits are not enough to rule them as partners as they cannot make decisions for the partnership. If this was a limited partnership, the traits of the senior associates mirror limited partners, but as mentioned above, an LLP was not established and therefore they are likely employees of the firm.

Members

As mentioned above, members are people who run an LLC, and an LLC was not established in the facts so the senior attorneys are not members.

Shareholders

As mentioned above, shareholders own stock or equity in a corporation, and make decisions and vote for corporate issues regarding the corporation. Nothing in the facts suggest the senior attorneys are shareholders.

5. Whether the firm is bound by Martha's Agreement with Nancy

Last, we assess whether the firm is bound by the agreement Martha signed with Nancy. In order for a partnership to be liable for the acts of the partner, authority must be established. A partner is essentially an agent of the partnership and can act on behalf of the partnership to enter into agreements and conduct business.

Actual authority

First, we assess whether there was actual authority. Actual authority can either be express or implied.

Actual Express Authority

Actual express authority is when the partnership/principal gives actual express authority through an agreement, conduct, or words expressly granting the partner/agent to conduct an act. Here, Martha, a senior attorney, met Nancy at a social function and Nancy told Martha about her business legal issues. Martha gave Nancy her business card, and after looking at the card (which showed Martha as a "partner") she can agree to the firm handling her legal problems at a reduced hourly rate in return for future business. Martha was aware that the firm has a strict policy of not reducing hourly rates, but signed the agreement for it to handle Nancy's legal matter at a reduced hourly rate. Here, Martha did not have express authority to enter into an agreement with reduced hourly rates, it was strictly against firm policy and therefore Martha lacked express actual authority to enter into the agreement.

Actual Implied Authority

Actual implied authority is formed when the partner/agent reasonably believes that he/she is allowed to act in a certain way based on conduct of the partnership/principal. Here, there is no evidence of conduct that would make Martha reasonably believe she had the authority to enter into such agreement. The firm has a strict policy of not reducing hourly rates, and Martha acted against that. There was no implied authority for Martha to enter into the agreement.

Apparent Authority

Last, we assess apparent authority. Apparent authority is given when a third party reasonably believes that the partner/agent has authority to act on behalf of the principal/partnership. Here, the firm’s website and business cards for senior attorneys stated that they are "partners." Nancy saw Martha’s business card that stated she was a partner, and asked if she can agree to the firm handling her issues for a lower rate, in capacity as a partner. Nancy reasonably believed that Martha had authority to act in such way and enter into the agreement, and no facts suggest she could not reasonably believe so. Even though it was against firm policy, it is likely that the firm will be bound to the agreement by apparent authority.

Jul 2019

California Bar Examination

Essay Questions and Selected Answers

July 2019

The State Bar of California
Committee of Bar Examiners / Office of Admissions

180 Howard Street • San Francisco, CA 94105-1639 • (415) 538-2300
845 S. Figueroa Street • Los Angeles, CA 90017-2515 • (213) 765-1500

ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2019

CALIFORNIA BAR EXAMINATION

This publication contains the five essay questions from the July 2019 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	Subject
1.	Civil Procedure
2.	Remedies / Constitutional Law
3.	Criminal Law and Procedure
4.	Professional Responsibility
5.	Contracts

ESSAY EXAMINATION INSTRUCTIONS

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little or no credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

Q1 Civil Procedure

In 2015, Priscilla was shopping at Grocery when a very large display of bottled soda products fell on her, bruising her head and entire body. She filed suit in federal district court against Grocery for negligently maintaining the display, and sought damages for medical expenses, pain and suffering, and lost wages. Grocery recognized that jurisdiction was proper and filed an answer denying liability.

Accompanying the complaint was a set of 26 interrogatories, which read in part:

25. Please provide the names and addresses of every Grocery employee who worked on construction of the soda display and every soda company employee who did so.
26. Please provide copies of every training manual Grocery has used in training its employees.

Grocery responded: “Objection. These interrogatories are flawed.” Upon receiving the reply, Priscilla filed a motion to compel further responses.

Grocery made two discovery requests asking for:

a. An order requiring Priscilla to submit to mental and physical examinations.
b. All of Priscilla’s tax returns since 1995.

Priscilla opposed both discovery requests and Grocery filed motions to compel.

Before Priscilla filed her lawsuit, Grocery hired Xavier, an expert on grocery store displays, to investigate the accident. His findings were unfavorable, and Grocery has not identified Xavier as a witness. Xavier is an independent contractor, but he works exclusively for Grocery.

Included in Priscilla’s original set of interrogatories was a question seeking the names and opinions of all experts Grocery had hired for the litigation. In response to that interrogatory, Grocery replied: “Objection. Privileged.” No information about Xavier was disclosed by Grocery.

1. How should the court rule on Priscilla’s motion to compel further responses to her interrogatories to Grocery? Discuss.
2. How should the court rule on each of Grocery’s motions to compel? Discuss.
3. Was Grocery’s response to Priscilla’s interrogatory about its experts proper? Discuss.
4. Should the court sustain Grocery’s assertion of privilege with regard to Xavier? Discuss.

Answer A

Priscilla's motion to compel further responses to her interrogatories to Grocer.

PROPER SCOPE OF DISCOVERY

A threshold issue is whether Priscilla's ("P") interrogatories were proper in scope. Under the Federal Rules of Civil Procedure, a litigant is entitled to discover all non-privileged information relevant to the subject matter of the litigation so long as the requests are not disproportional to the needs of the litigation. Relevance is defined broadly and is not limited to evidence that will be admissible at trial. To obtain relevant information, a litigant may use several discovery devices, including interrogatories, to another party. The party responding to interrogatories must provide written responses, under oath, within 30 days of service of the interrogatories. However, a responding party need only provide information within its possession, custody, or control after a reasonably diligent search or inquiry.

Here, P has asked for the names and addresses of every Grocery ("G") employee who worked on construction of the display. The identification of such employees is relevant to determining who created and maintained the display and, therefore, is relevant to P's negligence claim. However, the request is overbroad in seeking the addresses, if P is seeking home addresses. The disclosure of such information would likely be an unwarranted invasion of the employees' privacy, irrelevant and disproportional to the needs of the case. The part of that request is improper and should not be compelled.

P also has asked for the name and address of every soda company employee who worked on the display. A party responding to written discovery requests need only provide information within its possession, custody or control. G does not need to obtain information from the third-party soda company, unless G has the right to request that information from the soda company. The facts here do not indicate that G had that right, and, therefore, the request should not be compelled as to that part of the request.

In addition, P has requested copies of every training manual G has used in training its employees. On the one hand, G's training with regard to the construction and maintenance of such displays as the one at issue is relevant and therefore discoverable. P's request is not limited to any particular type of training or particular time period. G may have training materials from many years ago entirely unrelated to the creation of product displays, and the request would be overly broad and unduly burdensome as to those requests given the issues dispute. The court should not compel such unrelated materials.

TIMING OF WRITTEN DISCOVERY

In issue is whether the timing of P's interrogatories is proper. Under the Federal Rules, a party cannot serve written discovery, except for requests for production, before the Rule 26(f) conference. Here, P served her interrogatories with the complaint. This was premature, and G is not required to answer them, and the Court should not compel answers at this point.

PRESUMPTIVE LIMIT ON INTERROGATORIES

Another issue is whether P served too many interrogatories. Under the Federal Rules, there is a presumptive limit of 25 interrogatories, including discrete subparts, unless a

party receives leave of court. Here, P served 26 interrogatories, with the complaint. Accordingly, she has exceeded the presumptive limit without leave, and G is not required to answer interrogatory #26. The court should not compel an answer to that interrogatory.

NEED TO MEET AND CONFER

In issue is whether P met and conferred with G before filing her motion to compel. Under the Federal Rules, a party must attempt to meet and confer with the responding party in good faith in an effort to resolve any discovery disputes before moving to compel further responses. Any motion to compel must contain a certificate or statement of compliance with this requirement. Here, upon receiving the reply from G, P filed a motion to compel. There are no facts indicating that she tried to meet and confer, or that G was unwilling to do so. Accordingly, P's motion was improper or, at least premature, and the court should not grant it.

ADEQUACY OF OBJECTIONS

A party responding to written discovery requests, including interrogatories, must state his objections specifically. If an answer is only in part objectionable, a responding party must specify the part objectionable and answer the remainder. In this matter, G simply stated that "These interrogatories are flawed." This was not a proper objection to the relevance, scope, burden, or objectionable basis of the interrogatories. Having failed to make proper objections, G has likely waived his objections.

2. Grocer's motions to compel two discovery requests.

TIMING OF DISCOVERY

As noted above, written discovery cannot be served until after the Rule 26(f) conference. As such, G's two discovery requests may also be premature, but the facts do not clarify when G made his requests.

NEED TO MEET AND CONFER

As also noted above, a party must meet and confer before seeking to compel discovery responses. The facts here do not indicate whether G tried to meet and confer with P before filing his motions.

GOOD CAUSE FOR EXAMINATIONS

An issue is whether G properly requested mental and physical examinations of P. Unlike other discovery requests, obtaining a mental or physical examination of a party under the Federal Rules requires a court order based on a showing of good cause, unless the party consents. In this case, G did not seek a court order but appears to have served a request for an order directly on P. She opposed the request, implying her lack of consent. Accordingly, G was required to file a motion seeking an order for examination. In this context, the court may treat G's motion to compel as requesting such an order if good cause is shown.

G is likely to show good cause as to the physical exam. P has filed a negligence lawsuit seeking medical expenses and pain and suffering. By seeking such damages, she has put her physical condition at issue, and G should be entitled to obtain an independent medical opinion as to P's prior physical condition and the extent of her injuries. While P

may argue that such an exam is unduly intrusive that argument is unlikely to succeed for a physical exam, and the court should allow the exam. P would be entitled to have her attorney attend the examination to help protect her interests.

G is unlikely to show good cause as to the mental exam. While P has asserted pain and suffering, she has not expressly asserted emotional distress. G does not need to inquire into her emotional state to present evidence that would allow a jury to determine the amount of pain and suffering. Therefore, given the highly intrusive nature of such an exam, the court should not allow it here.

SCOPE OF DISCOVERY

Another issue is the scope of G's request for P's tax returns. While G is entitled to information about P's past earnings because she has claimed lost wages, thereby putting her earning capacity at issue, G's request for tax returns goes back 20 years. Requesting documents dating back that far has little probative value and the burden on P of obtaining and producing them is likely disproportional to the needs of the case.

3. Grocer's response to Priscilla's interrogatory regarding experts.

DISCOVERY OF EXPERT EVIDENCE

An issue is whether P is entitled to the names and opinions of G's experts. Under the Federal Rules, a party has an affirmative obligation to disclose basic information about its testifying experts, including the identity of the expert, the opinions to be offered, the factual basis for those opinions, and the expert's qualifications. Here, if G intends to offer X's testimony he must disclose this information, and P's requests for it would be proper.

PROPRIETY OF OBJECTIONS

As noted above, a party objecting to discovery requests must make its objections specific. Here, G has not provided sufficient information to know the basis of his objection. Merely stating "privileged" does not indicate whether he is asserting attorney-client privilege, work product protection, or some other basis. To assert a privilege, a responding party must provide sufficient information for the requesting party to test the validity of the assertion, usually by providing a privilege log. G has not provided any information. Accordingly, his objection is likely inadequate and risks waiver.

4. Grocer's assertion of privilege regarding Xavier.

In issue is whether G's expert, X, is merely a consulting expert. Information about a party's consulting expert, meaning one who is not going to testify at trial, is generally not discoverable except in very limited circumstances. Here, G hired X before the lawsuit was filed to investigate the accident and has not identified X as a witness. These facts tend to indicate that G obtained X merely as a consultant, and information about his opinions would not be discoverable. The court should deny discovery if merely a consulting expert.

Another issue is whether the attorney-client privilege applies to communications with X. To assert the attorney-client privilege, G must show a confidential communication between a lawyer and client made for the purposes of requesting or receiving legal advice. The privilege extends to agents, including independent contractors, of both the attorney and the client, if their communications are made in connection with the attorney-client relationship. In this matter, G has not shown the involvement of any

attorney or that any communications with X were in connection with requesting or receiving legal advice. Accordingly, the court should not sustain G's assertion of attorney-client privilege here.

Answer B

Priscilla's motion to compel

Scope of discovery

Under the Federal Rules of Civil Procedure (FRCP), the scope of discovery extends to relevant evidence, or evidence that is reasonably calculated to lead to the discovery of relevant evidence. Further, discovery requests must be proportionate to the matter.

Here, Priscilla (P) has sought, in her interrogatories, the names and addresses of every Grocery (G) employee who worked on construction of the soda display. This information is relevant because P has sued G for negligently maintaining the display; employees of G who worked on construction of the display will very likely have relevant information regarding the methods used to construct the display and whether reasonable care was used. Therefore, this portion of the request falls within the scope of discovery.

Priscilla also sought the names and addresses of every soda company employee who worked on the display. Since this request was directed at G, and not the soda company itself, G may claim that it does not have possession or access to this information, or alternatively that it would be unduly burdensome to produce. If this is the case (i.e. G does not have this information in its possession), the court should not compel G to produce it.

Finally, P sought copies of every training manual G has used in training its employees. This is relevant because it speaks to whether G used reasonable care in training its employees to erect soda displays, thus bearing on its liability for negligence. G may

argue that the request is overly burdensome or beyond the scope of discovery because it seeks "all" training manuals and not just manuals related to erecting displays. Overall, the court would agree that at least training manuals regarding the displays are within the scope of discovery.

Interrogatories

After mandatory disclosures have been made, a party may direct interrogatories to another party. The FRCP limits the number of interrogatories to 25.

Here, there are two issues regarding P's interrogatories. First, the facts state that she filed the interrogatories "accompanying the complaint." This was premature, as mandatory disclosures had not yet taken place--and indeed, at this point G had not filed an answer.

In addition, P sent 26 interrogatories. This exceeds the maximum number of 25, and there is no indication that P sought leave from the court to send additional interrogatories. For these reasons, the court can find that the interrogatories were procedurally improper, and need not compel G to respond to them (or at least to interrogatory 26).

Objection

A party may object to an interrogatory. In so doing, the party must explain the basis for the objection.

Here, G simply responded "Objection. These interrogatories are flawed." It did not explain the basis for its objection or why it believed the requests were improper. Thus, G's objection itself was flawed and the court need not sustain it.

Motion to compel

If a party fails to comply with a good faith and permissible discovery request, the other party may file a motion to compel. Typically, courts request that the parties meet and confer to attempt to resolve the dispute before the motion to compel stage. A motion to compel will ultimately be granted in the court's discretion.

Here, there is no indication that the parties met and conferred. Rather, it appears P filed her motion to compel immediately after receiving G's reply.

Because both the interrogatories and the objection were improper as discussed above, and because the parties did not meet and confer, the court should not grant the motion to compel at this stage, but rather should order the parties to attempt to cure the procedural flaws discussed above and come to a resolution.

[2] Grocery's motions to compel

[2][a] Mental and physical examination

A mental or physical examination may be ordered against a party to the case, when that party's physical or mental condition is at issue, and for good cause shown.

Here, P is a party to the case. In addition, her physical condition is at issue; she has alleged that as a result of G's negligence, her head and body were bruised when the soda display fell on her. Further, she is seeking damages for medical expenses and pain and suffering. A physical exam would be relevant in helping to determine the scope and extent of P's injuries and the proper amount of damages. Thus, the court should

grant G's motion to compel the physical examination.

As to the mental examination, it is not clear whether P's mental condition is at issue. She has sought damages for pain and suffering, so G will argue that a mental examination is necessary to corroborate the extent of her pain and suffering. P will counter that she can testify about this at trial, and an invasive mental examination is beyond the permissible scope of discovery. Without further information, a court could go either way. On balance, without further facts as to P's allegations of pain and suffering, a court would probably allow P to testify at trial about her pain and suffering, and should not grant G's motion to compel on this point.

[2][b] Tax returns

Production of documents

After mandatory disclosures have been made and as part of the discovery process, a party may request the production of documents and information relevant to the claim.

Here, G has sought "all of Priscilla's tax returns since 1995." Since P has sought damages for lost wages, G will argue that the tax returns are relevant to determining the amount of lost wages. P will counter that producing tax years for the 20 years before the injury (which occurred in 2015) is unduly burdensome and not relevant to determining her lost wages now. Her wages in 1995 would very likely be different than her wages in 2015. Overall, a court would probably agree. The court may compel P to produce some tax returns for recent years to the extent necessary to determine lost wages, but would probably not order the production of 20 years of tax returns.

[3] Grocery's response to Priscilla's interrogatory about experts

Disclosure of experts

A party is required to disclose the names and identities of all expert witnesses who will testify at trial. Disclosure of experts hired simply to prepare for litigation (but who will not testify at trial) is not required.

Here, G hired Xavier (X), an expert on grocery store displays, to investigate the accident. Since his findings were unfavorable, G has not identified X as a witness. Since there is no indication that G is planning to call X to testify at trial, disclosure of X's identity is not required.

Privilege log

In response to a discovery request, a party may produce a "privilege log" that describes the privileged nature of information sought. The privilege log must identify with specificity the basis for asserting the privilege, so that the other side can properly assess whether the privilege was properly invoked.

Here, in response to the interrogatory, G simply replied, "Objection. Privileged." G did not explain the basis for the asserted privilege (work product, attorney-client etc.) or why it believed the information to be privileged. As such, P and the court cannot properly determine whether G's privilege assertion was proper. On these facts, the court should not sustain G's bald objection, but rather should order G to explain the basis of the asserted privilege.

[2] Grocery's assertion of privilege regarding Xavier

Disclosure of experts

The rule is as above. As analyzed above, because X was not retained to testify at trial, disclosure of his identity was not required by the discovery rules.

However, G need not disclose the information if it is protected by a privilege. While it is not clear what privilege G is asserting, G may attempt to assert work product privilege.

Work product privilege

Under the work product privilege, materials prepared by counsel in preparation for litigation may be protected from disclosure. Some materials, such as investigative reports, are discoverable if (1) the information cannot reasonably be obtained through other means, and (2) the party seeking disclosure will suffer substantial prejudice if the information is not disclosed. However, the mental impressions of an attorney, are absolutely protected.

Here, P has sought not only the name of all experts, but their opinions. G will argue that X's opinion is covered by the work product protection. This argument will not likely prevail, as X's findings were not work product prepared by a lawyer. There is no indication that X was working with a lawyer or that counsel had a hand in drafting X's findings. Instead X is simply an independent contractor working exclusively for G. Thus, P will argue that X's findings constitute an investigative report that does not qualify as privileged work product. A court will probably agree.

G will argue that P has not shown that the information cannot reasonably be obtained by other means. Instead, G will say that P can hire her own expert in grocery store

displays. Further, there is no indication that P will suffer substantial prejudice, as P again can hire her own experts. However, this does not matter, as X's findings likely do not qualify as privileged work product in the first place.

Overall, the court should not sustain G's assertion of privilege. At a minimum, for the reasons discussed above, it should require G to explain the basis for any privilege in a more fulsome way.

.

Q2 Remedies / Constitution

Clear City is home to 50 churches, one of which burned down earlier this year. Fire investigators suspected that the cause was a burning candle.

Clear City has enacted an ordinance that prohibits burning candles in any church and authorizes the fire marshal to close down any church in which candle burning occurs. The Mayor told the press that Clear City would vigorously enforce the ordinance and that the fire marshal would randomly visit churches during their Sunday services to close down violators.

The fire marshal visited six churches last Sunday, but did not visit the Clear City Spiritual Church ("SC"). Two of the six churches visited were burning candles, but were only issued warnings, not shut down. Immediately after visiting the last of the six churches, the fire marshal publicly announced that it was likely no further warnings would be issued to churches caught violating the ordinance. The fire marshal also announced that, due to a lack of personnel, these random visits would not resume for "at least eight weeks."

The members of SC burn candles during Sunday services to signify spiritual light in the world. The day after the fire marshal's announcements, SC gave notice to Clear City's attorney that it would immediately sue Clear City in federal court seeking: (1) a temporary restraining order and a preliminary injunction to enjoin Clear City from enforcing the ordinance during the pendency of the lawsuit; and (2) a declaration that the ordinance violates the First Amendment.

Clear City's defense is that it has not taken any action and there is no controversy.

1. What is the likelihood of SC's success in obtaining a temporary restraining order? Discuss.

2. What is the likelihood of SC's success in obtaining a preliminary injunction? Discuss.

3. What is the likelihood of SC's success in obtaining declaratory relief in its favor?

Answer A

This question triggers issues of Freedom of Religion under the First Amendment, associational standing, mootness, ripeness, and potentially conduct as speech under the First Amendment.

Preliminary Issues

A necessary prerequisite to SC's ability to obtain any form of relief is that standing exists and that ripeness and mootness can be cleared. Article 3 courts (federal courts) are courts of limited jurisdiction. Under the Constitution, they are not permitted to issue advisory opinions and may only issue opinions where cases or controversies exist. The defense of Clear City ("CC") is essentially that standing does not exist here--that there is no live action or controversy that may be appropriately assessed and provided a remedy. Each of the three questions below will require that there is standing before the remedy may be addressed. Thus, we must tackle the issues of standing, ripeness, and mootness before proceeding to the three questions below, as each of these has the ability to remove the "case/controversy" requirement and thus preclude Art. 3 jurisdiction over the case.

Standing

The issue here is whether there is either individual or associational standing. In order to have standing, one must have suffered a concrete and particularized injury in fact, there must be causation between the defendant's conduct and the plaintiff's injury, and redressability by a favorable decision of the Art. 3 court must exist. In addition, we should note that the association bringing the lawsuit here is exactly that--an association

and not an individual. There are additional rules in order to find associational standing. First, the individual members who make up the organization must have standing. Second, the lawsuit at issue must accord with the organization's purposes. Third, the association must be able to sue in its own right without requiring the active participation of its individual members.

Here, we should find that both individual standing and associational standing are satisfied. The requirement of injury in fact is probably the most tenuous link. SC has not been visited, issued a warning, or shut down. However, they engage in activity that is now prohibited under the ordinance and did so previous to the ordinance's creation. As such, the possibility that they will be reprimanded for their use of burning candles should constitute an injury in fact, as it interferes with the free exercise of their religion. (This finding is bolstered by the lurking First Amendment issues. It might not be so convincing in a non-religious context. See below.) We should note that the fire marshal's statement that they probably wouldn't keep issuing warnings is ambiguous. This could either indicate that the ordinance will not be enforced going forward, or that it will be enforced strictly and to the full extent of its reach. It is more likely that the latter is the correct response because it accords with the Mayor's press announcement that the ordinance would be vigorously enforced. This also increases the likelihood of an actual injury in fact occurring to SC directly.

Additionally, the causation between the defendant's conduct and plaintiff's injury is clear. Here, the defendant's action was to pass an ordinance that prohibits the burning of candles in churches, a religious activity. Without the passing and enforcement of that ordinance, SC would have been permitted to continue burning candles in their church at

their leisure.

Additionally, redressability is within the power of the court. Here, if the court finds the ordinance to be unconstitutional (as requested in the prayer for declaratory relief), the injury in fact imposed on churches in CC will cease.

Thus, we can conclude that an individual member of the church would likely have standing. We should then consider associational standing. In addition to the requirement that the individual members who make up the organization would have standing (satisfied directly above), the lawsuit in question must accord with the association's purpose. Here, the purpose of the association is not directly stated, but one could conclude that it is "to signify spiritual light in the world," the reasoning given for the burning of candles during Sunday services. Realistically, it is probably broader than this. The church's purpose is to provide spiritual guidance and so on, and one part of that is to signify spiritual light in the world to others who might consider joining and so on. Regardless, the nexus between the association's purpose and the lawsuit should be sufficient to satisfy this requirement.

The final requirement is that the association must be able to represent itself in the lawsuit without requiring the individual input of any of the particular members. There are no facts in the pattern that indicate otherwise. Thus, I assume this element is satisfied.

As such, there is both associational and individual standing here. Because SC is bringing the lawsuit, associational standing is most pertinent to our purposes. It is satisfied.

Ripeness

The issue here is whether the case or controversy here is actually ripe. The conclusion should be yes, but CC will argue that it is not. In order to be ripe, a lawsuit must be capable of actually being determined. Issues of ripeness arise with respect to proposed legislation, ordinances that have not yet been enacted, laws that have not yet been violated, and so on. In short, the injury is essentially to come, and the plaintiff is seeking a declaration that the ordinance (or otherwise) is invalid before harm can occur.

Generally, ripeness questions can also arise when there is a dearth of appropriate facts such that the court cannot appropriately answer the question. A case is less likely to be unripe when the question is essentially one of law. Here, the question is essentially one of law--is the ordinance compatible with the First Amendment? Thus, there is no need for a slew of facts before judicial review can be appropriately had.

SC will also point out that the ordinance has actually been enforced (at least in part), because the fire marshal has begun to make random visits and has begun to issue warnings. The ambiguity of the fire marshal's statement is again in issue here, because it is not entirely clear whether he means to ramp up or down enforcement after the eight weeks have passed. Because of the threat of interference with religion, and because the question here is mostly one of law, the court should find the issue to be ripe and to take up the case.

Mootness

The issue here is whether the case or controversy in question has been mooted. CC could claim that there is no controversy, because the fire marshal publicly announced that they would not seek any further warnings to issues caught violating the ordinance.

Additionally, he announced that the random visits would not occur for the next 8 weeks because of a lack of personnel. Thus, CC might claim that there is no longer any live issue in the case as there is no risk that SC will be caught burning a candle during a Sunday service and being closed down. If there is no live controversy, then a federal court cannot act on the issue.

However, there are two exceptions to the mootness doctrine. One exists where the problem in the lawsuit is capable of repetition, yet evading review. The best example of this is abortion. By the time a decision is made in federal court, typically 9 months have passed and the live issue has been resolved. However, if this standard were strictly followed, there would never be an opportunity to adjudicate on the issue. Here, SC could raise this exception, perhaps arguing that the fire marshal might just cease enforcement activity whenever a lawsuit is threatened. However, this doesn't exactly accord with the facts, as SC informed CC of its intent to sue the day after the fire marshal's announcements.

The better argument for SC is that this is an example of the voluntary cessation mootness exception. Where the conduct complained of by defendant pauses or is halted, such that the live controversy disappeared as a result of defendant's own free will, the case cannot be said to have been resolved. Rather, it is wholly possible that upon dismissal of the case the defendant will begin to once again engage in the conduct complained of. As such, voluntary cessation is an exception to the mootness doctrine. Here, voluntary cessation neatly fits the facts. The fire marshal indicated that there was a lack of personnel, so the random visits would stop for at least eight weeks. However, if many new personnel signed up the very next day, random visits could start again

immediately. Additionally, the fire marshal's decision to "likely" not issue any further warnings is voluntary. The ordinance giving him the authority to do so has not been repealed; this is simply a policy decision on his behalf. As such, this is a good case of voluntary cessation that should prevent the mootness doctrine from disposing of this case.

Potential Remedies

Above we have ensured that the case is an appropriate case or controversy under Article 3 such that it is permissible for a federal court to hear it. Now we must assess the remedies issues assigned.

One preliminary issue with respect to remedies is that the suit is being filed against Clear City, a municipality. Municipalities are not entitled to state sovereign immunity under the 11th amendment, and at any rate it appears that CC has not attempted to fight the suit on an immunity basis, so I will not consider that potential defense further.

(1) Temporary Restraining Order

The issue here is whether a temporary restraining order is appropriate. Temporary restraining orders are devices that are intended to be available only when there is a serious threat of immediate, irreparable injury to the plaintiff. Temporary restraining orders require the showing of two elements (1) likelihood of success on the merits for plaintiff, and (2) likelihood of irreparable injury to the plaintiff if not granted. Temporary restraining orders ("TROs") are also allowed to be issued before a hearing occurs--thus

ex parte--and in some cases without notice to the other party. Notice is not required if the plaintiff can show that provision of notice would potentially lead to the destruction of the item in question in a goods case or some other good reason why it might be inappropriate to furnish the defendant with a warning. Another good reason can also include simply documented unavailability of the defendant. Temporary restraining orders in federal court are good for 14 days. They can be extended for another 14 days with a showing of good cause, but all reasonable efforts must be made to secure a preliminary hearing before that point. When a preliminary hearing occurs, the court will determine whether or not to issue a preliminary injunction. If the court does not hold a hearing before both 14 day periods have passed, the TRO effectively morphs into a preliminary injunction.

Here, there is probably not a compelling case for a TRO. First, there is probably a likelihood that plaintiff can establish a likelihood of success on the merits (see section 3 below). However, it is unlikely that irreparable injury would occur without a TRO. The fire marshal's statement indicated that there would not be any random visits for eight weeks. Eight weeks consisting of 7 days is 56 days. A TRO would be good for, at maximum, 28 days. As such, there is no pressing need that requires a TRO be granted in order to prevent the SC church from being shut down.

SC's likelihood of success in obtaining a temporary restraining order is low, unless they can demonstrate some increased likelihood of irreparable injury (i.e., if the fire marshal suddenly hired 50 new employees and could carry out the ordinance in full).

(2) Obtaining a Preliminary Injunction

The issue here is whether SC will be able to obtain a preliminary injunction. The test for a preliminary injunction is much the same as that of a TRO. The plaintiff must establish a likelihood of success on the merits; a likelihood of irreparable injury if a preliminary injunction is not granted; and a balancing of the hardships of plaintiff and defendant/the public in plaintiff's favor in order to succeed. We should also note that in the case of a preliminary injunction it is appropriate to provide a bond, such that if a preliminary injunction is inappropriately awarded, the defendant can be compensated for the time in which he was precluded from acting in a particular way/possessing a particular good. We will assess each element below in turn.

Likelihood of success on the merits. See section (3) on declaratory relief.

Likelihood of irreparable injury if preliminary injunction not granted. Here, there is an increased chance of irreparable injury if the injunction is not granted, because the reality of litigation/trial is that the process is lengthy. The likelihood is that litigation will exceed 8 weeks of preparation and trial. Again, the ambiguity of the fire marshal's statement is pertinent. If they intend to ramp up ordinance enforcement when the 8 weeks end, then the likelihood of irreparable injury via the closing down of the church is significant. We should also note that the manner of enforcement of the ordinance is rather extreme. Rather than fining a church, they will be shut down. Shutting down surely gives rise to an inference of irreparable injury--even if the ordinance is later declared unconstitutional and the church is permitted to reopen, there is a likelihood that congregation members

will have gone elsewhere and the ability of the church to attract new members will have been greatly diminished. Because of the widened time scope of the preliminary injunction, likelihood of irreparable injury is probably satisfied here.

Balance of hardships between plaintiff/defendant and public. Here we must assess how the ordinance and its enforcement affect parties on either side of the case. If the ordinance is not enforced, the hardship imposed on the defendant and public is that occasionally a church (potentially) burns down. (Note that fire investigators weren't even sure if this was the cause of the church burning down.) While the loss of a church to a community is likely impactful, the fact remains that CC is home to 50 churches, so the public and the city are unlikely to be devastated by the loss of one. By contrast, to the plaintiff--an actual church--the potential for them to be shut down as a result of burning a candle imposes a significant hardship. This is so because of the likelihood of irreparable injury as discussed above (loss of congregation members, inability to attract new members). The balance of hardships thus comes out strongly in favor of plaintiff.

Because we aren't given facts about SC's financial situation, I will presume that they could afford to post the appropriate bond.

The likelihood of SC's success in obtaining a preliminary injunction is thus high.

(3) <u>Obtaining Declaratory Relief</u>

The issue here is whether declaratory relief is appropriate. Declaratory relief is that relief provided by a court that does not change the rights of a party but merely delineates those rights. Declaratory relief is an appropriate way to handle the question of whether

or not an ordinance is constitutional, and is especially appropriate in the context of a municipality because it does not run into any 11th amendment state sovereign immunity issues that might be implicated by a damages analysis.

To determine whether declaratory relief is appropriate, we must assess the merits of the constitutional challenge to the ordinance. Here, the challenge is that the ordinance violates the First Amendment. There are at least two ways in which this could violate the First Amendment under freedom of religion and potentially one under freedom of speech--regulation of symbolic conduct.

It should be noted that here the municipality is a government actor whose actions might be violating the First Amendment.

Freedom of Religion - Free Exercise Clause

The issue here is whether the ordinance inappropriately restricts SC's ability to freely exercise their religion. Under free exercise jurisprudence, a general statute of neutral applicability is valid even if it incidentally burdens religion. However, where it appears to regulate only religion, then the governmental conduct in question must pass strict scrutiny. Strict scrutiny requires the government to show that the law in question was necessary to achieve a compelling governmental purpose, and that there was no less restrictive alternative available.

Here, the law in question does not appear to be neutral and general. Rather, it is directed toward religious entities (churches) alone. As such, it must pass strict scrutiny. One could argue that there is a compelling purpose here in ensuring that churches are not burnt down. (This may not be an appropriate governmental purpose, as it could be argued under the Establishment Clause/*Lemon* test that this constitutes inappropriate

excessive entanglement of government and religion.) Another potential purpose the government could put forward is fire suppression/prevention for the health, safety, and welfare of their residents. Assuming arguendo that this is considered an appropriate government compelling purpose, then we must ask whether it was *necessary*--that is, whether it was the least restrictive means for accomplishing that purpose. CC is very unlikely to be able to fulfill this burden, because there are a variety of other ways a church could undertake to ensure its candles didn't lead to its burning down. Increased fire safety measures, the installation of sprinklers, the placement of fire extinguishers within the church, repositioning of candles in un-flammable areas, etc.--there are a variety of less restrictive alternatives as compared to shutting a church down entirely.

The ordinance probably violates the free exercise clause.

Freedom of Religion - Establishment Clause

The issue here is whether the ordinance inappropriately establishes or interferes with a religion. Generally, the Establishment Clause analysis proceeds by consideration of the Lemon test, which asks: (1) Was there a secular, non-religious purpose in enacting the law? (2) Was the primary effect of the law to advance or inhibit religion? (3) Was there excessive entanglement between the government and religion? Here, there was clearly a secular purpose in enacting the law--prevention of loss of churches through accidental burning down from unattended candles. This is not religious in nature merely because the place in which the government seeks to stop burning buildings is candles. There is probably a general compelling governmental interest in fire suppression/prevention for the health, safety, and welfare of its constituents.

The primary effect of the law, however, probably inhibits religion. Because a common

religious practice, burning candles, is here being prohibited by the government upon pain of being shut down entirely, the law seems to be overbroad in attempting to achieve its legitimate non-secular purpose. Because if the law were fully enforced many churches would be shut down, there is probably a failure on prong 2.

Third asks whether there is excessive entanglement between government and religion. This is a close call. It is possible that there is excessive entanglement here because the fire marshal seems to have an inordinate amount of discretion in deciding whether he is going to issue a warning or shut the church down entirely. For example, if the churches issued warnings were Catholic, but future Lutheran churches were immediately shut down, this would appear to be excessive entanglement of government and religion because it seems to send a message about the content of church services. This makes exercise of discretion very dangerous. Presuming that the fire marshal is going to strictly enforce the law going forward and decline to exercise discretion, this prong is probably not problematic, but from the fact pattern, the conclusion is unclear.

Because the second prong of the Lemon test is failed, the ordinance is probably improper under the Establishment Clause as well.

Freedom of Speech Issue - Symbolic Conduct

The issue here is whether the ordinance is permissible governmental regulation of conduct speech. This is probably permissible governmental regulation of conduct speech. The test for permissible conduct speech is a hybrid test closest in nature to intermediate scrutiny. It requires that the regulation of speech not be overbroad; that the purpose for regulating the speech not be purely to regulate the speech content, but for another unrelated governmental purpose; that the government have an important

purpose in regulating the speech; and that the regulation be narrowly tailored; and that it directly advance the government purpose.

Here, the regulation of symbolic speech--prohibiting candle burning--is not merely to regulate the content the speech communicates (signifying spiritual light in the world), but to prevent buildings within a municipality from burning down. The interest in fire suppression/prevention is probably an important government purpose because it affects the health, safety, and welfare of its residents. The question of whether the regulation is narrowly tailored is arguable--again, the enforcement mechanism seems somewhat strict--but it seems appropriate as it merely prevents open flame within the church while the point of the regulation is to prevent fires. Because of this, the regulation is probably not overbroad, though its enforcement mechanisms may be. The government purpose of fire suppression is probably directly advanced by eliminating the most likely source of flame/fire within the buildings in question.

The ordinance probably does not constitute a violation of the freedom of speech with regard to regulation of speech by conduct.

It is likely that SC will be successful in obtaining declaratory relief in its favor under a first amendment freedom of religion theory. The best theory for SC is probably a violation of the free exercise clause as strict scrutiny is extremely unlikely to be satisfied here. An establishment clause argument would probably also succeed. A first amendment freedom of speech argument would probably not succeed, so one of the other two should be used.

Answer B

Whether Clear City Spiritual Church ("SC") is Entitled to a TRO to enjoin Clear City ("CC") from enforcing ordinance

Standing

The first issue is whether SC has standing to bring an action against CC. A party meets the elements of constitutional standing by showing (a) injury in fact (b) causation, and (c) redressability.

Injury in fact

Injury in fact means that the injury is concrete, not abstract, and is particularized. In other words, the plaintiff must show that *they* were actually harmed.

Here, SC can likely argue that it has suffered injury in fact. SC's practice is to burn candles during Sunday services to signify spiritual light in the world. CC is effectively trying to put that light out by prohibiting burning candles in any church. This has a concrete effect on SC in particular. This element is met.

Causation

But for CC's ordinance, SC would not be in a position where they are afraid to engage in one of their regular religious practices. This element is met.

Redressability

If the court prevents SC from enforcing the ordinance and eventually overturns the ordinance, it will provide SC with exactly the relief it seeks, allowing SC's members to continue lighting candles. Redressability is met.

Organizational Standing

CC might argue that SC's members are required to bring the action rather than SC. Indeed, it is SC's members who burn the candles. However, even if it were true that SC's members are the ones that suffer harm, SC likely has organizational standing here.

An organization has standing to bring a suit on behalf of its members where the members can be adequately defined and the organization can show that it adequately represents the members' interests. Here, the members are SC's churchgoers, and, as SC is the organization that leads the congregational worship and oversees Sunday services where candle burning takes place, it can represent the interests of its churchgoers effectively. SC has organizational standing.

Ripeness

A court may only hear a live case or controversy. That is, there must be an actual dispute over the rights and obligations of parties, such that resolution will clarify those rights and obligations. A court may not issue advisory opinions. Ripeness may exist even if one party voluntarily curtails their conduct where there is the ongoing possibility of a violation.

Here, CC argues that there is no controversy, likely because it is not currently enforcing the ordinance. The facts show that due to a lack of personnel, random visits to enforce the ordinance are delayed "at least eight weeks." Nonetheless, the ordinance is still in effect, and it is highly likely that at some point in the near future, SC will be paid a "visit" by the fire marshal. SC's argument holds considerable weight in light of the public statements made by the Mayor and fire marshal. The Mayor told the press that CC

would "vigorously enforce the ordinance," and the fire marshal announced that churches will likely no longer get the benefit of a warning if caught violating the ordinances. Accordingly, while SC may not have to worry about a fire marshal "visit" for at least eight weeks, the concern is still very much live. Furthermore, there is nothing to say that the fire marshal is true to his word. The Mayor's announcement to the press suggests that the CC has almost an inquisition-like desire to shut down churches burning candles. There's nothing to suggest that the fire marshal may gain personnel to start the sweeps earlier.

Accordingly, there is a live case or controversy such that ripeness exists.

Entitlement to a TRO

A temporary restraining order ("TRO") is a form of injunctive relief that a party may obtain with or without notice, which, if granted, immediately enjoins a party from taking a contested action until the parties can be heard on a preliminary injunction motion. In essence, TROs and PIs are designed to preserve the status quo during the pendency of an action. When a court grants a TRO, it will generally set the preliminary injunction hearing shortly thereafter (usually within 10 days). TROs are obtained ex parte upon a showing that giving notice to a party is likely to frustrate enforcement. Here, the TRO appears to be with notice as SC gave notice to CC's attorney that it would seek a TRO.

A TRO is only granted upon a showing of immediate harm. In determining whether to grant a TRO, the court looks at (i) whether the party will suffer irreparable or immeasurable harm if injunctive relief is not granted, (ii) the likelihood of success on the merits. (iii) the balance of the harm to the movant if the TRO is not granted against the burden to the nonmoving party in complying with the injunction, (iv) the public interest in

granting a TRO.

i. Irreparable harm

SC can meet this element because it is not seeking monetary relief, but rather declaratory relief declaring that the ordinance violates their First Amendment rights. A monetary value cannot be placed on the harm SC will suffer if its members are prohibited from practicing their religious beliefs. This element is met.

ii. Likelihood of success on the merits

This factor is explained below in the discussion of declaratory relief. The short answer is that this element will be met because CC would be considered a state actor, and has passed a law that facially discriminates against religion, and does not meet strict scrutiny.

iii. The balance of harms

This factor also favors SC. The harm SC will suffer due to a violation of the free exercise clause is profound, as its members would have to give up one of their regular religious practices, or otherwise practice secretly, in fear of government intervention, which evokes Soviet Union-type concerns. On the other hand, CC would be prohibited from enforcing an ordinance that may be unconstitutional, and even if it is not, the harm is small. Indeed, SC can point to the fact that the fire marshal has already explained that they will have to postpone random visits due to lack of personnel. If enforcement of the ordinance was that important to the city, then CC would find another way to continue enforcement, such as moving over personnel from other departments.

iv. Public interest

The public interest in allowing persons in the United States to exercise their First Amendment rights is paramount. On the other hand, there is no interest in allowing a government actor to enforce a questionable ordinance.

Immediacy of harm

While SC will easily satisfy the four-factor test for injunctions, the court may still refuse to grant the TRO because SC may not be able to show a risk of immediate harm. The fire marshal's announcement that random visits will not resume for at least eight weeks means that there is plenty of time to seek a preliminary injunction prior to any harm befalling SC. If the court accepts CC's statement that they will not enforce the ordinance for at least eight weeks, then it will likely not grant a TRO.

Accordingly, while the factors for a TRO all favor SC, SC still may lose its TRO application based on a lack of immediacy of harm.

2. Whether SC is Entitled to PI to enjoin CC from enforcing ordinance

On the other hand, SC is likely entitled to a PI.

Courts use the same four-factor analysis in determining whether to grant a PI. Additionally, a PI does not require a showing of immediate harm; only a showing that the harm is likely to occur if an injunction is not granted during the pendency of the action.

For the reasons stated above, SC can meet the four-factor test. Furthermore, if CC begins its sweeps in the next eight weeks, then the risk of harm is likely to occur during the pendency of the action, such that the PI is necessary to preserve the status quo.

3. Whether SC is likely to obtain declaratory relief

Government Action

The First Amendment applies only to government action. The First Amendment is couched on *Congress* not making any law that violates a person's rights. It is extended to state and local government through the Fourteenth Amendment due process clause.

Here, CC appears to be a state actor because it is a city. It has a Mayor, a fire marshal, and enacts ordinances that it seeks to enforce. The alleged First Amendment violation directly relates to one of those ordinances. Accordingly, government action has occurred raising First Amendment issues.

Free Exercise

A person has the absolute right to their religious beliefs, but religious conduct may be limited in some circumstances. The government may pass laws that limit religious conduct, but they are more likely to be upheld where the laws only incidentally limit religious conduct. Where a law is facially neutral, such that the prohibited conduct applies equally to religious and secular conduct, absent a showing or discriminatory motive, the law must merely meet rational basis scrutiny. This requires the proponent to prove that the law is not rationally related to a legitimate government interest. On the other hand, where a law is facially discriminatory, such that it is aimed at tailoring religious conduct, it is subject to strict scrutiny. This requires the government to show that the law is narrowly tailored to meet a compelling government interest.

The ordinance is facially discriminatory

Here, the ordinance applies only to burning candles in *any church*. On its face, it appears to target religious conduct because it only affects churchgoers.

The city could argue that the ordinance is not aimed at religious conduct, but is instead aimed solely at regulating burning or candles. But if that's the case, then CC could have drafted the ordinance to say that. The ordinance could have applied to burning candles in any building, or any place where members of the public meet, or similar. It does not say that; rather, it applies only to burning candles in churches.

Because it is facially discriminatory, strict scrutiny applies. The government must show the law is narrowly tailored to meet a compelling government interest.

Compelling government interest

The government can likely meet this because CC is home to many churches, and one of those churches burned down earlier this year, with the suspected cause being a burning candle. It can be presumed that people go to these churches, and CC has a compelling interest in protecting the safety of its citizens. Accordingly, CC meets this element.

Narrowly tailored

CC will lose on this element because the ordinance is not narrowly tailored. To be narrowly tailored, the government generally must use the least restrictive means. Here, CC completely prohibits the use of candles, and has invoked draconian enforcement measures and sanctions to enforce the ordinance. CC could have regulated in a less restrictive way, such as by regulating where candles are placed in churches, or the type

of candle used, or required other safety measures, such as burning candles over a non-flammable service. CC instead issued a blanket prohibition. CC fails this element.

Accordingly, the law does not meet strict scrutiny.

Rational basis

On the chance that the law is considered facially neutral, it is more likely to be upheld. SC would have to show that the law is not rationally related to the legitimate government interest. Courts generally give the state wide discretion under rational basis scrutiny. Accordingly, the ordinance would likely survive on the unlikely chance that the ordinance is found to be facially neutral.

Establishment Clause

The First Amendment also prohibits the government from favoring one religion over others or favoring religion over non-religion. The government must show (1) the law has a secular purpose, (2) its primary aim is not to advance or inhibit religion, and (3) the law does not excessively entangle government with religion.

Here, even if the law has a secular purpose, and even if the primary aim is to not to advance or inhibit religion, the government would fail on the third factor because it excessively entangles government with religion. As mentioned above, these draconian sweeps are Soviet-Union like. Because the ordinance applies only to churches, the practical effect is that the government is engaging in random, chilling sweeps of churches and churchgoers. The government's willingness to crash Sunday services is strong evidence that the government is excessively entangled in religion.

Conclusion

For the foregoing reasons, SC is likely to succeed on its declaratory relief action because CC likely violated the First Amendment by passing and enforcing the ordinance.

Q3 Criminal Law and Procedure

Delia entered a coin shop, pulled out a toy gun that appeared to be a real gun, and pointed it at the owner, Oscar. Oscar handed her a set of valuable Roman coins and she fled. Neither said a word.

Subsequently, the police received an anonymous email that stated, “Your coin robber is Delia, and she is trying to sell the stolen coins.” Detective Fong followed Delia and saw her using a payphone in a public alley. The payphone was not in a phone booth. As he walked past her, he heard her say softly, “I have a set of ‘hot’ Roman coins for sale that need to go to a discreet collector. I will call you back at 9:00 p.m. tonight.”

Detective Fong then bought a “Bird Song Microphone” from a pet store, a parabolic microphone that promised to enable a listener to hear the chirping of birds from a distance of 150 feet. He went to Nell’s house, which had a deck that overlooked the alley, and lied to Nell saying that he needed to go on the deck because he was investigating a terrorist plot and “lives are at stake.” Nell let him onto the deck at 9:00 p.m. that night. He aimed the microphone at Delia, who was using the same payphone in the alley, and heard her say softly, “Fine, call your buyer and let me know if we have a deal for the hot coins.”

The next day, Detective Fong put all of the above information into an affidavit for a search warrant for Delia’s house, obtained a signed search warrant from a judge, searched Delia’s house, and recovered the coins. Delia was arrested and charged with robbery.

Prior to trial, Delia filed a motion under the Fourth Amendment to the United States Constitution seeking to suppress her statements and the coins.

1. What arguments may Delia reasonably raise in support of her suppression motion, what arguments may the prosecution reasonably raise in response, and how should the court rule with regard to

    a) Delia’s statement, “I have a set of ‘hot’ Roman coins for sale that need to go to a discreet collector. I will call you back at 9:00 p.m. tonight.” Discuss.

    b) Delia’s statement, “Fine, call your buyer and let me know if we have a deal for the hot coins.” Discuss.

    c) The Roman coins. Discuss.

2. Is Delia guilty of robbery? Discuss.

Answer A

Delia's Motion to Suppress

OF = Officer Fong.

State Action

For a motion to suppress based on constitutional rights, there must be state action. All the actions here were undertaken by Fong, a police officer, so there was state action.

The Fourth Amendment

The Fourth Amendment states "the right of the people to be secure, in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, except upon probable cause, supported by oath and affirmation, and particularly describing the places to be searched, and the persons or things to be seized."

The requirements of particularity and probable cause facially apply only to searches which are conducted pursuant to a warrant. However, the Supreme Court has held that, because it would not make sense for a warrantless search to be conducted to a lower standard than a search conducted with a warrant, the same requirements of particularity and probable cause apply both to warrantless searches and searches conducted pursuant to a warrant. Probable cause is slightly more stringent for a warrantless search, and in a marginal case, a warrantless search will be found not to be based on probable cause *(US v. Ventresca).* A warrantless search is presumptivelyunreasonable, unless an exception to the warrant requirement applies.

a) Delia's First Statement

The statement made by Delia was overheard by Officer Fong without a warrant. Therefore, *assuming that a search took place,* it would be presumptively unreasonable. I analyze this issue below.

Standing

Standing is a threshold inquiry which is not jurisdictional, but may nevertheless bar a defendant from arguing a suppression motion. A defendant must show that their own reasonable expectation of privacy was violated (that they have standing) in order to bring a constitutional claim.

Delia here has standing - the words she seeks to suppress are her own.

Probable Cause Based on Informants

In *Illinois v. Gates*, the Supreme Court relaxed the relatively strict constraints placed on information obtained from the informants which previously was codified in *Aguilar/Spinelli.* Originally, under *Aguilar/Spinelli*, information from an informant was evaluated on a two prong test: first, corroborating circumstances confirming the information contained in the warrant was required, and secondly, the informant's reliability, as well as the reliability of the information, would be evaluated. Probable cause could not be established unless the state could meet both prongs. *Illinois v. Gates* modified this test, holding that a strong showing on one of the prongs could compensate for a poor showing on the other. Furthermore, the facts would be evaluated

based on the totality of the circumstances, rather than in a prong-specific manner.

Here, OF's investigation was undertaken based on an informant's anonymous, uncorroborated tip. This would fail both *Aguilar/Spinelli* and *Illinois v. Gates* because, at the time the tip was received, there were no corroborating circumstances available to OF, other than the fact of the robbery. Presumably, Oscar would have provided a description of the robber which could be matched with Delia's appearance, but the facts are silent on whether this was actually available to OF. Regardless, the informant's reliability was not established, nor was the accuracy of the information ascertainable on anything other than innuendo.

However, *Illinois v. Gates* only governs whether probable cause could be established based on an informant's tip. It does not govern whether police may *investigate* based on the tip when there is no probable cause, in order to follow up on information that may or may not be true. Therefore, the information from the tip would not support probable cause by itself, but it is completely admissible to support further action by OF which does not violate any constitutional provision - which is, in fact, what happens.

Delia's Use of the Payphone

Is *Katz* Implicated?

In the seminal case of *US v. Katz*, the Supreme Court ruled on the constitutionality under the Fourth Amendment of police using technology to overhear a

conversation *inside a telephone booth*. The relevant holding, in Justice Harlan's concurrence, stated that action under the Fourth Amendment is a search if it 1) violates a subjective expectation of privacy by the defendant 2) which society is prepared to recognize as reasonable.

OF's actions here took place without a warrant. Therefore, *if the actions were a search*, it would be presumptively unconstitutional. We must therefore determine whether a search took place at all.

Subjective Expectation of Privacy

Delia will certainly argue that she has a subjective expectation of privacy in the contents of her own conversation. She certainly did not want her conversation to be overheard by OF. However, subjective expectations of privacy are based on the conduct of the parties, not their subjective thoughts. Delia's speech was in an alleyway which was "a public alley", where anybody could go. The payphone she used was not enclosed. Delia could argue that her actions manifested an intention on her part to be especially careful about being overheard (she spoke "softly"). But this will not be enough to establish a subjective expectation, given that the conversation took place in a public space.

Objective Expectation of Privacy

Furthermore, Delia's conduct is not one which society is prepared to recognize as reasonable. It took place in a public thoroughfare, and the law is settled that police officer may conduct investigations from locations where they have a right to be.

Furthermore, it is unclear whether Delia has a recognizable expectation of privacy in her conversations in the first place. When a party speaks to another, they run the risk that the other party will disclose the contents of their conversation (*Hoffa v. US*). However, it could be argued that this only applies to disclosures from that party, such as when the party wears a wire. In this case, Delia's conversation was overheard by a third party, OF. If OF had taken special measures to overhear the conversation (considered in Part II) it might be argued that Delia had an objectively reasonable expectation of privacy, but against this will be held the fact that the entire conversation took place in a public space. Although, in some cases, courts have been willing to hold that an objective expectation of privacy was violated when listening devices were surreptitiously placed in a public space, this is not the case here - OF simply walked past Delia. Therefore, there is no objectively reasonable expectation of privacy, and OF's overhearing Delia was *not a search at all*.

Because OF's behavior was not a search, it does not matter that the informant's information could not establish probable cause. Nor does it matter whether the overhearing of the conversation was a "fruit" of the original informant's tip. Because there was no action subject to the Fourth Amendment at all, there can be no constitutional challenge to OF's action here.

Conclusion

The motion will fail with respect to the first statement.

b) The Second Statement

The second statement raises a number of different issues from the first.

Standing

Rules above. Delia has standing; the statements are her own.

Use of a Listening Device

OF uses a "Bird Song Microphone" to listen in on Delia's conversation, presumably because Delia might be suspicious if he listens in on her again.

The Supreme Court precedent most closely on point, with respect to technology assisted searches, is *Kyllo v. United States*, which holds that when police use technology which is not in general public use, to obtain information from the interior of a home which they would otherwise not be able to obtain unless they made a physical intrusion, then there is a search.

However, *Kyllo* is not entirely on point here. The technology here is in general public use, because it was purchased from a pet store. Furthermore, there was no intrusion into a constitutionally protected area through the use of the bird microphone, because

Delia was not at home when she used the payphone. (It is possible that there was a search, however, and that there was a reasonable expectation of privacy. I consider this below).

Another relevant precedent is *Dow Chemical*, which considered the constitutionality of an aerial search using a high powered camera. The Supreme Court in that case did not hold that a search had taken place at all, although it was willing to grant that the use of the camera in that case could, in some cases, transform action which did not otherwise violate the Constitution into a constitutional search.

Since the microphone here was in general public use, it is likely that the use of the microphone would not transform the search into a constitutional violation by itself. Persons in a public space can generally be held to assume the risk that other private individuals, using generally available technology, might listen in on their conversations. Therefore, the use of the microphone, by itself, will likely not raise a constitutional violation.

Pretextual Entrance Into Nell's House

A different issue is raised by the location from which OF conducted the search.

Consent

Consent, for purposes of the Fourth Amendment, is governed by *Schneckloth v. Bustamonte*. A court will evaluate the totality of the circumstances in determining whether consent was voluntary or not. However, consent is not a waiver - it need not be

knowing or intelligent in order to be valid.

Here, two separate issues are raised by OF's entry into Nell's home. First, Delia will need to argue that the consent was invalid because it was procured by a lie on the part of OF. It does not matter that OF stated that he was "investigating a terrorist plot" or that "lives were at stake" - although these raise issues of exigency, the entry here would not be justified by exigency, but rather by consent. Besides, entry based on exigent circumstances is only unconstitutional when police gain entry via an actual or threatened violation of the Fourth Amendment, and there was no violation here because *Nell's* house was not searched by OF.

Rather, Delia will argue that the consent was not voluntary because it was procured falsely. Police are allowed to lie when they obtain consent, however, so the entry here will likely not be held to be have been obtained through involuntary consent. It is possible, however, that the egregiousness of OF's assertions to Nell could change this result.

A larger problem is raised, however, by standing. Even if Delia were to argue that the entry into Nell's house is somehow improper, Delia does not have standing to object to an entry into Nell's house because only Nell can assert a possessory interest in her own home. Therefore, for purposes of challenging the later search, Delia will likely have to presume that OF was where he had a right to be, and that when he aimed the microphone at Delia, Delia's rights with respect to OF are the same as if Nell had aimed the microphone at her.

Subjective Expectation of Privacy

I next turn to whether, given a police officer on the deck of a nearby house aiming a device which is in general public use at the defendant, such action constitutes a search.

The rules are the same as before (*Katz*).

The analysis for the subjective expectation is before. Delia will argue that she "spoke softly", but this alone cannot establish a subjective expectation of privacy, given that the conversation took place in a public alley.

Objective Expectation of Privacy

The analysis for an objective expectation of privacy differs here, however. The listening in on Delia's conversation took place not through OF listening to her as he walked by her, but through his use of a microphone at a distance of 150 feet. This could change the objective analysis.

Courts have sometimes been willing to hold that action by the police transforms activity which would not be a search in one context into a search in a different context. For example, installing a listening device in a public area can be held to violate an objective expectation of privacy, on the theory that an individual who has a conversation in a public place may assume the risk that bystanders will be listening to him, but if the conversation takes place in the public space when no bystanders are nearby, the expectation of privacy may be different.

In this case, the conversation which was overheard was still taking place in a public alley, but Delia was presumably not aware, at the time of the call, that any individual

was in the vicinity. This presents a slightly more difficult argument than before, but a court will still likely hold that OF"s activity here was not a search.

If OF's activity was a search, however, it would be presumptively unreasonable, because there was no probable cause based on the informant's tip. There is no exception which applies here - there was no consent, nor was this a search incident to arrest or a search justified by exigency.

Fruits

As before, whether probable cause can be based on the informant's tip need not be considered if the activity in question by the police is not a search at all, since police are entitled to investigate wrongdoing even on the basis of speculative tips. However, if OF's action is considered a search, the fruits doctrine may apply.

The fruit of the poisonous tree doctrine bars evidence which was obtained as the result of an earlier illegal action if the "taint" from the previous illegality is not held to be cleansed. Assuming that probable cause could not be established from the informant's tip, then the "taint" from the tip would extend to any searches which were conducted as a result. It would not matter whether the actual listening in by Fong was reasonable or not.

There are three exceptions to the Fruits doctrine: attenuation, independent source and inevitable discovery. Because Fong’s actions depend entirely on the tip, there is no independent source, and there is no argument that Fong would eventually have discovered Delia's wrongdoing. There is no argument for attenuation, either, since there

is no intervening event or large lapse of time between the tip and Fong's action. Therefore, if Fong's action is considered a search, then the fruits doctrine could result in suppression.

Conclusion

It is likely that Fong's activity was not a search, and, thus, suppression will fail. There is a very weak argument that a search took place; if one did take place, then the statement could be suppressed.

c) The Roman Coins

***Leon* - Searches Pursuant to a Warrant**

The doctrine of *United States v. Leon* holds that a search conducted pursuant to a warrant will not be held unconstitutional if the warrant is later held to be unsupported by probable cause. There are some exceptions to *Leon*, such as where the police knowingly uses false information to support the warrant, or if the magistrate abandons their neutral and detached role.

Here, it could be argued that the information from the informant did not support probable cause. However, the subsequent actions by OF did not depend on the warrant, because they were arguably not searches, and they *do* support probable cause (which is that quantity of suspicion which would justify a reasonable person, using nontechnical standards, to conclude that evidence of wrongdoing can be found, for a search, or that the defendant has committed a crime, for an arrest.)

There is no bad faith underlying the warrant here, and no facts indicate that the

magistrate was biased. Therefore, *Leon* will bar the suppression of the Roman coins.

II. Delia's Liability for Robbery

Robbery

Robbery is aggravated larceny - a trespassory taking (caption) and carrying (asportation) of the personal property of another, from the person's presence, by force or fear, with the intent to deprive the owner of it permanently.

Here, Delia entered the shop and took Roman coins from Oscar. There was, thus, a taking and carrying away of the property, and Delia can be presumed to have had the intent to deprive Oscar of the coins permanently, since she was making arrangements to sell the coins. The primary issue is whether the coins can be held to have been taken via force or fear.

Delia pointed a gun at Oscar. Although this was a toy gun, it "appeared to be a real gun", and there are no facts indicating that Oscar subjectively knew that the gun was false (otherwise he would not have given the coins to Delia). Furthermore, it was objectively reasonable for a person in Oscar's position to believe that the gun was real. Therefore, Delia used a threat of force to take the coins, and meets this requirement. It does not matter that the threat was not verbalized - pointing the gun would reasonably have been understood to mean a threat of force, without words being used.

Delia is, therefore, guilty of robbery.

Answer B

1. Suppression Motion

4th Amendment

The 4th Amendment protects the person, property, and effects of individuals from unreasonable and unlawful searches and seizures. The 4th Amendment has been incorporated to apply to states through the 14th Amendment. The remedy for a violation of the 4th Amendment is suppression of the information received that is a fruit of the invalid search and seizure, known as the fruit of the poisonous tree. There are exceptions to when the remedy applies.

Here, Delia (D) is alleging that three pieces of evidence were collected in violation of her 4th Amendment protections and is seeking suppression.

State Action

State action is when the state or an agent of the state acts. Here, the action taken is by a police and a detective; thus all are employees of the state and state action is met.

A. "I have a hot set..."

Standing - Reasonable Expectation of Privacy

A person must have standing to bring a suppression claim. They must have a reasonable expectation of privacy (REP) in the item searched or they must be subject to a seizure. A person can have a reasonable expectation in a private conversation. Persons do not have a reasonable expectation of privacy in Open Fields or for information in Public View.

Here, Fong (F) follows D into a public alley. Persons do not have a reasonable expectation in alleys that are public. There is no evidence that this alley is within the curtilage of P's home, which a person does REP for, because it is public.

The Supreme Court (SCOTUS) has found that person does have REP for a conversation in a public telephone booth if the booth is enclosed and the conversation could not otherwise be heard. In that case, the dispositive fact was that the police bugged the telephone booth and the person was attempting to keep the conversation private. Here, the facts are very different, the payphone was not in a phone booth, but was out in public view and anyone passing by could hear. The fact the conversation was spoken in low tones does not matter for this determination.

Thus, there is no REP and the remedy of Suppression is unavailable for the comment "I have a set of hot Roman coins. .. "

Warrant Requirement

In the unlikely event SCOTUS expanded the definition of REP to include this case, the police would only be able to collect this information through a valid warrant (discussed below) or warrant exceptions. Exceptions include searches made incident to valid arrest, searches for weapons in a Terry stop, and searches in plain view.

There is no warrant here, so F would need an exception.

Plain View

An officer may search and seize evidence that is in plain view when they are lawfully present, the item is in plain view, and its illegality is readily apparent.

Here, the officer could argue that the conversation was in plain view, anyone in the alley

could hear it. The officer was legally in this public place. And the illegality of the conversation was readily apparent.

Thus, this exception would apply.

Conclusion: There is no REP in this public conversation in a payphone without a phone booth, thus suppression is not merited.

B. Fine, call your buyer...

REP

See rule above. A person does not have a reasonable expectation of privacy in the home of another when they are not an overnight guest. A person does not have REP when they consent to a search. A person does have a reasonable expectation of privacy from searches to an otherwise private place when the search is effected through technology not available to the public and which enhances natural senses (Kyllo).

N's Home

Here, the first issue is that F is on the property of Neil's house. He gained access to this property by lying, however, an officer is permitted to lie in order to access a premise through consent so long as the lie is not based on a show of authority. For example, an officer is not permitted to lie about having a warrant. But they are permitted to pretend to be a drug buyer to gain consent and enter the home of a drug dealer. Here, it is unclear if F's lie is a lie based on authority. However, regardless of the validity of the consent, the officer is on N's deck. D has no expectation of privacy in a home that is not her own (See Rakas).

Thus, she has no REP based on this objection.

The Bird Song Microphone

Here, the second issue is that F uses a Bird Song Microphone from a pet store to listen to the conversation of D in the public alley. In Kyllo, the court found that the use of a thermal heat detector was impermissible when it was used to access the movement of people in a home. Here, D will say that like in Kyllo, F is using an object that enhances his natural perception to search D. The microphone is parabolic and enables a listener to hear birds (and all things) from a distance of 150 feet. However, this argument will fail because the microphone is readily available to the public.

Furthermore, unlike in Kyllo, the microphone is being used to search D in a place she has no REP. Kyllo was a search in a home. See discussion above. D is in the same alley as the first comment and because it is in public and there is no booth, she has no expectation of privacy for the conversation she puts out into the public.

Thus, there is no REP.

Warrant Requirement

See rule above.

In the unlikely event SCOTUS finds this is a search, there is no warrant and an exception must be applied.

Plain View

See rule above.

For similar reasons, F will argue that they validly heard the conversation. However, in this instance, D may be able to challenge the lawfulness of F's presence when he heard

the conversation because he was on N's property. See discussion above under N's Home, because this is likely a consensual permission to enter the property of N, and F is likely validly on the premises when he sees the conversation.

Thus, Plain View would likely work.

Exigence

A officer may make an otherwise unlawful search when there is an emergency or a hot pursuit of a felon.

Here, there is no emergency. F lied about the terrorist plot and the fact that lives are at stake.

This exception will not apply.

Conclusion: no REP for this conversation, thus it is not suppressible.

C. Roman Coins Physical Evidence

REP

See rule above. A person has REP in their home. The home is sacred under the 4th Amendment.

Here, F searches D's home. Thus the search must be pursuant to a warrant or an exception.

Warrant Requirement

See rule above. A warrant must be supported by probable cause, a signed affidavit, state the place and items to be seized with particularity, and it must be approved by a neutral magistrate.

There is an affidavit, and the warrant is signed by a judge. If they are a neutral magistrate, this is valid. The items to be seized and place searched are particular. The search identifies D's home and identifies that the coins should be seized.

Probable Cause

Probable cause requires sufficient facts that would lead a reasonable officer to believe that the commission of a crime was probably happening or has happened. The officer can use their own personal knowledge, lawfully obtained evidence, and the evidence of a reliable and verifiable informant to have grounds for probable cause. Facts alone may not be enough, but taken together, can lead to probable cause.

Here, the police received an anonymous email that stated D is the coin robber and she is trying to sell stolen coins. The informant is anonymous so the reliability and verifiability of the information are hard to obtain. SCOTUS has allowed such informants when the information is particular and the officer verifies it through independent investigation. Here, this is likely a valid tip, as F follows up on the tip by following D in public and overhearing her conversation which confirms the tip.

Furthermore, F has the other evidence, that was validly obtained as described above. F has the phone conversation that was in public about the "set of hot Roman coins for sale that need to go to a discreet collector. I will call back at 9..."and "Fine, call your buyer and let me know if we have a deal for hot coins." Both are likely independent grounds for a warrant as they are strong evidence of the crime of possessing and selling stolen goods, as the "hot coins" indicate. An officer may use their experience and expertise; thus, an officer who knows that hot coins may be a sign of stolen goods can rely on this information.

There is probable cause.

Thus, the search of D's home was pursuant to a lawful and valid warrant. The search does not appear to exceed the scope of the warrant.

Exceptions

Good Faith Reliance on Warrant

In the event that the court finds the statements to be collected in violation of the 4th Amendment, the probable cause would be undercut as the information would be fruits of the poisonous tree of suppressed evidence. However, an officer may rely on a warrant if a reasonable officer would not find that there is no reasonable belief, but that there is probable cause. An officer may not rely on this exception if they acted in bad faith.

Here, as described above, all of F's conduct is within the bounds of the 4th Amendment; thus if new law makes the searches invalid that support the warrant, the officer will still be relying in good faith upon a warrant that a reasonable officer would believe is not wholly lacking probable cause. There is no indication that F acted in bad faith, even the fact that he lied is something that officers routinely do as part of investigations, although this lie seems more egregious.

Thus, this exception would apply.

Conclusion: The roman coins are not suppressible, because they were collected pursuant to a valid warrant.

2. Robbery

Robbery is the crime of larceny by physical force or threats of imminent physical force to

the person of another.

Threats of Force to the Person of Another

The threats of force must be imminent and create the apprehension of the fear of physical force; economic force is not enough. The force must be directed at another person's person.

Here, D threatens O with a gun. It is a toy gun, but a reasonable person would have the fear of imminent physical force because it appeared to be a real gun. D did not use words to threaten, but actions are sufficient and pointing a gun at someone would certainly be threatening. The gun was directed at the person of O because D points the gun at him.

Thus, the larceny was achieved through threats of force to O's person.

Larceny

Larceny is the trespassory, taking, carrying away, the property of another, with the intent to permanently deprive.

Trespassory

Trespassory is the interference with another's property; it does not request permanent deprivation like conversion does.

Here, D enters a coin shop and takes the valuable Roman coins. Thus, D is interfering with the coin shop’s ownership of the coins by taking them without permission. The

owner Oscar (O), only gives them in response to the threat of violence.

Thus, the taking is trespassory.

Taking and Carrying Away

The D must physically take the personal property and carry it away, the slightest movement suffices as carrying away, including putting it in one's purse or taking something from a shelf.

Here, D takes the coins and leaves the stores.

Thus, she takes it and carries it away.

The Personal Property of Another

Personal property is a removable object and includes objects and money.

Here, D takes a valuable set of Roman coins. Coins are tangible objects and they belong to another, to O.

Thus, this element is satisfied.

Intent to Permanently Deprive

A D must specifically intend at the time of the taking to permanently deprive the true owner of their property. This intent may be later negated and still be found to be intent so long as the intent was held at the time of the actus reas. Intent may be inferred from the circumstances.

Here, D entered the shop, pulled out a toy gun and pointed it at O, takes the coins and then flees. These facts create the inference that she intends to permanently at the time. Furthermore, there is subsequent evidence from the telephone booth conversation that

she has a set of hot coins that she wishes to sell. This is strong evidence that at the time of the taking she meant to permanently deprive.

Thus, all of the elements of larceny are met.

Conclusion: D is guilty of robbery

Q4 Professional Responsibility

Larry is an associate lawyer at the ABC Firm (ABC). Larry has been defending Jones Manufacturing, Inc. (Jones) in a suit brought by Smith Tools, Inc. (Smith) for failure to properly manufacture tools ordered by Smith. XYZ Firm (XYZ) represents Smith. Larry has prepared Jones' responses to Smith's discovery requests.

Peter is the partner supervising Larry at ABC in the Smith v. Jones case. Peter has instructed Larry to file a motion to compel discovery of documents that Smith claimed contains its trade secrets. Larry researched the matter and told Peter that he thought that the motion would be denied and may give rise to sanctions. Peter, who had more experience with trade secrets, told Larry to file the motion.

Larry also told Peter about a damaging document that Larry found in the Jones file that would be very helpful to Smith's case. Larry knows that the document has not been produced in discovery. The document falls into a class of papers that have been requested by Smith. Larry knows of no basis to refuse the production of the document. Peter told Larry to interpose hearsay, trade secrets, and overbreadth objections and not to produce the document.

Larry recently received an attractive job offer from XYZ.

1. May Larry ethically follow Peter's instructions to file the motion? Discuss.

2. What are Larry's obligations in relation to the damaging document? Discuss.

3. What ethical obligations must Larry respect with regard to XYZ's job offer? Discuss.

Answer according to California and ABA authorities.

Answer A

An attorney owes his clients the duty of loyalty, confidentiality, competence, and financial responsibility. A lawyer also owes third parties, the public, and the court the duties of fairness, dignity, and candor.

I. FOLLOWING PETER'S INSTRUCTIONS TO FILE THE MOTION

FILING THE MOTION

The issue here is whether Larry, who is an associate lawyer at ABC, must follow the supervising partner Peter's instructions to file a motion to compel discovery of documents that Smith claims contains trade secrets. The second issue is whether there is a questionable issue of law as to whether it is proper to file the motion to compel.

A lawyer owes the duty to supervise attorneys and staff that work under the lawyer and ensure they do not commit any ethical violations. A lawyer who is being supervised still must follow the ethical rules despite being told otherwise from supervising attorneys. If there is an arguable question of law/duty regarding the ethical violation, then the lawyer may rely on supervising attorneys for advice and instruction. If there is no questionable issue of law or duty, the attorney must adhere to the ethical rules of the ABA and California, even if it goes against what the partner says. If the attorney violates the rules, both the associate lawyer and the partner will have committed ethical violations. Here, Peter has instructed Larry to file a motion to compel discovery of documents that Smith believes contains trade secrets. Larry believes that the motion would be denied and may give rise to sanctions. It appears that Larry is less experienced in trade secrets than Peter, who is a partner and has likely been a practicing attorney longer

than Larry. Thus, there appears to be a questionable issue of law; therefore, Larry can rely on Peter's advice as a supervising attorney and file the motion to compel.

If Larry does further research and discovers that there are no grounds to file the motion, and therefore no questionable issue of law, then Larry must not file the motion to compel despite Peter's instructions. If Larry does further research and learns that there are no grounds to file the motion to compel, he will be violating the duty of competence to Jones. The duty of competence requires an attorney to act with the legal knowledge and skill necessary to perform for the client. In California, the duty of competence is looked at under a reckless standard; a lawyer will not violate the rules for a single issue that breaches the duty of competence. Here, if Larry knows the motion to compel should not be filed, and files it anyway because of Peter's instructions, he is violating his duty of competence to Jones. He is also violating the duty of fairness to Smith, the opposing party, and the duty of candor and dignity to the court.

Because there likely is a questionable issue of law, Larry may rely on Peter as the supervising attorney and file the motion. However, if Larry further learns that the motion to compel discovery is unwarranted and may give rise to sanctions, then he cannot rely on Peter's instructions and must not file the motion; if he does, he will have committed an ethical violation.

RESEARCHING TRADE SECRETS

There is a possibility that Larry has violated the duty of competence for failing to familiarize himself with trade secret law adequate enough to represent Jones. The duty of loyalty requires an attorney to act with the legal skill and knowledge necessary to

represent the client. If the area of law is unfamiliar to the attorney, they have a duty to familiarize themselves with the area of law in order to adequately represent the client. Though Larry is an associate, he still must familiarize himself with trade secret law in order to competently represent Jones, or must associate with a lawyer who has sufficient experience in trade secret law. Here, Peter appears to have adequate knowledge of trade secret law to assist Larry. However, Larry may need to speak with someone else at the firm or conduct further research to ensure that the trade secret law is properly followed in relation to filing the motion to compel. Under California rules, Larry likely has not violated the duty of competency since California follows a reckless standard and does not punish for a single isolated event of incompetency.

Additionally, there is a possibility that Larry will violate his duty of competency if he files the motion, knowing that sanctions are likely, and the court imposes trade secrets, thus hurting his client Jones. This may give rise to reckless behavior. As such, Larry could violate the duty of competency under both ABA and California rules for filing a motion he thinks will bring sanctions.

II. LARRY'S OBLIGATIONS IN RELATION TO DAMAGING DOCUMENTS:

PRODUCING DAMAGING DOCUMENTS

Here, the issue is whether Larry will commit an ethical violation if he fails to produce the damaging document he has discovered.

A lawyer owes a duty of fairness, dignity, and candor to the court and opposing party. Simultaneously, a lawyer owes the duty of confidentiality and loyalty to their client. A lawyer has a duty to follow court orders, including discovery request, and to not assert frivolous litigation claims or defenses. Here, Larry has found a damaging document that

has not been produced in discovery. The document is damaging to Larry's client, Jones. However, the document falls into a class of papers that have been requested by Smith. Larry has a duty to turn over the document to Smith because it has been requested by Smith. This does not violate the duty of loyalty to Jones because the duty of loyalty does not ask an attorney to withhold evidence from a proper discovery request. Additionally, while the duty of competency requires attorneys to fight zealously for their clients, it does not allow an attorney to assert false, misleading or frivolous defenses. Here, there does not seem to be a reason for Larry to claim hearsay, trade secrets, or any other defense to keep the document from being produced to Smith.

Thus, Larry has a duty to turn over the document to Smith. If Larry were to assert these frivolous claims to try and avoid turning over the document, Larry will be violating his duties of candor, fairness and dignity to the court and Smith. Additionally, asserting a false claim is likely considered reckless, as it could lead to sanctions on Larry, Peter, ABC, and Jones. As such, Larry will likely be violating his duty of competence to Jones if he asserts a frivolous and false defense to try and protect the document. Therefore, Larry must turn over the document.

As explained above, if there is a questionable issue of law, an attorney may rely on a supervising partner to determine how to proceed. Here, Larry knows of no basis to refuse the production of the damaging document. Even though his supervising attorney, Peter, is ordering Larry to refuse to produce the document, Larry must go against Peter's wishes and produce the document in order to avoid committing an ethical violation.

DUTY REPORT VIOLATIONS OF OTHER LAWYERS

The issue here is whether Larry must report Peter's ethical violation to the bar.

The ABA rules require that an attorney report any ethical violations of another attorney or judge to the bar. Here Peter has committed an ethical violation by refusing to produce the document and making up frivolous and meritless defenses to avoid producing the document. Therefore, Peter has breached his duties of fairness, candor, and dignity to the court and to Smith. Thus, Larry must report Peter's actions to the bar. California does not follow the same rule, so Larry will not need to report Peter's violations to the California bar. However California has a duty to self-report violations, malpractice claims, or other ethical violations/cases that may arise. Larry may need to self- report if he commits any ethical violations under California rules.

III. XYZ'S JOB OFFER

At issue here is whether Larry must disclose his job offer from XYZ to Jones in order to avoid committing any ethical violations.

CONFLICT OF INTEREST - DUTY OF LOYALTY

A lawyer owes their current clients the duty of loyalty. A conflict of interest may give rise to breaching the duty of loyalty. A conflict of interest exists when a lawyer represents two clients in the same suit as adverse parties or when there is a significant risk that the lawyer's personal life, duties to current clients, or duties to former clients may materially limit the attorney's ability to act in the best interests of his client. If there is a conflict of interest, an attorney may still represent the client if the attorney reasonably believes he can still represent the client without breaching any duties and acting in the client's best

interests and the client is aware of the conflict and gives informed, written consent. The attorney cannot represent the adverse clients in the same case in a tribunal, and the representation cannot be prohibited by law. In California, the client's consent must be in writing.

Here, Larry is representing Jones in a suit against Smith. Larry works for ABC, who is representing Jones, and Smith is represented by the firm XYZ. Larry has received a job offer from the law firm XYZ, which is directly adverse to his client Jones in a current case. This creates a conflict of interest for Larry. Even if Larry decides not to take the job from XYZ, he still must disclose the job offer to Jones, as it gives rise to a conflict of interest. Here, a conflict of interest has occurred because there is a significant risk that Larry's personal life will impact his duty of loyalty to Jones. (Additionally, there is the potential that, should Larry accept the job with XYZ, it could impact his duty of confidentiality to Jones.) Larry may reasonably believe that he can still represent Jones competently and diligently without violating his duties of loyalty and confidentiality despite the job offer from XYZ. Even if he reasonably believes this to be the case, Larry must still disclose the conflict of interest to Jones. He must get Jones' informed, written consent before proceeding with the representation. Additionally, in California, the disclosure must be in writing and the client must confirm in writing that they are consenting to the representation. It is unlikely this conflict of interest would be prohibited by law. If Larry does not reasonably believe that he can continue representing Jones due to the job offer, even if he does not take the job offer, then he must cease representing Jones and allow another attorney at his firm to take over the case. He will likely need to be screened off from the case, and not share in a portion of fees earned

from the Jones v Smith case.

In California, an attorney must disclose, in writing, to his client any personal relationship the attorney may have with another party, witness or lawyer in the case. Here, Larry has created a personal relationship with XYZ because of the job offer. Because of this personal relationship, he must disclose, in writing, the relationship to Jones.

CONFLICT OF INTEREST - DUTIES TO FORMER CLIENTS

At issue here is what duties Larry will breach if he accepts the job offer from XYZ. If Larry leaves ABC and goes to XYZ, he will now be adverse to former client Jones and ABC. This gives rise to a conflict of interest. A lawyer owes the continuing duty of confidentiality to former clients. A lawyer's conflict may be imputed to the firm if it is not personal in interest. Here, if Larry took the job, Larry's conflict with Jones at his new firm XYZ would not be personal and would therefore be imputed to the firm since he worked significantly and substantially on the case Jones v. Smith. Larry has learned significant confidential information from Jones about the case. If Larry were to go to XYZ, then he must be screened off from the case, not share in any fees earned from the case, and XYZ must give notice to ABC. Under the ABA rules, Larry may be allowed to take the job if he is properly screened, shares no fees from the Jones v Smith case, and does not give any confidential information about Jones to XYZ or Smith; additionally, notice must be given to Jones. In California, if an attorney has worked on the same matter in a substantial way, the conflict cannot be cured from screening off the client. Therefore, in California, Larry would likely not be able to take the job because XYZ would have to stop representing Smith, since Larry's conflict would be imputed to the firm.

Answer B

May Larry Ethically Follow Peter's instructions to file the motion

Associate attorney's duties with regard to following a supervising attorney's instructions

Under both the ABA Model Rules (MR) and the California Rules of Professional Conduct (RPC), an attorney that is working under the supervision of a partner or other attorney has a duty to abide by the instructions that the supervising attorney gives, while still maintaining her duty to maintain independent professional judgment and to avoid committing a clear ethical violation.

Here, it could be argued that, by filing this motion to compel, L is bringing a frivolous claim in violation of the MR and RPC.

Duty to avoid frivolous claims

Under both the MR and the RPC, an attorney must not bring a cause of action or claim that has no basis in law or fact, or where the attorney has no good faith argument for an extension of existing law or a change in existing law.

Here, Peter (P) is instructing Larry (L) to file a motion to compel discovery documents that Smith (S) claimed contain trade secrets. It could be argued that if L files this motion after doing the research and believing that the motion will be denied, filing that motion

would constitute a frivolous claim and would thus violate both the MR and the RPC. However, on the other hand, L could argue that he only "thought" that the motion would be denied and "may give rise to sanctions," not that it absolutely would be denied. He could note that, because it wasn't absolutely clear that this would be denied, there is a basis in law for obtaining the discovery and that the claim is therefore not frivolous. He can further note that P is much more experienced with trade secrets, and he told L to file the motion. Note that the efficacy of following P's instructions in this instance is discussed in more detail below.

On balance, a court is likely to find that this is not a frivolous claim because there is some basis in law for making the request.

Duty with regard to following P's instructions

This balance between following the instructions of the supervising attorney and maintaining that independent professional judgment turns on whether the action sought by the supervising attorney is clearly an ethical violation or whether it is a reasonable question of law or fact. If the reasonable minds of attorneys would differ as to whether the action ordered by the supervising attorney would constitute a violation of an ethical duty, then the attorney must abide by the supervising attorney's instructions and will not be liable for an ethics violation. If no reasonable minds would differ as to the propriety of an action, or if it is clearly a request for a violation of an ethical rule or law, then the associate attorney must refuse to take the action.

Here, Larry (L) has been instructed to follow through with filing this motion to compel. As noted above, this may constitute a violation of the duty to avoid frivolous claims.

However, L has an argument that reasonable minds could differ as to whether this is a frivolous claim, as well as whether this request could lead to sanctions. Furthermore, he could note that, because reasonable minds could differ, in this instance, he was under a duty to follow his supervising attorney's instructions.

Conclusion

On balance, a court is likely to agree that this is an arguable question of law in which reasonable minds could differ, and L therefore did not violate any ethical duties by following P's instructions and filing the motion to compel.

Duty to report ethical violations

Under the MR, an attorney has a duty to report any ethical violations that they know another attorney has committed. The RPC does not have a corresponding duty to report ethical violations of others, but it does impose a duty on attorneys to self- report when they know that they have committed ethical violations.

Duty to report others under MR

Here, it could be argued that L violated MR's duty to report by not reporting P for ordering him to file this motion to compel, a possible frivolous claim. However, as discussed above, this is likely not a frivolous claim, and if it is, he did not know it with a certainty, so he is not under a duty to report.

Duty to self-report under RPC

Furthermore, under the RPC, it could be argued that L has a duty to self- report after filing the possibly frivolous claim. However, again, this is a close call, and likely not a

frivolous claim, so L was not under a duty to report.

As such, L has not violated his duty to report ethical violations under the MR or under CA.

Larry's obligations in relation to the damaging document

Duty of Confidentiality

Generally speaking, under both the MR and the CA, an attorney must not disclose any information relating to the representation of a client unless authorized by the express written consent (informed written consent in CA, informed consent confirmed in writing under the MR), or unless impliedly authorized in order to carry out the representation.

Here, L has discovered a document that contains information relating to the representation of Jones. However, this information has likely been legitimately requested in discovery, and one situation in which an attorney is impliedly authorized to disclose such information in order to carry out the representation is in response to a discovery request.

Therefore, L would not be violating his duty of confidentiality to Jones by turning this document over in disclosure.

Duty of Diligence

Under both the MR and CA RPC, an attorney owes a client a duty to provide reasonably diligent and prompt representation. Under the RPC, an attorney must be committed and dedicated to their client's cause. However, this duty does not require an attorney to

press for every available advantage. And as discussed below, an attorney must not violate the duty of fairness in an effort to zealously advocate for their client.

Here, L may need to balance the need to protect his client's interests against disclosing this information. He must be dedicated to protecting his client's interests. However, this duty may give way to the duty of fairness to opposing counsel, as discussed more below.

Duty of Fairness

The duty of fairness requires that an attorney act with fairness to opposing counsel during the courts of litigation. This requires that an attorney not knowingly obstruct another party's access to evidence, nor alter, conceal, or destroy evidence, or counsel or instruct another to obstruct access to evidence, or conceal, alter, or destroy evidence in the course of litigation.

Here, L has discovered a damaging document in the Jones file. He knows that the document has not been produced in discovery, but he also knows that it falls into the class of papers that have been requested by Smith, and he knows of no basis for refusing to produce the document. It could therefore be argued that, by failing to disclose this document, and by "interposing hearsay, trade secrets, and overbreadth objections" in order to not produce the document, he is intentionally and knowingly obstructing Smith's access to evidence. Although L could argue that P told him to do this and that he should trust P's judgment on this issue, it should also be noted that L himself "knows of no basis to refuse the production of the document."

A court is therefore likely to find that L has violated his duty of fairness by obstructing Smith's access to the evidence.

Duties following a supervising attorney's instructions

See rule above.

Here, claiming hearsay, trade secrets, and overbreadth with regard to this document could be a frivolous claim. L can only avoid liability for violating an ethical duty if this is a question of law in which reasonable minds would differ. If they would not, then L has a duty to avoid committing the ethical violation.

Duty to avoid frivolous claims

See rule above.

Here, L clearly "knows of no basis to refuse the production of the document." When P instructed L to "interpose hearsay, trade secrets, and overbreadth," L likely should have executed some research to determine whether this would be an adequate basis for claiming that they should not be required to turn over the document. If not, then no reasonable minds could differ as to whether or not they had an obligation to do so. Following P's instructions in this instance would constitute making a frivolous claim, and therefore violating both the MR and CA RPC.

For this reason, L must either turn over the document or refuse to offer those objections.

Duty of candor

Under both the CA RPC and MR, an attorney owes a duty of candor to the court, and must not knowingly make a false statement of law or fact to the court. If such a false statement is made and the attorney learns of it, an attorney must promptly correct such false statements.

Here, if L files these objections, or raises them in opposition of a motion to compel, then it is possible that he is violating his duty of candor to the court. This would be the case if the documents do not legitimately contain hearsay, trade secrets, or if the request for the document is not overbroad. In such a case, making those claims would be false statements of law and fact, and L will have violated his duty of candor to the court.

For this reason, L should exercise great caution in ensuring that he does not violate his duty of candor.

Duty to report

See MR and RPC rules above.

MR duty to report

Under the MR, L may have a duty to report P if L refuses to file those objections and P follows through with them, because they may constitute a violation of the duty of candor and the duty of fairness.

CA duty to self- report

Under the RPC, L will not be under a duty to report P if P files such objections, but L would be under a duty to self- report if he does so.

Larry's ethical obligations with regard to XYZ's job offer

Duty of loyalty

Under both the MR and the RPC, an attorney owes all clients, past and present, a duty of loyalty and independent professional judgment. When there is a substantial risk that the attorney's representation will be materially limited due to their own interests, or the interests of past or present clients, then a conflict of interest may exist that could hinder the attorney's ability to provide competent and diligent representation. If a conflict of interest exists, then the attorney may be in breach of their duty of loyalty.

Duties of loyalty and confidentiality of past clients

An attorney owes continuing duties of both loyalty and confidentiality to past clients, even after the representation of those clients has ceased. The duty of confidentiality to past clients means that an attorney may not reveal information relating to the representation of that client, regardless of the source, unless authorized by the express written consent of the client. The duty of loyalty to past clients means that the attorney may not participate in an action against that client, or use information relating to the representation of the client, unless under the MR, the client provides informed consent confirmed in writing, or under the CA RPC, the client provides informed written consent.

Here, L has been in the process of representing Jones in a suit between Jones and

Smith. L is now entertaining an offer to join XYZ, the firm that is currently representing Smith in the same suit against Jones. Regardless of whether L takes on the case or works on it personally, L is under an absolute duty not to use or disclose any information relating to his representation of Jones.

Conflict of Interest - When moving to new firms Past and Present Client Conflicts

Under both the MR and the RPC, where an attorney has worked on the same or substantially similar matter for one client, and then moves to a new firm that is working on the same or substantially similar matter for the adverse party of that representation, a conflict of interest exists. That conflict of interest is imputed onto the other attorneys in the firm, and the firm must not take on the case, regardless of who works on it, unless (1) the former client gives informed written consent (under CA) or informed consent confirmed in writing (under the MR), or (2) the new attorney is properly screened.

Informed Written Consent/Informed Consent Confirmed in Writing

Note while informed consent confirmed in writing only requires an attorney give full disclosure orally before the client provides written notice of consent, informed written consent requires that the disclosure of the conflict is in writing, and the client's consent is also in writing.

Screening procedure

An alternative for the firm exists where the new attorney is properly screened. This requires that the new attorney with the conflict does not work on the case in any way, does not have access to the case files nor discuss the case with any of the parties working on the case, and is not apportioned any fee for that case. Additionally, the firm

must provide notice of the decision to screen and the screening procedures put in place to the former client, and must certify compliance with those screening procedures if requested by the former client.

Here, if L wants to take the job at XYZ, he should let them know that this is a likely consequence of taking the new work. The firm will either need to inform Jones of the new conflict or implement appropriate screening procedures. However, as discussed in more detail below, this will not work under the CA RPC.

California exception for personal and substantial work

Under the CA RPC, a new lawyer's conflict is imputed into the entire firm, and the entire firm may not take on or continue a case, even with appropriate screening procedures or informed written consent, if the new and conflicted attorney worked substantially and personally on the same matter for the other client.

Here, it could be argued that L worked personally and substantially on the Jones v. Smith case. Although just an associate, "he has been defendant Jones" and prepared Jones's responses to Smith's discovery requests. He has consulted significantly with P, the partner, on issues involving sensitive materials.

It is therefore likely that L's conflict will be imputed to XYZ, and he should inform XYZ that this could cause problems with their representation. The best course of action would be to seek a delay in hiring until after the conclusion of the case.

Duty of confidentiality

See rule above. The duty of confidentiality applies to past clients as well as present ones.

Therefore, L will have a continuing duty to maintain confidentiality to Jones, even if he is able to take on the new work at XYZ.

Q5 Contracts

Sam owned a classic 1965 Eris automobile. Only 500 such cars were made and they are considered highly valuable.

Sam and Art, a classic car specialist, signed a valid written contract. The contract stated in its entirety:

> Art will serve as Sam's exclusive agent in selling his Eris car. Upon successful sale, Art will earn a commission equal to 10% of the sale price.

A few days later, Sam showed his Eris to Bob, who had learned of the car when he saw a "For Sale" sign Sam had decided to place on it while parked in his driveway. Bob, wanting to add the Eris to his personal collection, mailed Sam a signed letter later that day offering to pay $250,000 for the car. When Sam received the letter, he telephoned Bob and said he accepted the offer. They agreed to meet the following week for payment and exchange of title. Sam then called Art and said he was terminating their agreement.

The next day, Charlie saw an advertisement for Sam's Eris in a classic car trade publication. Art had placed the ad prior to Sam terminating their agreement. Charlie drove to Sam's house and offered $300,000 for the car and said he would mail a written contract to Sam that day. Sam said he would "think about it." He did not inform Charlie of his agreement with Bob. When Charlie's contract arrived, Sam signed it, placed it in a stamped envelope addressed to Charlie, and dropped it in the mailbox.

Sam died in his sleep that night. His will left all his property to his only relative, a nephew named Ned.

Ned wants to keep the Eris. As a result, Bob and Charlie filed timely claims against Sam's estate seeking title to the car. Art filed a timely claim seeking a 10% sales commission.

What contract rights and remedies, if any, do each of the following parties have against Sam's estate:

1. Bob? Discuss.

2. Charlie? Discuss.

3. Art? Discuss.

Answer A

Bob's Rights and Remedies

Applicable Law

Contracts for the sale of goods are governed by the Uniform Commercial Code (UCC). Goods are defined as movable, tangible things identifiable at the time of delivery. All other contracts are governed by the common law. Here, B attempted to contract for the sale of a 1965 Eris automobile (the car). The car is a tangible movable thing and so the UCC governs this contract.

Formation

This raises the issue of whether Bob (B) and Sam (S) entered into a contract. The formation of a contract requires mutual assent and consideration.

Mutual Assent

Mutual assent requires offer and acceptance. An offer must evince an objective intent to enter into an agreement, lay out sufficiently certain and definite terms such that the contract is capable of being enforced, and must be communicated to the offeree. Under the UCC, the key term for an offer to be sufficiently definite is the quantity term, and all other terms may usually be filled in by the court. Advertisements are not typically treated as offers.

Here, S had posted a sign on the car stating it was for sale. This was not an offer but rather an invitation to deal, that is a solicitation for offers. B responded to this solicitation

by mailing a signed letter "offering" to pay $250,000 for the car. We do not know if "the car" was the language used, so it is possible the offer does not describe the subject of the agreement with sufficient definiteness. However, it probably does in context, since all that is required is a sufficiently clear intent to agree. Since S was not selling any other cars this language would probably suffice. The letter was actually received by Sam, so this constitutes a valid offer.

An acceptance of an offer may be made by any means reasonable prior to the offer's termination. Here, after receiving B's offer, S called B and accepted the offer orally over the phone. The parties then agreed on the location where the final exchange would occur. This oral acceptance was sufficient to create a contract, even though the initial offer was in writing (but see the statute of frauds discussion below).

Consideration, the final element of contract formation, requires that there be (1) a bargained for exchange (2) of legally valuable detriment. A bargained for exchange requires the promise induce the detriment and the detriment the promise. To be of sufficient value, the detriment need not be economic, or even very large. Here, S agreed to relinquish title to his car and B agreed to pay $250,000. It was sufficiently bargained for in that each promise induced the other. Therefore, there was sufficient consideration.

B and S entered into a contract for the sale of S's car for $ 250,000.

Defenses to Formation

This next raises the issue of whether the contract is enforceable, and particularly whether it satisfies the Statute of Frauds.

Statute of Frauds

Even where a contract is formed, it may not be enforceable if it falls within the Statute of Frauds and no exception applies. Among the contracts covered by the Statute of Frauds are goods sale contracts where the price paid is $500 or more. Here, the contract was for the sale of a car at a price of $250,000, well in excess of the minimum to be covered. Therefore, to be enforceable the Statute of Frauds must be satisfied or some exception must apply.

To satisfy the Statute of Frauds, there must be some writing evidencing the existence of a contract and its essential terms, which is signed by the party against whom it is being enforced. Here, B sent a signed letter to S offering to purchase the car at a stated price. Had S sued B for breach of contract this would have satisfied the statute, however S never signed the letter, nor any other document. Rather, he accepted the contract over the phone. The "For Sale" sign is insufficient, both because it does not suggest a contract between S and B and was not signed. B might argue that S's contract with A shows he intends to sell the car, but that contract does not prove that S had a contract to sell the car to B (indeed it probably shows the opposite). Therefore, there is no writing which appears to satisfy the Statute of frauds and make the agreement enforceable against S.

The UCC contains certain exceptions to the Statute of Frauds which B may argue make the agreement enforceable. These exceptions include (1) where one party has partially performed on the agreement (but only to the extent of that partial performance) (2) where promissory estoppel applies (3) where the contract is for specially manufactured goods, after substantial performance has begun and the goods cannot

reasonably be resold and (4) a merchants' confirmatory memo.

Here, the first three exceptions clearly do not apply. The part performance exception only applies to the extent goods have already been either paid for or delivered, and only for the goods actually paid for and delivered. Here, there was an agreement but no delivery of goods or payment, so the exception does not apply. The facts do not suggest any detrimental reliance has taken place, so estoppel will not save the agreement. Finally, the contract was for the sale of unique goods, not for the manufacturer of such goods. Additionally, even if this did apply, it would protect S, not B.

The only possible exception is the merchants' confirmatory memo. Under the UCC, where one party sends a signed writing memorializing their oral agreement, and the counterparty does not object within 10 days, the counterparty will be deemed to have accepted and the writing may be used to satisfy the Statute of Frauds. If the party orally accepts, this will also satisfy the statute. Here, the memo was sent and S replied by accepting over the phone, so the confirmatory memo exception might apply.

However, the exception only applies where both parties to the agreement are merchants. The UCC defines as one who deals in goods of the kind sold, or otherwise holds himself out as possessing specialized knowledge, skill or expertise in such goods. Here, B might be a merchant, but there are no facts to suggest S is. B has some expertise in classic cars, since he has a personal collection. However even this might not suffice since it is personal, and he does not deal in the goods of the kind (here classic cars). Nor did he appear to hold himself out as having specialized knowledge, and he may not have such knowledge simply by owning a classic car collection. S is even less likely to be a merchant. There are no facts suggesting he knew more than

most about cars. The fact he hired an agent to sell his car affirmatively suggests he is not a merchant. Therefore, the confirmatory memo exception does not apply

Because the contract falls within the Statute of Frauds and cannot satisfy it, the agreement between S and B is unenforceable.

Dead Man Act

The facts do not state if the jurisdiction in question has a Dead Man Act. This kind of act generally precludes the use of oral statements of a deceased against the descendant’s estate to prove the existence of an agreement. Here, the only evidence of B's contract with S was S's oral statement over the phone. Therefore, if the jurisdiction had such an act, B would be further barred from proving the existence of his contract with S in a subsequent suit against Ned (N).

2. Charlie's Rights and Remedies

Applicable Law

For the same reasons discussed above, the UCC is applicable to Charlie's (C's) contract with S.

Formation

The threshold issue is whether S and C formed a contract. The rules governing formation are discussed above.

Mutual Assent

Here, the advertisement placed by Art (A) was merely an ad, and did not constitute an offer. However C's subsequent oral statement to S offering to buy the car for $300,000 would constitute an offer. It specifies the quantity (the car) and was communicated to S.

S did not immediately accept, but said he would "think about it." Later, he received a contract from C. He signed the contract and placed it in the mailbox.

Under the mail box rule, an acceptance is deemed effective when it is mailed. At this point, a valid contract is formed even if the offeror has not yet received the acceptance. By placing the contract in the mail box, S has accepted the offer and it became effective when he did so.

N might try to argue no contract was formed because S's initial response, that he would think about it, terminated the initial offer, because it constituted a rejection. However, this was not a rejection but rather a deferral of a response. Even if it were, the subsequent written contract would constitute a new revived offer that S accepted.

N might next argue that the offer terminated prior to acceptance. An offer is assumed to be valid for a reasonable time if it does not specify a particular date on which it terminates. An offer terminates by operation of law upon the death of either the offeror or offeree. Here, S died immediately after mailing his acceptance. Had he not mailed his acceptance his death would have terminated the offer, but by mailing the acceptance a contract was formed.

A contract, unlike an offer, does not terminate at the death of one of the contracting parties unless the contract is for specialized services. A sale of goods contract certainly does not. Here, the death of S did not terminate the acceptance or the formation of S's contract with C.

For the same reasons stated above, consideration exists for the agreement between S and C. Therefore, a contract was formed between them.

Defenses to Formation

Statute of Frauds and Dead Man's Acts

The Statute of Frauds is equally applicable to the contract between C and S. However, unlike the contract between B and S, this contract likely satisfies the statute. S signed the written agreement and accepted. Assuming the contract C sent contained all the essential terms (quantity, a description of the subject matter, the parties), which there is every reason to think it did, this writing will satisfy the statute and the agreement will be enforceable.

Because the agreement is in writing and signed by S, any Dead Man's Act would not preclude enforcement of the obligation.

There are no other defenses to either formation or performance which appear in the facts, therefore, C will be entitled to some remedy should N refuse to deliver the car.

Remedies

This raises the issue of what remedies C may be entitled to.

Replevin

Replevin is a legal restitutionary which allows a party to obtain a court order (even before trial in certain circumstances) allowing the party to retake chattels to which he has a lawful right. To be available under the UCC, the chattels must have been identified in the contract, the amount of time between contracting and the order being sought must not have been too great, and damages must be an inadequate remedy. Damages are inadequate where the subject matter of the contract is unique. The order must also be able to be enforced by the Sheriff.

Here, the car is an identifiable good to which C has a contractual right. The contract was formed mere days before, so the amount of time which has elapsed is not too great. The car is also unique, since there are only 500 in the world. Therefore, C will likely be able to replevin the car from N should N refuse to perform.

C may be able to do this even before a full trial on the merits is had. If N is given notice and a hearing before the order is issued (and potentially even if not), and C posts a bond ensuring against losses incurred by N if the taking is wrongful, C may obtain the order before the case is decided. However, N may post a bond in response ensuring against the disappearance or loss of the car and may then keep the car until the merits are resolved.

Specific Performance

Specific performance is a court order requiring a party to perform on a contract or face contempt proceedings. To obtain specific performance on a contract, the party must show (1) certain and definite terms (2) that legal remedies are inadequate (3) that enforcement would be feasible and (4) that the party has, or is willing to, fully perform its obligations under the contract. Here, the contract is, presumably sufficiently clear, as discussed above. If C tendered the purchase price he has performed. The remedy would be enforceable, since it would simply require transfer of the car. The only question is whether legal remedies are inadequate. If the court were willing to make replevin available as a remedy, then legal remedies would not be inadequate. If replevin was unavailable for some reason, for instance the sheriff could not locate the car, then the car would be considered sufficiently unique to award specific performance.

Damages

C might alternately seek damages. Expectation damages are intended to place the non-breaching party in as good a place as they would have been had the contract been performed. Here, assuming C could not cover, the damages would be equal to the difference between the contract price and the market price of the car, plus incidental damages and consequential damages, less expenses saved. There is no evidence in the facts of what the market price would be, or of any incidental or consequential damages, however C would be able to recover whatever was avoidable and foreseeable at the time of contracting.

3. Art's Rights and Remedies

Applicable Law

Unlike the above contracts, the agreement with A is governed by the common law. The contract is for the service of selling a car. While the underlying object is a good, the agreement's primary focus is the services rendered, especially since A is not the one actually buying the car. Therefore, the common law applies.

Formation and Defenses

The facts state that a valid contract was formed between S, so presumably mutual assent was present. The agreement was in writing so the Statute of Frauds would be satisfied (and is not applicable in any event because it could be complete in less than a year). There are also no obvious other defenses to formation, save consideration.

Consideration

N will argue that he is not obligated to pay A because the contract is illusory. For

consideration to exist, each party must have obligations under the agreement. Future contingencies are sufficient to support consideration.

Here, A agreed to serve as S's exclusive agent in selling the car. He would receive a 10% commission for his services. S clearly incurred legal detriments, both by making A his exclusive agent and offering to pay him if there was a successful sale. N will argue that A was not obligated to do anything under the agreement.

Where parties enter into an agreement where one will act as the selling agent of another, courts typically do not find them illusory. Instead, they imply a term that the agent must use their best reasonable efforts in carrying out the agency to save the contract. Here, a court would likely reach a similar conclusion regarding the contract between S and A, and find it enforceable.

Breach

Length of Employment

This raises the issue of whether A was an at will employee or was to work for S until the car was sold. The key term in an employment or services contract is duration. Without such a term a contract is created, but will be deemed an at will employment relationship terminable by either party at any time. Here, the agreement did not state a specific term. N will argue this means S did not breach by ending the relationship. A will respond that the term was for the completion of a particular task, and that he was employed until that task was complete. He will point to the fact that the relationship was exclusive to support this conclusion. It is unclear how a court would rule on this point. Given how short the contract is, the court would likely permit parol evidence concerning prior performance to assess, and may also look to industry custom.

If the court found it was an at will employment arrangement, S, by terminating A, ended it and is not entitled to payment because a "successful sale" had not occurred. However, even if this is the result, A will still probably be able to recover under a quantum meruit theory for the amount of time and money he has already put into selling the car.

Anticipatory Repudiation

If the court instead found that the contract lasted until the task was completed, S would have anticipatorily repudiated the contract and would be in total breach. A party materially breaches a contract when they unambiguously give notice to the other party that they will not perform, and the agreement is executory. If this happens the counterparty need not perform further and may sue. Here, S told A that he was not going to honor the contract. Neither party had completed performance and the repudiation was unambiguous, therefore S likely breached the contract.

A might alternately not accept the repudiation and instead seek his portion of the compensation for the sale to C. A party may elect not to accept the repudiation but instead keep performing under the contract and wait until performance is due. Here, C came to S because of A's efforts (through an ad A placed). A will argue that he acquired a buyer for the car and so, under the terms of the contract, even absent a repudiation, S's duty to perform (now N's) became absolute upon signing the enforceable contract with C.

N might argue that no "successful sale" occurs until the car is actually transferred. Even if this is true, N cannot wrongfully prevent the occurrence of a condition precedent.

Remedy

Damages

As discussed above, expectation damages, which are the default, place the party in as good of a position as they would have been in had the breach not occurred. To be recoverable damages must be sufficiently certain and calculable. Finally, a party must take reasonable steps to mitigate damages, although in a services contract they need not accept substantial.

Here, A will be entitled to whatever 10% of what the sales price would have been equal to, assuming he can prove with sufficient certainty both that amount and that a sale would have occurred. A's costs saved after the repudiation would be deducted from this, but if he received the 10% he is entitled, past advertising expenses would not be recoverable.

He may also seek to recover on a reliance measure of damages if expectation damages are too uncertain. Reliance damages seek to place the party in as good of a position as they would have been in had the contract not been made. Here, A would be entitled to the expenses he has incurred up to this point in trying to find a buyer. This includes the cost of the advertisement he placed in the newspaper, as well as any similar efforts, and the reasonable value of the time he has worked on the project.

Answer B

Applicable Law

In contracts, contracts that are for the sale of goods are governed by the UCC, while contracts for anything else (i.e. services) are governed by the common law. Only one of these can be applied (all or nothing rule) and when the contract is mixed, the one that is applied is determined by the primary purpose test.

1. BOB v. SAM'S ESTATE

Applicable Law

See rule above. Here, Bob is asking for a claim based upon an alleged contract for the purchase of a car from Sam. A car is a tangible good, thus this contract is governed by the UCC.

Contract Formation

In order to form a valid contract, there must be the following: mutual assent (offer and acceptance), consideration, and no defenses.

Offer - Sam's Sign

An offer requires that the offeror objectively manifest terms that indicate to a third party the intent to be bound by the contract, such that the offer creates in the offeree the power of acceptance. Under the UCC all essential terms must exist, which would only be the quantity. A court will gap fill the rest of the provisions.

Advertisements are typically not considered offers, but are usually considered offers to deal.

Here, the ad was a for sale sign that had been placed in the car when parked on the driveway. This is not going to be considered an offer, but is instead an invitation to deal. This is clear because Bob understood it as such as demonstrated by the fact that he actually went to speak with Sam and sent Sam an acceptance. As such, this was not an offer, but simply an invitation to deal.

Offer - Bob's Letter

See above for offer rule. Further, the type of offer matters as to the type of contract that exists. A bilateral contract is the exchange of promises, while a unilateral contract is asking for the other party to perform

Here, Bob sent Sam a signed letter that offered to pay $250k for the car. This is clearly a valid offer under the UCC as it contains the subject matter of the deal (the car) and even includes the price and the parties. Therefore, there is nothing left even for the UCC to gap fill. One could argue that simply offering for the "car" may not make the quantity term specific enough, but based on the prior interactions that the parties had between each other, this was a clear term and thus this was a proper offer.

In addition, this was an offer for a bilateral contract as Bob was asking for a promise from Sam to give him the car, in exchange for a promise from Bob to give Sam money.

Acceptance - Sam's Phone Call

An acceptance requires an intent by the offeree to be bound by the terms of the offer. There must be a clear manifestation of assent to properly accept an offer. In the case of a bilateral contract, the offer can be accepted by either a return promise or by beginning performance.

Here, Sam accepted the contract over the phone by saying "he accepted the offer" and promising to perform, which is a proper way to accept a contract.

Therefore, this was a proper acceptance.

Consideration

Consideration is evidenced by a bargained-for exchange between two parties. It is usually evidenced by a detriment to the promisee or a benefit to the promisor.

Here, there was clearly bargained for consideration between these two parties as Sam (offeree) was incurring a legal detriment by giving his car to Bob and Bob (offeror) was getting a benefit by receiving Sam's car.

Therefore, there was consideration.

Defenses

However, in order to be a valid contract, there must be no defenses to the formation of the contract. Here, there might not have been a proper contract because it may need to satisfy the Statute of Frauds.

Statute of Frauds

When the Statute of Frauds applies, it requires that the contract be in writing, signed by the party to be charged and contain the terms of the deal. The Statute of Frauds applies in several situations, including in the UCC for sales of goods that exceed $500.

Here, the contract was for the sale of goods, and was for $250k, which far exceeds the amount required to apply the Statute of Frauds. Therefore, the Statute of Frauds

applies.

Next, the Statute of Frauds requires that the contract be in writing, signed by the party to be charged and contain the essential terms of the deal. Here, this is not satisfied because the only writing that exists between Bob and Sam was Bob's offer to Sam. While this certainly contained the essential elements of the deal, it fails because it doesn't have the other requirements.

First, it is not signed by Sam. It is necessary that Sam be the one to sign it as Bob is trying to enforce this contract. Thus, Sam is the one to be charged under the contract. Sam could argue that his letter offer to Bob was signed, but that doesn't help him as 1) that was just an offer, not the contract, and 2) Bob is not the party to be charged here. In fact, there is no writing at all other than the offer that would be the contract between these parties.

Therefore, this contract violates the Statute of Frauds and should fail.

Statute of Frauds Exceptions

The Statute of Frauds can be overcome in limited circumstances where perhaps this was an order for specialty goods, one party has already performed, or there was promissory estoppel.

Here, however, none of those things occur here as there is no indication that the car was ever delivered to Bob and while this is certainly a special car, this was not a specialty ordered good, but one that was already in existence when the order was placed. Finally, promissory estoppel doesn't apply as there is no evidence that Bob did anything in terms of relying on the promise (i.e. setting up a person to get the car,

finding a storage space, etc.).

Therefore, because the Statue of Frauds exceptions don't exist, this will not be an enforceable contract.

Conclusion

In sum, Bob and Sam did not enter into an enforceable contract because it did not conform with the Statute of Frauds and no Statute of Frauds exceptions exist.

2. CHARLIE v. SAM'S ESTATE

Applicable Law

See rule above. Here, Charlie is asking for a claim based upon an alleged contract for the purchase of a car from Sam. A car is a tangible good, thus this contract is governed by the UCC.

Contract Formation

See rule above.

Offer - Ad in Publication

See rule above on ads and offers. Here, this was still clearly not an offer as it was just an invitation to deal with an indication that the car was for sale. Further, this is shown by the evidence that Charlie simply saw the ad and went over to Sam's house in order to see the car and make an offer. Therefore, this was not an offer (note that it doesn't matter that Art put the ad in the paper as that was done by Art while he was Sam's agent).

Offer - In Person

See rule above for offers.

Here, we clearly have an offer that satisfies the UCC requirements as the car is clearly identified (quantity term). In addition, the offer indicated a willingness by Charlie to enter into a deal and even contained a money term. Therefore, this was a proper offer.

Offer - Written Contract

Note that this written contract actually just restated the oral offer that Charlie had made earlier and therefore, it is also a continuation of the same offer.

UCC Firm Offer?

In the UCC world, a merchant can have an irrevocable offer held open for a stated number of days (not to exceed 90) if they send the offer in writing and sign it. A merchant is one who deals in the goods at issue regularly. Here, there is no evidence that Charlie is a merchant. Rather, it appears that Charlie is just a collector who wanted to buy this particular car. Therefore, this was not a firm offer that could be held open.

However, that does not mean that the offer lapsed or anything by the time acceptance became an issue. Rather, the offer was still good and was in the power of Sam to accept.

Acceptance - Think About It

See rule above for acceptance. When Sam said that he would "think about it," this was not an acceptance. Rather, this was an indication that he was open to the offer and that he would like to think more about it. Further, this was not a rejection that would terminate the offer, but rather was just an expression that he needed more time to think

about whether or not to accept. Therefore, no contract had formed at that point.

Acceptance - Mailbox

See rule above for acceptance. Under the mailbox rule, an offer is accepted when placed in the mailbox by the offeree. The actual receipt of the acceptance by the offeror does not make a difference under this rule.

Here, Sam received the contract from Charlie and decided to accept it. He accepted it by signing it, placing it in an envelope, and then putting it in the mail to send back to Charlie. The offer was therefore accepted when Sam placed the offer into the mail and the receipt of the acceptance is of no consequence.

Further, it does not matter that Sam died in his sleep that night. The offer was accepted when he placed it in the mail and that is when the contract came into existence. A good contract is not terminated imply because one of the parties dies (this is of course subject to various exceptions).

In sum, when Sam placed the signed letter in the mailbox, a valid acceptance was sent and his death does not impact that.

Consideration

See above for consideration. Here, the analysis is the same. Sam (offeree) is incurring a detriment by sending his car to Charlie, while Charlie is incurring a benefit by receiving the car. There was clearly a bargained for exchanged here as evidence by the fact that Sam even indicated that he wanted to think about whether or not to accept the offer.

In sum, there was consideration for the contract.

Defenses

See rule above. Again, here, there is a Statue of Frauds question as this applies here.

Statue of Frauds

See rule above. Here, contract again is subject to the Statute of Frauds as this is a UCC contract with a price of $300k, which far exceeds the $500 minimum. Therefore, SOF applies.

Further, here, the requirements are met. First, we have a writing as we know that Charlie mailed a copy of the contract to Sam which contained the essential terms of the deal (car, price, parties, etc.). In addition, as the party to be charged, Sam needed to sign it and, here, Sam did sign it before sending it out. Therefore, this is a contract in writing with the essential terms and the party to be charged signed it.

Therefore, this does not violate the Statute of Frauds.

Conclusion

In sum, Charlie and Art entered into a valid contract for the sale of Sam's Car. However, the remedies are now an issue provided that Sam's estate does not honor the sale.

Remedies

Specific Performance

Charlie may want to sue for specific performance of this contract in order to receive the car provided that S's estate does not follow through with the contract. Specific performance is an equitable remedy that allows a court to force that the contract be

performed.

Specific performance requires: (1) a valid contract; (2) no defenses; (3) clear/definite terms; (4) all conditions precedent are satisfied; (5) it is possible for the court to enforce; and (6) legal remedy inadequate.

Valid Contract

Here, this exists as discussed above.

No Defenses

This is satisfied as no valid contract defenses exist. See above.

Clear/Definite Terms

This is satisfied as the contract concerns a specific car that exists and which we know where it is. Therefore, this will be found to exist.

Conditions Precedent

This will be found to exist provided that Charlie pays Sam's estate the amount that he owes. That is likely considered a concurrent condition (C gets the car and pays at the same time). Therefore, no condition precedent exists.

Enforcement

This is feasible as the court will simply need to oversee the transfer of the car from S's estate to C. This is entirely possible and easy as it only needs to happen once.

Inadequate Legal Remedy

In order to grant specific performance, the legal remedy (money damages) needs to be inadequate. This will most often be granted in situations in which the subject matter is

rare or unique.

Here, C will argue that simply getting money will not be enough as what he really wants is this car. Further, this is a rare/unique car as there were only 500 of these particular cars made and they are extremely valuable to collectors. Further, C can point out that it is rare that these cars even come on the market, therefore, the odds of this coming on the market again may be unlikely and this may be C's only chance to get this particular car. S could try to argue that 500 cars means that they aren't all that rare and that C can just be compensated with expectation damages, but this is likely to fail due to the unique nature of the car and that fact that it is so rare and may not come on the market again.

Conclusion

In sum, the court should grant specific performance to C.

3. ART v. SAM'S ESTATE

Applicable Law

See rule above. Here, this contract is for a service (i.e. Art will help Sam to sell his car), thus this contract is governed by the Common Law.

Contract Formation

See rule above. Here, the facts state that there was a valid agent contract between Art and Sam. Therefore, that contract is good.

Revocation

A contract can be revoked by a party and that means their relationship ends and the non-breaching party can sue for damages. However, a revocation is only good going

forward and can't be revoked in a services contract for services already provided.

Here, since Art had already placed the ad in the paper before S terminated the contract, and Art's ad led to the sale of the car, a court will likely find that the contract was not properly revoked at that time and that therefore, the contract is in existence.

Performance - Condition Precedent

Generally, under the common law, a party performed by providing "substantial performance." However, a condition precedent to a contract means that it must be strictly met in order for performance on the contract to be required. Courts typically construe provisions in a contract as promises rather than express conditions. However, an express condition can exist if it is clear that is what the parties intended per the contract language.

Here, the contract between Art and Sam contained an express condition -- "upon successful sale" that triggered Sam's duties to Art. Therefore, this condition needed to be strictly met before S owed anything on the contract to Art.

Here, the successful sale occurred (as discussed above) between C and S. Therefore, this condition has been properly met and this triggers S's duty to perform on his end of the contract. Therefore, S will have to pay the 10% of the sale price to Art.

S's estate should pay Art 10% of the $300k purchase price - $30k.

Damages

If S's estate refuses to pay the 10%, Art will be able to request expectation damages that would give him the benefit of the bargain. Here, Art expected to get per the terms of the damage 10% of the purchase price - $30k. This means that Art could properly sue S's estate for that amount.

Feb 2019

California Ba 

Essay Questions and

Selected Answers

The State Bar Of California
Committee of Bar Examiners/Office of Admissions

180 Howard Street • San Francisco, CA 94105-1639 • (415) 538-2300
845 S. Figueroa Street • Los Angeles, CA 90017-2515 • (213) 765-1500

ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2019

CALIFORNIA BAR EXAMINATION

This publication contains the five essay questions from the February 2019 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	Subject
1.	Wills and Trusts / Community Property
2.	Torts
3.	Real Property
4.	Evidence / Civil Procedure
5.	Professional Responsibility

ESSAY EXAMINATION INSTRUCTIONS

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little or no credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

Q1 Wills and Trusts / Community Property

In 2006, while Hank and Wendy were married and living in State X, a non-community property state, they purchased a house in State X and a condominium in California with money from Hank's salary. Hank took title to both the house and the condominium in his name alone.

In 2008, Hank executed a will leaving whatever he might own at death to Wendy. As allowed by State X law, only one witness signed the will.

In 2016, Hank and Wendy retired and moved to California. Hank conveyed the condominium to himself and to Sid, his son from a prior marriage, as joint tenants with right of survivorship, doing so as a gift to Sid. Hank then put $100,000 he obtained from an inheritance into a valid revocable trust, the income to be paid to him for life, then to Wendy for life, remainder to Sid.

In 2017, as a result of a skiing injury, Hank lost all mental capacity and was on the verge of death. In accordance with Hank's prior wishes, Sid was appointed as Hank's conservator. Sid prepared a codicil to Hank's will, giving a one-half interest in the State X house to Hank's best friend, Bill. Sid signed the codicil as conservator, and had it properly witnessed.

In 2018, Hank died. Sid found that Hank owed various creditors more than the value of the State X house and California condominium combined.

1. What rights, if any, do Wendy and Sid have in the California condominium? Discuss. Answer according to California law.

2. What rights, if any, do Wendy and Bill have in the State X house? Discuss. Answer according to California law.

3. Will Hank's creditors be able to reach the assets in the trust? Discuss.

Answer A

Community Property Basics / Overview

General Community Property Rules; Quasi-Community Property Concept

California is a community property state - a married couple is seen as forming a marital economic community (MEC) and property acquired by the couple or either spouse during the MEC (which exists from time of valid marriage until the earlier of permanent separation (which may be affected unilaterally by a spouse by the communication of the intent to permanently separate together with conduct in conformity with such intent) or death) while domiciled in CA is presumptively community property, unless it fits into specific categories of so-called "separate property". Separate property includes property acquired by either spouse prior to (or for that matter after) the MEC, or during the MEC if: (1) by gift, inheritance, or bequest; (2) as income, issue, or rents on SP; or (3) by the expenditure of SP funds (i.e., property traceable to SP).

California's system also captures so called "quasi-community property" - property that would have been CP if the couple had been domiciled in CA at the time of acquisition. QCP is treated like SP until the death (or dissolution) of the MEC, when it is subject to treatment like CP.

Default Division upon Death of Spouse; Right of Decedent Spouse to Make Will; Surviving Spouse Rights to Take Against Will

At death, in the absence of a valid will (i.e., decedent spouse dies intestate), CP and QCP owned by the decedent spouse will generally all be inherited by the surviving spouse (anywhere from 1/3 to all of decedent spouse's SP will also be inherited by surviving spouse - it would be 100% if decedent spouse left no issue or surviving parents or issue of parents; but if as here decedent spouse was survived by 1 child, then surviving spouse would take 1/2 SP)

However, a spouse may make a valid will - and CA will probate a will that was validly made pursuant to the laws of another jurisdiction where decedent spouse testator was domiciled at the time (even if the will would not be valid under CA law). However, if the will attempts to gift

away CP / QCP owned by the surviving spouse, the surviving spouse can (at the cost of rejecting all gifts under the will), "take against the will" and claim all such CP / QCP (i.e., decedent testator spouse can only will away all of his SP and his 1/2 of CP / QCP without surviving spouse consent / acquiescence)

Application to Hank and Wendy

Here, Hank and Wendy were validly married in 2006 and living in State-X (a non-community property state) until 2016, when they moved to CA - Hank then died while the couple was domiciled in CA. So, all property acquired by the couple from 2006 to 2016 is generally QCP (unless it qualifies as SP - burden of proving SP would be on the SP proponent)).

Furthermore, Hank's 2008 will (which was validly made under State X law) can be probated under CA law (effect of 2017 codicil to be discussed below)

With these basics in mind, we now turn to each Q1.

California Condo

Original Characterization of Condo

When a couple ultimately is domiciled in CA at the time of death of one spouse or dissolution of the MEC, property acquired while domiciled outside of CA is QCP if it would have been CP if the couple had been domiciled in CA at the time the property was acquired. This is true even if the purported QCP is real property located in CA. Wages / salary of each spouse during the MEC are CP - and property acquired using such CP funds is also CP, regardless of whether title to the asset is taken in the name of one spouse.

Here, even though Hank took title to the condo in his own name, he used CP funds (his salary during the marriage) to purchase, so the condo would have been CP -- since the couple was domiciled in State X at the time, and Hank is dead now, it is treated as QCP.

Effect of Inter Vivos Conveyance

QCP is generally treated as the acquiring spouse's SP until the time of the acquiring spouse's death (or, irrelevant here, the dissolution of the marriage). However, that does not mean that

the acquiring spouse is completely free to make inter vivos transfers of the QCP -- if the acquiring spouse transfers QCP during his life for less than fair value while retaining an income right, a right to revoke the transfer, or a right of survivorship, the other spouse has a right to clawback 1/2 of the value of the transferred QCP from the transferee.

Here, Hank transferred the QCP condo while retaining a right of survivorship - so Wendy has a right to 1/2 of the condo under this clawback rule. Sid does not have the right to own the entire condo (even that would otherwise be the result, due to the right of survivorship - if not for the QCP system, Hank's death would have extinguished his ownership rights in the condo, leaving nothing to pass by his will to Wendy, and giving Sid 100% ownership of the condo). Note that this is not "taking against the will", since this was a separate inter vivos transfer of QCP - so Wendy doesn't need to repudiate any rights under the will to assert this right to the CA condo.

2. State X House

Original Characterization of State X House

See above for rules.

Here, Hank also purchased the State X house using CP funds (his salary), so the State X house is also QCP.

Validity and Effect of 2017 Codicil

Under California law, a will can be amended, revoked or otherwise modified in whole or part by a subsequent codicil, provided it is validly executed. A validly appointed conservator can make a will or codicil for a now-disabled / incompetent person.

Here, Sid was properly appointed as conservator (when Hank become incapacitated from the skiing accident), signed the codicil, and had it properly witnessed (i.e., 2 witnesses who witness the will signing simultaneously and then sign the will) - so this a proper testamentary instrument that modifies Hank's 2008 will, even though Hank was not mentally competent. Furthermore, there are no facts that would allow Wendy to argue that Sid abused his power as conservator to improperly benefit himself. Instead he gave a gift to a close friend of Hank's,

and Hank expressly designated Sid to be his conservator, so there are no "bad facts" for Wendy to attack.

Wendy's Rights

See rules above

Because the will and codicil together only dispose of 1/2 of the State X house, and provide that Wendy receives the other 1/2, Wendy has no grounds (or reason) to "take against" the will here.

3. Creditor Rights with respect to Trust Assets

Trust Basics; Characterization of Trust Res

A Trust is fiduciary relationship in respect of property, where one party - the Trustee - is given legal title to certain property by another - the Settlor / Trustor; the Trustee holds the property subject to fiduciary duties, for the benefits of certain beneficiaries, who have equitable rights in the property.

A trust requires trust property and ascertainable beneficiaries, an act of creation (including an inter vivos transfer to a Trustee) by the Settlor with the intent to create a Trust, and a Trustee with duties (who can be selected by agreement between Settlor and Trustee, or Trustee can be designated by court if Settlor does not name or intended person declines to serve as trustee). Trust must also have a valid purpose

Settlor can name self as beneficiary and can reserve right to revoke trust. Providing income to a person (including Settlor) during lifetime is a valid trust purpose.

Here, Hank created a valid trust, with himself and Wendy as successive lifetime income beneficiaries, and Sid as the remainderman beneficiary. Since he funded the Trust with inheritance, this was SP, and there is no CP issue with Hank putting the money into trust (or designating Sid as remainderman) without Wendy's consent.

Rights of Creditors to Reach Assets In Revocable Trust; Rights of Creditors to Reach Assets in Trust After it Becomes Irrevocable

When Settlor puts money or other assets into trust and reserves the rights to revoke, creditors of the Settlor can generally reach these assets. However, a trust that that is revocable inter vivos becomes irrevocable upon death.

Here, Hank's creditors could have reached the trust assets during his life - if they obtained a judgment against him, they could have moved against his various assets (including his interests in the State X House and CA Condo, for that matter). But here the creditors have not acted promptly - Hank's estate does not have an interest in the trust; Wendy has an income interest for life, and then Sid has the remainder. Accordingly, Hank's creditors cannot reach the trust res.

As discussed above, however, the State X house is owned by Hank's estate, and due to go 1/2 to Wendy and 1/2 to Bill. Creditors could presumably move against that asset.

Answer B

1. California condominium - Wendy & Sid's rights

Valid Will

A will is considered valid in California if it complies with the law of either: (i) California, (ii) the state where the will was executed, or (iii) the state of the decedent's domicile at death. H's will was executed in State X. Under the law of State X, which allowed only one witness to sign the will, the will was valid. Therefore, Hank (H)'s 2008 will is valid in California because it complied with the law of the state where it was executed (State X), even if it would not be valid under CA law, which requires two witnesses.

Community Property Law

California is a community property state. Under community property law, the marital economic community (MEC) begins with a valid marriage and ends with the death of a spouse, divorce, or permanent separation. Any property obtained during the marriage, as well as any labor and wages of the spouses during the marriage, is community property (CP). Property obtained prior to marriage, or after permanent separation, is considered separate property (SP). Property obtain by gift, inheritance or devise before or during the marriage is also considered SP. Property that is obtained with SP only will also be considered SP, because a change in form will not result in a change in characterization. Quasi-community property (QCP) is any property obtained by the spouses during marriage while living in a non-CP state, that would have been considered CP had the spouses been living in California. QCP will receive that classification on the death of the titled spouse or on divorce, prior to which the property will be governed by the law of the non-CP state. QCP will be divided on divorce just as CP is.

Hank (H) and Wendy (W) married in 2006 in State X, a non-CP state. Thus, the MEC was formed by at least 2006, when H and W were living together in State X. The California condo was bought after H and W married, thus during the marriage. Although

H and W were living in a non-CP state when they bought the California condo, the property would have been considered CP had the spouses been living in California because it was obtained during the marriage. Therefore, on H's death in 2018, the condo became QCP. However, prior to H's death, H and W's rights to the condo remained governed by State X law.

H took title to both the house and the condo in his name alone. Assuming this was valid in State X, H could then transfer his interest in the property to himself and Sid during life because the property was not yet classified as QCP. However, once H died, the property became classified as QCP, and will be treated as community property for the purpose of W's rights if she elects to take her CP law share instead of taking under the terms of the will.

a) SID

Joint Tenancy

A joint tenancy is characterized as having four unities: unity of possession, unity of transfer, unity of interest, and unity of time. This means that for a valid joint tenancy to be present, the tenants must have the right to possess all of the property together, they must receive those interests in the same instrument of transfer, and in equal shares, at the same time. A right of survivorship can only be created by express language in the deed. Consideration is not necessary to transfer an interest in real property. A right of survivorship vests the entire interest in the property to the surviving tenant after the other has deceased.

H transferred the condo to himself and Sid (S) as joint tenants with right of survivorship. H created these interests at the same time in the same transfer. Therefore, assuming also H granted Sid half, and himself the other half interest in the property, H and S had a valid joint tenancy with right of survivorship, as long as H also included express language that this was to be a joint tenancy with right of survivorship.

If W decides to take under the terms of the will, instead of her intestate share, S would receive the entire interest in the property because an interest in a right of survivorship

cannot be devised by will. S would own the condo in fee simple absolute as the surviving joint tenant because H's interest would vest in S upon H's death. The creditors will not be able to take the property in this case because S is not part of the MEC and not otherwise liable for H's debts.

However, if W decides to take her forced intestate share under CP law, she will be able to take the condo, but it will likely be subject to the claims of H's creditors as discussed below, because the CP is liable and the condo would be QCP, effectively treated as CP for the purposes of distribution and satisfaction of creditors.

b) WENDY

Spouse's Share

On the death of a spouse, a spouse can elect to either take under the terms of the deceased spouse's will, or take an intestate share. There is no elective share of the will in California. Rather, community property law provides for the distribution.

Electing under Community Property Law

Under California intestacy law, the spouse takes an intestate share that includes: the deceased spouse's 1/2 interest in the community property, in addition to the surviving spouse's own 1/2 interest in the CP, totaling to all of the CP. In addition, if the deceased spouse is surviving by one issue, parent, or issue of parent, the surviving spouse takes half of the deceased spouse's separate property.

H was survived by only one issue, his son, S. Therefore, if W chooses this option, W is entitled to all of the CP and half of H's SP. As discussed above and below, both the condo and the State X house will be considered QCP on H's death. Therefore, W can decide to take all of the CP, including both the State X house and the condo, as well as 1/2 of the interest in the trust as H's SP ($50,000 worth).

Under the Will

If W decides to take under the terms of the will, she will not receive any interest in the condo because it would vest entirely in S due to the right of survivorship.

Spouse's Homestead Rights

In probating a will, a spouse can petition the court to allow for a homestead for the surviving spouse, essentially allowing the spouse to continue living in the family home.

If the California condo was H and W's family home, W could petition the court to allow it as her homestead. However, if W does not take her CP share, S will have a valid interest and claim to the condo and the court would not grant the petition.

2. State X house - Wendy & Bill's rights

a) Classification as Separate Property

(i) Community Property Presumption

See rule above.

H and W bought the house during their marriage while living in a non-CP state. Therefore, the State X house will be presumed QCP on H's death, because H, the titled spouse, has died. Unless H's estate is able to rebut this presumption by a preponderance of the evidence by tracing the funds used to purchase the house to H's earnings before marriage, the State X house will be properly presumed QCP because a spouse's earnings *during* marriage are CP. Any property obtained with CP funds will also be considered CP.

However, a general presumption, such as the general community property presumption, can be overridden by application of a special presumption, such as those listed below. H's estate, or Bill, or both, will likely argue that the special title presumption should apply such that the court should presume the property is H's SP.

(ii) Special Community Property Presumption

W might argue, fruitlessly, that under the special community property presumption, property that is held jointly at divorce or the death of a spouse is presumed to be CP. This presumption can be rebutted by clear and convincing evidence. However,

because H and W did not own either the State X house or the California condo jointly at H's death, this presumption will not apply.

(iii) Special Title Presumption

On divorce or death of a spouse, property will be presumed to be held as stated in the title. This presumption can only be rebutted by clear and convincing evidence. In California, it must be rebutted by clear language in a deed or other document that indicates the spouse's intent to hold the property as not stated in the title, such as CP.

Because the property was held only in H's name, a court will presume that this is how the spouses intended to hold the property absent clear language otherwise. Because there is no clear language in the deed or other document indicated H and W's intent to hold the property in both of their names, or as CP, W will not be able to rebut this presumption, and the property will be considered H's SP.

Thus, the court should presume that the State X house was H's SP, and therefore could be properly devised by will without W's consent or knowledge. However, if W elects to take her forced share under CA community property law, she is still entitled to 1/2 of H's SP.

b) Devised by Will as Separate Property

2017 Codicil

A prior will can be revoked in whole or in part by subsequent instrument, such as a codicil.

By a Conservator

If the testator does not have capacity to make a will, a conservator can make a will if ordered to do so by a court. A conservator has fiduciary duties towards the incapacitated person. An incapacitated person can nominate someone to serve as their conservator prior to becoming incapacitated.

H nominated S, as part of his prior wishes. Thus, the appointment of S was valid. As conservator, S was required to act in H's best interests as to the disposition and care of H's property. In accordance with this role, S executed a codicil to H's prior will. H's 2017 codicil to his 2008 will transferred a 1/2 interest in the State X house to Bill. However, S was not ordered by a court to do so. There are no facts to suggest that S's action in changing H's prior will are supported by H's likely intent, as Bill was also likely H's best friend before he became incapacitated. This codicil impliedly revoked H's prior will in part by inconsistency because the prior will left all of H's property to W, and now Bill is being given a 1/2 interest in the State X house.

If W decides to take her intestate share under CP law instead of under the will, Bill will not be granted his 1/2 interest because the State X house will be considered QCP, as discussed above.

However, if W decides to take under the terms of the will, B will receive the 1/2 interest in the State X house.

Undue Influence - Confidential Relationship

A presumption of undue influence arises when a person in a confidential relationship with the testator participates in making a will, and an unnatural devise results. W could argue that S was in a confidential relationship with H when he became incapacitated, as S owed H fiduciary duties. S participated in making the codicil because he "prepared" and signed it as conservator for H. However, S will correctly counter-argue that no unnatural devise resulted because the devise of 1/2 of the interest in the State X house to Bill was natural, since Bill was H's best friend.

Therefore, W is unlikely to succeed in convincing the court to reject the codicil on this basis.

Conclusion - W's Rights Under the Will

A remainder beneficiary takes whatever is left in the testator's estate once all other devises have been satisfied.

If W does not choose to force her share under community property law, she will not own the California condo, but she could receive the other 1/2 interest in the State X house that was not transferred to Bill. If the court finds that the codicil is unenforceable, W will receive the State X house in fee simple absolute because she is the remainder beneficiary under the will. However, it is more likely that the condo and house will be taken by H's creditors in order to satisfy H's debts. Therefore, unless some portion of the trust remains after the debts have been satisfied, H is actually likely to get nothing.

3. Hank's creditors - Ability to reach the assets in the trust

Source of the Trust: Separate property

See rule above. Because H obtained the $100,000 from an inheritance, even though he obtained it during the marriage, the $100,000 will be considered H's SP. Therefore, interests to be given in the trust were subject to H's discretion because although spouses owe each other the highest duty of good faith and fair dealing in managing and controlling community property, the same is not true of a spouse's separate property.

Liability for Debts

The MEC is liable for debts of the spouses incurred both before and during the marriage. However, the SP of a spouse will not be liable for debts incurred by the other spouse prior to the marriage.

The facts state that H owed various creditors more than the value of the State X house and California condo combined. The MEC, and hence all of the community property, will be liable to pay these debts. Furthermore, in settling an estate, creditors are paid first, and any devises will abate proportionally to satisfy the testator's debts accordingly. Therefore, the creditors will be able to obtain both the State X and the California Condo. If this is the case, the devise to Bill will not occur because it will either abate or be eliminated due to the debt.

S's interest would not be reachable, and thus the California condo would not be reachable by the creditors, because H's 1/2 interest vested automatically in S on his

death. If any debt related to the condo itself, such as a mortgage, S would take on that debt.

Ability to Reach Trust

A creditor can reach the interest of a person in a trust if it is freely alienable, if the settlor retained a right to revoke the trust, or if the assets of a trust are subject to the demand of a current beneficiary.

Because H retained a right to revoke the trust, H had an interest in the trust that his creditors could reach upon his death. However, as discussed above, the MEC is also liable for the debts incurred by Hank and thus the creditors can reach the CP. If W elects to take her intestate share under CP law instead of under the terms of the will, she will be entitled to $50,000 of the $100,000 in the trust as 1/2 of H's SP. If her SP is also liable for the debts, such as if some of the debts were incurred for necessaries of life or for the benefit of the community, the creditors could reach her interest because as a life tenant, she would be entitled to payment from the trust.

Q2 Torts

Dan, a dog breeder, had some eight-week-old puppies to sell. Bob and Carol went to his house to look at them. Dan invited them into the living room where the puppies were located and said, “Whatever you do, don’t go into the room at the end of the hall.” As they were examining the puppies, the largest puppy, without warning, gave Carol a nasty bite on her hand. Dan told Bob to go to the bathroom near the end of the hall to retrieve some bandages.

Forgetting Dan’s earlier admonition, Bob opened the door at the end of the hall, thinking it was the bathroom, and entered a darkened room where Dan kept an enormous pet chimpanzee. The chimpanzee jumped between Bob and the door, beat its chest and made menacing hoots. Frightened, Bob stood still.

In attending to Carol’s bite, Dan mistakenly grabbed a bottle of heavy-duty solvent, thinking it was a bottle of antiseptic. When Dan rubbed its contents into Carol’s wound, she began to scream and shout in pain. Hearing Carol’s cries, Bob barged past the chimpanzee, which gave him a deep gash to his head as he passed. Shaken and sore from their injuries, Bob and Carol fled Dan’s house.

Bob and Carol filed a lawsuit against Dan to recover for their injuries.

1. What claims may Carol reasonably raise against Dan, what arguments may Dan reasonably make, and what is the likely outcome? Discuss.

2. What claims may Bob reasonably raise against Dan, what arguments may Dan reasonably make, and what is the likely outcome? Discuss.

Answer A

1. Carol v. Dan

Strict Liability - Puppy Bite

Carol could claim that Dan is strictly liable for the injuries caused by the puppy who bit her hand. The owner of a wild animal is strictly liable for any injuries caused by the animal's dangerous propensities. A puppy would likely not be considered a wild animal for strict liability purposes. However, the owner of an animal with known dangerous propensities is also strictly liable for any damages caused by the animal's dangerous propensities. An owner will not be charged with knowing the dangerous propensities unless some circumstances exist which would give him reason to know of the animal's dangerous propensities, such as a prior incident of biting. Here, Carol will argue that Dan should have known that the largest puppy had dangerous propensities. However, this is unlikely to be successful, because the facts indicate that the puppy bit Carol "without warning." Further, it is generally known that puppies have a tendency to nip and chew, but they do not bite hard enough give "nasty bites" often enough that a reasonable person would know of a dangerous propensity to give nasty bites. Thus, Carol will not succeed in showing that Dan should be strictly liable on the basis of a known dangerous propensity. Carol will need to claim for her damages under a theory of negligence.

Negligence - Puppy Bite

Prima Facie Case

Carol can claim that Dan owes her damages for her hand injuries because he was negligent in allowing her to become bitten by the puppy. A prima facie case of negligence requires a showing of duty, breach, proximate and actual causation, and damages.

Duty

Carol must prove that Dan owed her a duty of care. A duty of care is owed to all foreseeable plaintiffs. Where defendant's conduct poses a risk to the plaintiff, his duty of care will run to her. Under the majority view, a plaintiff is foreseeable if she is within the zone of danger created by the defendant's conduct. Under the minority view, a plaintiff is foreseeable if she is injured by defendant's conduct, regardless of whether she was in the zone of danger. Here, Dan's conduct was in showcasing puppies for sale in his living room. Under either test, Carol was a foreseeable plaintiff because she was in the living room, and because she was injured while present there. Thus, Dan owed Carol a duty of care. His specific standard of care is determined by the surrounding circumstances.

Standard of Care

The standard of care applicable to the defendant is based on the circumstances. The default standard of care is to act as a reasonably prudent person would under the circumstances. The defendant's standard of care can be increased based on the setting and his relationship with the plaintiff. Owners or possessors of property are subject to stricter standards of care with respect to entrants upon their property. The specifically applicable standard depends upon the nature of the entry, and the nature of the entrant. Licensees are those who enter onto the land of another with permission, for social purposes. Invitees are those who enter with permission, either to bestow an economic benefit upon the owner, or because the premises are held open to the general public. Here, Carol entered into Dan's living room, and onto his property, with Dan's permission, and for the purpose of looking at the puppies that Dan was selling. It is unclear whether Bob and Carol were looking at the puppies with the intent to potentially purchase one, but because of the nature of the setting, the intent to evaluate for purchase can probably be assumed. In any case, Dan allowed them into the living room for the purpose of potentially selling his puppies. Thus, Carol and Bob were invitees and Dan owed them the duty of care required for invitees.

A landowner's duty of care owed to a business invitee requires him to: make reasonable inspections of the premises, warn of any concealed dangers, and make the premises safe for invitees. Here, Dan allowed Carol to be bitten while she was on the premises. Dan would be required to have inspected not only his premises, but to have observed the puppies and known whether any of them had a propensity to bite. Dan would also be required to take the necessary steps to ensure that business invitees would not be bitten by any of the dogs.

Breach

A defendant breaches his duty of care by failing to live up to the requisite standard of care. Carol will argue that Dan breached his duty of care by failing to observe the dogs sufficiently to determine if any of them posed a risk to the potential buyers who would be entering onto his land. Further, Carol will assert that Dan breached his duty by failing to warn Carol that one or more of the puppies was dangerous. Additionally, Carol will claim that Dan breached his duty by failing to remove the dangerous puppies from the pen where the rest of the puppies were, and where they were available for inspection. Dan will counter that he had no reason to know, despite dutifully watching the dogs, that any of them would bite or would bite hard enough to give a "nasty bite," and further, that the dog who bit Carol did so without warning. However, because Carol was bitten on Dan's premises by Dan's dog, it is likely that Carol can demonstrate that Dan breached the duty of care owed to her as a business invitee. Indeed, Carol can demonstrate that Dan should not have allowed the dogs to be in an open pen where Bob and Carol could freely access them because there was a potential for the puppies to pose a biting risk to invitees.

Actual Cause

Actual cause, or legal cause, is determined under the "but for" test. A defendant's breach will be the actual cause of the plaintiff's injuries if the plaintiff can demonstrate

that but for the defendant's breach, her injuries would not have occurred. If the court finds that Dan did indeed breach his duty of care to Carol, this test will be easily met. But for Dan's failure to warn Carol of the puppy's dangerous propensities, or failure to sufficiently observe the puppies to determine whether any of them had such propensities, as well as his failure to separate the dangerous puppy from the rest of the puppies which were available for inspection and sale, Carol would not have put her hands near the biting puppy such that she would have been bit. Indeed, even if the court finds that Dan breached his duties by leaving the puppies in an open pen where visitors could freely access the puppies, and put their hands near the puppies' mouths, but for this breach, Carol would not have been able to put her hands near the puppy's mouth and would not have been bitten. Thus, Dan's negligence was the actual cause of Carol's injuries.

Proximate Causation

The defendant's conduct will be the proximate cause of the plaintiff's injuries where the injuries suffered were within the increased risk created by the defendant's conduct, and were a foreseeable result of the defendant's conduct. The risk that a person would be bitten, and thus injured, was a foreseeable result of Dan's failure to adequately secure the puppies or ensure that they posed no danger to humans. Dan's failure to secure the dogs or ensure that they were not dangerous clearly created an increased risk that someone would be injured by a biting dog. Thus, Carol's injuries were a foreseeable result of Dan's alleged negligence.

Damages

Any personal injury or property damages are sufficient to support a claim of negligence. Here, Carol's hand injury will be sufficient to support her negligence claim.

In conclusion, if the court finds that Dan was negligent in his failure to ensure a safe premises for visitors who came to inspect his dogs for purchase, and as such breached

his duty to business invitees, Carol can demonstrate that Dan's negligence resulted in her dog bite and as such that Dan is liable for tort damages.

Negligence - Solvent Injury

As explained above, negligence requires a showing of duty, breach, causation and damages. Here, Carol will argue that Dan is also liable for whatever increased damage she incurred as a result of Dan's mistaken cleaning of her wound with heavy duty solvent.

Duty

In general, there is no duty to act affirmatively to come to a person's aid when they are injured. However, a land owner owes a duty of aid to injured business invitees on the premises. Further, where one does begin to render aid, he is under a duty to carry out the rendition of aid reasonably. Where a rescuer acts negligently in giving aid, he will be liable for damages caused by his negligence. Here, Dan's duty of care would be to reasonably render aid.

Breach

Dan failed to act reasonably when he mistakenly cleaned Carol's wound with solvent as opposed to antiseptic. This was not reasonable even under the circumstances. Dan will argue that it was a chaotic and hectic emergency situation, and thus that he did not breach his duty of care. However, any minor inspection of the bottle presumably would have led him to realize that it was solvent, and thus Dan failed to render aid reasonably under the circumstances.

Causation and Damages

But for Dan's using solvent instead of antiseptic, Carol would not have suffered any further aggravation of her injuries. Thus, Dan's negligence was the actual cause of her aggravated injuries. Further, Dan's negligence in failing to care for Carol's wounds created an increased risk that her injuries would be aggravated, and the aggravation of

her open wounds was a foreseeable result of Dan's exposing them to corrosive solvent. Thus, the element of causation will be met. As discussed above, Carol's injuries (as aggravated by the solvent) are sufficient to demonstrate damages. Dan will be liable to Carol for failing to render aid reasonably and exacerbating her injuries as a result.

Defenses-

Contributory Negligence

A plaintiff is also required to act reasonably to prevent her own injuries. Contributory negligence will bar the plaintiff from recovery if the defendant can demonstrate that the plaintiff failed to live up to her own standard of care. Here, Dan will argue that Carol was unreasonable in reaching into the puppy pen without consulting Dan as to whether the puppies were dangerous. If they are in a contributory negligence jurisdiction and the court agrees that Carol was negligent in so doing, she will be barred from recovering. However, it is unlikely that Carol was negligent in failing to inquire, because a reasonable person would not assume that puppies, especially those on open display and available for sale, posed a risk of biting such that it would cause a nasty injury. Thus, Dan will probably not succeed under a defense of contributory negligence.

Assumption of the risk

A plaintiff is similarly barred from recovering if the defendant can demonstrate that the plaintiff subjectively knew of the risk and proceeded anyway, despite that knowledge. Dan will argue that Carol knew there was a risk of being bitten in inspecting puppies. However, there is no indication that Carol knew that by inspecting the puppies she risked incurring a "nasty bite" like the one that she suffered. Dan did not warn of any such risk. Thus, Dan will likely fail to show that Carol was subjectively aware of the risk of being bitten with such severity. This defense will not succeed.

Comparative Negligence

Most jurisdictions have abandoned the harsh results of contributory negligence and assumption of the risk in favor of a comparative negligence regime. Under comparative negligence, if the jury finds that the plaintiff was at fault in causing her injuries, the jury will assign a percentage of fault to the plaintiff and her recovery will be reduced proportionately to her percentage of fault. Under pure comparative negligence, a plaintiff will still be able to recover some damages, so long as the defendant is also negligent, regardless of the percentage of fault assigned to her by the jury. Under partial comparative negligence, when the plaintiff's degree of fault exceeds a certain amount, (usually 51%), she will be barred from recovering.

Dan will argue that Carol was comparatively negligent in handling the puppies despite failing to inquire as to whether they were dangerous. As discussed above, it is unlikely that the jury will find Carol's actions to have been negligent under the circumstances. However, if the jury does so find, her recovery will be decreased accordingly.

In conclusion, Carol will likely succeed in suing Dan for damages for his negligence in failing to make his premises safe for business invitees, and for negligently tending to her wound with solvent instead of antiseptic.

2. Bob v. Dan

Strict Liability

As discussed above, the owner of wild animals is strictly liable for all injuries that occur as a result of the animal's dangerous propensities. Dan owned a chimpanzee, which is considered a wild animal. A chimpanzee's wild nature poses a risk of injury from contact inflicted by the chimpanzee. Here, the chimp inflicted a gash on Bob's head as Bob passed it. Thus, Dan will be held strictly liable for the gash that Bob suffered in moving past the chimpanzee.

Defenses

In jurisdictions that apply contributory negligence, contributory negligence is generally not a good defense to strict liability. However, recovery will be reduced according to the plaintiff's degree of fault in comparative negligence jurisdictions. Further, assumption of the risk may bar recovery under strict liability.

Dan will argue that Bob assumed the risk by entering the room that Dan had instructed him not to go into under any circumstances. However, Dan will not be able to show that Bob assumed the specific risk of the chimp attack because Dan told Bob to go into the bathroom "near the end of the hall," without any further instructions, and because Bob was not warned specifically of what was lurking in the room at the end of the hall. Indeed, a reasonable person would not know that Dan was warning of the danger lurking behind the door, a reasonable person could easily assume that Dan warned not to go into the room because it was messy, or because someone was sleeping inside. Thus, because Bob did not subjectively know there was a chimpanzee behind the door that he opened, he cannot be said to have assumed the risk of injury caused by the chimp under the circumstances.

Dan will also argue that Bob was comparatively negligent in going into the door that Dan had told Bob and Carol not to enter. Bob will counter with the fact that Dan's warning was not sufficiently serious to make Bob aware of the dangerous chimp in the room. Further Bob will argue that Dan's later instructions, to go to the bathroom "near the end of the hall" were so unclear as to nullify his prior warning. Indeed, Dan's failure to instruct Bob as to exactly which room was the bathroom will likely prevent a jury from finding that Bob acted negligently under the circumstances. Further, it was an emergency situation, so a reasonably prudent person under the circumstances would not have paused to question which door "at the end of the hall" was the bathroom and which was the one he was warned not to enter. Thus, Dan will not succeed in arguing that Bob was contributorily negligent and will be strictly liable for the damages Bob suffered.

Negligence

As discussed above, Dan owed a duty to inspect the premises, warn of any dangers, and make the premises safe, to both Bob and Carol. Bob will successfully argue that owning a vicious chimp and not securing the chimp, or warning Bob and Carol of its existence breached this duty of care. However, land owners owe no duty to business invitees where invitees exceed the scope of their invitation, i.e. by entering an area marked "do not enter," or "employees only." Dan will argue that when Bob entered the room, he exceeded the scope of his invitation because Dan had previously told both Bob and Carol not to enter the room with the chimp, "whatever [they did]."

Bob will counter that when Dan told Bob to go to the bathroom near the end of the hall, Dan's prior warning ceased to be effective. Indeed, Bob did not intend to exceed the scope of the invitation, and he was genuinely confused as to which door led to the bathroom. Dan's instructions were confusing and incomplete. Bob did not act unreasonably under the emergency circumstances in exceeding the scope of the invitation. Dan negligently failed to ensure that his premises were safe for visitors, and failed to warn Bob as to what danger lurked behind the bathroom door. Thus, Bob can also assert a successful claim for negligence against Dan.

Dan will argue the same defenses as under strict liability, with the addition of a contributory negligence defense, but for the reasons discussed above, they are unlikely to succeed.

So long as the jury does not determine that Bob exceeded the scope of his invitation, Dan will be liable for Bob's injuries under a theory of negligence. Dan will also be found liable for Bob's injuries under a theory of strict liability because a chimpanzee is a wild animal.

Answer B

1. Claims of C against D

Strict Liability

An animal owner is strictly liable for injuries caused by a domestic pet, only if the owner had prior notice of a dangerous propensity by the animal. Some jurisdictions impose strict liability on owners for dog bites. Here, C received an injury caused by the puppy in the form of a nasty bite that required medical attention. However, it does not appear that D had notice of the puppy's propensity to bite. D is selling eight week old puppies. The puppies are domestic animals. They were very young, giving little opportunity for D to notice if the puppies had any dangerous propensities. The largest puppy bit C "without warning." Thus, it is unlikely that D had notice of the puppy's tendency to bite and D will not be held liable for strict liability in a majority of jurisdictions. D may be liable in a jurisdiction that imposes strict liability on owners for dog bites.

Negligence

A negligence action requires (1) duty; (2) breach of duty; (3) causation; and (4) harm.

Dog Bite

Duty

A landowner or possessor of land has a duty to invitees to inspect for dangerous conditions and take reasonable steps to cure any concealed dangers or warn the invitee of the danger. The landowner must also carry out activities on the land with due care to invitees. In some jurisdictions, a landowner owes a reasonable duty of care to all persons who enter the property. The standard of care depends on what a reasonably

prudent landowner would do under similar circumstances. A person with special knowledge or expertise must use that knowledge and skill in exercising their duty of care. Here, C and B were entering onto D's property as invitees to buy puppies that D had for sale. Thus, D owed a duty of care to C and B.

D also owed a duty of care to C and B as an animal owner. Under the majority (Cardozo) view, D has a duty to all foreseeable plaintiffs within the "zone of danger" created by D's animal ownership. Under the minority (Andrews) view, D had a duty to all plaintiffs. A person who is injured by a dog bite when interacting with a dog is a foreseeable plaintiff within the "zone of danger" of the dog's mouth. Thus, under both views, C was a foreseeable plaintiff.

Breach

Here, D had a duty of care to inspect for dangerous conditions and cure any concealed danger or properly warn C and B. The puppies were not obvious dangers, because puppies are generally considered to be "cute," friendly, and small. Here, D is a dog breeder. D must use his knowledge and skill as a dog breeder in exercising care. If D has learned that some puppies are dangerous, then D must exercise reasonable care in keeping the puppies behind a gate or in a kennel and bringing out puppies one at a time to meet potential buyers so the puppies do not become overexcited. Further, D could have warned C and B how to act around the puppies and how to take care in case the puppies do something unexpected. However, if the dog bite was truly unexpected, then D may not have breached his duty. However, the average dog breeder would likely take steps to keep the puppies calm and warn buyers of potential dangers. Thus D likely breached his duty of care.

Causation

The breach must be both the direct cause and the proximate cause to be the causation of the harm.

Direct Causation

A breach is the direct cause of an injury if the injury would not have occurred "but for" the breach. Here, C's injury would not have occurred if the puppy had been properly restrained. Thus, D's breach is the but for cause of C's injury.

Proximate Causation

Proximate causation requires that the injury not be too remote or attenuated from the breach that is the" but for" cause of the injury. For proximate causation, the harm must be of the type that is foreseeable or a natural or probable cause of the breach. Here, C was bitten by a dog. A dog bite is a foreseeable result of a dog owner's negligence.

Harm

Generally, the harm must be physical or property damage, rather than simply economic harm. Here, C suffered a physical injury in the form of a nasty bite to her hand. Thus, the element of harm is satisfied.

Negligent Rescue

See rules above re negligence cause of action.

Duty

Generally, a person has no affirmative duty to act to assist an injured person. However, a person who originally puts another in peril or who elects to assist a person in peril has a duty to assist the victim non-negligently. The rescuer must avoid any unreasonable harm to the victim by acting as a reasonably prudent person under the circumstances. Here, D arguably put C in peril by allowing her to interact with the puppies without restraints or proper warnings to C. Regardless, D elected to come to C's aid once he saw the dog bite. Thus, D owed a duty of care to C.

Breach

See rule above. Here, D grabbed a bottle of heavy duty solvent thinking it was a bottle of antiseptic and applied it to C's injuries. A reasonably prudent person would check the label before applying the chemical to C's wounds. Further, a reasonably prudent person may not have stored dangerous chemicals next to first aid agents in the first place to avoid such a situation. Thus, D did not act as a reasonably prudent person under the circumstances and breached his duty of care.

Causation

See rule above.

Direct Causation

Where there are two causes of an injury, a cause is a direct cause if it is a substantial factor in the injury. Here, C's initial injury was from the dog bite. D's application of chemical solvent to the wound caused C considerable additional pain and may cause additional damage because it is not meant to be applied to skin, let alone broken skin. Thus, D's action was a substantial factor in C's injury that satisfied direct causation.

Proximate Causation

See rule above. Here, it is foreseeable that application of chemical solvent to a wound will create extreme pain and will likely cause additional damage because it is not meant to be applied to human skin. Thus, causation was proximate.

Harm

See above. This element is satisfied.

In conclusion, C likely has a valid claim for negligence with respect to the dog bite and the subsequent negligent aid by D. C is unlikely to have a valid claim for strict liability due to the lack of notice to D of the particular puppy's dangerous tendencies, unless they are in a minority jurisdiction that holds owner's strictly liable for dog bites.

Defenses

Contributory Negligence

In a jurisdiction that applies contributory negligence, a plaintiff is barred from recovery if the plaintiff's own negligence contributed to her injury. Here, C had no warning the puppy would bite her or that she was in danger. C likely did not have an opportunity to see or object to the application of the solvent. Thus, this defense is unlikely to apply.

Comparative Negligence

In a majority of jurisdictions, the plaintiff's own negligence only reduces the plaintiff's total recovery in the case by the percentage of the plaintiff's own negligence compared to the defendant's. As noted, C likely did not contribute to her own injury. Thus, this defense is unlikely to apply.

Assumption of the Risk

A person who knowingly and voluntarily assumes the risk of her activity will be barred from recovery. In a comparative negligence jurisdiction, assumption of the risk usually only reduces the plaintiff's recovery. Here, C had no warning regarding the puppy's tendency to bite. As described above puppies are considered non-threatening to the average person. Thus, she could not have knowingly assumed the risk. This defense will fail.

Damages

A plaintiff in a tort action is entitled to damages that put them in the position they were in before the harm. Here, C will be entitled to medical expenses, pain and suffering, and lost past and future earnings if the dog bite causes her to miss work or reduces her ability to work.

2. Claims of B against D

Strict Liability

The owner of a wild animal is strictly liable for injuries cause by an unrestrained wild animal. Warnings will not suffice to prevent liability to the owner. Here, D owns a chimpanzee, a wild animal. The chimpanzee was confined to the back room in which the chimpanzee was unrestrained. Confinement to the back room is not restraining the chimpanzee because the door was not locked. As a result Bob, and probably the chimpanzee, was easily able to open the door. Thus, unless a defense applies, D will be strictly liable for the injuries the chimpanzee caused.

Negligence

See rules above. Here, D had a duty to B as a chimp owner and landowner. D breached that duty because D did not give Bob a proper warning because he simply told Bob not to go in the back room without informing him of the presence of a wild animal, which would have made more of an impression on Bob. D could have also locked the door to prevent access to the chimp. Thus, D breached his duty of care which caused B's gash by the chimp. In conclusion, D was negligent.

Defenses

Trespassers

An owner is not strictly liable for injuries by a wild animal to trespassers. Further, a landowner is generally not liable for injuries to an undiscovered trespasser. A trespasser physically invades property without the owner's consent, or exceeding the scope of the owner's consent. Here, B was told not to go into the back room, but he did so anyway. B exceeded the scope of D's consent and was therefore a trespasser. Thus, D is not liable to B because B trespassed into the back room.

Assumption of the Risk

See above. Assumption of the risk is generally not a defense to strict liability for wild animals. Further, Bob did not know about the concealed chimpanzee. Thus, this defense will not apply to either cause of action.

Contributory Negligence

See above. B went into a back room where D told him not to go. B's contribution is likely minimal, given B did not understand why he should not go into the back room. Thus, this defense is likely not to apply.

Comparative Negligence

See above.

Damages

See above.

Q3 Real Property

Lois rented a furnished apartment in her building to Tammy, a medical student, for nine months, beginning June 1. Tammy prepaid the first month's rent. When Tammy arrived at the apartment on June 1, Ralph, the prior tenant, was still there despite the fact Ralph's rental term had ended on May 15. Tammy complained to Lois and Lois was able to evict Ralph by June 15. Tammy took possession of the apartment on June 16.

The apartment above Tammy's was occupied by Coco, a member of an up-and-coming band, The Gyrations. The band's daily rehearsals interfered with Tammy's studies so much that she complained repeatedly to Lois about the continuing noise. On July 15, The Gyrations were arrested at Coco's apartment for disturbing the peace. After that Tammy was spared the noise from rehearsals.

Beginning July 16, the shower in Tammy's apartment delivered only cold water. Tammy complained, and Lois promptly hired a plumber to fix the problem. The repair only worked for a week. Tammy was too busy with her studies to tell Lois.

On August 30, Tammy's stove in her apartment stopped working. On August 31, Tammy, disgusted with all these events, knocked on Lois's door, gave the key to Lois, and said, "This place is a zoo; I wouldn't live here if you paid me!" Lois took the key and said, "Sure, okay, if that's how you feel." Tammy stopped paying rent and never returned to the apartment.

Lois commenced a lawsuit against Tammy for breach of her lease and special damages for past due and prospective rent.

What arguments may Lois reasonably raise in support of her lawsuit, what counterclaims and defenses may Tammy reasonably assert, and what is the likely outcome? Discuss.

Answer A

Rights and Duties of Lois and Tammy

Duties of Landlord

In general, landlords owe tenants a duty to deliver possession. Although the traditional rule required only the delivery of constructive possession, such as by providing a key to the property, most states follow the modern rule of requiring the delivery of actual, physical possession. Lois has therefore breached this duty by failing to evict or otherwise remove Ralph, the prior tenant who became a holdover tenant after the term of his lease ended. Although Tammy was able to take possession by June 16, her lease started on June 1. Ralph's lease had ended on May 15, and Lois failed to evict him for more than two weeks before Tammy's lease began. Tammy therefore has a valid claim/defense against Lois for being constructively evicted from her apartment from June 1 through June 15. Tammy should not be liable for payment of rent during this period.

Landlords in residential leases also generally have a duty to make repairs. Even if a lease places this duty on the tenants, courts will still find that it rests with the landlord. Landlords are permitted to engage professionals to make repairs - there is no obligation that they do so themselves. Lois likely satisfied this duty with respect to the hot water issue by immediately hiring a plumber. Lois was not made aware of the faulty stove (as discussed below) and therefore could not have reasonably arranged for its repair, such that she should not be found to have violated this duty.

Please see below (implied warranty) for further discussion of repairs.

Covenant of Quiet Enjoyment

Landlords also generally are required to comply with the covenant of quiet enjoyment. This doctrine requires that landlords not interfere, or permit others (such as other tenants in a multi-unit property) to interfere, with one's right to use, possess and enjoy their possessory interest. Tammy will argue that Lois breached this covenant by permitting *daily* band rehearsals in the upper floor apartment, as Lois had the right to stop such rehearsals in her capacity as landlord. Although Lois may respond that Tammy suffered only because of her unique study requirements as a medical student, such that Lois did not cause or permit the Gyrations to surpass an objective level of loudness so as to interfere with Tammy's quiet enjoyment of her property, this is a failing argument because the Gyrations were all arrested in the upper apartment during a rehearsal for disturbing the peace. In general, a tenant can suffer a breach of the covenant without giving rise to an arrest for disturbing the peace, but that should be completely sufficient for Tammy's claim. Moreover, Lois was on notice of the issue because Tammy had repeatedly complained to her.

Because Lois likely breached this covenant, Tammy could seek remedies. A tenant that has suffered a breach of this covenant must give notice to the landlord to take remedial action. Failing any remedial action, the tenant is permitted to give notice of her constructive eviction and cease paying rent. See below for discussion of damages. Although Tammy may be likely to reduce her rent during this period, the grounds for constructive eviction ceased once the Gyrations were arrested.

Implied Warranty of Habitability

Residential leases only are subject to an implied warranty of habitability. This requires that the landlord deliver the property in a condition fit for ordinary residential use. This implied warranty generally requires landlords to provide electricity, heating, hot and running water. A tenant must give notice to the landlord if a breach has occurred, and they may either refuse rent during the period of breach, make repairs and deduct the costs from their rent, or vacate the premises until remedied. Here, the hot water failed

in Tammy's apartment on July 16. T promptly gave notice to Lois as required, and Lois promptly hired a plumber to repair the problem. The problem, however, occurred again in one week. Again, Tammy was obligated to give Lois notice of the issue. Tammy failed in this regard because she was too busy with her studies. Because Lois was not on notice of the problem (that she reasonably would have believed had been solved the previous week), Lois should not be found to have violated the implied warranty with respect to the water.

Tammy may also allege that Lois violated the implied warranty because the stove failed. This is not as critical a failure as a lack of heating or electricity, and the implied warranty does not typically extend to include household appliances, even those useful for making food. Further, although the stove did break, Tammy never informed Lois of that fact. Rather, Tammy instead moved out the next day without mentioning the stove, such that Lois should not be found to have violated the warranty.

Duties of Tenant

In general, a tenant has two key duties: pay rent and not commit waste. Lois may bring a claim against Tammy on both grounds.

Waste

First, Lois may argue that Tammy committed waste by failing to inform her of the second time the hot water failed. There are three types of waste: affirmative (tenant intentionally destroys or reduces value of property), permissive (tenant's negligence causes damage or otherwise reduces value of property), and ameliorative (tenant alters the property, even in an economically valuable way, without landlord's permission). Here, Lois may claim that Tammy committed permissive waste because Tammy was aware that the hot water did not work but did not take any steps to inform Lois or otherwise fix the issue because she was too busy. Her alleged negligence may cause

potential and ongoing problems with the water if it remains unfixed. Lois may therefore seek damages to satisfy this waste claim.

Rent

As noted, a tenant has the duty to pay rent. As discussed above, however, there are instances in which a tenant may refuse to pay, reduce, or otherwise withhold (such as in an escrow account) rent.

General

The facts indicate that Lois and Tammy entered into a lease or tenancy for years. Despite its name, this lease is simply a lease for a fixed period, such as nine months in this case. (Leases, because they are interests in real property, must generally be in writing to satisfy the statute of frauds even if under one year in length). This lease is different from a periodic lease, such as month-to-month, because it has a definite end-point that the parties have agreed upon.

Termination of Lease

A tenancy for years will automatically terminate at the expiration of its term. Continued tenancy following the lease can give rise to a periodic tenancy or a holdover tenancy. A lease can also terminate through an action for eviction or by mutual agreement of the parties. Here, Tammy will allege that the lease terminated instead on August 31. Tammy will assert that because she made evident her desire to end the lease by saying the "place was a zoo" in which she could not be "paid" to live, and because Lois responded by saying "sure, okay" and taking back the key, the parties mutually agreed to terminate the lease on August 31. Lois may aver that her expression was not an affirmative agreement to end the lease but rather a surprised reaction to "how [Tammy] feels," such that the lease should not be viewed as terminated. But in light of Tammy's

express statement that she would not continue living there and turning over the key, Lois's actions may be seen as an agreement by silence, such that any reasonable landlord would challenge it if they wanted to. Because Tammy stopped paying rent and never returned to the apartment, she will argue that she does not owe any more rent. Regardless of the ultimate disposition of Tammy's defense, Lois is required to mitigate damages by taking reasonable steps to rent out the property once Tammy leaves, but Lois will not be responsible if she cannot find a suitable renter after taking reasonable steps.

Damages

As discussed above, Tammy was within her rights to withhold rent because of her constructive eviction during Ralph's holdover tenancy. Tammy would then be responsible for rent from June 16 onward. But because Tammy also has a valid claim for breach of the covenant of quiet enjoyment from June 16 through July 15. Tammy's rent obligations would thus begin on July 15 instead. Tammy would not have a claim to breach of the implied warrant with respect to the water or stove as discussed, so her obligation to pay rent would continue from July 15 through the end of her lease. The lease ended at earliest on August 31 as discussed above. But because Tammy paid only one month's advance rent, she is still at least a half-month behind in her rental payment. Further, Tammy's claim to being constructively evicted appears either irrelevant or moot on August 31: the hot water does not work likely as a result of Tammy failing to inform Lois; Tammy never gave notice to Lois about the stove; and the issue with the Gyrations stopped more than a month previously. Tammy's constructive eviction claim has been resolved after which she continued living in the apartment, and Tammy has no other grounds to terminate the lease. But if the lease is found to have mutually terminated, Lois can still claim back rent but not prospective rent.

Answer B

Lois's Claim Against Tammy

Type of Lease

A term of years lease is one that terminates on a specific date.

Here, the lease was for a specific nine month period starting on June 1. This makes it a term of years lease.

Duties of Tenant

In a term of years lease, the tenant is obligated to pay rent for the period of the lease unless that duty is relieved by some breach of duty by the landlord. Traditionally, the duties under a lease were independent of each other such that a breach of one duty would not relieve the other of their obligations. However, modernly, the duties under a lease are dependent on each other. Therefore, if the landlord breaches her duties under a lease, that may relieve the tenant of her obligation to continue paying rent. If, however, the tenant breaches her duty without an appropriate reason, the landlord is entitled to damages for the unpaid rent for the remainder of the lease term, subject to the landlord's duty to mitigate losses by re-letting the premises.

Here, Lois will argue that Tammy breached the lease improperly and without justification and therefore, Tammy is liable to Lois for the rent for the remainder of the lease term. Tammy paid rent for three months until her abandonment of the lease on August 30. This would leave a remaining 6 months of rent that Tammy would owe to Lois.

Surrender

When a tenant breaks a lease and surrenders, it generally must be in writing if the lease term was over 1 year. Because this lease was for only nine months, the surrender did not need to be in writing.

When a tenant surrenders the lease, and the landlord accepts the surrender, the landlord owes a duty to mitigate losses. Here, Lois responded to Tammy's surrender by

stating, "sure, ok, if that's how you feel." This would imply acceptance of the surrender, and would obligate Lois to mitigate her damages by attempting to re-let the premises.

Tammy's Defenses

Tammy's duty to pay rent for the remainder of the term may be mitigated or eliminated if she can show that Lois breached her duties under the lease.

Duties of Landlord

Duty of Possession

A landlord owes a duty to deliver possession of the premises to the tenant. Traditionally, this simply required providing the right to possession, but not actual possession. However, modernly, the landlord is required to deliver actual possession of the property and is required to remove any holdover tenants prior to the commencement of the lease.

Here, Lois did not provide possession of the premises at the beginning of the lease. Instead, Ralph was in possession of the property at commencement of the lease. Lois did finally remove Ralph 15 days later and Tammy was able to possess the premises. Technically, Lois was in violation of her duties under the lease by failing to provide possession. This could have given Tammy the opportunity to break the lease, however, she did not pursue this action.

Duty to repair

Generally, there is no general duty of a landlord to repair or maintain the property. However, there are special duties in relation to the duty of habitability and quiet enjoyment as discussed below which may create a duty to repair.

Implied Warranty of Habitability

In every residential lease, a landlord owes an implied duty of habitability to make the premises suitable for human habitation.

Here, Tammy may be able to establish that Lois breached this duty when the shower started delivering only cold water, or when the stove stopped working. However, it is unlikely that either of these issues would render the apartment unsuitable for human habitation. In addition, when Tammy notified Lois of the shower issue, she promptly sent a plumber to fix the problem. And, when the fix did not work, Tammy failed to notify Lois again of the issue.

With regard to the stove, Tammy never notified Lois of the problem so she had no opportunity to repair

Because the issues were minor and likely did not render the facility unsuitable for human habitation, and because Tammy failed to pursue the issue and notify Lois of the continuing problems, it is unlikely that a court would find that Lois was in breach of the warranty of habitability in such a way that it would allow Tammy to terminate payment of rent.

If, a court did find these issues to be sufficient, however, Tammy's obligation to pay rent may have been terminated, or Tammy could have remained and sued for the cost or repair, or withheld the cost of repair from her rent.

Implied Warrant of Quiet Enjoyment

Implied in every lease is a warranty of quiet enjoyment where the landlord will not disturb the tenant from their ability to use and enjoy the property. A breach of this covenant may exist when the landlord fully or partially evicts the tenant, or if the landlord fails to repair a condition that significantly impairs the tenant's ability to use and enjoy the property.

Constructive Eviction

There are no facts to show that there was an actual eviction of Tammy, such that Lois prevented Tammy from using all or part of the property. However, Tammy may argue constructive eviction under two theories. Constructive eviction exists when 1) there is a wrongful action by the landlord such as a breach of duty, 2) the tenant timely notifies the landlord of the issue, 3) the breach or issue significantly interferes with the tenant's use and enjoyment of the property, and 4) the tenant abandons the property.

The Band

First, Tammy may argue that the band practices of The Gyrations significantly interfered with her use and enjoyment of the property because the practices interfered with her ability to study. However, it is unlikely that Tammy will succeed on this claim because, although Tammy complained repeatedly about the issue to Lois, it is not totally apparent that Lois breached her duty to Tammy. The band was removed from the premises only one month after Tammy moved in. It is not immediately clear whether their removal was instituted by Lois or another tenant. However, it is not immediately clear from the facts that Lois failed to heed Tammy's complaints about the band. In addition, even though the band interfered with her use and enjoyment of the property, Tammy failed to abandon the property at the time. She did not abandon the property until a month and a half later, after the band had been removed and her enjoyment was no longer disturbed.

Therefore, it is not likely that Tammy can show constructive eviction due to the band's noise because she did not abandon the property in a sufficient time, and the issue was remedied shortly after it began.

Issues in the Apartment

Second, Tammy may assert constructive eviction due to Lois's lack of repairs of the issues in the apartment which substantially interfered with her use and enjoyment of the property. However, this theory is also not likely to succeed because, as discussed above, Tammy failed to notify Lois of the fact that the shower continued not to work, or that the stove was broken. When the stove stopped working, she simply moved out without notifying Lois or giving her an opportunity to fix the issue. Without proper notice,

Lois could not have breached her duty to Tammy because she did not know of the issue.

Because there was lack of notice and lack of a breach of duty by Lois, it is unlikely that Tammy will succeed on a claim of constructive eviction against Lois.

Lois's Damages

Here, the damages to which Lois is entitled are based on her duty to mitigate. Contract damages must be causal, foreseeable, certain, and unavoidable. Under a lease contract, the landlord owes a duty to mitigate damages by re-letting the premises. In addition, the landlord is only entitled to those damages that are certain and unavoidable.

Therefore, Tammy should not be liable for any future rent on the premises if Lois was able to re-let the premises to someone else in order to mitigate her damages, and she definitely is not liable for any prospective rent that she did not owe under the lease because those prospective rent damages were not foreseeable from the lease contract. In addition, the prospective rent damages are likely not certain.

The facts do not indicate whether Lois attempted to re-let the premises. However, if she failed to do so, Tammy may assert this as a defense in order to reduce the damages that she owed to Lois under the lease.

Statute of Frauds

The statue of frauds requires that contracts creating interests in land, including leases over one year, must be in writing.

Because this lease is for nine months, it is not subject to a statue of frauds defense. Therefore, if it was not in writing, this defense could not be asserted.

Q4 Evidence / Civil Procedure

Dave is domiciled and owns a house in California on the state line adjacent to Petra's house in Nevada. Petra is domiciled in Nevada.

Dave installed a large rainwater tank near the property line, which leaked. One day, the water tank fell over onto Petra's property, landing on her retaining wall, which buckled. Petra sued Dave for negligence in federal court seeking $100,000 to replace the retaining wall, claiming it failed because the water tank, weakened by leaks, landed on it.

At the jury trial, Petra testified that she had complained to Dave several times over the prior decade that the water tank leaked and that he had done nothing. She also testified that the retaining wall was only a couple of years old.

Petra then called Walt, a water tank repairman, who testified that when he repaired Dave's water tank after it fell over, Dave instructed him to caulk all the joints so that it wouldn't leak. Petra rested her case.

Dave called Gwen, Petra's gardener, who testified that she had met with Petra the day before the water tank fell and, while they inspected the retaining wall at issue, she saw it was old and had structural cracks that could cause it to fail, pointed this out to Petra, and told her that it would cost at least $100,000 to replace it. Gwen testified that Petra had replied, "You're right. It's at least 30 years old."

The jury returned a verdict in favor of Petra and awarded her $20,000 in damages. Dave filed a motion to dismiss based on lack of subject matter jurisdiction, which was denied. Dave properly appealed the verdict.

Assume all appropriate objections and motions were timely made.

1. Should the court have admitted:

    A. Petra's testimony about her complaints to Dave about the leaks? Discuss.

    B. Walt's testimony that Dave instructed him to caulk all the joints so that the water tank wouldn't leak? Discuss.

C. Gwen's testimony

i) That the retaining wall was old? Discuss.

ii) That the retaining wall had structural cracks that could cause it to fail and that it would cost $100,000 to replace it? Discuss.

D. Gwen's testimony about Petra's reply, "You're right. It's at least 30 years old." Discuss.

2. Did the court properly deny Dave's motion to dismiss based on lack of subject matter jurisdiction? Discuss.

Answer all questions according to federal law.

.

Answer A

A.) PETRA'S TESTIMONY ABOUT HER COMPLAINTS TO DAVE

In order to be properly admitted all evidence must be relevant and not be excluded under the Federal Rules of Evidence.

RELEVANCE

All evidence must be logically and legally relevant. Logical relevance means that the evidence tends to make a material fact more or less likely. Legal relevance refers to a judge’s discretion to exclude evidence if its probative value substantially outweighed by the risk of unfair prejudice, confusion to the jury, or unreasonable delay.

Here, the evidence is relevant because the issue in the case is whether Dave was negligent in maintaining the water tank that landed on Petra's retaining wall. Petra also contends that the failure of the water tank was due to leaks. The fact that she notified him of the leaking would tend to make it more likely that Dave was negligent in not repairing the tank before it fell. Thus, the evidence is logically relevant. There also does not appear to be any obvious risk of unfair prejudice to the defendant, so it would not be excluded under legal relevance balancing.

HEARSAY

Hearsay is an out of court statement offered to prove the truth of the matter asserted. This applies even to the testifying witness's own statements if they were made out of court. If a statement offered by a witness is offered to prove something other than the truth of the matter asserted, it will be admitted as non hearsay. Otherwise, if it is hearsay, it must fall within an exception to be admissible.

Here, Petra is testifying that she had complained to Dave several times over a decade that the water tank leaked. If offered to prove that the tank did in fact leak, then it would be hearsay and would need to fall under an exception. However, if it is not offered for that purpose, it may be admissible for the other limited purpose.

EFFECT ON THE LISTENER

Statements offered to show the effect on the listener are classified as non hearsay under the FRE. However, the defendant has a right to request a limiting instruction so that the jury does not use the statement to prove the truth of the matter asserted (i.e. inadmissible hearsay).

Here, Petra's complaints can be offered to show that Dave knew about something and did not act in response; thus it is offered to show the effect it had on Dave.

CONCLUSION

Therefore, the testimony is admissible for this purpose and if Dave requested a limiting instruction, it should have been granted. The court did not err in admitting this testimony.

B.) WALT'S TESTIMONY THAT DAVE INSTRUCTED HIM TO CAULK THE JOINTS SO THAT THE WATER WOULDN'T LEAK

RELEVANCE

See rule above. Here the testimony is relevant because it tends to make it more likely that there was problems with the water tank and that Dave requested to have the leaking joints repaired. There also does not appear to be any significant risk of unfair prejudice here. Thus, the evidence is relevant.

HEARSAY

See rule above. Here, Walt is testifying regarding what Dave said to him in requesting repair of the water tank after it fell over. It is being offered to prove that the water tank was in fact leaking, which is at issue in the case. Therefore, it is hearsay and must fall within an exception.

PARTY ADMISSION

A statement by a party opponent is admissible as a hearsay exemption when offered against that party. Here, Dave is a party opponent and his statements are being used against him in this testimony. Thus, the party admission exemption would apply.

SUBSEQUENT REMEDIAL MEASURES

There is a public policy exclusion for evidence of subsequent remedial measures taken when offered to show fault. Here, Dave's statements ordering Walt to caulk the joints so that it wouldn't leak after the water tank fell over onto Petra's property is evidence of a subsequent remedial measure taken in order to show fault. Thus, it should be excluded under the public policy exclusion.

CONCLUSION

The court erred in allowing Walt's testimony, as it should have been excluded as evidence of a subsequent remedial measure.

C.) GWENS TESTIMONY

i) TESTIMONY THAT THE RETAINING WALL WAS OLD

RELEVANCE

See rule above. Here the evidence is relevant because it tends to make show that the wall was old and fell due to that, rather than due to Dave's negligence. As with the previous evidence, there does not appear to be a risk of unfair prejudice that the judge should have determined inadmissibility based on those grounds.

EXPERT WITNESS TESTIMONY

In order to properly admit testimony as expert witness testimony, the following must be met: (i) it must be helpful to the jury, (ii) the expert must be qualified in the field, (iii) the

expert must have a proper factual basis, (iv) and the expert must have used reliable methods and applied them reliably.

Here, Gwen is a gardener who is testifying about her inspection of the retaining wall with Petra. While the testimony would be helpful to the jury in determining whether the wall fell due to its age, it is unlikely that Gwen can meet the other requirements to qualify as an expert witness. There is no evidence offered that shows that Gwen had a proper factual basis for her testimony, nor that she is qualified in determining the age of the wall. Thus, the testimony would not be properly admitted as expert witness testimony.

LAY WITNESS TESTIMONY

In order for a witnesses testimony to qualify as lay witness opinion testimony, it must be (i) helpful to the jury, (ii) be reasonably ascertainable based on the perceptions of a layperson, and (iii) not based on any scientific fact or specialized knowledge.

Here, Gwen is stating that she saw the wall was old. This is helpful for determining the quality of the wall and whether the wall fell due to its age or Dave's negligence. The age of a wall would be reasonably ascertainable by an average person, as plenty of signs can signal a wall's age, such as cracks, or growth of ivy, and the like. The opinion does not appear to be based on any specialized knowledge. Thus, it is lay witness testimony.

CONCLUSION

The court properly admitted the testimony regarding the wall's age as lay witness testimony.

ii) TESTIMONY THAT THE WALL HAD STRUCTURAL CRACKS AND IT WOULD CAUSE $100,000 TO REPLACE IT

RELEVANCE

See rule above. Here, the testimony is relevant for the same reasons as the testimony regarding the age of the wall above. Thus, it is relevant.

EXPERT WITNESS TESTIMONY

See rule above. Here, again, Gwen does not appear to have the qualifications to be able to speak authoritatively on the structural soundness of the wall or the price to repair it. If Gwen was in fact a builder of retaining walls, then she would be qualified. However, this qualification was not established in the facts given.

Therefore, Gwen likely doesn't qualify as a proper expert witness on these issues.

LAY WITNESS TESTIMONY

See rule above. Here, Gwen's testimony is helpful for the same reasons as the age of the wall. However, the structural soundness of the wall and the cost to replace it are not matters that would be reasonably ascertainable by a layperson. If this perception was in fact based on some kind of specialized knowledge, that it definitely does not qualify as lay witness testimony.

CONCLUSION

The court erred in admitting the testimony regarding that structural cracks and cost to replace the wall, as a proper factual and qualification basis was not established for expert testimony and it does not qualify as admissible lay witness testimony.

A. GWEN'S TESTIMONY ABOUT PETRA'S REPLY TO HER

RELEVANCE

See rule above. Here, the testimony is relevant as it tends to discredit Petra as a witness since she claimed in her testimony that the wall was only a couple of years old. It also tends to prove that the wall was in fact old, which could have led to its collapse and would reduce Dave's liability in negligence. There does not appear to be any risk of unfair prejudice. Thus, the evidence is relevant.

HEARSAY

See rule above. Here, the testimony regarding Petra's statement, if offered to prove both the age of the wall and that Petra knew the wall was old and needed replacing,

would be hearsay as it would be offered to prove the matter asserted. Thus, it must fall under an exemption or exception, or be used for a non hearsay purpose.

PARTY ADMISSION

See rule above. Here, Petra admitting that the wall was old is being offered against her by the defendant. Thus, it would be admissible under this exemption to hearsay.

PRIOR INCONSISTENT STATEMENT

A witness can be impeached based on prior inconsistent statements, however, the witness must be available and they must be given a chance to explain the statement.

Here, Petra is an available witness who testified that the water tank was only a couple of years old. The statement she said to Gwen is inconsistent with this statement. However, since the other statement was not given under oath, it cannot be used for substantive purposes. It can only be offered for the limited purpose of impeachment. However, the statement falls under a party admission, so it can be admissible for both.

CONCLUSION

The court properly admitted the testimony regarding Petra's statement as a party admission and an impeachment based on a prior inconsistent statement.

2) MOTION TO DISMISS BASED ON LACK OF SUBJECT MATTER JURISDICTION

A party can file a motion to dismiss for lack of subject matter jurisdiction at any time. In order to determine whether the motion was denied improperly, it must be determined whether the court, in fact, had subject matter jurisdiction over the case at issue.

SUBJECT MATTER JURISDICTION

In order for a federal court to have subject matter jurisdiction, it must either have federal question jurisdiction or diversity jurisdiction.

Federal Question Jurisdiction

Federal question jurisdiction exists when the claim arises out of federal law, including Constitutional rights, treaties, and the like. Here, the claim is based on negligence which is based on state tort law. Thus, federal question jurisdiction is not present and there must be diversity jurisdiction in order to hear the case.

Diversity Jurisdiction

Diversity jurisdiction requires (i) complete diversity between the plaintiffs and the defendants, and (ii) an amount in controversy exceeding $75,000.

Complete Diversity

Complete diversity means that each plaintiff is a resident of a different state than each defendant. Residency is determined by domicile which is shown by a physical presence in a state and an intent to remain there.

Here, Dave is domiciled and owns a house in California. Although it is on the state line, the facts state that it is in fact in California, thus he is a California resident for the purposes of diversity. Petra is domiciled in Nevada.

Thus, there is complete diversity between the plaintiff and the defendant.

Amount in Controversy

The amount in controversy must exceed $75,000. This only requires that it be legally plausible that the defendant could receive those damages based on the injury. The actual amount of damages awarded has no bearing on whether the amount in controversy is satisfied for purposes of diversity jurisdiction.

Here, the amount in controversy is $100,000. There appears to be evidence supporting the legal plausibility of this claim, given that Petra's gardener stated that it would cause $100,000 to replace to retaining wall when called by Dave on the stand. Given that there is no reason to doubt that there is a legal plausibility of Petra's claim, the amount in controversy is also satisfied.

CONCLUSION

The court properly denied Dave's motion to dismiss based on lack of subject matter jurisdiction, as the federal court had diversity jurisdiction over the claim.

Answer B

1A. PETRA'S TESTIMONY

Relevance

All evidence must be logically and legally relevant to be admissible. Evidence is logically relevant if it has any tendency to prove or disprove a material fact. Otherwise relevant evidence may be excluded for lack of legal relevance, where its probative value is substantially outweighed by the danger of unfair prejudice, waste of time, or confusing the jury. Here, Petra's testimony that she had complained to Dave several times over the prior decade that the water tank had leaked and that he had not done anything is relevant because it makes it more likely that Dave was negligent in not repairing the water tank. Therefore, the testimony is relevant.

Personal Knowledge

A witness must have personal knowledge regarding what the witness wishes to testify to. Here, Petra has personal knowledge because she is testifying to what she has observed and commented on to her neighbor, Dave. Thus she has sufficient personal knowledge.

Hearsay

Hearsay is an out of court statement made by a declarant, and offered in court to prove the truth of the matter asserted. Generally, hearsay is inadmissible, unless it is not offered for its truth, qualifies for an exemption, or an exception. Here, Petra is offering evidence that she had "complained" to Dave several times over the prior decade. If offered to show the truth of the matter asserted, namely that she did in fact complain to Dave, then the testimony is hearsay and will not be admissible, unless an exception applies.

Non-Hearsay Purpose - Notice

An otherwise hearsay statement may qualify as non-hearsay if offered to show the effect on the listener or the declarant's state of mind. Here, Petra will argue that she is offered the evidence to show the effect on Dave, namely that he had notice that the water tank had been leaking. As such, the evidence is admissible as non-hearsay to show the effect on the listener.

Admission

An admission constitutes an exemption to the hearsay rule and is considered non-hearsay. An admission is a statement by a party and offered in court against that party. Here, Petra may argue that the statement is an admission. However, Petra is the declarant and the evidence is not being offered against her. Therefore, the statement would not constitute an admission.

Conclusion

Petra's testimony is likely admissible as non-hearsay to show the effect on the listener.

1B. WALT'S TESTIMONY

Relevance

Walt's testimony is relevant because it has a tendency to prove that Dave's water tank did in fact fall over, and that it had previously leaked. Therefore, the testimony is relevant.

Personal Knowledge

Walt has personal knowledge because he is testifying to what Dave told him. Therefore, he has sufficient personal knowledge.

Public Policy - Subsequent Remedial Measure

As public policy, generally evidence of subsequent remedial measures are not permitted, except to show ownership or where the defendant has claimed that there was no way to make something more safe. Here, Petra would like to admit into evidence Dave's instruction for Walt to caulk all the joints so that it wouldn't leak, which is likely evidence of a subsequent remedial measure showing that it did in fact leak before. There is no dispute that Dave owned the water tank. Additionally, there is no evidence that Dave has testified or asserted that the water tank was as safe as possible. As such, none of the exception would apply and Walt's testimony that Dave instructed him to caulk the joints would be inadmissible for public policy reasons.

Hearsay

This testimony constitutes hearsay because Walt is testifying to what Dave told him when he was repairing the water tank. The testimony is likely offered to show that Dave did in fact instruct Walt to caulk all the joints, so therefore, unless an exemption or exception applies, this testimony will be inadmissible.

Admission

An admission constitutes an exemption to the hearsay rule and is considered non-hearsay. An admission is a statement by a party and offered in court against that party. Here, Walt is testifying as to what Dave - the declarant and defendant - said outside of court. Petra is offering the statement against Dave in court. Thus, the statement would be permitted as an admission of a party opponent.

Conclusion

While the statement qualifies as an admission, since it constitutes a subsequent remedial measure, the court would not admit Walt's testimony.

1C. GWEN'S TESTIMONY

Retaining Wall Was Old

Relevance

Gwen's testimony that the retaining wall was old is relevant because it has a tendency to prove that the wall was not only a couple years old, and that it is possible that the water tank was not the reason for the wall failing. Thus, the evidence is relevant.

Personal Knowledge

Gwen has personal knowledge because she is testifying as to what she told Petra, and what she observed when she was at Petra's house. Therefore, Gwen has sufficient personal knowledge.

Lay Opinion

A lay witness is permitted to give opinion testimony which is helpful to the trier of fact, and not based on scientific or specialized knowledge. Here, Gwen seeks to testify that she noted that the retaining wall was old. This is helpful to the trier of fact because it would help the trier determine whether the falling of the water tank was the cause in fact of the failure of the retaining wall. Additionally, an observation that a wall is old, while an opinion, is not based on scientific or specialized knowledge because it is simply an observation that any person could make. As such, Gwen will be permitted to testify that the wall was old.

Retaining Wall Structural Cracks

Relevance

Gwen's testimony regarding the retaining wall having structural cracks is relevant because it has a tendency to prove that the wall did not fail simply because the water tank fell on it. Therefore, the testimony is relevant.

Personal Knowledge

As discussed above, Gwen has personal knowledge because she is testifying to what she observed and what she told Petra. Therefore, she has sufficient personal knowledge.

Lay Opinion Testimony

A lay witness may give opinion testimony where it is helpful to the trier of fact, and not based on scientific or specialized knowledge. Here, the testimony that the wall had "structural cracks" that could cause it to fall and that it would cost $100,000 to replace, is not something a lay witness would be permitted to testify to because whether a retaining wall has structural cracks, and the amount to replace is based on specialized knowledge. Therefore, for this testimony to be admissible, Gwen would need to be qualified as an expert witness.

Expert Witness Testimony

To qualify expert witnesses, the federal courts use the *Daubert* standard, which requires that the expert have sufficient expertise and training, rely on commonly used treatises and materials relied on in that field, and that the expert's opinion is based on such knowledge. Here, Gwen is a gardener and therefore, it is unlikely that Gwen would be qualified as an expert to render an opinion on structural integrity of retaining walls and the cost to replace them because that is outside of the knowledge and purview of a gardener. While a gardener may have a working knowledge of retaining walls based working around them or with them, it is unlikely such experience would qualify Gwen as an expert witness. Thus, Gwen would not be qualified as an expert witness.

Conclusion

Since Gwen does not qualify as an expert witness, she will not be permitted to testify as to her opinion that the retaining wall had structural cracks and would cost $100,000 to replace. As such, Gwen's testimony regarding those issues would be inadmissible.

1D. GWEN'S TESTIMONY ABOUT PETRA'S REPLY

Relevance

Gwen's testimony that the Petra said the retaining wall was 30 years old is relevant because it has a tendency to prove that the wall was not only a few years old, as Gwen had testified, and that it was susceptible to damage because it was old. Thus, the testimony is relevant.

Personal Knowledge

Gwen has personal knowledge because she is testifying as to what Petra said to her. Therefore, Gwen has sufficient personal knowledge.

Hearsay

Gwen seeks to testify as to what Petra told her, which is hearsay, and is likely offered to prove the truth of the matter asserted, namely that the wall is in fact old. Thus, to be admissible, the statement must qualify for an exemption or an exception.

Admission

Here, the statement was made by Petra, a party, and is being offered against Petra in court. Therefore, the statement qualifies as an admission of a party opponent and will be admissible substantively.

Impeachment - Prior Inconsistent Statement

A party may be impeached with a prior inconsistent statement. Here, Petra had testified in court that the wall was only a couple of years old. Thus, Gwen's testimony that Petra told her it was at least 30 years old, is admissible as a prior inconsistent statement to impeach Petra's testimony.

Conclusion

Gwen's testimony regarding Petra's statement will be admitted to impeach and substantively to prove the truth of the matter asserted.

2. DAVE'S MOTION TO DISMISS BASED ON LACK OF SUBJECT MATTER JURISDICTION

The issue is whether the court properly denied Dave's motion to dismiss based on lack of subject matter jurisdiction. A motion to dismiss for lack of subject matter jurisdiction should be granted where the court lacks subject matter jurisdiction. A federal court must have subject matter jurisdiction to hear a case. Federal courts are courts of limited subject matter jurisdiction, and are authorized to hear federal questions, or diversity of citizenship cases. A federal question is a cause of action which arises under federal law. A diversity of citizenship case is where the plaintiff is completely diverse from all defendants, and the amount of controversy exceeds $75,000, exclusive of interests and costs. An individual's citizenship for diversity purposes is based on their domicile, or where the individual is physically present with the subjective intent to remain.

Timing

A motion to dismiss for lack of subject matter jurisdiction can be brought at any time, including for the first time on appeal. Here, Dave brought the motion after the jury rendered the verdict. While a claim of lack of subject matter jurisdiction is not barred, the proper remedy would be to base the appeal on lack of subject matter jurisdiction, since the jury had already rendered the verdict. However, as discussed below, the court had proper subject matter jurisdiction, so the motion to dismiss was properly denied, regardless.

Federal Question

Here, the claim is for negligence, so there is no federal question.

Diversity of Citizenship

As noted, all plaintiffs must be diverse, or of different domiciles, from all defendants. Here, Petra is domiciled in Nevada. Dave is domiciled in California. Therefore, Petra and Dave are of different domiciles and are completely diverse.

Amount in Controversy

The amount in controversy must exceed $75,000, exclusive of interests and costs, based on the plaintiff's well-pleaded complaint. Here, Petra has plead $100,000 in damages, which exceeds $75,000. It does not affect the amount in controversy where the recovery is less than $75,000, as long as the amount was plead in good faith. Therefore, the amount in controversy element has been met.

Since Petra and Dave are completely diverse, and the amount in controversy is met, the action qualifies for diversity of citizenship jurisdiction. As such, the federal court had proper subject matter jurisdiction and the court properly denied Dave's motion to dismiss based on lack of subject matter jurisdiction.

Q5 Professional Responsibility

Attorney Anne shared a law practice with Kelly representing professional athletes. In the past Kelly represented professional athlete Player, but Kelly was disbarred several months ago. Kelly immediately resigned from the firm, and was re-hired by Anne as a litigation support clerk. Anne now represents Player.

Player is currently involved in a dispute with the professional team that employs him. Despite a valid and enforceable contract, Player refused to play because he wanted to re-negotiate his salary. The team obtained a preliminary injunction requiring Player to play under the terms of his current contract. Player sent Kelly an email asking for advice as to his next move.

Kelly referred Player to Anne who told Player to ignore the court order and to continue to refuse to play. To put pressure on the team to re-negotiate Player's contract, Anne also called the team owner, and implied that she could file a discrimination complaint against the team with a federal administrative agency that handles civil rights matters. Anne and Kelly agreed that there wasn't really a basis to file this complaint.

After the team refused to re-negotiate Player's contract, Anne filed a counterclaim drafted primarily by Kelly so as to "get the team owner's attention" for "tortious interference with contractual relations."

As part of the civil lawsuit, the team owner (Owner) was deposed. Before the deposition, Kelly drafted questions for Anne to ask Owner. During the deposition, Kelly sat next to Anne and passed her notes with further suggested questions for Owner.

What ethical violations, if any, has Anne committed? Discuss.

Answer according to California and ABA authorities.

Answer A

The issue is whether Anne committed any ethical violations. Based on the facts, Anne has in fact committed several violations.

Hiring and Use of Kelly's Services

Under both the ABA and California rules, a lawyer may not assist another in the unauthorized practice of law. This rule extends to the hiring and employment of disbarred attorneys. Here, Anne engaged in several activities involving Kelly, who was disbarred several months ago. Thus, these actions must be examined to determine whether Anne violated any ethical obligations.

Hiring of Kelly.

A lawyer may employ a disbarred lawyer as a clerk or paralegal to assist in certain activities that do not involve the practice of law, However, the lawyer must take care to prevent the disbarred attorney from conducting activities that constitute the unauthorized practice of law. For example, a disbarred attorney can conduct research, draft documents reviewed and supervised by the lawyer, and conduct other administrative tasks such as communicating with the client concerning billing. The disbarred lawyer may not engage in counseling of the client, appear before any tribunal, or communicate with the client or adversaries concerning substantive matters that constitute the practice of law.

Here, Kelly previously shared a law practice with Anne but, after being disbarred, Kelly resigned from the firm (as required). Anne hired Kelly as a litigation support clerk. There is nothing inherently improper about Anne's hiring of Kelly. However, under the California rules, where a lawyer retains a disbarred attorney as an employee, the lawyer must notify the state bar of the employment, as well as the client. Here, there are no facts indicating that Anne notified the bar that Kelly was employed by Anne, or disclosed to Player that Anne had retained a disbarred attorney to perform clerical duties. To the contrary, Player appears to have believed that Kelly was still a lawyer because he emailed Kelly for advice regarding the preliminary injunction. Anne should not have

permitted Kelly to communicate with Player directly about substantive legal advice, although it appears that Kelly properly referred Player to Anne to answer his question. Nevertheless, Anne should have made it clear to Player that Kelly was disbarred and that all substantive communications should be directed to Anne.

Therefore, although Anne's retention of Kelly did not itself constitute an ethical violation, Anne failed to notify the bar and the client of Kelly's involvement. This constituted an ethical violation under California law.

Filing of Counterclaim Drafted by Kelly

After the team refused to renegotiate Player's contract, Anne filed a counterclaim that was drafted primarily by Kelly. As a disbarred attorney, Kelly cannot engage in activities that constitute the unauthorized practice of law.

As stated above, a lawyer may allow a disbarred attorney to draft documents so long as the attorney properly reviews, supervises, and takes ownership of the activity. Here, it appears that Kelly primarily drafted the counterclaim, but it is not clear whether Anne provided appropriate supervision and review of Kelly's work. If Kelly was the sole drafter and Anne did not review or supervise her work, which is possible given that they were formerly partners and/or co-workers, then Anne will have committed an ethical violation by allowing Kelly to engage in the unauthorized practice of law. If, however, Anne closely reviewed, edited, and supervised Kelly's work, and had the ultimate authority over the filing of the counterclaim, she will not likely have committed any ethical violations by permitting Kelly to engage in the drafting.

Based on the facts, it appears that Anne may have also committed an ethical violation if Kelly was primarily responsible for the filing.

Kelly's presence at deposition

As part of the civil lawsuit between Player and the professional team that employs him, the team owner (Owner) was deposed. Kelly assisted Anne in preparing for the deposition by preparing draft questions for Anne to ask Owner during the deposition. Here, Kelly's assistance in drafting deposition questions may have violated the ABA and

California rules depending on the level of supervision and management by Anne, similar to the drafting of the counterclaim. A lawyer may use a non-lawyer (including a disbarred lawyer) to draft documents and conduct research. However, the disbarred lawyer may not engage in activities that constitute the practice of law. Drafting deposition questions requires legal skill and judgment and would likely constitute the unauthorized practice of law unless Anne merely used Kelly's work for reference and supervised and edited her work. However, it is not clear from the facts the extent to which Anne played a part.

Kelly also attended the deposition, and sat next to Anne and passed her notes with further suggested questions for Owner. This likely constituted an ethical violation under the ABA and California rules because Kelly was participating in the deposition, even though she was not directly asking questions. Depositions are typically limited to counsel, the witness, and the court reporter; the parties also typically make their appearance on the record, and the opposing side would have understood Kelly to be second-chairing the deposition on the facts. Therefore, Kelly's appearance at - and passing of notes to Anne during - the deposition likely constituted an ethical violation. Even though she was not directly asking questions, Kelly's feeding of questions to Anne and serving as the second chair would likely be deemed to be the unauthorized practice of law.

In short, it is likely that Anne did not violate any ethical duties in using Kelly to prepare for the deposition, but her presence and assistance at the deposition likely constituted an ethical violation.

Filing of Counterclaim

A lawyer may not assert a legal claim for the purpose of harassing another party or gaining an unfair litigation advantage. Here, after the team refused to re-negotiate her client's contract, Anne filed a counterclaim with the purpose of "get[ting] the team owner's attention" for "tortious interference with contractual relations."

Accordingly, because the purpose of the claim was solely to get the team's attention, Anne likely committed a violation when she filed the counterclaim for tortious interference with contractual relations.

Advising Player to Ignore the Court Order

Here, after the team obtained a preliminary injunction requiring Player to play under the terms of his current contract, Anne told Player to ignore the court order and to continue to refuse to play. This likely constituted a violation of both the ABA and California rules.

A lawyer must not counsel a client to violate a court order. Although Anne could have counseled Player to push back on his contractual obligations if she had a good faith basis for doing so, here the court had imposed a preliminary injunction requiring Player to perform under the contract. Thus, Anne directly advised her client to violate the court order without any good faith basis for doing so.

In addition to breaching her duty to the tribunal, this likely constituted a breach of her duty of competence owed to Player because a reasonably prudent lawyer would not counsel their client to disregard a court order that is likely to subject them to contempt charges.

Accordingly, Anne likely committed an ethical violation when she advised Player to ignore the court order.

Threatening to file a discrimination complaint

In order to put pressure on the team to re-negotiate Player's contract, Anne called Owner and implied that she could file a discrimination complaint against the team with a federal administrative agency that handles civil rights matters. Anne knew that there was not a legal basis to file the complaint but made the threat in order to put pressure on the team.

Under California rules, a lawyer may not threaten to report another person for disciplinary purposes in order to gain an advantage in a litigation. Where the lawyer has a good faith belief that a violation has occurred, the lawyer may advise the party that they might file a complaint. But the lawyer must not do so in order to gain a litigation advantage.

Here, Anne knew that there was no basis to file a discrimination complaint, yet made the complaint in order to put pressure on the team. This constituted a violation of the California rules because Anne lacked any good faith basis for making the complaint and did so solely in order to advance her client's position in the contractual negotiations.

Answer B

Anne (A) has committed several ethical violations, as discussed below.

Disbarred Attorney/Resigning

A disbarred attorney must resign from their law firm and cannot associate with that firm as an attorney.

Here, A and K shared a law practice. Thereafter, K was disbarred and immediately resigned from the firm. Assuming that the firm name was changed to recognize that K was no longer associated with the firm then A did violate the ABA or CA RPC.

Employing Disbarred Attorney

The issue is whether it is permissible to hire a disbarred attorney to work in one's law firm. In CA, a disbarred attorney can be hired to work as a litigation support clerk or in a similar support. The disbarred attorney can only work in this limited capacity; moreover, the CA State Bar must be notified if an attorney seeks to hire a disbarred attorney. Additionally, the disbarred attorney is prohibited from interacting with clients in a manner that would reasonably lead the client to believe the disbarred attorney was an attorney. Therefore, their client contact must be minimal.

Here, A hired K to work as a litigation support clerk. A did not notify the CA bar that she had hired K, who was a disbarred attorney. A was required to notify the CA State Bar, but failed to do so. Therefore, she violated her duties under the Cal RPC.

Also, the facts indicate that K's former clients may have still been contacting her for legal advice. As a disbarred attorney, K is prohibited from providing legal advice and can only interact with clients in an administrative capacity. Because K referred Player to A after he emailed her, this conduct would likely not create separate grounds for an ethical violation.

Telling Client to Ignore Court Order

A lawyer has a duty to the court and the profession to act with integrity, in good-faith, and ethically. Failure to do is a violation of both the CA and ABA RPC.

Here, A told Player that he should ignore the court order that required him to play under the terms of his current contract. This advice by A was in direct contravention to a legitimate court order. There are no facts - such as a stay of the court's order - that indicate that Player was bound by the court order and obligated to comply with. The fact that he disagreed with what it required, or that A may have believed that his noncompliance would create leverage in the negotiation of his contract are not sufficient bases for not complying with a lawful court order. Moreover, a litigant is liable to be held in contempt for failing to comply with a preliminary injunction. Therefore, A's legal advice to Player was to ignore a court order, the consequences of which could result in her client being ordered to jail or to pay a fine until he begins to comply with the order. Consequently, A did not act with integrity because she told her client to ignore the court's order without a legitimate basis for doing so.

This conduct by A violated both the ABA and CA RPC.

A lawyer also has a duty of competence. A lawyer must act with the knowledge and skill reasonably necessary to provide competent and diligent legal services. Under the ABA, the standard for a breach of this duty is reasonableness. In CA, a lawyer breaches their duty of competence if they act intentionally, recklessly, or with gross negligence.

Based on the above facts, A acted intentionally when she told Player not to comply with the order. Because failure to comply with a lawful order of a preliminary injunction has the consequences of contempt, it seems grossly negligent by A to give her client legal advice that would result in him violating the law.

As a result, A breached her duty of competence under both the ABA and CA RPC.

Calling and Threatening Team Owner

A lawyer cannot have contact with an opposing party that the lawyer knows is represented by counsel, unless opposing counsel consents.

Here, A called Team Owner and spoke with him without his lawyer present. A likely knew that Team Owner had retained counsel since he was engaged in a contract dispute with Player. There are also no facts that show that Team Owner's counsel consented to this call without him.

A also threatened Team Owner that she would file a civil rights complaint against him. The purpose of this threat was to create leverage in her dispute with Team Owner, as A and K "agreed there wasn't really any basis for the complaint." A lawyer must not threaten to bring an administrative complaint against a lawyer or non-lawyer absent a good-faith basis for filing the complaint. It is unethical to threaten or pursue such a complaint purely for the purposes of harassing the subject of the complaint.

As a result, A violated her ethical duties under both ABA and CA RPC by talking with an opposing party who has counsel and also by threatening someone with filing an administrative complaint against solely as a means of negotiating.

Duty of Good-faith/Candor re Counter Claim

A lawyer must have a reasonable, good-faith basis for pursing a legal claim. In other words, they must have a reasonable belief in the merits of the claim and they must be pursuing the litigation for a legitimate basis (i.e., remedying a legal right and not to harass)

Here, A filed a counter claim against Team Owner. Presumably, this counter claim was filed as part of strategy by A and K to be in a better position to negotiate Player's contract dispute. Generally, such a counter claim would be permissible and not constitute an ethics violation. However, it is not clear that A believed the claims asserted had merit. The fact that the court ruled in the PI in Team Owner's favor weighs against a finding that this counter claim had merit. Moreover, if the only purpose for bringing the claim was to "get the team owner's attention", then it seems likely that A's

motivation was not to necessarily vindicate Player's contract rights, but to impermissibly harass and create leverage in negotiating a better contract for Player. In sum, it is not clear that A had a good faith basis in prosecuting this action.

Therefore, A may have committed an ethical violation if she filed this counter claim with a good faith based as to the merits of the case. If it was done purely to harass, then A committed an ethical violation under both the ABA and CA RPC.

Duty to Supervise

A lawyer may delegate tasks to their nonlawyer employees. However, the lawyer must closely supervise the nonlawyer's work and the lawyer remains ultimately responsible for the work product.

- Drafting Complaint

Here, K was primarily responsible for drafting the complaint. For the reasons discussed above, the filing of this counter claim could be the basis for a violation of the ABA and CA RPC. If so, then A clearly failed to supervise K. If she had done so, they would have thoroughly discussed the theory of the counter claim and whether the facts support that theory. A should not have filed the counter claim if this was not satisfied. Moreover, because an attorney is ultimately responsible for the work delegated to a nonlawyer, A can argue as a defense that K was "primarily responsible."

Therefore, A may have breached her duty to supervise her nonlawyer employee.

- Drafting deposition questions

Here, A's nonlawyer employee K drafted questions for A to ask during the depositions. The facts do not indicate how closely, or whether at all, A supervised K in this process. It is likely that A provided limited oversight over K in this process since she probably reasoned that this was something that K had experience doing and could be trusted. It is not impermissible for the nonlawyer to provide a draft of deposition questions to the attorney. A likely exercised supervision by using her discretion as to which questions drafted by K she chose to ask. However, if A did not do this and simply followed K's

deposition outline without exercising her own independent judgment and, as a result, she asked impermissible questions, there could be a basis for finding that A breached her duty to supervise. Moreover, although K is a disbarred attorney, this type of conduct is not impermissible for a disbarred attorney. A litigation support clerk, under the supervision of an attorney, can draft deposition questions to help the attorney prepare for a deposition.

Therefore, it was likely permissible for A to allow her non-lawyer employee to draft the deposition questions.

K's participation in the Depo

A lawyer is liable for ethical violations of their employees. Moreover, as discussed above, a disbarred attorney is limited in the type of employment that they may engage in as it relates to working for a law firm.

Here, A and K jointly participated in the deposition of Team Owner. K is carrying on in the capacity as a licensed attorney would during a deposition - actively participating and thinking of additional questions to ask the deponent. This type of conduct would lead a reasonable person to believe that K was an attorney. However, it is not clear that a nonlawyer cannot participate and assist during a deposition.

As a result, this conduct may have violated the CA RPC because the CA state bar was not notified that a disbarred attorney was being employed by A and A allowed her to work in a capacity greater than administrative.

Jul 2018

The State Bar of California

COMMITTEE OF BAR EXAMINERS
OFFICE OF ADMISSIONS

CALIFORNIA BAR EXAMINATION
ESSAY QUESTIONS AND SELECTED ANSWERS

Califo ıation

Essay Questions and

Selected Answers

The State Bar Of California
Committee of Bar Examiners/Office of Admissions

180 Howard Street • San Francisco, CA 94105-1639 • (415) 538-2300
845 S. Figueroa Street • Los Angeles, CA 90017-2515 • (213) 765-1500

ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2018

CALIFORNIA BAR EXAMINATION

This publication contains the five essay questions from the July 2018 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	Subject
1.	Contracts
2.	Evidence
3.	Professional Responsibility
4.	Community Property
5.	Constitutional Law

ESSAY EXAMINATION INSTRUCTIONS

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little or no credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

Q1 Contracts

In January, Stan, a farmer, agreed in a valid written contract to sell to Best Sauce-Maker Company (Best), 5,000 bushels of tomatoes on July 1, at $100 per bushel, payable upon delivery. On May 15, Stan sent Best the following e-mail:

"Heavy rains in March-May slowed tomato ripening. Delivery will be two weeks late."

Best replied:

"Okay."

On May 22, an employee of Delta Bank (Delta), where Best and Stan banked, told Best that rains had damaged Stan's tomato crops and that Stan would be unable to fulfill all his contracts. Best called Stan and asked about the banker's comment. Stan said:

"Won't know until June 10 whether I'll have enough tomatoes for all my contracts."

Best replied:

"We need a firm commitment by May 27, or we'll buy the tomatoes elsewhere."

Stan did not contact Best by May 27. On June 3, Best contracted to buy the 5,000 bushels it needed from Agro-Farm for $110 per bushel.

On June 6, Stan told Best:

"Worry was for nothing. I'll be able to deliver all 5,000 bushels."

Best replied:

"Too late. We made other arrangements. You owe us $50,000."

Concerned about quickly finding another buyer, Stan sold the 5,000 bushels to a vegetable wholesaler for $95 per bushel.

Stan sued Best for breach of contract. Best countersued Stan for breach of contract.

Has Stan and/or Best breached the contract? If so, what damages might be recovered, if any, by each of them? Discuss.

Answer A

Applicable Law

Contracts for goods are governed by Title 2 of the Uniform Commercial Code. All other contracts are governed by common law.

Goods

Goods are qualified as movable, tangible objects. As this contract is for bushels of tomatoes, which are movable, tangible objects, this contract will **be governed by the UCC.**

Merchants

The UCC additionally has special rules for merchants. A merchant is someone who regularly deals with the types of goods that are the subject matter of the contract, someone who has special knowledge of such subject matter, or a business person involved in the transaction.

This contract is a contract between Best, a sauce making corporation, and Stan, a farmer, who appears to be a commercial farmer, but even if he is not, he would have special knowledge of the goods involved, and therefore both parties **qualify as merchants,** and the UCC rules for Merchants will apply.

Possible Breaches of Contract

Valid Contract

In order to have a valid contract there must be an offer with clear and definite terms, acceptance, consideration, and no defenses to contract. Here, the facts indicate, that Stan and Best have entered into a valid contract. There appears to have clearly been an offer and acceptance. The only essential terms under the UCC are *parties, subject matter, and quantity*, but this contract also included price and timing. Both have exchanged valuable consideration, tomatoes for money, and as it's a valid contract, there should be no defenses to formation.

Anticipatory Repudiation

Anticipatory Repudiation is when one party to a contract clearly and unambiguously informs the other that they will not or cannot perform the performance required by the contract. Upon an anticipatory repudiation, the non-repudiating party may either (i) treat the repudiation as a breach and sue immediately, (ii) treat the contract as rescinded, (iii) suspend performance until the repudiating party indeed performs, (iii) or wait and sue when a breach occurs.

Best will argue that Stan repudiated his contract when he sent Best the May 15th email saying Delivery will be two weeks late. While under the common law, a **time is of the essence** clause is not typically enforced as a material breach of contract unless this has been specified when the contract was formed, the UCC requires **Perfect Tender**, which applies to goods, quantity *and time of delivery*. The UCC does not allow for substantial performance unless under an installment contract, which this is not. Therefore, Best will argue, by saying that there was going to be a 2-week delay in the delivery of Stan's tomatoes, Stan had anticipatorily repudiated the contract, and Best was allowed to treat such anticipatory repudiation as a breach.

Contract Modifications

While under the Common Law, a modification to a contract must be supported by consideration, the UCC only requires good faith to modify the contract.
Stan will argue, therefore, that the initial May 15th communications between Best and Stan were not a repudiation of the contract, but instead a good faith modification. Stan will argue that the only reason he was delayed in delivering the tomatoes was due to the heavy rains, a condition completely out of his control, and that therefore his attempt to change the delivery date will be a good faith effort to modify the contract. He will point to Best's response, an "Okay", as further proof that Best also viewed this communication as a modification of contract.

Because Best did not treat Stan's informing them of the delay as a breach of contract, or as a rescission, but instead answered in the affirmative, “Okay”, a court will most likely treat this as a modification rather than a repudiation as of May 15.

Request for Assurances

Under the UCC, when a party has a reasonable suspicion that the other party may not perform, they may make a request for assurances *in writing* from the other party that they will indeed be able to perform as promised under the contract. Upon receiving a request for assurances, the other party must respond within a reasonable period of time (typically not to exceed 30 days), also in writing, with assurances that they will be able to complete their portion of the agreement. If a party fails to respond to a request for assurances, the requesting party may treat this failure as an anticipatory repudiation and take any of the options discussed above.

Best will argue that the phone call on May 22nd was a request for assurances. Best will argue that due to the information shared with them by their and Stan's bank, they had a reasonable suspicion that Stan may be unable to perform and were therefore within their right under the contract and the UCC to make such a request. Best will argue that Stan's

further uncertainty, about not knowing until June 10, would be even more support for their request for assurances. Best will argue that because Stan failed to respond to their request, he breached the contract by implicitly repudiating the contract, and Best was therefore within their rights to search elsewhere for their tomatoes to cover any losses. Stan will argue that he did not breach the contract through the May 22nd conversation. First, Stan will argue that because the request for a "firm commitment" was in a phone call rather in writing, that this was not an enforceable request for assurances. Stan will also argue that as Best only gave him 5 days, from May 22nd to May 27th, to respond to such assurances, with the date of performance still a month away, that this was not a reasonable time for him to respond in. Stan will further point out that even if this was a viable request for assurances, Stan gave the assurances on June 6th. Stan will argue that despite the fact that Best had demanded assurances be given by May 27th, as mentioned above, this was an unreasonable amount of time, and Stan did give them assurances within a reasonable amount of time. June 6, 2 weeks later, is well within 30 days, and still well before the date of performance. Stan will further argue that the fact that he had told Best that he wouldn't know until June 10th is even more evidence that the required date of May 27th was unreasonable.

Because Best's request was not in writing, and because they gave Stan less than a week to respond, most likely a court will not find that Sam breached his contract by failing to respond by May 27th.

Revocation of Repudiation

In the event of an anticipatory repudiation, the breaching party may revoke their repudiation any time before the date of performance agreed upon on the contract provided (i) the other party has not rescinded the contract already, (ii) the other party has not materially changed their position in reliance of this repudiation, or (iii) the other party has not already filed suit for breach of contract.

Stan will argue that even if it were found that he repudiated the contract either on May

15th, or the May 22nd through May 27th communications, that he revoked that repudiation on June 6th when he said there was nothing to worry about, and he would deliver as promised.

Best will argue that by that point in time, they had already materially changed their position and contracted with Agro-Farm in order to ensure they were able to obtain the necessary tomatoes, and that therefore Sam's revocation came too late. Stan will argue that as there was not a proper request for assurances, and that despite this, Stan was still able to give assurances well before the July 1st date, that Best itself was breaching the contract by entering into the agreement with Agro-Farm and refusing to honor the contract.

Impracticability

A contract becomes unenforceable if the subject matter of the contract is destroyed, the performing party dies, or the performance becomes illegal; also if performance becomes impracticable due to an **unforeseen occurrence,** (i) the nonoccurrence of which was an essential assumption of the contract, (ii) that makes performance impracticable, and (iii) the other party was not at fault.

Finally Stan might argue that he was not repudiating the contract, that the rain made his performance impracticable. However, this would have been a foreseeable occurrence, the risk of which Stan would have assumed.

Possible Damages

Best's Damages Compensatory Damages

Compensatory Damages are damages meant to put the non-breaching party into the position they would have been in had the contract been fully performed. Typically these

are determined by the difference of the market price and that of the contract, or the difference between price of goods purchased in the non-breaching party's attempt to cover and the contract price. A party only needs to put in an objectively reasonable effort in finding a reasonably priced product to cover.
Should it be found that Stan did indeed breach the contract, Best will be able to claim compensatory damages. These would be the difference between the price they paid to Agro-Farm, $110 per bushel for 5,000 equaling $550,000 minus the agreed upon price with Stan of $500,000, or $50,000.

Consequential Damages

Consequential Damages are any damages that rise naturally out of the breach of contract that are not compensatory damages. These damages must be (i) actually **caused** by the breach, but for the breach, these damages would not have been suffered, (ii) **foreseeable**, and (iii) relatively **certain** as to the amount.

As Best only requested $50,000 dollars from Stan, it does not seem that they suffered any consequential damages, but if for some reason production were stopped as a result of having to go through Agro-Farm or something of this nature, they would be able to recover such consequential damages.

Incidental Damages

Incidental Damages are damages suffered by the non-breaching party in trying to remedy the breach.

Again, it is unclear wither Best suffered any such damages, but if they did in their attempts to locate and contract with Agro-Farm, these damages too could be recovered from Stan.

Stan's Damages

Compensatory Damages

See Rule Above.

If Best is found to be in breach of contract, Stan also could recover compensatory damages. These would be the difference in the agreed upon price with Best with what he was able to sell them for to the vegetable wholesaler. As such, Stan's compensatory damages would be the $500,000 agreed upon price, minus the $475,000 he received from the wholesaler or $25,000.

Consequential Damages

See Rule Above.

If Stan suffered any consequential damages, such as costs in having to transport the vegetables further, or storage fees, lost profits if he couldn't replant soon enough, etc, so long as these were caused by the breach, foreseeable, and a relatively certain dollar amount, these damages too could be recovered.

Incidental Damages

See Rule Above.

If Stan suffered any incidental damages, like Best, he too could recover these.

Reliance Damages

Reliance damages are recoverable as the costs suffered by the party upon reliance of the contract and reliance that the other party would perform. Reliance damages and

compensatory damages cannot both be obtained and as such a party must choose between reliance and compensatory damages.

Stan, therefore, could choose to take reliance damages that he suffered instead of compensatory damages

Duty to Mitigate

A non-breaching party must do all that is reasonably possible to mitigate damages and eliminate costs. The damages recoverable will be reduced by what has actually been mitigated, or what could have, should the non-breaching party fail to take steps.

Therefore, if Stan were to take reliance damages, they would be mitigated by his sale to the vegetable wholesaler and the costs such a sale would normally cost Stan.

.

.

Answer B

The main issue in this case is whether there was a breach of the contract when Stan did not reply to a request for assurance of performance. This is a case governed by the UCC since it deals with delivery between merchants.

Waiver of Delivery Date

It is likely a court will find that the May 15 email from Stan to Best is a proposed modification of the contract.

At common law, a modification requires consideration. However, as this concerns movable goods (i.e. tomatoes), the UCC allows for modification as long as it was in good faith. Here, the modification of the delivery was due to the heavy rains, which was not, arguably, the fault of Stan. As such, the assent of Best, although without consideration, was binding.

Moreover, considering that the contract dealt in goods with a value in excess of $500, the modification had to be in writing. Here, the modification was by email and constitutes a writing in accordance with the Statute of Frauds. As such, the proposed modification is binding.

Alternatively, this is construed as an express waiver of the delivery date. A waiver need not be supported by consideration, and the mere fact Best replied "okay" is sufficient for the waiver to be provided. As such, the delay in delivery is valid.

Anticipatory Repudiation on May 22

According to the facts, Best was informed by a bank employee (Delta) that rains had

damaged Stan's crops, and that Stan would be unable to fulfill all of his contracts. Best in turn called Stan, who commented that he will not know until June 10 whether there will be enough tomatoes.

An anticipatory repudiation allows the other contracting party to treat the contract as breached when the other party unequivocally states he will not perform. It is likely that a court will find that the admission by Stan that he would not know until June 10 whether there will be enough tomatoes is not, by itself, a breach of contract as there is no such unequivocal assurance by Seller that he will be unable to perform. All he said is he will not know by June 10 whether there will be enough tomatoes for all of his contracts. There is a probability he will breach the contract, but it is not unequivocal amounting to a refusal to perform under the contract. As such, this statement alone is not sufficient to constitute anticipatory repudiation and therefore, at this point, there has been no breach by Best.

Assurance of Performance on May 22

As per the same facts, while it did not constitute an anticipatory repudiation, which would have allowed Stan to treat the contract as breached, Stan had reasonable grounds to require assurance of performance. If there are reasonable grounds for a party to doubt performance of the contract by the other party, a party may require the other party to provide reasonable assurance of performance. Until receipt of the reasonable assurance, the party is allowed to suspend performance.

Here, it was a Delta employee who told Best about the crops. There is no indication here of its reliability, although it may be reasonable for Best to rely on it since it came from a bank, and presumably came from a reasonable source. However, even if this fact alone was not sufficient, Stan himself admitted to Best that he will not know until June 10 whether there will be enough tomatoes. The information, coupled with the admission, allows Best to require the assurance of performance from Stan.

The main issue here is whether there was a reasonable request for assurance of performance.

It is arguable whether the telephone call by Best demanding a firm commitment by May 27 would be considered by the court as reasonable since it was not in writing. Moreover, as Best is aware, Stan would not know until June 10 whether there were enough tomatoes to comply with the contract. A court may find that it was unreasonable to make Best wait. However, Stan did secure, as discussed earlier, a valid waiver, of two weeks, which would move the delivery date from July 1 to say July 14. As such, demanding an earlier time for Stan to commit may be held as unreasonable since the delivery date has been delayed for two weeks anyway and therefore, waiting from May 22 to June 10 would not be unreasonable.

On the other hand, it may be argued that by Best that all Best wanted was for Stan to assure him by May 27 that he will deliver the tomatoes, failing which, he will buy tomatoes elsewhere. Best will also argue that he was not asking for anything else, other than an assurance that Stan will comply. It is likely that a court will agree that a firm commitment in this case is reasonable since all that Best is asking is that he will receive assurances that Stan will perform the contract. Considering that Stan did not reply, Best was entitled to treat the contract as breached.

The attempt on June 6 by Best to provide assurance may be treated by the court as being too late. In this case, Stan was aware on May 22 that Best intended to buy tomatoes from another supplier without adequate assurance of performance. As such, the failure by Stan to reply by May 27 would allow Best to contract for the tomatoes from Agro- Farm. At best, Best may argue that Stan's failure to commit led Best to reply on the assumption that performance is not forthcoming and therefore, Best may treat the contract as breached.

Moreover, even if the court found earlier that Stan anticipatory repudiated the contract, Stan is not permitted to retract his repudiation if Best has already detrimentally relied on

the reputation. This is the likely result here since Stan is aware that Best will make other arrangements if Stan did not contact Best by May 27. As such, Stan took the risk that Best actually went through, as is here, with securing an alternative supply of tomatoes.

As such, it is likely that a court will find that this was reasonable and as such, the failure by the Stan to reply would be considered a breach. If a court finds that this was a breach, then Best was permitted to buy the other tomatoes from Agro-Farm. On the other hand, if the court finds that this was not a reasonable request, then Best is liable for the breach of contract.

Impossibility

It is possible that Stan will argue impossibility. Impossibility of performance will only be excused if it is not objectively possible for Stan to perform. However, it is likely this argument will fail because even if Stan's farm could not have produced the tomatoes, Stan could have easily performed by buying tomatoes from a different supplier, of equal quality. There is no indication here that Best only wanted Stan's tomatoes, or that Stan's tomatoes were of a unique quality that only Stan could provide. In fact, Best simply went to Agro-Farm for the other tomatoes, indicating that this was a generic purchase.

Impracticability

It is possible that Best will argue impracticability. Impracticability of performance will only be excused if its performance will be highly impractical. The mere fact it has become more expensive does not by itself make performance impractical. As stated earlier, even if Stan's farm could not have produced the tomatoes, Stan could have easily performed by buying tomatoes from a different supplier, of equal quality. As such, if he was not sure if he could deliver, Stan should have committed to delivering the tomatoes anyhow.

Damages

Applying the aforementioned, it is likely that a court will find that Stan had breached the contract, and as such, Best is entitled to damages.

As a preliminary matter, both parties had a duty to mitigate damages. Regardless of which party was at fault, both Stan and Best fulfilled their duty to mitigate damages by finding another customer, and supplier, respectively.

Best Damages

The general rule for damages here are expectation damages, which would put the non-beaching party at the same place as though the breach did not occur. Here, the contract price was 5,000 bushels at $100 per bushel (or total of $500,000). On the other hand, Best contracted to buy additional tomatoes at $110 a bushel. As such, the expectation damages here would be the difference between the original contract price and the new contract price, or 5,000 x ($110-$100) = $50,000.

Moreover, the non-breaching party is allowed to recover incidental expenses incurred by the breach. Here, there is no showing of incidental expenses.

Best is also entitled to recover special damages in the form of lost-profits if this was specifically pleaded and was a foreseeable loss due to the breach of the contract. Here however Best did not suffer any such damages.

As such, Best would only be entitled to recover the $50,000 from Stan, since Best did not make any down payment. Stan would not be entitled to recover any damages.

Stan Damages

On the other hand, if the court finds that Best breached the contract, then it will be liable to Stan for expectation damages and incidental damages as well. The same formula would be applied to compute the expectation damages, which would be the difference between the original contract price and the new contract price, or 5,000 x ($100-$95) = $25,000. As said earlier, the non-breaching party is allowed to recover incidental expenses incurred by the breach. Here, there is no showing of incidental expenses by Stan.

As such Stan would only be entitled to recover $25,000, as Best did not make any down payment.

Q2 Evidence

Deb was charged in a California state court with battery of a spouse or live-in companion. Vic, Deb's live-in boyfriend, was beaten when he stepped out of his car in their driveway. Vic called 911 about two minutes after the beating and reported that Deb, his girlfriend, had beaten him.

At trial, the prosecution called Vic as a witness. He reluctantly took the stand. He refused to identify Deb in open court as the perpetrator. He admitted making the 911 call in which he reported that Deb had beaten him. The parties stipulated that the 911 recording was a business record of the police department, but that Vic's statements on it were specifically not covered by the stipulation. The prosecution properly authenticated the 911 tape, moved the tape into evidence, and played it for the jury.

The prosecution also called Sam, a man who had been Deb's live-in boyfriend eight years earlier. All evidence pertaining to Sam's testimony had been properly disclosed to the defense before trial. Sam testified that Deb had threatened to choke him to death if he left her, and that she had beaten him several times during the time they lived together.

Deb took the stand in her own defense. She testified that she was working at her desktop computer in her office at the time of the assault, 20 miles away. She offered a print-out of a list of file names, which contained the dates and times they were created, indicating they were created on her computer at the time of the beating. She testified that her computer clock was set to the correct time and keeping time accurately on the day of the beating.

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

1. The 911 tape? Discuss.

2. Sam's testimony? Discuss.

3. The computer print-out? Discuss.

Answer according to California law.

Answer A

Battery

Battery is unlawful touching of the victim's person which results in harm or offense.

Proposition 8

As a preliminary matter, in California, Proposition 8 permits the admission of all relevant evidence in criminal cases, subject to certain exceptions. Hearsay rules and exceptions still apply, as do Constitutional requirements. To be relevant, evidence must be: 1) factually relevant, or make a material element of the case more or less likely, and 2) legally relevant, in that the probative value of a piece of evidence outweighs its prejudicial effect.

911 Call

The first issue is whether the 911 tape recording of Vic's statement is admissible.

Relevance & Authentication

The 911 call is likely relevant because Vic's statement on the 911 call claiming that Deb battered him, if true, makes it more likely that Deb is actually guilty of battery. The probative effect of such evidence would far outweigh its prejudicial value. Additionally, the facts state the recording has been properly authenticated.

Confrontation Clause

We must next determine whether admission of the 911 tape violates Deb's rights under

the Confrontation Clause. The Confrontation Clause is a federal Constitutional requirement which requires all criminal defendants the opportunity to confront witnesses against them. It applies only to the admission of testimonial evidence. Testimonial evidence is generally determined under the "primary purpose" test, in which a statement is adjudged testimonial if the primary purpose of the statement is to assist law enforcement or give testimony. 911 recordings are generally not considered testimonial.

Here, Vic's primary purpose in calling 911 was to seek help, rather than to aid law enforcement. He did not intend to give testimony in his communications to the dispatcher. Thus, the call was likely not testimonial. Further, Vic has taken the stand as a witness, giving Deb the opportunity to cross-examine him as to the contents of the recording. Thus, regardless of whether the tape was testimonial, its admission does not violate Deb's Confrontation Clause rights.

Hearsay within Hearsay

The next issue is whether the tape presents a double hearsay problem. Hearsay is an out-of-court statement offered for its truth. It is generally inadmissible, subject to certain exceptions. When an item of evidence presents two levels of hearsay (as is the case with a recording), both levels must be subject to an exception to be admissible.

Here, the prosecution is trying to admit an out-of-court statement by Vic. The tape is a recording of his voice, which is itself another level of hearsay (Vic's statement is level 1, and the recording of his statement is level 2). Thus, the recording presents a hearsay within hearsay problem.

Level 1: Vic's Statement

Now we must determine whether Vic's statement falls under a hearsay exception.

i. Spontaneous Statement

In California, a spontaneous statement (under the FRE, an excited utterance) occurs when a speaker becomes frightened or excited by a startling event, and speaks during or shortly after that event while still experiencing the excitement. This type of statement is admissible as an exception to the hearsay bar, regardless of whether or not a declarant is available.

Here, Vic called the police two minutes after he was allegedly beaten by Deb. Though there are no facts which indicate Vic's mental state at the time of the call, being beaten is likely considered a startling event. The prosecution will likely successfully argue that two minutes is not enough time to recover from the stress or shock of such an experience, considering the physical and emotional ramifications. Thus, the first level of hearsay is likely admissible under the spontaneous statement rule.

ii. Contemporaneous Statement

A contemporaneous statement (under the FRE, a present sense impression) occurs when a speaker is describing events he is witnessing after they occur. This is broader than the federal rule, which permits a description shortly after the events occur. Such a statement is an exception to the hearsay bar, regardless of whether or not a declarant is available.

Given the narrowness of the rule, it is likely not satisfied by Vic's statement. He called the police two minutes after the alleged beating, and was thus not describing events as they occurred. Therefore, his statement is likely inadmissible as a contemporaneous statement.

Description of Past Physical Harm or Threat of Harm

California provides a hearsay exception which permits the admission of a statement describing past physical harm or threat of physical harm by a declarant who is unavailable. The statement must be made: 1) at or near the time the harm/threat occurred; 2) with circumstances suggesting reliability; and 3) be made to a police or medical professional, written, or recorded. In California, unlike under the FRE, a declarant is not "unavailable" merely because he refuses to testify.

Here, Vic is available because he has taken the stand. His refusal to identify Deb in open court is not sufficient to make him "unavailable" for purposes of the above hearsay exception. Thus, the exception likely does not apply

iii. Statement of Past Physical Condition

California also permits a hearsay exception when a declarant is making a statement describing a past physical condition, if it is at issue in the case. The statement need not be made for medical assistance; however, the declarant must be unavailable.

Because Vic is available, as discussed, his statement will not be admissible under this exception. Furthermore, Deb would likely argue that, even though the case concerns domestic violence, Vic's physical condition is not "at issue" in the case. Instead, she would likely be successful in arguing that her actions towards Vic are what is at issue.

In sum, the first level of hearsay - Vic's statement on the 911 call - is likely admissible as a spontaneous statement.

Level 2: 911 Recording

The next issue is whether the second level of hearsay is admissible under any exception.

i. Business Records Exception

A business record is admissible if: 1) it is not made in preparation for litigation; 2) it is made in the normal course of business; 3) it is made by someone with a duty to records; and 4) the recording party has personal knowledge or is transcribing on behalf of someone with personal knowledge.

Here, the recording 1) was not made in preparation for litigation; 2) was made in the normal course of police business; 3) recorded by one with a duty to record (here, the dispatcher); and 4) recorded on behalf of one with personal knowledge (here, Vic). The parties have furthermore stipulated that the 911 recording itself is admissible as a business record. Thus, the recording is likely acceptable under the business records exception to the hearsay rule.

The 911 call will likely be admitted if Vic's statement is considered a spontaneous statement, since the second level (the recording itself) has been stipulated admissible by the parties.

Sam's Testimony

The next issue is whether Sam's testimony is admissible.

Relevance

Sam's testimony is relevant because the fact that Deb has battered a partner in the past makes it more likely she would continue that pattern of behavior in the future. This is true even though the alleged battery occurred eight years prior. Domestic violence is a special exception to the presumption that past bad acts do not predict future behavior, likely due to the habitual behavior of domestic abusers. Though such testimony is also prejudicial, a court would likely find that its probative value outweighs its prejudicial effect, notwithstanding the time that has passed.

Character Evidence

Character evidence can take three forms: opinion testimony, reputation testimony, and prior bad acts. In a criminal case, character evidence of the defendant is typically not admissible unless the defendant first "opens the door" to such evidence by presenting testimony of her good character. However, California provides a special exception for character evidence in domestic violence cases: the prosecution may present evidence of opinion, reputation, and specific bad acts testimony to show a defendant's character for domestic violence.

Here, Sam lived with Deb as her boyfriend eight years prior. He testified that Deb had threatened to choke him to death if he left her, and that she had beaten him several times during the time they lived together. This is adequate "bad acts" testimony which is admissible as character evidence under California's rule pertaining to domestic violence. From Sam's testimony, a factfinder may infer that Deb is more likely to batter Vic, if they accept Sam's testimony as credible.

Deb's Statement

Statements of a criminal defendant, or a party admission, is admissible as a hearsay exception.

Here, part of Sam's testimony covers what Sam said in the past (that she would choke him to death). Since it is an out of court statement, it is hearsay. However, it is admissible, notwithstanding the above character evidence rule, as a party admission.

Computer Print-Out

The final issue is whether Deb's computer printout should be admissible. The computer print-out is not hearsay because it is generated by a machine (here, a computer). Hearsay only occurs if made by a person.

Relevance

Whether the computer printout is relevant is a close call. Evidence is likely inadmissible if it is likely to cause delay or confuse the issues of the case.

Here, a print-out would show that *someone* used Deb's computer at the time stated. There are no assurances that the person was Deb. However, such a fact likely goes to the weight of the evidence and not admissibility. Furthermore, the evidence is unlikely to be particularly prejudicial; thus, it is likely relevant to show that Deb might not have been near Vic at the time of the alleged battery.

Authentication

An item may only be admitted to evidence if the moving party presents enough circumstantial evidence to allow a jury to find that the evidence is what it purports to be. Here, Sam is testifying that a print-out list of file names, containing the dates and times they were created, is evidence of the state of her office computer on the day of the battery. Some documents are "self-authenticating."

Here, Deb has testified to the nature of the list, where she obtained it, and that her computer clock was accurate. Whether Deb's testimony is sufficient to authenticate will likely depend on the level of expertise required to create and identify such a list. If any person could create a printout of file dates/times, then it is likely common knowledge and able to be authenticated by a layperson. However, if obtaining such a list is complicated, authentication may require a computer expert to testify that the list is what it purports to be. Thus, the document's admissibility will depend on proper authentication. Furthermore, the document is likely not considered "self-authenticating."

Secondary Evidence Rule

California's secondary evidence rule (the FRE "best evidence" rule) requires that when a

document is admitted to prove its contents, an original must be provided. This includes duplicates or written copies.

Here, Deb is attempting to admit a file list from her computer at the time in question. A print-out of the list is likely adequate to be considered a "copy" that will satisfy the secondary evidence rule.

Given that the printout is not hearsay and will likely satisfy the secondary evidence rule, it will be admissible to the extent it can be properly authenticated.

In sum, the 911 tape and Sam's testimony are likely admissible against Deb. Her computer print-out is likely inadmissible.

Answer B

RELEVANCE

Logical Relevance

Evidence must be logically and legally relevant. Under the California Evidence Code (CEC), logical relevance means that the evidence has any tendency to make a disputed fact of consequence to the determination of the action more or less probable.

Legal Relevance

Evidence must be legally relevant. Under CEC section 352, evidence is legally relevant when its probative value is not substantially outweighed by the danger of unfair prejudice, waste of time, misleading the jury, or needless presentation of cumulative evidence.

PROPOSITION 8

Under California's Proposition 8, in a criminal case, all relevant evidence must be admitted, subject to the court's balancing power under section 352, and subject to additional exceptions noted in my answer below. Because Deb (D) is charged with the crime of battery in California state court, Proposition 8 applies.

I. THE 911 TAPE

Relevance

The 911 tape is both logically and legally relevant. The tape has logical relevance because it is highly probative of whether D committed the battery. The tape has legal relevance because it has high probative value that is not substantially outweighed by the

risk of any unfair prejudice or misleading the jury. Although any evidence tends to prejudice the D when it demonstrates guilt, that does not make the prejudice unfair. The 911 tape is also logically relevant to impeach V by a prior inconsistent statement (discussed below).

Authentication

All evidence must be properly authenticated, meaning that there must be enough evidence to support a jury finding that the evidence is what the proponent says it is. Here, the tape was properly authenticated.

Personal Knowledge

Testifying witnesses must have personal knowledge of what they are testifying about. Here, Vic (V) had personal knowledge of what D did to him and what he conveyed on the 911 call.

Secondary Evidence Rule

Any writing, tangible collection of data, or recording must satisfy the Secondary Evidence Rule when offered to prove its contents. In California, the original or a duplicate (including carbon copies, photocopies, and handwritten notes) must be admitted into evidence, unless it is reasonably unavailable (then testimony is allowed). Here, the actual tape of the 911 call was admitted into evidence, and it appears to be an original (or at least, an exact duplicate).

Hearsay

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Hearsay is generally excluded unless an exception warrants admissibility. Proposition 8 does not apply to or alter the hearsay rules.

Multiple Hearsay

The tape presents the problem of multiple hearsay. The recording itself is hearsay (the outer layer), and the statements contained within it, including V's statements, are also hearsay (the inner layer of hearsay). Both layers must fall within an exception to be admissible.

Outer Layer of Hearsay

The parties have stipulated that the 911 tape is a business record of the police department. The CEC recognizes an exception for business records. Thus, the outer layer of hearsay (the tape itself) is admissible under this exception.

Inner Layer of Hearsay

V's statements are hearsay because they are being offered to prove the truth of the matter asserted, i.e. that D battered V. To be admissible, V's statements must be admissible under a hearsay exception. (They may also be admissible nonsubstantively as impeachment of V's credibility, as noted below).

Hearsay Exceptions

Prior Inconsistent Statement

The prosecution's best argument is that V's statement was a prior inconsistent statement of a testifying witness. Under the CEC, a prior inconsistent statement is admissible as a hearsay exception even when it was not made under oath at a prior proceeding. Here, V is the prosecution's testifying witness, and he refuses to identify D on the stand. Thus, the statements are admissible as a prior inconsistent statement. Moreover, these statements are admissible both substantively and as impeachment evidence.

Spontaneous Statement (Excited Utterance)

The prosecution will also succeed in showing that V's statement was a spontaneous statement. A spontaneous statement is one that describes a startling or exciting event and that is made when the declarant is still under the stress of that exciting event. Here, V was allegedly beaten by D as he stepped out of his car. He called 911 "about two minutes after the beating." Unexpected physical violence would constitute a startling or exciting event, and it is very likely that V was still under the stress of excitement of that event when he called 911 a mere two minutes later to report D as the perpetrator. Thus, V's statements are likely admissible as a spontaneous statement.

Contemporaneous Statement (Present Sense Impression)

The prosecution will argue that V's statements are admissible as a contemporaneous statement, but this argument will fail. Under the CEC, this exception only applies when the declarant is describing or making understandable his own conduct while engaged in that conduct. V's statements identified D's conduct. Thus, this exception does not apply.

Statement of Infliction of Violence

The CEC recognizes an exception for a statement made by a declarant that describes, narrates, or makes understandable an infliction of physical violence or a threat of physical violence. The statement must have been made at or near the time of the event; must be made under circumstances indicating trustworthiness; and must be in writing, recorded, or given to emergency personnel. The declarant, however, must also be unavailable at trial. Here, V's statement would likely meet all of the requirements for this exception (his statements were made 2 minutes after the beating, were recorded, and were communicated to 911), but V is a testifying witness at trial. Thus, because V is not unavailable at trial to testify, this exception does not apply.

Dying Declaration

The CEC recognizes an exception for a dying declaration. This exception applies in all cases (not just homicide cases or civil trials, as the Federal Rules require) when the declarant is dead and when the statement concerns the cause of death. Here, V is alive and testifying at trial. Thus, this exception does not apply.

Business Record

V's statements are not admissible under the business records exception. For the exception to apply, the statement must relate to an event or condition (not opinions or diagnoses under the CEC, but courts allow simple ones); must be made in the regular course of business; must be made at or near the time of the matter described; must be made by a person with personal knowledge or transmitted by a person with a duty to transmit the information; and must be authenticated by a custodian or record. It must also be a regular practice of the business to make such records. Here, V was not under any duty to transmit the information to 911. Thus, this exception does not apply to V's statements, the inner layer of hearsay.

No Marital Privileges

V is a live-in boyfriend of D. Thus, V could not invoke any spousal immunity, which is a privilege held by a non-defendant spouse in which that spouse can refuse to testify in any civil or criminal proceeding against the defendant spouse.

No Confrontation Clause Problem

The Confrontation Clause in the Sixth Amendment bars testimonial out-of-court statements by an unavailable witness when the criminal defendant had no opportunity to cross-examine the statement when made. Here, V testified at trial, and his statements

were arguably in response to an emergency. So, they were likely not testimonial.

Conclusion

The 911 tape of V's statements are admissible.

II. SAM'S TESTIMONY

Relevance

Sam's testimony is legally relevant because it makes it more probable that D committed the battery. By showing that D committed a similar battery against a former live-in boyfriend 8 years before V's battery *and* that she committed several batteries during the time Sam and D lived together, this evidence would make it more probable that D has a violent nature and propensity to commit batteries against boyfriends, which in turn, would make it more probable that she battered V. The testimony, however, likely poses a risk of unfair prejudice because it is improper character evidence, as discussed below.

Character Evidence

Evidence of a person's character trait to prove that the defendant acted in conformity with that character on a given occasion, or that the person has a propensity to act in conformity, is referred to as character evidence. Proposition 8 does not apply to character evidence rules. Here, Sam's testimony is likely being offered by the prosecution to show that D has a character for violence and propensity to commit battery against boyfriends. Thus, this evidence is character evidence.

Defense Must Open the Door

In a criminal case, evidence of a defendant's character is not admissible in a prosecution's case in chief. The defendant, however, may present evidence of the defendant's pertinent good character, which the prosecution may rebut. Here, there is

no indication that D had offered any evidence as to her peaceful nature or as to any other good character trait. Thus, Sam's testimony was inadmissible to prove D's character based on that justification.

However, the CEC recognizes an exception for character evidence in cases of sexual assault, child molestation, elder abuse, and domestic violence. Here, D is charged with battering her live-in boyfriend, which likely qualifies as domestic violence. Thus, under this exception, Sam's testimony should have been admitted.

Not Independently Admissible

At issue is whether Sam's testimony is offered for a non-character purpose. Evidence of a defendant's past acts may also be independently admissible if not offered to prove character or propensity. Evidence of past acts, for example, are admissible to prove motive, identity, absence of mistake, and a common plan or scheme. Here, the prosecution could argue that Sam's testimony is being offered to prove the identity of the assailant (Deb) or to prove that D has a common plane or scheme of using battery to prevent boyfriends from leaving her. Sam testified that D threatened to choke him to death "if he left her." As the prosecution would argue, this shows a common plan of D to coerce boyfriends into staying. Neither of these arguments are persuasive. First, evidence is usually allowed to prove identity when there is a unique modus operandi of the defendant. Here, the fact that someone committed battery in the past is indistinguishable from character evidence. Second, it is unlikely that a court, based only on D's threat to S, would find that D had a "common plan or scheme" to entrap boyfriends unless there is other evidence that could prove such a plan. Unfortunately, many people threaten significant others if they attempt to leave, and this by itself is not sufficient to show a scheme.

Impeachment of Deb

The prosecution may also argue that Sam's testimony is offered to impeach Deb's

credibility, given that Deb has testified in the case. Under Proposition 8, prior acts of moral turpitude are admissible, subject to 352 balancing, as impeachment. Moral turpitude includes violence and would likely include these batteries against Sam. However, the court would likely exclude the evidence under its section 352 balancing power because of the high risk of unfair prejudice. Even with a limiting instruction, a jury would be hard-pressed not to view these past batteries as a form of character evidence.

Conclusion

Sam's testimony is likely admissible given that it is character evidence in a case involving domestic violence. However, if this exception did not apply it would otherwise be inadmissible for character purposes and would likely be inadmissible as impeachment evidence because of the high risk of unfair prejudice.

III. COMPUTER PRINT-OUT

Relevance

The computer print-out is legally relevant because it supports D's alibi, i.e. that she could not have committed the assault because she was working at her office 20 miles away. The evidence is legally relevant because of its high probative value and because it does not present a risk of unfair prejudice, waste of time, or misleading the jury.

Authentication

As noted above, evidence must be authenticated. In other words, there must be enough evidence to support a jury finding that the evidence is what the proponent says it is. Here, D testified that her computer clock was set to the correct time and that it was keeping time accurately on the day of the beating. This may be at least sufficient to show that a bona fide print-out of the activity from D's computer for that day would be accurate in terms of its time entries. But D's testimony does not actually provide any other

evidence that the print-out came from D's computer (after all, many computers have accurate time-keeping) or that it was unaltered or unmodified. To reach a definitive conclusion, the court would need more evidence on what the print-out specifically entails (e.g. if it indicates D's user ID) and what other testimony is offered.

Secondary Evidence Rule

As noted above, the Secondary Evidence Rule would apply to such writings and tangible collections of data. A computer print-out of an original would suffice.

Not Hearsay

The computer print-out is not hearsay. Hearsay does not include print-outs of machine-created data that was not a result of human assertions. But hearsay would include a declarant's out-of-court statements even if recorded or transcribed on a computer. Here, D's computer likely automatically generated these time stamps and records of the activity and file names. Thus, these were not assertions by a human declarant, so the hearsay exclusion rules would not apply.

Conclusion

Assuming that authenticity objections can be overcome, the computer print-out should be admitted.

Q3 Professional Responsibility

Betty and Sheila, who have been friends for a long time, were charged with armed robbery, allegedly committed in a convenience store. They decided to hire Betty's uncle, Lou, as their lawyer. Lou is an estate planning attorney and has never represented defendants in criminal cases before.

Both Betty and Sheila met with Lou together. In that meeting, both of them emphatically denied that they robbed anyone. Lou agreed to represent them in their criminal cases and gave them a retainer agreement, which states:

> **Scope of representation.** Lawyer agrees to represent Clients through any settlement or trial.
>
> **No conflicts of interest.** From time to time, Lawyer may represent someone whose interests may not align with that of Clients. Lawyer will make every effort to inform Clients of any potentially conflicting representations.
>
> **Fees and expenses.** Lawyer will advance the costs of prosecuting or defending a claim or action or otherwise protecting or promoting Clients' interests, but Clients are ultimately responsible for repaying Lawyer for all costs that Lawyer advances. If Clients are unsuccessful at trial, Clients will owe only costs advanced by Lawyer and zero fees. If Clients are successful either before or at trial, Lawyer will be paid $10,000 plus any costs incurred.

Betty and Sheila each signed the retainer agreement.

Two days later, Lou represented both defendants at the joint arraignment. He angered the court during the arraignment because of his unfamiliarity with criminal procedure, and the court relieved Lou and appointed new counsel for Betty and Sheila. Betty and Sheila agreed to new counsel.

Although Lou had not incurred any costs by that point, Lou asked Betty and Sheila to pay him a total of $2,000, divided up however they wanted, to reimburse him for his time spent on the case.

What, if any, ethical violations has Lou committed? Discuss.

Answer according to California and ABA authorities.

Answer A

Lou (L) has committed a number of ethical violations that would subject him to discipline under both the CA and the ABA rules.

Duty of Loyalty

The first issue is L's breaches of the duty of loyalty. A lawyer has a duty to act in the best interests of their client, which means avoiding potential and actual conflicts of interest.

Potential Conflicts of Interest

L's representation raises a potential conflict of interest by representing two criminal co-defendants.

Representing two co-defendants raises the significant possibility that their interests will become adverse to each other in the future.

Under the ABA and CA rules, an attorney may represent two clients with a potential conflict of interest if he (1) reasonably believes that the representation of either client, the lawyer's own personal interests, or the interests of his family will not materially limit his duties to the other; (2) informs the client in understandable language of the conflict; and (3) obtains written consent. Under the CA rules, the belief that representation won't be materially limited doesn't have to be objectively reasonable (it can be subjectively reasonable based on what the attorney knew).

So under the ABA rules, an attorney must advise a client of any conflict of interest, and obtain consent, memorialized in writing (if the client consent was initially oral). CA requires written consent to all conflicts of interest. Additionally, CA requires the lawyer to

advise on all potential and actual conflicts, and obtain additional consent if a conflict actualizes.

Here, L was representing two co-defendants in a criminal case. Even if both maintain innocence now, there's a strong possibility that one might want to testify against the other in exchange for favorable sentencing, or to mitigate their own culpability as compared to the co-defendant. A disciplinary board might view that as making representation unreasonable. L might point to the fact that Betty (B) and Sheila (S) have been friends for a long time, and both emphatically deny guilt, so they are less likely to become adverse. But that argument is weak, since L has a duty to convey to each client the best possible legal course of action, and it's very likely that B and S will have conflicting interests. Under the CA rule, L probably has a stronger argument that he subjectively believed it was possible, given his knowledge of B and S, and the defenses they were making.

More information about the strength of their relative cases might be useful here. But on the whole, under the ABA standard, it's probably a close call but representation is likely unreasonable, and under the CA rule, L can probably prevail under the subjective test.

But, L likely failed to adequately warn of conflicts. L's retainer contains general language about conflicts of interest. But he doesn't specifically warn B and S about the risk that his representation would be limited. Nor does he inform them that information between them won't be protected by attorney-client privilege if he represents both, so there's a real risk their statements to him would be used against them.

Because his retainer is wholly inadequate at advising B and S about the risk, the fact that they signed the retainer likely doesn't constitute consent. Therefore, L would likely be subject to discipline under both the ABA and CA rules for failing to get adequate consent to a potential conflict of interest.

Actual Conflicts of Interest

The next issue is that L failed to reveal an actual conflict of interest, because he has a personal conflict.

An actual conflict of interest is treated under the same standard as above. But under the CA rules an attorney just needs to advise a client of a personal conflict in writing. They don't need written consent.

Here, L is Betty's uncle, so they are close family. That raises an actual personal conflict of interest. L is much more likely to favor B's representation; he is likely to be uncomfortable with taking action that will harm B's position, and he likely faces family pressure to ensure that B gets the best possible outcome. He doesn't face similar pressure with S.

So that's an actual personal conflict of interest.

L failed to advise either client of that risk, let alone in writing, because the retainer is completely silent on that issue.

Therefore, L would also be subject to discipline under both ABA and CA authorities for failing to adequately disclose an actual, personal conflict of interest.

Duty of Confidentiality

L's representation also raises an issue with the duty of confidentiality.

A lawyer has an obligation to keep all of a client's non-public information private, and not to use that information against them. There are limited exceptions for: (1) when legally

required to do so by a statute, ethical rule, or court order, when the client consents, when the representation is at issue (i.e. in a fee or malpractice dispute); when necessary to prevent death or serious bodily injury; or under the ABA to prevent your services from being used to commit a financial crime or fraud.

When an attorney represents co-clients, attorney client privilege and confidentiality is waived as between them. So B and S would be able to use the confidential information of the other against each other. An attorney may represent co-defendants, but must advise them of the risk from losing confidentiality, and obtain written consent.

Here, L made no mention of confidentiality. There's no indication, though, that L has yet disclosed any information, so this is probably more a violation of the duty of loyalty, than a direct violation of the duty of confidentiality: L failed to warn his clients about the risk, and adequately protect their confidentiality, and act in their best interests.

Therefore, L would likely be subject to discipline under the ABA and CA rules for failing to receive informed consent for this part of the arrangement as well.

Financial Duties

A lawyer also owes a client a number of financial duties. Here L would likely be subject to discipline for violations of these as well.

Improper Fee Agreement

The issue here is whether L entered into an improper fee arrangement, and made the appropriate disclosures, under the ABA and CA rules.

The ABA prohibits contingent fees in criminal and domestic cases. CA prohibits contingent fees in criminal cases, or in a domestic case where the contingent fee "promotes the dissolution of a savable marriage."

A contingent fee is a fee where payment depends on the outcome. Usually the lawyer is only paid upon the resolution of a favorable result.

Here, L entered into a fee agreement where he was only paid if they were successful at trial. L might argue that he wasn't recovering a percentage, just a flat fee for certain results. But since this is a criminal case, making the fee contingent on the outcome of the case seems like the only way to enter into such an arrangement. So the ABA and CA disciplinary boards would probably find this was a contingent fee.

Therefore, L entered into an impermissible contingent fee arrangement in a criminal case.

The next issue is whether L complied with the formal requirements for a fee arrangement. CA requires all fee agreements to be in writing, unless the client is a corporation, the fee is less than $1000, or the fee is for routine work for a regular client.

None of these exceptions apply, so the fee would have to be in writing signed by the client, with informed consent. Here, that information is contained in the retainer, and it was signed by B and S. But there is still a potential issue with the informed consent. It's unclear whether L went over the fee arrangement, and it's not clear the retainer is in sufficiently plain language.

So in all, the retainer could satisfy the writing requirement, but more information about the nature of the fee meeting would probably be necessary.

Next, both the ABA and CA require certain information in a contingent fee arrangement. The ABA requires the attorney's percentage of recovery; whether it's taken out before or after expenses; and who pays for which expenses. CA also requires the lawyer to advise the client how work not paid for under the contingency will be compensated.

Here, L arguably meets neither requirement. Specifically, he does not explain how work outside the contingency will be paid for. For example, the agreement is completely silent about how L will be compensated in the event that one of the clients pleads guilty. It's unclear whether that would be counted as success at trial, or whether L would recover nothing. That information would be highly relevant to the clients in determining the veracity of L's advice. Under the ABA, by analogy to a civil case, it's like L is only explaining what his percentage would be with the best and worst possible outcomes. Under the CA rules, he's failing to explain how work outside the contingency will be compensated.

Therefore, L is likely subject to discipline under both these rules as well.

Excessive Fee

The size of L's fee also raises an issue. Under the ABA rules a lawyer's fee must be reasonable in light of the experience of the lawyer, time and preparation required, nature of the case, and the result achieved. Under the CA rules the fee must not be unconscionable.

Here, a board might argue that L was unqualified for the case, and didn't plan on doing much work, $10000 is unreasonable. On the other hand L might argue that this is a complex robbery case, where he represents 2 defendants, and he is charging a flat fee, so $10,000 makes sense through trial. The outcome likely depends on more facts. Under the higher CA standard that's obviously a harder argument. But the board would likely look to the fees for similar work to see if this is unreasonable/unconscionable.

So this might be grounds for discipline depending on additional facts.

Request for Payment After Discharge

L also requested payment for $2000 for the work already performed. Generally, when a

lawyer is discharged by a client they represent on contingency, they may recover through quantum meruit for the work already done. Here though, L appears to have added almost no value to B and S's case. Additionally, if a lawyer is discharged by the court they may not be able to recover. Finally, this was an unethical fee arrangement, so it's unlikely the court would enforce a portion of it to compensate L.

Therefore, although a lawyer might ordinarily be entitled to quantum meruit, L probably isn't entitled to the $2000, and demanding that payment is unreasonable.

Duty of Competence

Finally, L has violated his duty of competence. A lawyer has an obligation to competently represent his clients.

Under the ABA rules, a client must employ the time, preparation, skill, expertise, knowledge, and experience necessary to reasonably represent the client. If a client does not have those factors, he must learn the relevant material if possible without undue delay or associate with a competent attorney.

CA looks to a similar standard, but will only discipline a lawyer for repeated or reckless violations of the duty of competence.

Here, L was an estate lawyer, with no criminal experience. There's no indication he associated with a competent attorney. And it seems unlikely that he took time to prepare since the court was so frustrated with him they dismissed him as counsel. Under the ABA standard then, it's very likely that L failed to employ the requisite experience, skill, knowledge, time, and preparation in the case.

Therefore under the ABA rules, it's highly likely that L would be subject to discipline. Under the CA rules it's unclear whether this is L's first violation, so he might argue that his conduct is not repeated. But there's a strong argument he acted recklessly. An

armed robbery prosecution has a potential to seriously and permanently harm the interests of the lawyer's client(s). Failing to act competently at any stage could waive issues on appeal, or cause a host of problems that lead to long-term incarceration, and a felony conviction. That risk would be apparent to any attorney undertaking a serious criminal case. Taking on such a case without apparently any preparation, or association when you have no prior background in that area is arguably disregarding a substantial and known risk.

Therefore, even under CA's standard, L probably not only violated the duty of competence, but would be subject to discipline for reckless conduct.

Duty of Decorum in the Court

A lawyer also owes duties to the court.

Among others, a lawyer has a duty to uphold decorum in the court, and behave professionally and appropriately at all times. They should act in a way that builds the confidence in the legal profession. Arriving at an arraignment with such serious lack of preparation that the court was forced to appoint alternative counsel, and discharge the lawyer arguably violates those duties.

The lack of preparation is clearly disruptive to the court proceedings, and inconveniences the court and the parties, so it violates the duty to uphold decorum in the court. Such flagrant lack of preparation also undermines public confidence in the judicial system, by appearing to undermine the integrity of counsel. That's particularly important in a criminal prosecution, where there's a strong interest in ensuring adequate representation on both sides.

Therefore, L may be subject to discipline for violating (some of) his duties to the court as well.

In all, under both the ABA and CA rules, L is likely subject to discipline for violations of the duty of loyalty, the duty of confidentiality, financial duties, duty of competence, and duty of decorum in the court.

Answer B

Duty of loyalty

A lawyer has a duty of loyalty to his clients. The duty of loyalty prohibits a lawyer from representing an individual with interests that are adverse to that of a current or former client. A lawyer may nevertheless represent parties with conflicting interests if he reasonably believes that he can provide adequate representation despite the conflict, if he can inform both clients of the conflict without breaching his duty of confidentiality, and if he obtains the consent of both clients to proceed. In California, the lawyer needs only a subjective belief that he can provide adequate representation. Additionally, California requires that the lawyer obtain written consent from the clients. Moreover, the California rules require a lawyer to get the consent of the clients when the potential is merely a potential conflict and again when the conflict ripens into an existing conflict.

Here, a potential conflict exists between the clients because they are co-defendants. During the course of the criminal trial, it is possible for the interests of Betty and Sheila to become adverse to each other. For example, Betty and Sheila might not agree on a defense to assert or they might not agree on plea deal. Because there is a potential conflict of interest, Lou is required to inform the clients of the conflict of interest and to get their written consent before proceeding. There is nothing in the facts to indicate that the clients consented to the potential conflict of interest. However, under the ABA rules, Lou has not breached his ethical duties because the conflict is merely a potential and not an existing conflict.

Therefore, it is likely that Lou breached his ethical duty in CA by not obtaining written consent from the clients. However, it does not appear that he has breached his duties under the ABA rules.

Personal conflicts of interest.

The duty of loyalty also requires that the lawyer disclose his clients of personal conflicts that he has. In California, personal conflicts simply require disclosure and not consent and personal conflicts are not imputed to other lawyers at the attorney's firm.

Here, Lou likely has a personal conflict of interest because Lou is Betty's uncle. The fact that Lou is Betty's uncle indicates that he might tend to act more in Betty's best interest rather than acting in the best interest of Sheila. This is purely a personal conflict of interest. In California, Lou is simply required to disclose the conflict to Sheila. Under the ABA rules, however, Sheila is required to consent to the conflict and the consent must be memorialized in writing. The facts here do not indicate that there has been disclosure and do not indicate that Sheila has consented to the conflict.

Therefore, Lou has breached his ethical duty by not disclosing her personal relationship to Betty to Sheila.

Lou's retainer agreement

The facts here indicate that L will make every effort to inform clients of potentially conflicting representations. This disclaimer is not enough to satisfy the consent requirement for a conflict of interest and does not relieve Lou of any liability for not receiving consent for conflicts of interest. This disclaimer has no effect on Lou's duty of loyalty to Betty and Sheila.

Moreover, the agreement states that the lawyer will make every effort to inform clients of any potentially conflicting representations. According to the CA rules, this is not sufficient and Lou must obtain written consent from the clients for any potential conflicts of interest.

Duty of competence

A lawyer has a duty of competence which requires him to provide competent representation to his clients by using the appropriate skills, knowledge, and thoroughness. A lawyer who is not competent in a particular area may nevertheless take a case in that area if he can either 1) become competent before trial through research and familiarizing himself with the area of law or 2) associating with a lawyer who is competent in the area. Additionally, in an emergency, a lawyer may act in an area in which he is not competent, as long as he stops the representation when the emergency is over. In California, a lawyer breaches his duty of competence only if he intentionally, recklessly, or repeatedly acts without competence.

Here, Lou is an estate planning attorney who has never represented defendants in a criminal case before. Lou has not breached his duty of competence merely by taking the case because he can potentially become competent in the area or he can associate with an attorney who is competent in the area. The facts, however, do not indicate the Lou has done either of these things. Lou clearly has not familiarized himself with the area of law because the court was angered during the arraignment with Lou's unfamiliarity with criminal procedure. Additionally, there is nothing in the facts that indicates that Lou has associated with a competent attorney. Therefore, under the ABA rules, it is likely that Lou has breached his duty of competence.

Under the CA rules, a lawyer breaches his duty of competence only if he acts incompetently intentionally, recklessly, or repeatedly. In this instance, Lou has not repeatedly acted without competence because there is no indication that it was Lou's normal practice to accept representation for clients in areas in which he is not competent. There is a strong argument that Lou has intentionally or recklessly acted without competence. If Lou has not made any effort to familiarize himself with the area of law, then he has intentionally acted incompetently. However, if Lou truly made an effort to become competent but nevertheless was unable to become competent, it is unlikely that he acted intentionally or recklessly.

Therefore, Lou has clearly breached the ABA rules by acting incompetently. His actions preceding the arraignment would indicate whether or not he has breached his duty under the CA rules by intentionally or recklessly acting incompetently.

Fee agreement

Contingent fees

In a contingent case, the lawyer must give the client a written fee agreement that states 1) the lawyers % of the recovery, 2) expenses to be paid out of the recovery, 3) whether the lawyer's fee will be taken before or after expenses are taken out, 4) other expenses that the client will be required to pay. Additionally, under both the ABA and CA rules, contingent fee agreements are not permitted in criminal cases.

Here, Lou clearly has a contingent fee agreement because his payment is contingent on whether or not the clients are successful either before or after trial. Additionally, this is a criminal case because Betty and Sheila were charged with armed robbery. Therefore, it was not proper under either the ABA or the CA rules for Lou to enter into a contingency agreement with Betty and Sheila because of the criminal nature of their case. Moreover, even if it were proper for Lou to enter into a contingency agreement with his clients in this instance, the contingency agreement would not meet the requirements under the ABA and CA rules because the agreement states that Lou will be paid $10,000, which is not a percentage of the recovery.

Non-contingent fees

If this is not a contingent agreement but rather is a fee agreement, certain requirements must be met. The agreement must state how the lawyer's fee is calculated, what the duties of the clients and the lawyer are, and what expenses will be paid out of the fee. In

California, the agreement is required to be in writing unless it is for 1) less than $1000, 2) a corporation, 3) regularly performed services for a regular client, 4) it is impracticable, or 5) there is an emergency.

Here, the fee agreement does not indicate how L's fee is calculated: it merely states what the fee is, $10,000, and when the fee is incurred: if the client is successful in their case. Although the fee agreement is in writing in this instance as it was contained in the retainer agreement, it does not meet all the requirements for a fee agreement because it does not provide enough details about how the fee is calculated and it does not provide information about the lawyer's and client's duties.

Therefore, Lou has breached his ethical duties because he has used a contingent agreement in a criminal case. Even if the agreement were not contingent, he has breached his ethical duties because he did not include enough information about how the fee is calculated to satisfy the CA and ABA rules.

Fee amount

The $10,000 flat fee

Under the ABA, the fees that a lawyer charges must be reasonable. Under the ABA, a lawyer's fees cannot be unconscionably high. Some factors used to determine whether a lawyer's fees are reasonable are the time he spends on the case, his expertise and experience, the difficulty and novelty of the matter, and the result obtained.

Here, it is difficult to determine whether Lou's fee of $10,000 is unconscionable or unreasonable. Given that the fee is obtained only if the client is successful at trial, it could be considered reasonable. However given that it is a flat fee instead of a percentage of the client's recovery indicates that it might not be reasonable or conscionable, depending

on what the client actually recovers at trial. Additionally, the fee does not take into account how much work that Lou puts in the case. Under the agreement, it is possible for Lou to get the $10,000 fee if the case is dismissed early on in the proceeding before Lou has performed any work.

Given all these facts, it is likely that the $10,000 flat fee is not reasonable or conscionable under the CA and ABA rules.

The $2,000 charge

The $2,000 charge that Lou eventually charged to Betty and Sheila likely is not reasonable or conscionable since he had not yet incurred any costs. Additionally, the arraignment was only 2 days after Betty and Sheila came to Lou for help. This means that Lou is seeking to be paid $1,000 per day. This fee is definitely unreasonable and unconscionable, especially given that Lou apparently made no effort to learn criminal procedure or criminal law since the judge was angered during the arraignment due to Lou's unfamiliarity with criminal procedure.

Therefore, Lou violated his ethical duty by asking Betty and Sheila to pay him $2,000 for a mere 2 days of incompetent work.

Loans to clients

Under the ABA rules, a lawyer is prohibited from making loans to his client unless 1) the loan is an advance of litigation costs to an indigent client or 2) the loan is an advance of litigation fees in a contingent case. Under the CA rules, a lawyer is allowed to make a loan to his client for any reason so long as the client and the lawyer enter into a written loan agreement. Additionally, in CA, a lawyer is prohibited from promising to pay a client's debts in order to persuade the client to agree to have the lawyer represent them.

Here, Lou has promised to advance the costs of prosecuting or defending a claim or action or otherwise protecting or promoting the client's interest. The facts here do not indicate that either Betty or Sheila are indigent, so this agreement would not be permitted on this grounds. However, the fee arrangement here is appears to be a contingent fee basis since Lou will recover only if the clients are successful at trial. Therefore, the lawyer could appropriately advance the litigation costs in this instance under the ABA rules.

This agreement is likely valid under the CA rules because the clients have entered into a written loan agreement with Lou. The agreement is written because it is contained in the retained agreement, which was signed by both Betty and Sheila.

Therefore, Lou has not breached his ethical duties under the CA rules because he has entered into a written loan agreement with the clients. Additionally, he has not breached his duties under the ABA rules if this agreement can validly be classified as a contingent fee agreement.

Withdrawal

A lawyer is required to withdraw from a case when he is fired or when continuing representation would violate a law or ethical duty. Upon withdrawal, the lawyer must return all materials related to the representation to the clients. In CA, the lawyer is prohibited from keeping the materials in order to persuade the client to pay the lawyer any fees owed.

In this instance, Lou has been removed from the case by the judge. This is likely akin to being fired. If this act is not alone enough to constitute Lou being fired, it is likely that the clients agreeing to representation by new counsel is enough for Lou to be considered fired, thus requiring that he withdraw from the case. The fact that Lou's retainer agreement states that the Lawyer agrees to represent Clients through any settlement or

trial does not affect his ability to withdraw from or to be fired in the case. Here, Lou contends that Betty and Sheila owe him $2000 to reimburse Lou for the time that he spent on the case. Under the CA rules, Lou would not be permitted to hold the materials of the clients hostage while he waits for them to pay this amount. Under both the ABA and CA rules, Lou is required to give the materials related to the representation back to the clients.

Therefore, it is not clear that Lou has breached an ethical duty yet. But it is possible for him to breach an ethical duty by not withdrawing or by not promptly returning the clients' materials.

Q4 Community Property

Wilma, a California resident, was employed as an accountant for many years. She retired in 2010 and received a pension. Wilma received part of the pension as a lump sum and the rest in monthly installments deposited into an account in her name at Main Street Bank. She used the lump sum as a down payment on a townhouse. The title to the townhouse and the mortgage are in Wilma's name.

In 2011, Wilma met Harry, also a California resident, who worked in a local store. Wilma and Harry married in 2012. Harry opened an account at Valley Bank in his name and deposited his salary from the store into the account. Wilma did freelance accounting work and deposited the pay from that work into her Main Street Bank account.

During their marriage, Wilma and Harry used funds from Harry's account to pay the mortgage on the townhouse in which they both lived. They paid all their household expenses from Wilma's account. Wilma's pay from her accounting work did not cover all their expenses and her monthly pension installments paid the rest of their expenses.

In 2013, Wilma and Harry bought a motorboat using funds from Wilma's account. Although they would both use the boat, title was taken in Wilma's name.

In 2014, Harry was injured when a driver, Dana, negligently struck him with her car.

In 2016, Wilma and Harry permanently separated, and Harry moved out of the townhouse and stopped making mortgage payments.

In 2017, Harry settled his claim against Dana for $30,000.

In 2018, Harry instituted dissolution proceedings.

What are Wilma's and Harry's rights and liabilities, if any, with regard to:

1. The townhouse? Discuss.

2. The motorboat? Discuss.

3. The personal injury settlement funds? Discuss.

Answer according to California law.

.

Answer A

California (CA) is a community property (CP) state. There is a community presumption, meaning that all property acquired during marriage is CP. This includes wages of either spouse and labor of either spouse during marriage. There are areas of separate property (SP): (1) property acquired before or after marriage, (2) property acquired during marriage by either spouse through gift, will, or inheritance, (3) Property acquired from SP funds, and (4) profits, rents, and issue of SP. The burden is on the spouse opposing SP to defeat the CP presumption. Courts use the source rule to determine the character of property by tracing the source of funds used to acquire the property.

The marital economic community (MEC) begins at marriage and ends at death of either spouse, divorce, or with the intent of either spouse to not resume the marital relationship coupled with conduct indicating that intent. If spouses maintain the facade of marriage the MEC has not ended.

Here, Wilma (W) and Harry (H) married in 2012. This is when the MEC began. The MEC likely ended in 2016 when W and H permanently separated. Although separation in and of itself is not sufficient to end MEC, it shows the intent of both spouses not to resume the MEC. The fact that Henry moved out is conduct that supports that intent. However, if Henry moved out for the intention of improving and coming back together, the MEC would officially end when H instituted divorce proceedings in 2018.

Generally, on divorce, CP is divided equally in kind, meaning on a per-item basis (not in the aggregate), unless a special rule requires deviation from the equal distribution requirement. Earning power is not generally not considered, other than considering spousal support or debt. Upon divorce, each spouse is entitled to their own SP. Upon death, one spouse's CP inures to the other spouse, such that the surviving spouse ends up with 100% of CP. The

surviving spouse is entitled to at least 1/3 of decedent- spouse's SP, depending on how many, if any, heirs or issue the decedent left behind.

Note, that all CP is divided equally between the spouses. Thus, even if property below is awarded CP, it is still split between the two spouses upon marriage, with the exception of personal injury funds.

TOWNHOUSE

The issue is whether the townhouse is CP or SP. As stated above, property acquired before marriage is presumptively SP. Here, the townhouse was purchased by W prior to 2012 when H and W married. Additionally, wages of either spouse earned prior to marriage is SP. The court will trace the source of the funds used to acquire the townhouse to determine its character. Here, the source of funds is W's pension before she was married. To determine the character of pension, courts use the time rule. Courts consider the amount of time the spouse worked during marriage to get the pension divided by the amount of time total the spouse worked to get the pension. The rationale for the formula is that spouse's labor during marriage is CP and any funding earned from spouse's labor is CP. However, W received the pension before she met or married H. As such, the entire pension is her SP. As such, the townhouse was initially SP.

Spouses may alter the character of assets during marriage with an agreement known as a transmutation agreement. A transmutation agreement may alter the character of CP to SP, SP to CP, or one spouse's SP to another spouse's SP. A valid transmutation agreement must be in writing, accepted by the adversely accepted party (signed), and expressly state that ownership of the property is being transferred. One exception to the writing requirement is gifts of personal property given by one souse to another spouse that are not substantial in value and used in the home. Here, there were no transmutation agreements because there was no writing. Rather, after the MEC, the spouses began paying off the mortgage on the townhouse with funds from Harry's account, which is CP (as discussed below). Harry might argue that the fact that both spouses lived in the townhouse changed

the character of the townhouse. However, that is insufficient. There was not a valid transmutation agreement. As such, using CP to pay the mortgage on SP did not alter the character of the townhouse from SP to CP.

When property is acquired in joint and equal form, there is a presumption that the property is CP and if any SP was used to purchase the property is subject to the Lucas and anti-Lucas statute. Here, the townhouse was solely in W's name alone. Therefore, the presumption that arises from joint and equal form and the anti-Lucas (which applies on divorce) and the Lucas (which applies on death) need not be considered.

Harry may argue that the fact that CP funds are used during marriage to pay off the mortgage on the townhouse makes the property CP. The funds used to pay down the debt constituted deposits of H's salary at the Main Street Bank. As stated above, wages earned during marriage by either spouse are CP. The fact that such wages are deposited into an account in the sole name of just one spouse does not alter the character of the funds. Therefore, the funds in Harry's account deposited after 2012 are CP. The funds beforehand are SP.

Here, the Court will trace back the funding used for the house. As stated above, the downpayment was W's SP, but for the reasons stated in the previous paragraph, the mortgage was paid with CP.

When CP funds are used towards SP property, the character of the property does not change. Rather, the community gets a pro rata ownership share in the property. Courts use the principal debt reduction method to discern the community's ownership share in the property. The community is entitled to the amount it expended to "feather the nest" of CP. Additionally, the community is entitled to the pro-rata increase in value of the property as to its pro-rata ownership share. As such, the townhouse is SP, and under the principal debt reduction method, the CP will receive a pro rata share as follows: amount of CP funds expended on paying down the debt divided by the total amount of SP and CP money used to

pay off the debt X the increase in value. Furthermore, the CP is entitled to the funds expended on paying down the debt from H's account.

If the court finds that the property was somehow held in joint and equal form, upon divorce, under the anti-Lucas statute, the SP spouse is entitled to a refund for downpayment, and any improvements and principal payments. Under this unlikely theory, W will receive a refund for the downpayment.

With regards to the mortgage, the lender's primary intent when giving the loan determines the character of the loan. If the lender looks to SP as security, the mortgage is likely SP. However, if the lender looks to the spouse's standing in the community or CP property as security, the loan is likely CP. Here, the loan was given before marriage. Therefore, the mortgage is entirely SP. Upon divorce, W will be responsible for the mortgage unless justice requires otherwise.

MOTORBOAT

The issue is whether the motorboat is SP or CP considering that it was purchased during the marriage, but from funding from Wilma's account. As stated above, property purchased during marriage is presumptively CP. Here, the motorboat was purchased during the marriage and therefore is presumptively CP. W will urge the court to use the source rule to trace back the funds used to purchase the motorboat. Here, the funds used to purchase the motorboat were funds from Wilma's bank account. Funds from Wilma's bank account include the pension plan monthly installments as well as her pay from freelance accounting.

W may argue that the motorboat is SP because it was purchased in her name alone and with funds from a bank account held in her name alone. W will not prevail on this argument because depositing wages earned during MEC into an account held in the name of only one spouse does not alter the character of the asset. Additionally, holding property in the name of one spouse does not defeat the community presumption that arises when property is

acquired during marriage. As such, W will not prevail on these arguments. For the reasons stated above, neither action is a valid transmutation agreement (no writing).

As stated above, the pension plan monthly installments are W's SP because she worked as an accountant for many years prior to the marriage and thus, under the time rule, none of her labor during the marriage (CP labor) was used to earn the pension. However, W also deposited her pay from the freelance accounting jobs into her Main Street account as well. After MEC, W did freelance accounting. Since these wages were earned during the marriage, W's bank account in Main Street is commingled with both CP and SP.

COMMINGLED FUNDS

H might argue that W's pension plan benefits are CP because they were commingled with CP. However, commingling SP and CP funds does not alter the character of either spouse. When CP and SP funds are commingled, the burden is on the spouse claiming that property acquired with funds from that account is SP to show that SP funds were used to acquire the property. Here, W may claim that her pension benefit funds only were used to purchase the motorboat and thus, under the source rule, the motorboat is SP.

W can satisfy the burden using two methods of accounting: (1) direct in-direct-out method and (2) the exhaustion rule. Under the direct-in-direct-out rule the spouse claiming SP must show that there were sufficient SP funds in the account and that the spouse had the intent to purchase the asset with SP funds. Alternatively, under the exhaustion rule, the spouse claiming SP must show that all the CP funds were used in the account and all that was left in the account was SP. Under the family expense presumption, expenditures for community items, such as living, rent, food, etc. are presumptively made from CP. However, inevitably due to commingling and inadequate records, SP funds may be used for family expenses. If there are not adequate records and commingling occurs, it is presumed the SP funds used for family expenses are a gift to the community.

Here, H and W paid all of their household expenses from Wilma's account - the account that has both SP and CP. Wilma's pay from her accounting work, which is CP, was not enough to cover all of their expenses and the monthly pension installments (SP) were used to pay the rest of the expenses. Under the exhaustion rule, W has a strong argument that only SP funds were used to purchase the motorboat because the CP funds were "exhausted," shown by the fact that Wilma's accounting work was not enough to pay for their expenses. This means that inevitably Wilma's separate property was used to pay for the living expenses. Under the family expense presumption, it is presumed that CP was used first to pay for the family expenses and that all the funds left to purchase the boat were Wilma's SP. H can argue some of W's SP was used for the family expenses and some of Wilma's accounting work (CP) was used for the motorboat. However, due to the family expense presumption, H is unlikely to prevail in this argument given the exhaustion method.

Under the direct-in-direct-out method, Wilma must argue that not only were SP funds available but also it was her intent that the motorboat remain SP. It is unclear from the facts when the motorboat was purchased - whether it was at a time when the Wilma's wages from accounting were exhausted and thus only SP funds were available for the rest of the expenses, or was it during the beginning of the month when both SP and CP funds were available. H may argue that Wilma's pension funds used for expenses is presumably CP because the funds were commingled. A court may have to seek more documents to see the status of the funds during the time the motorboat was purchased. However, it is likely that SP pension funds were available when the boat was purchased because SP funds were used by the "finish out the month" after the CP funds were exhausted. This means that generally SP funds were always available.

If court finds that SP funds were available, then with regards to the intent, W will argue that the spouses intended the motorboat to be SP because it was held in her name alone. H will argue that the intent was for the property to be shared because they both used the motorboat.

H may also argue that W violated her fiduciary duty to him as a spouse. Due to the close and honest relationship between spouses, courts find a fiduciary duty relationship. Where one spouse gains a better position in a transaction as compared to the other spouse, there is a presumption that the spouse in the better position breached that duty. Here, H may argue that W breached her duty using SP funds to purchase the motorboat and thus, the community does not have a stake in the property. H can argue that W was more sophisticated financially then H because she was employed as an accountant for many years and was working as a freelance accountant during the marriage. H can point out that he merely worked at a local store and did not have the financial knowledge held by W. H can argue that CP funds were available from his work at the store, as well. This is a strong argument for H and a court will strongly consider this fact when deciding whether W satisfied her burden from the commingled funds.

Accordingly, unlike PI and townhouse, it is unclear who has rights to the motorboat.

PERSONAL INJURY SETTLEMENT FUNDS

The issue is whether the personal injury (PI) funds are CP and SP considering the cause of action arose during the MEC, but the case settled after the MEC. Generally, all funds acquired during marriage are presumptively CP. With regards to PI settlement awards, if the cause of action arose during the MEC, the settlement award is CP, UNLESS the settlement award is from the other spouse when the other spouse is the tortfeasor. The rationale behind this is if the funds were CP, the tortfeasor spouse would be able to benefit from his own wrongdoing. Although PI funds awarded from a cause of action that arose during marriage are CP, upon the divorce the court usually awards the funds exclusively to the injured spouse as SP. However, this exception is limited and applies only if those funds are not spent. The court will attempt to trace back the funds to determine that.

Here, H was injured by driver (D) when she negligently struck him in 2014. H and W permanently separated in 2016 and divorced in 2018. As such, even if the MEC did not end

at separation (as discussed above), the cause of action still arose during MEC. Although the funds were paid out afterwards, the funds were initially CP.

H will ask the court to provide the award solely to him because he was the victim of the accident. Here, the funds were paid out after the MEC and there is no evidence that supports an assertion that it would be difficult to trace the funds, given that they were awarded after MEC has ended. As such, H is likely to receive rights to the entire award at divorce because he was the victim and tracing is not an issue. While courts may split PI awards evenly if justice so requires, there are no facts here that suggest it is equitable to split the PI funds. Accordingly, H will receive the PI settlement award.

Answer B

California is a community property state. There is a presumption that all assets acquired during marriage are community property. California also recognizes the following forms of separate property: (1) property acquired before marriage, (2) property acquired through gift or inheritance, (3) expenditure of separate property, and (4) rents and profits of separate property.

Upon divorce, all community property assets are separated equally in kind, unless otherwise provided by a special rule of community property. Separate property remains separate property upon divorce.

THE TOWNHOUSE

There is an issue as to how the townhouse should be distributed upon divorce. Here, Wilma purchased the townhouse in 2010, prior to Wilma and Harry's marriage in 2012. Both title to the townhouse and the mortgage are in Wilma's name. The townhouse is presumptively Wilma's separate property since it was acquired before marriage.

Characterization of Funds From Harry's Account

There is an issue as to whether the funds used to make the payments on the townhouse mortgage were separate property or community property. Generally, all assets acquired during marriage, including any income earned, is presumptively community property. The fact that the funds are placed in a separate account, not a joint account, does not change the characterization of the property.

Here, the funds to pay the mortgage on the townhouse came from Harry's account. Harry opened the account only in his name and deposited his salary from his job into the

account. The fact that the funds were put into an account in Harry's name does not change the fact that the funds were community property. Since the funds were acquired from a job during marriage, they were community property. The community therefore was responsible for paying down the mortgage on the townhome.

Proration Rule

Under the proration rule, when community property is used to pay an installment payment on separate property, the community gains an interest in the property. The community has a prorated interest in the property, calculated by the expenditure of community property towards the installment payment over the total purchase price.

Here, Wilma and Harry used funds from Harry's account to pay the mortgage on the townhouse. As discussed above, the funds from Harry's job are community property. Since community property was used to pay down the balance of the mortgage, the community has a pro rata interest in the townhouse. The community's interest in the townhouse is the ratio between the amount of community funds used to pay the mortgage, over the total purchase price.

Conclusion

The community has an interest in the townhouse, calculated by the ratio between the amount of community funds used to pay the mortgage over the total purchase price. Wilma and Harry will split the proceeds from the community's interest in the townhouse.

THE MOTORBOAT

There is an issue as to Wilma's and Harry's rights and liabilities in the motorboat. Since the motorboat was acquired during marriage, there is a presumption that the boat is community property, despite the fact that title was taken only in Wilma's name.

Characterization of Wilma's Pension

There is an issue as to whether the monthly payments from Wilma's pension are community property or are separate property. Generally, property acquired before marriage is separate property. However, property acquired during marriage, such as income, is considered community property.

Here, Wilma retired in 2010 and received a pension. Wilma received part of the pension as a lump sum and received the rest in monthly installments. She then deposited these funds into an account in her name at the Main Street Bank. Harry may try to argue that these funds are community property since Wilma gets funds each month, characterizing them as income. Wilma, however, will argue that the pension funds were earned and acquired before marriage. Wilma worked as an accountant for many years. Wilma had to work for many years prior to 2010 before receiving a pension. The work was already done, and Wilma earned her pension when she retired in 2010, despite the fact that it was paid over many months. Wilma will argue that unlike income, she did not perform any work during marriage to receive the funds. Wilma had a property interest in the pension prior to her marriage with Harry.

Wilma's pension will likely be considered her separate property, since it was earned prior to marriage. Wilma's pension was a result of her work as an accountant, from which she retired prior to the marriage.

Characterization of Wilma's Salary

Generally, all assets acquired during marriage--including income--are community property. Here, Wilma took a salary from freelance accounting work which she deposited into her Main Street Bank account. Wilma's salary was earned during marriage and is therefore community property.

Commingling of Funds

There is an issue as to whether Wilma's separate property or community property was used to purchase the boat. The commingling of separate property and community property does not transform the nature of the property. Wilma has deposited both her pension--separate property, and her salary--community property, into her account. The assets have been commingled and it must be determined whether separate property or community property was used to purchase the boat.

Family Expenses Presumption

There is a presumption that all family expenses are paid with community property. Any funds spent on household expenses exceeding the amount of community property is deemed to be a gift to the community.

Here, Wilma and Harry paid all household expenses from Wilma's account. Wilma's pay from the accounting work was not enough to cover their expenses, and her monthly pension paid the remaining expenses. There is a presumption that all these household expenses were paid using the community property assets.

Exhaustion

A spouse can show that a purchase was made with separate property from a commingled account if they show that the community funds were exhausted, and the only remaining funds were separate property.

Here, Wilma paid all household expenses with the commingled funds from Wilma's account. Based on the family expenses presumption, discussed above, the payment of these expenses is presumed to be from community property. Wilma can show that the

community property funds in the account were exhausted, since Wilma's pay from her accounting work did not cover all their expenses. Wilma was required to use her monthly pension installments to pay the remaining expenses. Since the community property funds were depleted each month to pay for the household expenses, the only funds remaining in her account were her separate property funds from her pension. Wilma can therefore show that the separate property funds were used to purchase the motorboat. Since the motorboat was purchased with Wilma's separate property, the motorboat is Wilma's property, not subject to equal division upon divorce.

Tracing

Tracing is available when you can directly trace a deposit of separate property into a commingled account to a subsequent purchase. For example, if Wilma deposited $12,000 into her account, and then purchased the boat for $12,000, the court can trace the purchase to the deposit of separate property. Here, however, Wilma only deposited her salary and monthly pension installments into the account, and tracing is not available.

Joint Use/Transmutation

Harry may try to argue that the boat is community property since they agreed that they would both use the boat. Joint use does not change the character of the property. Here, the property was acquired through the expenditure of Wilma's separate property, making the boat her separate property.

A valid transmutation requires a writing signed by the spouse whose interest is affected, and must explicitly state that a transmutation in the form of property is being made. Here, there is no writing signed by Wilma. The fact that both parties agreed to use the boat does not transform the separate property into community property.

Conclusion

There is a presumption that the boat is community property since it was acquired during marriage. Wilma, however, can show that the motorboat was purchased with her separate property. Wilma purchased the boat from a commingled account containing community and separate property. The community property was exhausted each month to pay the family expenses, and the only remaining money was Wilma's separate property. This separate property was used to purchase the boat, making it an expenditure of separate property. The boat is separate property and not subject to equal division upon divorce--Wilma has a 100% interest.

PERSONAL INJURY SETTLEMENT FUNDS

There is an issue as to how Harry's settlement for his personal injury claim should be distributed upon divorce. Funds received from a personal injury settlement are community property if the cause of action arose during the economic community.

End of Economic Community

The economic community ends when the parties intend not to continue marital relations, and take action consistent with that intent.

Here, Wilma and Harry permanently separated in 2016, but did not file for dissolution proceedings in 2018. It is unclear whether the parties intended to divorce when they separated in 2016. If the parties intended to end marital relations in 2016, it does not matter that dissolution was not filed until 2018. The fact that Wilma and Harry permanently separated is sufficient conduct for the economic community to have ended in 2016 if they intended to permanently end marital relations at the time of separation.

Harry was injured in 2014, while the parties were still married. Harry, however, did not settle his claim against Dana until 2017--arguably after the end of the economic community. Harry may try to argue that the personal injury award should be his separate property since it was obtained after the economic community. His argument will fail, however, because his cause of action arose in 2014 when the parties were still married. The parties were married at the time the cause of action arose, and Harry's settlement funds are therefore community property.

Personal Injury Funds Upon Divorce

Generally, personal injury settlement funds are community property. The court will, however, award the entire recovery to the injured spouse upon divorce, unless the money has been spent or the interests of justice require otherwise. Here, although the funds are community property, the money does not appear to be spent, and it does not seem unfair to award Harry the entire settlement. Harry should therefore be awarded the entire $30,000 settlement upon divorce.

Conclusion

Although Harry settled the claim after the end of the economic community, the cause of action arose while the parties were married making the settlement community property. The court should, however, award the entire $30,000 settlement to Harry, the injured spouse.

Q5 Constitution

Five years ago, State X bought Railroad (RR), which was in bankruptcy and about to be liquidated. RR has always been the largest rail carrier in State X, presently carrying 70% of its rail freight. RR's transport rates are generally lower than other rail carriers. In signing the Act authorizing the purchase of RR, the governor stated that it would ensure continued freight rail service for State X industry.

The Act authorizing the purchase of RR provides that manufacturers with factories in State X shall have first choice of space on RR.

Peter, a citizen of State Y, which borders State X, grows melons in State Y for sale to grocers there and in State X. Before its purchase by State X, Peter exclusively used RR for shipping melons to his many State X customers. Peter has lost nearly all of his State X customers over the last 5 years because he cannot guarantee timely delivery of ripe melons because shipping space on RR is so uncertain.

Corporation manufactures refrigerators in State Y and sells them there and in other states, including State X. Corporation has lost retail customers in State X because it can no longer guarantee dates of delivery when using RR.

Peter and Corporation have repeatedly been forced to give up reserved space on RR because it is being used by State X manufacturers. They have now filed suit in Federal Court in State X.

1. What claims can Peter make under the United States Constitution and how should the court rule? Discuss.

2. What claims can Corporation make under the United States Constitution and how should the court rule? Discuss.

Answer A

1. PETER'S POTENTIAL CLAIMS

The issues are the claims Peter can make under the United States Constitution against State X.

Dormant Commerce Clause (Negative Implications of the Commerce Clause)

Whether State X's Act providing State X manufacturers priority choice of space on RR is a violation of the Dormant Commerce Clause (DCC).

Under the Commerce Clause in the US Constitution, Congress has the authority to regulate interstate commerce. This includes (i) the channels of interstate commerce (roads, railways, waterways), (ii) the instrumentalities of interstate commerce (trucks, boats, airplanes, the internet), and (iii) economic activities that, when aggregated, have a substantial effect on interstate commerce. However, this authority is not absolute. States are allowed to regulate commerce if such regulation is not preempted by federal law, and so long as the State regulation does not discriminate against out of staters. If the state regulation discriminates on its face against out of staters, it violates the DCC unless the regulation is necessary for a compelling state interest (strict scrutiny). If the regulation does not discriminate against out of staters, it usually will be upheld so long as it does not unduly burden interstate commerce. Citizens, including individuals and corporations, as well as aliens can sue on a cause of action arising under the DCC.

Here, State X purchased RR, which is the largest rail carrier in State X. The Act authorizing the purchase of RR, provides that manufacturers with factories in State X get first choice of space on RR. Peter grows melons in State Y for sale in both State Y and State X. Peter exclusively uses RR for shipping his melons to his many State X

customers. Since State X purchased RR, Peter has nearly all of his State X customers because he cannot guarantee delivery due to uncertain availability of space on RR. State X manufacturers are given priority all the time so if they fill up all freight space, there is none left for out of state users. Peter will argue the State X Act discriminates against out of states because it gives priority to manufacturers in State X to the disadvantage of out of state business. In contrast, State X will argue that even if the Act prioritizes State X manufacturers it has a compelling interest in doing so. Prior to State X's purchase of RR, the railroad was in bankruptcy. The State X Act allowed the State to purchase RR to ensure its continued service as State X's largest rail carrier. Peter, on the other hand, can argue that although State X has a interest in continuing rail service, the provision in the Act giving priority to in-state business is not necessary to achieve this interest. Continued rail service is not dependent on giving priority space to in-state users and could be accomplished just the same if all shippers received the same access regardless of whether they were in state or out of state. Thus, although State X's interest is compelling, the methods used are not necessary and thus violate the DCC.

Therefore, because the State X Act discriminates against out of staters and the method used is not necessary to achieve the Act's purpose, State X has violated the DCC.

Market Participant Exception to DCC

Whether State X is a market participant.

Congress has provided two exceptions to the DCC: (i) consent by Congress, and (ii) when the state acts as a market participant.

Here, State X owns RR and RR presently carries 70% of State X's rail freight. Because State X owns the railroad, it is acting as a market participant and would fall under the exception to the DCC so long as there is not an undue burden on interstate commerce. Presently, 70% of RR's freight comes from State X. Further, the Act does not prohibit out of state users. It simply gives priority to its existing State X users which comprise the

majority of its rail freight. Therefore, it is likely that the court would find that State X qualifies as a market participant.

Therefore, although State X's Act discriminates against out of staters in violation of the DCC, State X is a market participant and as such would be exempted. Peter would fail in a claim under the DCC and the court would rule in favor of State X.

Privileges and Immunities Clause of Article IV

Whether State X's Act violates the Privileges and Immunities Clause of Article IV (P&I Clause).

The P&I Clause guarantees that citizens of each state shall be given the privileges and immunities of citizens of all states. A state law which discriminates against out of staters as to a fundamental right or civil liberties, including the ability to earn a livelihood, violates P&I Clause unless a substantial justification exists.

Here, Peter will argue that the State X Act violates the P&I Clause because it discriminates against out of staters. Peter will specifically argue that the Act has impeded his ability to earn a livelihood as evidenced by five years of lost customers for lack of access to shipping on RR. Although Peter is able to earn his livelihood in State Y and sell his melons in State Y, the State X Act substantially interferes with his preexisting customer relationships in State X, hindering his ability to earn a living. Such discrimination will violate the P&I Clause unless a substantial justification exists. Here, State X will make the same arguments regarding RR as to its market participation and its need to continue the rail service in State X. Peter will again argue other means would be available to meet the state's purpose. Unlike under the DCC claim, Peter will likely succeed in his P&I claim. Although the need to save the bankrupt RR is a substantial justification for the Act, it is not a justification for discriminating against out of staters. Therefore, Peter will likely prevail in his P&I claim.

Equal Protection

Whether Peter has an equal protection claim.

The equal protection clause under the 14th Amendment to the US Constitution applies when the government is making a distinction between similarly situated people. If the classification is based on race or national origin, then the state must meet strict scrutiny. If the classification is based on gender, then intermediate scrutiny will be used. Any other classification will only need to meet a rational basis test.

Here, Peter will be unable to argue a fundamental right has been violated. The right to use a railroad for shipping is an economic right and Peter will need to prove State X has no rational basis for the Act. Because the Act rationally relates to the legitimate interest of preserving the State X railroad, State X will likely prevail, and the court will rule against Peter.

Therefore, Peter will not prevail in an EP claim and the court will rule for State X.

Due Process

Whether Peter has a due process claim.

The Due Process clause under the 14th Amendment prohibits the government from acting arbitrarily and unreasonably.

Here, Peter will argue his due process rights were violated when State X arbitrarily and unreasonably gave priority to State X manufacturers over out of state users of RR. Because Peter used RR exclusively, he will argue he was deprived of right without due process of law. However, Peter's right to use RR relates to an economic liberty and not a fundamental right. Thus, State X's Act must only meet a rational basis test. The Act must be rationally related to the achievement of a legitimate government interest. As the

challenger, Peter will have the burden to prove the Act does not meet the rational basis test. Because State X can argue that preservation of the 70% of instate users is a legitimate interest and the Act's provisions rationally relate to this, Peter will likely lose this challenge.

Therefore, Peter will likely not prevail and the court will rule for State X on this claim.

2. CORPORATION'S CLAIMS

The issues are the claims Corporation can make under the United States Constitution against State X.

Dormant Commerce Clause (Negative Implications of the Commerce Clause)

Whether Corporation has a DCC claim against State X.

See rule above.

Here, Corporation will make very similar arguments as those by Peter above. However, Corporation will further argue that because he is an out of state manufacturer he is more directly impacted by the State X Act. The State X Act specifically discriminates against out of state manufacturers by giving priority to in state manufacturers. Additionally, because Corporation does not have any factories in State X, he is further impacted because he needs RR in order to get his refrigerators into State X to sell. Nonetheless, State X will again argue for a market participant exception and will likely prevail.

Thus, Corporation will lose on a DCC claim and the court will rule in favor of State X.

P&I Clause of Article IV

Whether Corporation has a claim under the P&I clause of Article IV.

See above. The P&I clause does not apply to corporations and aliens. Therefore, they cannot sue under it.

Here, Corporation is a state Y corporation. Thus it cannot sue under the P&I clause and would not prevail in such a claim.

Due Process (DP)

Whether Corporation has a claim under the DP clause of the 14th Amendment.
The due process clause provides that states may not act unreasonably or arbitrarily. Here, Corporation will argue that State X's Act unreasonably denies him due process because it deprives him of existing rights. Further, Corporation will argue that repeatedly being forced to give up on RR just because it is an out of state manufacturer is an arbitrary and unreasonable denial of his rights. However, Corporation's right to use RR relates to an economic liberty and not a fundamental right. Thus, State X's Act must only meet a rational basis test. The Act must be rationally related to the achievement of a legitimate government interest. As the challenger, Corporation will have the burden to prove the Act does not meet the rational basis test. Because State X can argue that preservation of the 70% of instate users is a legitimate interest and the Act's provisions rationally relate to this, Corporation will likely lose this challenge.

Therefore, Corporation will likely not prevail and the court will rule for State X on this claim.

Contracts Clause

Whether Corporation has a claim under the Contracts Clause of the US Constitution.

Under the Contracts Clause of the US Constitution, a state may not impair rights under pre-existing contracts. If the interference is with a private contract, intermediate scrutiny applies. If the interference is with a government contract, strict scrutiny applies.

Here, Corporation may argue that he has lost all retail customers in State X due to the fact that it can no longer guarantee delivery dates. If Corporation is engaged in existing contracts with these customers, then the State X Act giving priority to in-staters over out-of-staters would cause an impairment to Corporations' existing contracts. Corporation has shown that it has repeatedly had to give up space on RR for in state manufacturers. However, the facts do not indicate that Corporation has existing contracts in place. The facts only state Corporation has lost retail customers; there is no indication whether they are new or existing. Thus, if Corporation can prove the State X Act has impaired his rights under existing contracts, State X will have to prove its Act meets intermediate scrutiny--the provision in the Act is substantially related to an important government interest. If State X cannot do so, then Corporation may prevail on a contracts clause claim. Therefore, if Corporation can prove impairment of existing contracts under the contracts clause, it may prevail in this claim over State X.

Answer B

1. Peter's Claims

Standing

Injury in fact; causation/redressability; ripe; not moot

A plaintiff in federal court must have standing in order for the court to hear the case. In order to have standing the plaintiff must show (1) injury-in-fact; (2) causation: the P's harms were caused by the defendant's conduct; (3) redressability: a decision in the P's favor will redress the injury caused by D (e.g. a favorable decision will remedy the harm); (4) ripeness: the case must be ripe for judgment (e.g. a case is not ripe if the law has yet to be enacted and there is insufficient details in the legislative discussion on its enforcement or the law is unlikely to be enforced); and (5) not moot: a case is moot if the harm has already occurred and is not capable of repetition, but evading review (e.g. it is not a live case and controversy).

Injury: P's injury is the loss of nearly all of his State X customers over the last 5 years. Economic damages need not be proven to shown an injury in fact, but economic harms are sufficient if a P can prove them. P could easily demonstrate that the loss of this many customers led to a downfall in profits for his melon business.

Causation: P's injury was caused by the state law at issue (the Act that authorizes State X to purchase RR and giving manufacturers with State X factories first choice of space on the RR). P has been forced on many occasions to give up his space on the RR for his melons because a State X manufacturer needed the space. This priority given to State X manufacturer has caused P much uncertainty regarding whether or not he can ship his melons to customers in State X. Additionally, P exclusively used the RR for shipping melons to his many State X customers. Because of the uncertainty of

shipping space on the RR, P cannot guarantee his customers timely delivery of ripe melons, which has caused him to lose nearly all of his State X customers. Thus, there is but-for cause (but for the Act, P would not have lost its customers) and proximate causation (foreseeability and fairness). Thus, causation is satisfied.

Redressability: Because the state X Act caused the P's injuries, a decision by the court in favor of P will redress P's injuries. By striking down the Act, a court would allow P to get space on the RR without being kicked out unexpectedly by an in-state manufacturer and, thus, he would be able to deliver melons to his customers in a timely manner while the melons are still ripe.

Ripeness: Here, the Act has been enacted. It was enacted 5 years ago. It has clearly been enforced by the State because it purchased the RR and it repeatedly kicked out P and Corporation (out-of-staters) to make room for in-state manufacturers. Since it is an enacted law that is fully enforced, the case is ripe for adjudication.

Not Moot: The state may argue that this case is moot because the harm has already been done to P, he has lost nearly all his customers. Thus, a favorable decision will not be able to get those customers back. There is no live case or controversy since the law has caused all the harm it can to P. However, P will rebut that he has not lost all of his State X customers. Thus, the court striking down the law would help him to not be further harmed by losing the rest of his State X customers. Also, this is a harm (like Roe v. Wade) that is capable of repetition but evading review. Although the harm has already been caused by D's acts, it is possible that P could get more state X customers and then lose them again because of the impact of the Act on P's timely delivery of melons.

Thus, the court will likely find that P has standing to challenge State X's Act.

Dormant Commerce Clause

The Commerce Clause grants Congress the power to make laws regarding interstate

commerce (between states). This power includes the right to regulate (1) instrumentalities of interstate commerce (cars, trains, planes, buses); (2) channels of interstate commerce (roads, highways, etc.); and (3) intrastate (solely in one state) economic activity that has a substantial effect (in the aggregate) on interstate commerce. Where an intrastate non-economic activity is involved, the activity's effect on interstate commerce cannot be aggregated and courts generally require that Congress submit a finding that the activity has a substantial effect on interstate commerce.

The Commerce Clause also grants certain powers to the state. As part of the negative implications of the Commerce Clause (e.g. the dormant commerce clause), states are prohibited from unduly burdening interstate commerce and particular states may not discriminate between in-staters and out-of-staters without satisfying a level of scrutiny (discussed below). If a state's actions (law, regulation, act, etc.) violate the Dormant Commerce Clause (DCC), that state's actions will be deemed unconstitutional and the relevant law/regulation will be struck down. Both corporations and aliens can sue under the DCC.

Where a state both discriminates against in-staters and out-of-staters (treats in state citizens or corporations differently from those out of state) and burdens interstate commerce, the law will be deemed unconstitutional unless the state can demonstrate that the regulation is necessary to achieve an important government interest. Necessary means that there must be no less restrictive (e.g. no less burdensome or less discriminatory) means to achieve the stated ends. It is the state's burden to satisfy this level of scrutiny.

Where a state is not discriminating between in-staters and out-of-staters, but its regulation/law burdens interstate commerce, courts perform a balancing test to determine if the state's law unduly burdens interstate commerce. The court weighs the benefits to the state and the burdens placed on interstate commerce. If the benefits outweigh the burdens, then the state law does not unduly burden interstate commerce and is constitutional (e.g. does not violate the DCC). If the burdens outweigh the

benefits, then the law does unduly burden interstate commerce and it is unconstitutional (e.g. violates the DCC) and will be struck down.

Burdens and Discriminates

Here, P will argue that the Act both unduly burdens interstate commerce and discriminates between in-staters and out-of-staters. The Act unduly burdens interstate commerce because it prevents companies and businesses from being able to have reserved space on railroad transportation. Businesses require shipment of their goods between states in a timely manner. If goods are kicked off a train because of a need for priority space for in-state manufacturers, it will lead to the goods to spoil (as in the case of melons) or it will cause the business to pay extra money to secure some emergency shipment of the goods. It also causes the loss of customers for the businesses and slows down and frustrates transportation of goods between states. All of this was shown with P's situation because the priority space has led P's melons to be taken off the train and he lost customers since he failed to timely deliver these perishable goods to the customer when he contracted/promised to do so. P will also argue that it discriminates between in-staters and out-of-staters because it gives in-state manufacturers priority space on the train and does not give priority space to out-of-state companies or citizens. The law treats similarly situated companies and people differently based on their state of citizenship.

State X may rebut that it is not discriminating against out-of-staters, as the manufacturers it is favoring are not necessarily solely State X corporation, rather it is favoring those manufacturers that have factories in State X. This argument will likely be unsuccessful, as they are still favoring entities that operate within the state and disfavoring entities that operate out of state.

P's argument will likely be successful. State X will have the burden of providing that the Act is necessary to achieve an important government interest. X will argue that the important government interest is ensuring that State X industries are guaranteed freight

rail service. However, courts have found it to be not an important government interest to protect in-state companies and businesses at the expense of out-of-state ones. X will next argue that providing in-state manufacturers with first choice of space on the RR is necessary to ensure that these manufacturers with in-state factories are ensured and guaranteed railroad transportation for their goods. If RR had gone bankrupt and was not bought by State X, the in state manufacturers would have lost 70% of their source of freight services, which would have been disastrous for State X's economy and its in-state corporation. Also, this RR was less expensive than other rail carriers, so its bankruptcy would have led to less profits and revenues for in-state manufacturers since they would have to pay more for shipment costs and that would harm the job market and economy of State X. X would reason that stabilizing and ensuring the continuing profits of in-state manufacturers was an important interest.

P will rebut that necessary means least restrictive means and this law could be much more narrowly tailored. For example, the law could merely guarantee that a small percentage of all rail cars on a given RR train would be kept open only for State X manufacturers and if they are not filled, those spots can be used for out of state entities as well. This would be less discriminatory and less burdensome on interstate commerce because it would never kick out an out of state company's goods that had originally planned on being shipped to customers on that particular train. Thus, the Act is not necessary because there are feasible alternatives that cause less burden and are less discriminatory.

Thus, a court will likely find that the Act both discriminates and burdens and that the state will not be able to satisfy their burden of showing the Act is necessary to serve an important government interest. Thus, the law will be found to violate the DCC unless an exception applies.

DCC Exceptions

There are a few exceptions to the dormant Commerce Clause. Where there is

Congressional approval for the law/regulation/act in question, the DCC does not apply. Where a state is acting as a market participant, the state's regulation/law is allowed under the DCC. A state acts as a market participant when it assumes the role of an entity in the market place, such as a corporation, and participates in the market itself.

This would include a state-owned company. Another exception to the DCC is the traditional public function exception. This is where a statement is performing a function traditionally given to the states under their powers. Examples of this include public universities that charge lower tuition to in-state citizens as opposed to out-of-state citizens.

Here, there is no Congressional approval and the state isn't performing a traditional public function. However, State X is acting as a market participant. X bought a public company (RR) after it went bankrupt and was about to be liquidated. X bought it so that the State's manufacturers did not lose 70% of their freight services. The Act authorized the State to buy the RR and take its place as a market participant. Since X was performing the services of a private company in the marketplace of freight shipping, a court will likely find that an exception to the DCC applies.

Thus, a court will likely dismiss P's DCC claim against State X because the market participant exception applies.

Privileges and Immunities Clause under Article IV

Under the Privileges and Immunities Clause under Article IV, states are prohibited from discriminating between in-state citizens and out-of-state citizens as to fundamental rights (important rights) or important commercial activities. This clause prevents states from denying out of state citizens the privileges and immunities it provides to its own state citizens. If a state law both discriminates and burdens interstate commerce, the level of scrutiny discussed above under the DCC applies.

If the state law discriminates but does not burden interstate commerce, then the court will first ask whether a fundamental right or important commercial interest/activity is involved. Courts have found the right to earn a living to be an important commercial interest. Laws have been struck down under the privileges and immunities clause (PIC) where they only allow in-state citizens to get licenses to practice law. Laws have been struck down for charging in-state shrimp fishermen a small fee for a shrimping license (like $100), but then charged out of state fishermen an extremely large fee ($20,000-30,000). However, courts have found no important commercial interest where mere hobbies are involved. Thus, state laws charging in-state golfers lower greens fees on golf courses than out-of-state golfers were deemed constitutional and did not violate the PIC. Also, a law making hunting licenses relatively cheap for in-staters, but very expensive for out-of-staters was also found constitutional.

If a court finds a fundamental right or important commercial interest is involved, then the burden is on the state to show that the law is necessary to achieve an important government interest.

If the state law does not discriminate between in-staters and out-of-staters (and does not unduly burden interstate commerce (DCC)), the law is presumptively valid.

Unlike the DCC, corporations and aliens cannot sue under the PIC.

Here, State X is discriminating between in-state manufacturers/entities and out-of-state ones. P is an out of state citizen from State Y. State X provides first choice of freight space benefits to manufacturers with State X factories, but not those, such as P, who are out of state. The same scrutiny analysis will apply (state's burden to show Act is necessary to achieve an important government interest). P has standing to file this suit because he is an individual and a US citizen presumably, not an alien or a corporation. See DCC analysis from above. Because PIC does not have any exceptions, a court will likely find that the state cannot show the law is necessary to achieve an important government interest since less restrictive means are available. Thus, the court will find

the law invalid under the PIC under Article IV and strike the law down as unconstitutional.

Equal Protection Clause

Under the EPC, applied to the states through the 14 Amendment, states may not treat similarly situated persons differently. The level of scrutiny that applies depends on what classifications is used by the government to differentiate persons/entities. Corporations and individuals can sue under the EPC.

If the state is using a suspect classification, then strict scrutiny will be used to determine the constitutionality of the law. Thus, the state has the burden to show the law is necessary to achieving a compelling government interest (it must be the least restrictive means available). Suspect classifications include race, national origin, and alienage (for the states where it does not involve a job dealing with the democratic process, such as an elementary school teacher, police officer, etc.; this does not apply to the federal government, which has plenary power over immigration).

If the state uses a quasi-suspect classification, intermediate scrutiny applies. The state has the burden to show that the law is substantially related to an important government interest. This requires narrow tailoring, which does not require the least restrictive means, but requires there is a substantial relationship between the means and the ends). Quasi-suspect classifications include gender (where the state must show an exceeding persuasive justification) or illegitimacy.

If the state uses a non-suspect classification, rational basis review applies. The plaintiff (challenger of the law) has the burden to show that the law is arbitrary, e.g. that it is not rationally related to a legitimate purpose. The purpose need not be the actual one used, but rather need only be a hypothetical one that the court could come up with. Laws generally pass RBR. RBR applies to all classifications that are not those stated for SS and IS, which includes age, mental disability, wealth, education level, etc.

Here, the classification at issue under this law is whether the entity has an in-state factory or not. This is not a suspect or quasi-suspect classification. Thus, RBR would apply. P would not be able to show that this law is arbitrary and that it is not rationally related to a legitimate purpose. The legitimate purpose could be to protect the economy of State X and X's in-state factories and stabilize employment levels. The law achieves these ends by providing access to freight shipping to these in-state entities, so it is rationally related to those ends.

Thus, under the EPC the court would likely find the law is valid and constitutional.

Due Process

The Due Process clause of the 5th amendment applies to the federal government and applies to the states through the 14th amendment. Under the DP clause, states must not act unreasonably or arbitrarily. The government cannot deprive individuals of certain rights without a counter-balancing justification for doing so. Individuals and corporations can sue under the DP clause.

If the government is depriving individuals of a fundamental right, then SS applies (stated above). Fundamental rights include the right to contraception, marriage, guiding the upbringing of one's family, sex, privacy, right to vote, right to travel.

If the government is depriving other rights, such as the right to abortion (undue burden test for pre-viability), something below SS applies. For sex between members of the same gender, it is unclear what level of scrutiny applies.

IS applies when the government is depriving a member of the public's right to commercial speech.

Law depriving individuals of other rights need only satisfy RBR.

Here, the right to have goods shipped on a freight train is not a fundamental right. Thus, P has the burden to show the Act does not satisfy RBR. Since the law does satisfy RBR, the court will likely find the law is valid under the DP clause.

Conclusion: Thus, P's DCC claim will likely be successful and a court would likely strike down the State X act as unconstitutional on DCC grounds. However, none of P's other claims would likely be successful.

2. Corporation's Claims

Standing

Similar analysis as P. C manufactures refrigerators outside of State X (in State Y). C sells those fridges to customers in State X. C has injury because it lost retail customers in State X because it could not guarantee dates of delivery. This was caused by the Act since C was repeatedly forced to give up reserved space on RR to an in-state manufacturer. Redressability is also satisfied. The claim is ripe and not moot.

Privileges and Immunities

Because corporations and aliens cannot sue under the PIC, C will not be able to bring this claim because C is a corporation.

Dormant Commerce Clause

Same analysis as above. DCC can be used by corporations and aliens, so this would be available to C. C is an out-of-state manufacturer and the Act is discriminating between out-of-state and in-state manufacturers in providing the reserved freight space.

As above, the market participant exception likely applies and thus a DCC claim would be

unsuccessful.

Equal Protection

This claim can be used by individuals and corporations, so would be available to C. Same analysis as above. Same conclusion as above (the analysis for P).

Due Process

Can be used by individuals and corporations. Same analysis as above. Same conclusion as above.

Conclusion: Thus, C will likely not have any successful claims against State X's Act and, thus, a suit by C would not lead a court to strike down the State X act as unconstitutional under any grounds (unlike P's DCC claim which would be successful).

Feb 2018

California Bar Examination

Essay Questions and

Selected Answers

The State Bar Of California
Committee of Bar Examiners/Office of Admissions

180 Howard Street • San Francisco, CA 94105-1639 • (415) 538-2300
845 S. Figueroa Street • Los Angeles, CA 90017-2515 • (213) 765-1500

ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2018

CALIFORNIA BAR EXAMINATION

This publication contains the five essay questions from the February 2018 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	Subject
1.	Professional Responsibility / Contracts
2.	Constitutional Law
3.	Real Property
4.	Criminal Law and Procedure
5.	Wills / Community Property

ESSAY EXAMINATION INSTRUCTIONS

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little or no credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

Q1 Professional Responsibility / Contracts

Austin recently sold a warehouse to Beverly. The warehouse roof is made of a synthetic material called "Top-Tile." During negotiations, Beverly asked if the roof was in good condition, and Austin replied, "I've never had a problem with it." In fact, the manufacturer of Top-Tile notified Austin last year that the warehouse roof would soon develop leaks. The valid written contract to sell the warehouse specified that the property was being sold "as is, with no warranties as to the condition of the structure."

After Beverly bought the warehouse, the roof immediately started leaking. Beverly hired Lou, an experienced trial lawyer, and executed a valid retainer agreement. Beverly then sued Austin for rescission of the warehouse sale contract, on the bases of misrepresentation and non-disclosure.

At trial, Lou offered the expert testimony of Dr. Crest, a chemical engineer who had testified in other litigation concerning Top-Tile roofs. Lou knew that Dr. Crest had previously testified that, "Top-Tile roofs always last at least five years." Lou also knew from the manufacturer's specifications that Top-Tile roofs seem to last indefinitely, but not in some climates. On cross-examination, Dr. Crest testified that, "Top-Tile roofs never last five years," and that, "Climate is not a factor; Top-Tile roofs fail within five years everywhere in the world." During closing argument, Lou repeated Dr. Crest's statements and also said that Lou's own inspection of the roof confirmed Dr. Crest's testimony.

1. Will Beverly be able to rescind the contract with Austin on the basis of misrepresentation and/or non-disclosure? Discuss.

2. What, if any, ethical violations has Lou committed? Discuss. Answer according to California and ABA authorities.

Answer A

I. Contract dispute

The first issue is whether Beverly will be able to rescind the contract with Austin based upon misrepresentation.

A valid contract requires mutual assent (offer and acceptance) and consideration. Mutual assent means that there is a meeting of the minds as to the basis of the contract or bargain and the terms of the contract. Consideration requires a bargained-for exchange of legal detriment. Where the parties to a contract do not have a meeting of the minds, that is, there is no mutual assent, then the validity of the contract can be challenged. Put another way, if the parties do not have mutual assent then no contract was formed.

Rescission is a contract remedy available where one party seeks to void a contract. Lack of mutual assent is a basis for rescission of a contract where one party shows misrepresentation, mutual mistake or non-disclosure. The result is though the contract did not exist. A misrepresentation may make a contract unenforceable where one party makes a material misrepresentation, that was a basic assumption of the contract and the other party relies on that statement and was damaged. Non-disclosure arises where a party fails to disclose a material fact of the contract which forms the basis of the contract and the other party has no reason to know of the failure to disclose.

Generally, courts look to the terms contract in determining the terms of the contract. Moreover, parol evidence is generally not available to supplement or contradict the terms of a contract. However, the parol evidence rule against extrinsic evidence does not apply to evidence regarding the formation of a contract. Thus, oral

statements made at the time of entering into a contract may be admissible to show a condition on performance or misrepresentation.

Here, the facts state that Austin and Beverly entered into a valid written contract to sell the warehouse. Thus, there is a valid contract that can be the subject of a rescission claim. We are told that during negotiations, Beverly asked if the roof was in good condition and Austin responded that he had never had a problem with it, despite having been notified a year earlier by the manufacturer of the roof tiles, Top-Tile, that the roof would soon develop leaks. Thus, Austin made a misrepresentation of fact regarding the condition of the roof in response to Beverly's inquiry on that exact topic. Finally, the parties agreement included an "as is" clause which stated that Beverly was buying the warehouse in its current condition. Austin will argue that Beverly did not rely on his misrepresentation, and that Beverly did not make it clear in her comments to Austin that the condition of the roof was a material fact of the contract, and that had the roof been in poor condition Beverly would not have purchased the warehouse. Beverly will argue that Austin's misrepresentation as to the condition of the roof certainly formed the basis of the bargain because the condition of a roof is quite important in the purchase of a warehouse, or any structure. It is likely that Beverly would succeed on this point that the misrepresentation was a basic assumption of the contract. Moreover, as Beverly is challenging the formation of the contract itself, parol evidence of Austin's oral statement to her is admissible.

If the court believes that Beverly should have inspected the roof independently of Austin's representations, then Beverly will be hard pressed to survive a claim by Austin that the contract stated the property was sold "as is". Where a contract states that property is purchased "as is" at common law, this was strictly construed. However, the modern trend is to relax the enforcement of "as is" clauses where one party misrepresented or committed fraud. That is the case here given that Austin was informed the prior year by the manufacturer that the roof would soon leak, though it does not appear from the facts that Beverly made her own independent inquiry into the

condition of the roof. Again, Austin will argue that the "as is" clause is controlling and that it would be prudent for a purchaser of property to have an inspection done to inform the buyer of any potential defects in the property, including those that even the seller was unaware of. Finally, had the roof been of such a concern to Beverly, she could have made the condition of the roof a term of the contract and not executed an "as is" provision. Yet, given his misrepresentation of fact, which he clearly knew to be false as we know from the facts, a court may find that the misrepresentation was significant enough to void any mutual assent despite the "as is" provision in the interests of justice. Finally, Beverly can show damages in that immediately after she bought thewarehouse, the roof started leaking.

Thus, Beverly may be able to rescind the contract based upon misrepresentation.

With respect to the defense of non-disclosure, Beverly will be required to show that Austin did not disclose a material fact that formed the basic assumption of the agreement and that Beverly relied on his statement. Non-disclosure is different from misrepresentation in that with non-disclosure, the party makes no comment or disclosure with respect to a material fact that is known to be material to the other party. Moreover, Austin must not have any defenses.

Here, as stated above, Austin failed to disclose the actual condition of the roof in addition to misrepresenting the condition of the roof. Austin will make the same arguments as above that Beverly did not make it known - in words or actions - that the condition of the roof was a material fact of the contract that formed a basic assumption of the contract. Moreover, Austin will argue that the "as is" clause bars Beverly from recovery and that Beverly had a duty to do her own inspection of the property to discover the condition of the roof.

However, given the facts presented, and a court's ability to relax the strict construction of an "as is" clause where a party has misrepresented, or failed to disclose a material

fact, or committed fraud, a court may rescind the contract. Thus, Beverly may have a successful claim of rescission based upon misrepresentation.

II. The next issue is what, if any, ethical violations Lou committed.

Under both the ABA and California ethics code (CA rules), a lawyer, as an officer of the court, has a duty of candor. Under both the ABA and CA rules, a lawyer also has a duty to disclose law that is contrary to the client's position. However, a lawyer is not required to disclose facts that are not helpful to the client. Moreover, a lawyer must not offer evidence that he knows to be false or misleading and must seek to rectify any false evidence presented. If a lawyer reasonably believes that a witness will testify falsely, the lawyer must try to convince the witness or client not to testify falsely. If that fails, the lawyer must not allow the witness or client to testify. Under ABA and CA rules, a lawyer may then seek to withdraw. If a witness or client does testify falsely, in addition to seeking to rectify the false evidence, under the ABA rules the lawyer may notify the court or appropriate tribunal.

Here, Lou was an experienced trial lawyer who entered into a valid retainer agreement with Beverly. Lou hired an expert who he knew had previously testified regarding Top-Tile roofs. Lou apparently knew that the expert, Dr. Crest, had previously testified that the roofs last at least 5 years. Lou also knew, based upon review of Top-Tile's specifications, that Top-Tile stated that their tiles do not last indefinitely in some climates. However, at trial Dr. Crest testified differently, testifying on Beverly's behalf, that Top-Tile never lasted five years. If Lou knew that Dr. Crest was going to testify falsely, Lou must not have permitted him to testify. If Lou reasonably believed that Dr. Crest intended to testify falsely he should have tried to convince him to testify truthfully. Finally, if Lou knew that Dr. Crest had indeed testified falsely he must rectify the false testimony. This is particularly the case here, which is a civil case and one in which Lou retained Dr. Crest as an expert. Lou likely could have found an expert who would testify in support of Beverly's claim. Thus, under both ABA and CA rules, if Lou

knew that Dr. Crest was going to testify falsely and did nothing about it, then Lou is subject to discipline. Moreover, once Dr. Crest testified that Top-Tile roofs "never last five years", if Lou knew this to be false testimony, he had an obligation to neutralize the testimony.

This is also the case with respect to Dr. Crest's statement that "climate is not a factor." The fact that Lou was aware of Top-Tile's manufacturer's specifications that climate did affect the condition of the roofs does not mean under the ABA and CA rules that Lou was obligated to disclose that fact. This is a fact that is not in his client's favor, and under the ethical rules Lou was not obligated to disclose that. The obligation under ABA and CA rules is to disclose legal principles that are not in your client's favor. Thus, there is no ethical violation for failing to disclose that fact. However, if Lou knew that Dr. Crest's statement was false based upon the available data and his expert opinion, he had an ethical duty to clarify.

Thus, based on the facts presented, if Lou knew that Dr. Crest testified falsely, he has an ethical violation to clarify and rectify any false evidence, which he appears not to have done. Thus, he is subject to discipline.

Finally, with respect to Lou's closing argument. Lou would also be subject to discipline because he essentially ratified testimony which he likely knew was false. Thus, he did the opposite of what he is ethically obligated to do under ABA and CA rules. Moreover, Lou offered personal opinion and observation which was not the subject of evidence in the case. This was also unethical. Here, Lou inserted his own opinion and "evidence" that his inspection of the warehouse roof confirmed Dr. Crest's testimony. Lou was essentially giving testimony during his closing examination, based upon his own observations. A closing argument is not considered evidence and a lawyer is not permitted to raise issues, facts or evidence that were not presented at trial. Lou clearly violated this rule and is subject to discipline.

Finally, under both ABA and CA rules, when retaining an expert, a lawyer is required to get the client's informed consent (which must be in writing under the CA rules) which includes a clear statement of how the expert is going to be paid. The client is to be fully informed as to the terms of the retainer of an expert, before the expert is, in fact, retained. It does not appear from the facts that Lou did this. Thus, he is subject to discipline.

Answer B

1.) Applicable Law

There are two general bodies of law which apply to cases involving a breach of contract: The Common law, and the Uniform Commercial Code (UCC). The UCC applies to all contracts with respect to the sale of goods, and the common law generally applies to all other contracts. "Goods" for the purpose of this determination are movable objects.

Here, Austin sold a warehouse to Beverly. A warehouse is real property, not a "movable good." Thus, the Common Law would apply to this transaction.

2.) Will Beverly be able to Rescind the Contract with Austin on the Basis of Misrepresentation and/or Non-Disclosure

As a result of the alleged misrepresentation, Beverly seeks to rescind her contract with Austin. Rescission is an equitable remedy which a court may grant under certain circumstances where a valid, enforceable contract has been created, but monetary damages would be inadequate, and equity requires a different remedy. If a court grants rescission as a form of relief, the contract is effectively cancelled, and parties are returned to the position they were prior to the formation of the contract (with possibly some form of incidental damages recovered).

A.) Mutual Mistake

The first ground on which Beverly may seek to rescind this contract is the grounds of mutual mistake. Generally, under the common law, a contract cannot be rescinded due to the mistakes of the forming parties. However, a court may grant the remedy if rescission if it can be shown that (1) there was a mistake as to a material fact, and (2) neither party bore the risk of that mistake.

Here, Austin told Beverly that he had "never had a problem" with Top Tile, indicating that the roof was in good condition. However, the roof ultimately leaked. Thus, there

was a mistake as to whether the roof would leak. Moreover, this is a material fact as it substantially affects the value of the property. Thus, a court would likely find a mistake of material fact.

However, Austin appears to have known about the issue. The Manufacturer of Top Tile had recently reached out to him and informed him that the warehouse roof would soon develop leaks. Thus, Austin knew about the problem, so this would not be considered a "mutual mistake."

B.) Unilateral Mistake

While there is no "mutual mistake" which could have formed a basis for rescinding the contract, there has been a "unilateral mistake." A court allows rescission based on a unilateral mistake as long as (1) the mistaken party did not bear the risk of that mistake, (2) the mistake was as to something material, and (3) the other party had reason to know of that mistake.

Here, Beverly was mistaken about the quality of the roof. She believed that it was in good condition and would not break soon. As discussed above, whether or not it would break is a material fact. Thus, she was mistaken as to a material fact.

Moreover, Beverly likely did not bear the risk of that mistake. A court generally will find a party to have born the risk of the mistake only if they have some superior knowledge. Here, it was in fact the seller, Austin, who had better knowledge because he owned the property and had spoken with the Top-Tile manufacturer. Thus, Austin would have been the party to bear the risk of the mistake here.

Moreover, Austin had reason to know of Beverly's mistake. Beverly specifically asked if the roof was in good condition, and Austin induced that mistake by informing her that he had "never had a problem with it" while being fully aware that the manufacturer had warned him that it would start leaking soon.

Thus, a court would likely find that Beverly may rescind the contract on the grounds of a mutual mistake because (1) she was mistaken as to the condition of the roof, (2) she did not bear the risk as to that mistake, and (3) Austin had reason to know of that mistake.

C.) Misrepresentation

Courts may also grant rescission when a contract was formed based on a material misrepresentation. Under this rule, a court will rescind a contract if they can show that one party (1) intentionally, (2) made a misrepresentation of material fact, (3) intending that the other party rely on that misstatement, (4) the other party did in fact rely on that misstatement, and (5) damages were suffered as a result.

i. Intentional Misrepresentation

Here, a court would likely find that there was an intentional misrepresentation. As discussed above, Beverly specifically asked whether the roof was in "good condition." Despite knowing that Top-Tile, the manufacturer of the roof tiles, believed that the roof would soon develop leaks, Austin responded that he "never had a problem with it." While this was not a direct misstatement of fact, it was an omission.

While a seller of property generally has no duty to disclose issue on the property due to the common law doctrine of Caveat Emptor, a seller may not omit a material fact upon inquiry of the buyer. Thus, while he technically did not lie, he committed an intentional misrepresentation for these purposes.

ii. Material Fact

This omission was also material. A fact is "material" if a reasonable person would consider that information when deciding whether or not to enter into a contract.

Here, the omitted fact related to the quality of the roof. Because repairing roofs is expensive, a reasonable person would want to know that information when deciding whether or not to enter into a contract. Thus, this term would be deemed material.

iii. Intending That the Other Party Rely

Austin likely made this statement knowing or intending that Beverly would rely on it. He wanted to sell the property (possibly because it would soon start leaking). Thus, he would likely have intended that Beverly rely on that statement.

iv. Other Party Did In Fact Rely

It also appears that Beverly did rely on that misstatement. She ultimately purchased

the property. The fact that she asked about the roof's condition prior to the purchase indicates that it was an important fact to her. Thus, she likely relied on that statement. Moreover, there is no evidence that she made an independent inspection, further lending credence to the idea that she relied on this misrepresentation.

v. Damages

Beverly was also damaged. She now has to pay for the repairs.

Because all of these elements are satisfied, a court would likely find that Beverly can rescind the contract on the grounds of a misrepresentation.

D.) Rescission Based on Non-Disclosure

A contract may also be rescinded on the grounds of non-disclosure if (1) there was a duty to disclose information, and (2) the seller failed to disclose.

As discussed above, there generally is no duty to disclose conditions on the premises due to the doctrine of caveat emptor. However, if a buyer makes an inquiry, a seller is not permitted to omit and fail to disclose a material fact related to that question.

Here, Austin would not have had a general duty to disclose the statement made by Top-Tile regarding the impending leak on the premises. However, Beverly asked if the roof was in good condition. This question created a duty for Austin to disclose known conditions in the roofing, which he failed to do when he deflected the question by stating "I've never had a problem with it."

Thus, Austin had a duty to disclose, and failed to do so. Thus, Beverly may properly seek rescission on the grounds of non-disclosure.

E.) The "As Is Warranty."

Generally, when property is sold, certain warranties are contained within the sale contract. These include warranties of habitability (in a residential property), covenants of quiet enjoyment, and warranties related to the condition of the property. However, parties are free to waive such provisions in the contract.

Here, Beverly purchased a warehouse from Austin. Thus, generally she would be granted certain warranties which would have protected against things such as a leaky roof. However, the parties waived those warranties. The written contract explicitly stated that the property was being sold "as is, with no warranties as to the condition of the structure." Thus, there appears to have been a valid waiver of warranties with regards to the condition of the structure. Such a waiver would be applicable even to express conditions.

Arguably, Austin gave an express warranty to Beverly when he implied that there were no conditions with the roof. Thus, generally, this would protect against Beverly's contemplated rescission claims. However, warranties cannot overcome explicit misstatements, omissions, and fraud used to induce into the contract.

As discussed above, Austin made a material omission. Thus, while the waiver generally would be considered valid, the waiver cannot be applied to the condition of the roof.

F.) Parol Evidence

Austin may argue that evidence of his Statements are inadmissible under the "parol evidence rule." This rule state that, when there is a written, "integrated" contract, statements not contained within the writing cannot be used to contradict terms in the writing.

Here, there is a written contract. Assuming there was a proper merger clause, the parol evidence rule would apply to this contract. Moreover, Beverly would be attempting to introduce Austin's statements regarding the roof. This would contradict the "no warranty" provision." Thus, it is being introduced to alter the terms of the writing.

However, this is being introduced not to change the terms, but to show that the contract is invalid. Thus, the parol evidence rule would not bar introduction of this evidence.

III.) What Ethical Violations has Lou Committed

Lou has committed multiple ethical violations related to this representation.

1.) Duty of Candor to the Court & Opposing Counsel

Under both the ABA and CA ethics rules, attorneys own a duty of candor and truthfulness to both the court and to opposing counsel. This means that, while an attorney is required to zealously advocate for the interests of their clients, they may not introduce testimony which they know to be false.

Here, Lou offered the expert testimony of Dr. Crest. Lou knew that Dr. Crest had previously testified that "Top-Tile roofs always last at least five years" and that the manufacturer's specifications indicated that Top-Tile roofs last indefinitely, except in certain climates. However, during cross examination, Dr. Crest testified that "Top-Tile Roofs never last five years" and that "climate is not a factor." Thus, Lou's witness introduced testimony which Lou knew to be false. Moreover, Lou chose to repeat those statements in his closing argument.

By doing this, Lou introduced facts known to be inaccurate to the court and to opposing counsel. This is impermissible. Thus, he violated his duties of candor under both the CA and ABA Rules.

Lou may argue, in his defense, that the testimony was elicited on cross-examination, not in the direct. This means that Lou did not directly induce the fraudulent testimony. However, his duties would require him to communicate this fact to the judge, and would prohibit him from referencing those facts in his closing arguments (which he did.) Thus, even though he did not personally elicit the fraudulent testimony, he will have been found to have violated this ethical obligation.

2.) Attorney as a Witness

Lou also violated his ethical duties when he effectively served as a witness in this case. Under the ABA rules, an attorney is not permitted to act as a witness in a case which they are litigating unless their testimony (1) relates to a non-disputed issue, or (2) the attorney is so critical to the case, that they cannot be removed as counsel, and their testimony is critical. Under the CA rules, an attorney may only testify if

Here, during his closing arguments, Lou testified that his "own inspection of the roof confirmed Dr. Crest's testimony." This is opinion testimony. Thus, while he was not

technically called as a witness, he did serve as one. Therefore, this testimony is only permissible if one of the exceptions apply.

It is unclear if this is a disputed issue. The central issue in the case was the nature of the representation about the leaky roof. However, it does not seem to be in dispute whether the roof was leaking, just whether there was a warranty. Lou's testimony only seems to state that he confirmed there were leaks. It is unlikely that he was testifying about the chemical makeup of the roof, or its propensity to leak. Thus, arguably he was not testifying regarding a disputed issue. However, because what he is talking about comes so dangerously close to the central issue in the case, it is likely impermissible. Thus, by stating that he did his own inspection and confirmed the results, he violated the rule prohibiting attorneys from acting as witnesses.

1. Duty of Competence

Lou also may have violated his duty of competence. Under the ABA rules, an attorney must carry out a representation in a competent manner. Under the CA rules, an attorney must not repeatedly carry out a representation in a negligent, reckless, or incompetent manner.

Here, Lou hired an attorney who had regularly testified about the opposite of the position he sought to assert. This information would almost certainly come out in a proper cross examination. Thus, his witness would have been thoroughly discredited. A competent attorney does not hire an expert witness who will easily be discredited and impeached. Thus, under the ABA rules, he violated his duty of competence.

Under the CA rules, he likely violated no duties. There is no evidence that this was a repeated pattern. Thus, under the CA rules, he likely would not be found to have violated his duty of competence.

Q2 Constitution

County Jail has prominently posted in the inmate dining hall quotations from three of the Ten Commandments as follow: “You shall not kill.” “You shall not steal.” “You shall not give false testimony against your neighbor.” County officials thought these were “good moral principles” that would assist prisoners when they were released.

The Jail makes available to inmates copies of the Bible and the Quran (Koran), but no other religious books. Inmate Ivan requested a copy of a religious book central to his recognized, but relatively small, sect. This book urges the religious use of a hallucinogenic sacramental tea. Ivan has requested permission to have the hallucinogenic sacramental tea on a weekly basis as part of his religious observances.

Ivan’s request for the book was denied on the basis that it encourages illegal drug usage. His request for permission to have the hallucinogenic sacramental tea was denied for the same reason.

1. What challenges under the United States Constitution, if any, could Ivan reasonably raise to the dining hall quotations, and what is the likely outcome? Discuss.

2. What challenges under the United States Constitution, if any, could Ivan reasonably raise to the denial of his requests for the book and the tea, and what is the likely outcome? Discuss.

Answer A

Constitutional Law

In general, there must be a separation of Church and State.

Dining Hall Quotations

Establishment Clause

The issue is whether Ivan could assert a violation of the Establishment Clause with regards to the dining hall quotations.

First, to bring a claim under the U.S. Constitution and the Establishment Clause, there must be a government action. Here, the action of posting three of the Ten Commandments was done by the county jail. A county is considered a government actor. Thus, there has been a government action in this case.

Under the Establishment Clause, the government cannot take action or promulgate a rule that has the effect of establishing or inhibiting religion. In order to determine whether government action violates the Establishment clause, the court will apply the *Lemon* test. The *Lemon* test has three factors. To meet these three factors, the government must show that (i) the action has a secular purpose, (ii) that the action's primary effect is not to advance or inhibit religion, and (iii) there is not excessive entanglement between the government action and religion.

Secular Purpose

First, the government must show that its action has a secular purpose. Here, the county officials stated that the three commandments it posted were "good moral principles" that would assist prisoners when released. It appears that the county officials meant for the purpose of posting the commandments to be secular. Their goal was to assist prisoners when they are released from prison. Likely to ensure that they do not commit further crimes such as killing or stealing, and also telling them not to lie. If this was the sole purpose in posting those three commandments, that is likely considered a secular

purpose.

Primary Effect

The primary effect of the action must not be to advance or inhibit religion. Ivan will likely argue that anytime someone posts all or part of the Ten Commandments, the primary effect is to advance religion. More specifically, that the Ten Commandments are inherently religious because they are from the bible. Thus, the primary effect is to advance the religions that believe in the Ten Commandments, while inhibiting the religions that do not believe in the Ten Commandments.

Conversely, the county officials will likely argue that they only posted three of the Ten Commandments. That, coupled with the purpose in posting the three commandments, indicates that the primary effect is not to advance or inhibit religion. Rather, it was intended as a way to help morally guide the prisoners. That the primary effect is to advance good morals.

This will be a close factor and something for the fact finder to decide. It is possible the fact finder could go either way on this particular issue.

Excessive Entanglement

Even if the county is successful on the first two factors of the *Lemon* test, it will likely fail on this factor. Under this prong, the government action cannot be excessively entangled with religion. Ivan will argue (successfully) that the Ten Commandments are inherently religious. And it does not matter that the county posted only three of the commandments, or that their purpose was not religious. Posting the Ten Commandments would likely be the same as hanging a cross or a prayer on the wall. The government's action of posting the ten commandments entangles itself with religion. Even if they do not intend to promote religion, the association of the ten commandments with the government action results in that entanglement. The county officials will have a hard time arguing that their action was separate from religion.

In sum, although a court could find that the county official's purpose in posting the three commandments was secular, and that the primary effect did not advance or inhibit religion, it is likely a court would conclude that posting those commandments resulted in

an excessive entanglement between the government and religion. Therefore, Ivan will be successful in his claim that the county jail has violated the Establishment Clause.

Denial of Ivan's Book

Free Exercise of Religion Clause

The issue is whether the jail's denial of Ivan's request for his book violates the Free Exercise Clause of the U.S. Constitution.

Under the 1st Amendment of the Constitution, every person has the right to the free exercise of his or her religion.

Sincerely Held Religious Belief

The first issue here is whether Ivan's religious belief is protected.

Whether a religion is protected under the Constitution is not based on whether the particular religion is well known or well established. Rather, the court will look at whether the individual has a sincerely held religious belief. Put another way, the question is whether the individual's belief and whether that belief has a similar role in the individual's life as a typical religion would.

In this case, the facts state that Ivan was requesting a religious book related to his recognized, but relatively small sect of his religion. The fact that Ivan's sect is small does not mean that his belief is not protected. Based on the limited facts, it indicates that his sect is recognized, and that he holds a sincere belief in it. His sincerity is evidenced in his request for a book, as well as his request for the religious use of tea (analyzed below). This indicates that Ivan's religious belief, although based on a small sect, is sincerely held and thus subject to constitutional protections.

Free Exercise

The issue is whether the county jail's action of denying Ivan's book violates the Free Exercise Clause of the 1st Amendment of the Constitution.

When a government action or regulation is based on or discriminates against religion, it must pass strict scrutiny. Strict Scrutiny requires that the government action is

necessary to achieve a compelling government interest.

Here, the government's stated interest is that the book encourages illegal drug usage. The reduction or elimination of illegal drug is likely considered a compelling government interest so they will have met this prong of the test. However, the actions necessary to achieve that is to outlaw or prohibit the actual use of drugs. In this case, the county jail is denying Ivan a religious book. The act of denying that book is likely not necessary to achieve the stated purpose of preventing illegal drug use. The action of not allowing illegal drug use is the action necessary to prevent illegal drug use (analyzed below).

As such, a court will likely consider the county jail's action of not providing Ivan his book to not pass strict scrutiny. Specifically because it is not necessary to achieve their purpose. As discussed below, they have other means to achieve their purpose.

Ivan will likely be successful in his challenge that the county jail has violated his 1st Amendment right to Free Exercise of his religion based on their denial of his religious book.

Equal Protection

The issue is whether the jail's failure to provide Ivan his religious book violates the Equal Protection Clause of the Constitution.

Citizens are entitled to equal protection of the laws of the United States. This applies to the federal government under the 5th Amendment, and is applicable to the states under the 14th Amendment.

Here, the jail provides copies of the Bible and the Quran (Koran) to prisoners, but it does not provide any other religious books. Providing religious books for some religions and not others is not equal. Under the Equal Protection Clause, an action or law that discriminates against a suspect class must pass strict scrutiny. Actions based on religion, as mentioned, must pass strict scrutiny. Thus, because the government action is not equal and it is based on religion, it must pass strict scrutiny.

Similar to the above analysis, failing to provide Ivan his book does not pass strict scrutiny. There is no stated basis for why the Jail provides inmates with copies of the

Bible and the Quran, but not other books. The jail offers no reasons why it should be allowed to provide books based on some religions, while denying books for other religions. Although the jail's interest of preventing illegal drug use is compelling, denying the book is not necessary to achieve that purpose.

The jail is required to either provide all of the requested religious books (assuming they are sincerely held religious beliefs) or they can offer none. That is the only way that they can ensure equal protection of the laws to the various religions.

The county jail's offering of certain religious books and not others violates equal protection. The jail's action does not pass strict scrutiny, and thus Ivan would be successful on this claim.

Denial of Ivan's Tea

Free Exercise

The issue is whether the denial of Ivan's request for hallucinogenic sacramental tea violated his 1st Amendment right to free exercise of his religion.

As stated above, a government action that discriminated against religion must pass strict scrutiny. Unlike the book request, the jail's denial of Ivan's request for hallucinogenic tea will pass strict scrutiny.

As mentioned previously, the governments interest is to eliminate or outlaw the use of illegal drugs - a compelling government interest. That interest is no more compelling than in a jail setting. Illegal drug use is not allowed by the general public, and absolutely should not be allowed by prisoners in a jail. Here, Ivan is specifically asking to use hallucinogenic tea, which is assumed to be an illegal drug. As such, not providing that tea is necessary to accomplish its stated goal. The fact that the tea is sacramental does not matter. The Supreme Court previously upheld a similar government action that outlawed the use of drugs (i.e. peyote) by Native Americans. Although Native Americans are still allowed to practice their stated religions, use of sacramental drugs was not allowed. The same analysis applies here. Although Ivan is allowed to practice his religion, including use of a religious book,

the county jail is not required to provide him with illegal hallucinogenic tea.

Denying Ivan his hallucinogenic sacramental tea is necessary to achieve the jail's compelling interest of outlawing and eliminating illegal drug use in its prison.

Ivan will not be successful in his challenge of the government's denial of his hallucinogenic tea.

Equal Protection

The issue here is whether the jail's denial of Ivan's tea violates equal protection. See above for the rules regarding equal protection.

Unlike the book situation, where the jail offers some religious books but not others, there is not the same issue here. There is no indication that the jail has offered the use of teas or other drinks for other religious. Thus, without more, the Equal Protection Clause is not invoked here. Even if it were, for the same reasons as the analysis under the Free Exercise Clause, the government's action passes strict scrutiny.

Ivan will not be successful in his claim that the jail's denial of his sacramental hallucinogenic tea violates equal protection of the laws.

Answer B

Ivan's Constitutional Challenges to the Dining Hall Quotations

Ivan can challenge the quotations on the dining hall as a violation of the Establishment Clause.

A. Establishment Clause

The Establishment Clause prohibits the government from engaging in actions that constitute an establishment of a religion. The clause is applicable to state (and county) officials through the Fourteenth Amendment. When government conduct potentially implicates the establishment clause, courts apply the *Lemon* test to determine if there has been a constitutional violation. The *Lemon* test is a three-step approach whereby government conduct will be found to violate the establishment clause unless it has a secular purpose, the primary effect neither advances nor prohibits religion, and there is no excessive entanglement with religion.

1. Secular Purpose

First, County will need to show that the quotations on the dining hall have a secular purpose. The dining hall quotations contain three quotes from the Ten Commandments: "You shall not kill"; "You shall not steal"; and "You shall not give false testimony to your neighbor." The Ten Commandments is a religious document, and thus appears to have a religious, not a secular purpose. The County will argue that the officials chose this quotes, however, because they emphasized "good moral principles." Ivan may argue that this reason is not a meaningful distinction because the moral principles it purports to support are Christian, and religious, not secular. However, because emphasizing good moral principles is arguably a secular purpose, the County may be able to succeed in showing that the first prong of the *Lemon* test is satisfied.

2. Advances or Prohibits Religion

For the second prong of the *Lemon* test, the primary issue is whether the quotes could

be said to advance religion. There does not appear to be any real issue with the quotes prohibiting a religion. It's unclear from the facts if the dining hall quotations even make clear that the source of the material is the Ten Commandments. If the quotes are clearly attributable to the Ten Commandments, which as noted above is well-known religious text, then the quotations would clearly appear to advance a particular religion. If they do not, then arguably the quotes do not advance or prohibit a particular religion. The County may further argue that the quotes that were chosen do not reference a religion, nor do they expressly support a higher being. The first two quotes relate to common principles that are codified in the state law--all states prohibit killing and stealing. The last quote is arguably more specific to Christianity. While the law prohibits giving false testimony under oath, the actual quote relates to a more specific concept of not giving false testimony about your neighbor that appears to be more amorphous and arguably is readily identifiable as tied to a particular religion. Additionally, the quotes are prominently posted in the inmate dining hall, which suggests that the County is supporting these religious beliefs. While this issue is a closer call, Ivan may still prevail in showing that the primary effect of these quotes is to advance religion.

3. Excessive Entanglement

Finally, Ivan can argue that the quotes constitute excessive entanglement with religion. Many of the arguments discussed above with regard to prong two of the *Lemon* test would also be relevant as to whether the chosen quotes constitute excessive entanglement. However, if the County succeeds in arguing that the quotes relate to core principles of society that are not inherently tied to a religion, the County may succeed in arguing that there is no excessive entanglement.

In summary, for the reasons explained above, Ivan is likely to prevail on his Establishment Clause claim because it appears that the three prongs of the *Lemon* test have not been satisfied.

B. Government Speech

The County may respond to Ivan's Establishment Clause claim by arguing that the quotations constitute government speech. The Establishment Clause claim is part of

the First Amendment, and the First Amendment does not generally apply to government speech. However, when the speech at issue involves religious issues, the Supreme Court has held that the government may not engage in conduct that appears to disproportionately favor one religion. For example, the Supreme Court has held that governments may place a display in a city hall that depicts a menorah and a Christmas tree, two well-known religious symbols, because there are multiple religions recognized, not just one. Similarly, the government may include a religious text in a display that includes other types of texts as well. This exception, therefore, would not appear to help the County here because the dining hall only contains quotations from the Ten Commandments. Because the County has chosen only to display quotations from a religious text, it will not be able to claim that this is acceptable government speech.

(2) Ivan's Constitutional Challenges to the Denial of Requests for Book and Tea

Ivan can challenge the denial of his requests for the book and tea under the First Amendment's Free Exercise Clause (incorporated against the states (and counties) via the Fourteenth Amendment), Equal Protection Clause of the Fourteenth Amendment, and Due Process Clause. For the reasons explained below, Ivan is likely to succeed in challenging the denial of his book, but not the denial of the hallucinogenic tea.

A. Free Exercise Clause

There are three potential issues that arise with Ivan's claim under the Free Exercise Clause: (1) whether Ivan's beliefs are religious, (2) whether Ivan's beliefs are sincere, and (3) whether the County's conduct is discriminatory. Each is discussed below.

1. Whether Ivan's Beliefs Are Religious

The Free Exercise Clause protects religious beliefs. An individual does not give up this right merely because he is in jail. The Supreme Court has never clearly defined what constitutes a "religious" belief protected by the Free Exercise Clause, but it has made clear that it extends beyond the traditional religions. The general test is whether the belief holds a place in the individual's life parallel to that of traditional religious beliefs.

We have very little information about Ivan's religion. We know that it is a relatively small sect with a religious book and that it has weekly religious observances, including use of a hallucinogenic sacramental tea. The Supreme Court has made clear that courts have very little power to question the validity of a religion. Here, it is likely that a court will find that Ivan's beliefs are religious, and thus he may bring a claim under the Free Exercise Clause.

2. Whether Ivan's Beliefs Are Sincere

Assuming Ivan's beliefs are "religious," the court may assess whether Ivan sincerely holds these beliefs. We again have very little information to determine whether Ivan's beliefs are sincere. But there are no facts indicating that Ivan's requests are some kind of ruse or that he does not sincerely believe in this religion. A court, therefore, would likely find that Ivan's beliefs are sincere.

3. Whether County's Conduct is Discriminatory

Because Ivan will likely be able to show that his requests were based on sincere, religious beliefs, the next issue is whether the County's conduct is discriminatory. The Free Exercise Clause affords strong protections for religious beliefs. Any government action that discriminates against religion is subject to strict scrutiny, meaning the government will have the burden of showing it is necessary to achieve a compelling interest. However, government action that is facially neutral may not be subject to strict scrutiny in the otherwise absence of an intent to discriminate. The Supreme Court has recognized as well that the government need not provide religious exceptions if a facially neutral policy incidentally burdens the exercise of a religion. For example, the Supreme Court upheld as constitutional a ban on illegal drugs that prohibited a Native American from using peyote as part of a religious ceremony.

Here, the stated reason for the denial of the book and the tea is that they promote illegal drug usage. We don't have any information as to whether this is an official policy, but since this is a County jail it seems safe to assume that the County would have a policy against illegal drug usage in the jail. The policy on its face appears to be neutral and there is no evidence that it was passed intentionally to interfere with Ivan's religion. While the policy does incidentally burden Ivan's ability to practice his religion, this

seems to be a similar situation to the peyote case discussed above.

4. FEC Conclusion

In summary, as to the tea, a court almost certainly would find that the County does not have to make an exception for Ivan's religion, and would likely not find that the denial of the tea constitutes a violation of the Free Exercise Clause. As to the book, this is a closer call because the book itself is not a hallucinogenic. Ivan's stronger arguments, however, are probably based on the First Amendment and the Equal Protection Clause, for the reasons explained below.

B. Due Process Clause

Ivan may reasonably challenge the denial of his requests as a violation of the Due Process Clause, which prohibits the government from engaging in arbitrary and capricious conduct. Under the DPC, government action that infringes on a fundamental right must satisfy strict scrutiny, meaning the government must show that it is necessary to achieve a compelling purpose. If a fundamental right is not implicated, then the government action is subject only to rational basis review, meaning the burden is on the challenger (in this case Ivan) to show that the government action is not rationally related to a legitimate government purpose. As a practical matter, most government action will satisfy rational basis review.

Here, Ivan can argue that the County's conduct infringes on his fundamental rights of religious freedom. The County, therefore, would have the burden to show that its actions are necessary to achieve a compelling interest. The County has a strong argument that denial of the tea is constitutional. The tea is a hallucinogenic, and assuming hallucinogens are considered illegal drugs, then the County's denial seems to be necessary to uphold the policy against illegal drug usage (which a court would likely find is a compelling purpose).

However, the County would likely not prevail on the book. As noted above, preventing illegal drug usage in jail is likely to deemed a compelling purpose. But denial of the book is not necessary to achieve this purpose. While the book may urge the use of the tea, there are less restrictive means to prevent illegal drug usage (including denial of the illegal drugs). Reading the book in and of itself will not lead to illegal drug usage. The

County, therefore, will likely not prevail in showing that denial of the book satisfies strict scrutiny.

Accordingly, Ivan is likely to prevail on his challenge that the denial of the book violates the Due Process Clause.

C. Equal Protection Clause

Ivan may also argue that the County's denial of the book violates the Equal Protection Clause because the County allows other inmates to have copies of the Bible and the Quran but will not make available Ivan's religious sect. The EPC analysis depends on whether a suspect, quasi-suspect, or fundamental right is implicated. Government conduct that discriminates on the basis of a suspect class (such as race or national origin), as well as government conduct that implicates a fundamental right, is subject to strict scrutiny, which means the government must show it is necessary to achieve a compelling purpose. Government conduct that implicates a quasi-suspect class (such as gender) is subject to intermediate scrutiny, meaning the government must show it is substantially related to an important purpose (and in the case of gender must also show an exceedingly persuasive justification). All other government conduct is subject to rational basis review, meaning the challenger must show that it is not rationally related to a legitimate government purpose.

Here, Ivan can argue that the County discriminates against his religion because the County allows inmates to have access to the Bible and Quran but not his religious text. Because freedom of religion is a fundamental right, the court is likely to apply strict scrutiny. In that case, the analysis would be the same as described above for the DPC, and County is unlikely to be able to show that the denial of the book was constitutional.

Finally, there does not appear to be an EPC argument based on the tea because we have no facts indicating that the County allows other inmates religious tea or the equivalent. Even if there was, as explained above, because the tea is a hallucinogenic, the County would have a strong argument that strict scrutiny is satisfied because denial is necessary to prevent illegal drug usage.

D. Establishment Clause

Because the County allows inmates access to the Bible and Quran, but denied Ivan access to his religious text, Ivan may also argue that the County's conduct violates the Establishment Clause. The test is discussed above. It is unclear whether the County has a policy of only allowing these two religious texts. If it does, we do not have sufficient facts to analyze whether there is a secular purpose for this policy (such as budgetary constraints). Thus, it is difficult to tell whether Ivan can prevail on this claim, and it is not as strong an argument as the ones discussed above challenging the denial of his book.

Q3 Real Property

Len, an excellent chef, installed a smokehouse in his backyard three years ago to supply smoked meats to his friends. Len's neighbor, Michelle, enjoyed the mild climate and spent most of her time outdoors. She found the smoke and smells from Len's property very annoying and stopped having parties outdoors after receiving complaints from some of her guests. She asked Len multiple times to stop using the smokehouse, but he rebuffed her requests.

Len has frequently invaded Michelle's patio to retrieve his dog when it wandered from home. Michelle put up a "no trespassing" sign and a wire fence between their parcels. After the dog dug a hole under the fence, Len cut some of the wires and entered Michelle's property anyway, telling her that he had been fetching his wandering dog from her patio for at least ten years and wouldn't stop now.

Last week, the Town filed suit to condemn Michelle's land for a public park. It tendered to the court as compensation a sum substantially exceeding the prices of comparable parcels recently sold in the neighborhood. Michelle argues that the amount is insufficient because it is substantially less than a sum she turned down for her parcel a few years ago and it does not include compensation for relocation costs.

1. If Michelle sues Len regarding his continued use of the smokehouse, what claims, if any, may she reasonably raise, what defenses, if any, may he reasonably assert, and what is the likely outcome? Discuss.

2. If Michelle sues Len regarding fetching his dog, what claims, if any, may she reasonably raise, what defenses, if any, may he reasonably assert, and what is the likely outcome? Discuss.

3. Is Michelle likely to prevail in her argument for additional compensation from Town? Discuss.

Answer A

Property/Tort (Nuisance), Torts (Trespass/SL), Property (easement by prescription), Con Law (Takings)

1. Smokehouse

a. Private Nuisance

A private nuisance is any substantial and unreasonable interference with the use and enjoyment of property.

i. Substantial

The interference must be substantial. An interference is substantial if it would be offensive or annoying to an average member of the community. This is an objective standard - there is no requirement that the plaintiff actually be annoyed nor is there any special allowance if he or she is actually annoyed or offended.

Here, M finds the smoke and smell annoying, so much so that she stopped having parties. This is, however, irrelevant.

It is unclear from the facts whether an "average" person in the community would be annoyed by a smokehouse. While many people find barbecue scents pleasant, just as many find them offensive. It is unclear how much smoke is produced by the smokehouse and how much of it blows into M's property. If the smoke is found to be of such volume that it makes it difficult or impossible for an average person to enjoy M's backyard, then there will be substantial interference. Given that M is annoyed to such a serious degree, it is likely that an average person would at least be annoyed or offended.

ii. Unreasonable

The activity causing the nuisance must be unreasonable. This is a balancing test. If the utility of the activity outweighs its interference with the plaintiff's property rights, it is

reasonable. Otherwise, it is unreasonable.

Here, M will assert that the smokehouse is unreasonable because it prevents her from enjoying the outdoors in the way which she had done for years. Furthermore, it prevents her from having her parties, and likely depreciates her property somewhat.

However, L will counter that the smokehouse enables him to hone his skills as a chef and provide smoked meats to his friends. He will argue that these activities are of substantial benefit.

However, because L's activities substantially interfere with M's enjoyment of her property, and because only L and his immediate circle of friends substantially benefit from the smokehouse, the smokehouse will likely be found to be unreasonable.

iii. Interference/Trespass

The activity must actually interfere with the use of land. Generally, this has been expressed as requiring that the activity have a trespass component. Interfering with access to light traditionally has not met this standard. However, the introduction of any particulate matter or sound waves on the plaintiff's property satisfies this requirement.

Here, L will claim that the smoke is only offensive in that it blocks light, and that therefore there is no interference.

M will counter that the smell component of the nuisance is fundamentally particulate in nature, because of how noses work (discussion omitted). Additionally, she will contend that the smoke consists of particulate matter, and that some of that particulate actually invades her property.

Because there is some degree of physical trespass, M will succeed in demonstrating interference

iv. Use and Enjoyment of Property

The substantial and unreasonable interference must directly interfere with the use of private property. Interfering with public spaces does not create a private nuisance.

Here, L's activity is interfering with M's personal use of her own property. Therefore, it interferes with the use and enjoyment of her property.

Assuming that a reasonable person would be annoyed at L's smokehouse and its resultant effluence, M could succeed in an action for private nuisance. (see statute of limitations, below)

Remedy

Generally, the remedy for a private nuisance is an injunction. If the activity is essential to a community's economic health or otherwise of exceptional utility, money damages may be awarded instead.

Here, L's smokehouse serves limited economic purpose, and does not benefit the community as a whole. Therefore, M will likely receive an injunction.

b. Public Nuisance

Public Nuisance is any activity that interferes with the health or safety of the public at large.

i. Standing

Public nuisance has strict standing requirements. In order to collect under public nuisance, a private individual must demonstrate that they have suffered a harm that is different in kind than the general public. A harm different in degree is insufficient.

Here, M will claim that she has uniquely suffered from the smoke and odor, and that she has uniquely stopped having parties. However, it is extremely unlikely that the smokehouse only deposits smoke and odor on her property, and if it does, there is no effect on the community at large (and as such there is no public nuisance regardless). Furthermore, the inability to have parties is a result of that same harm, merely an intensifier, rather than a unique or different harm. Therefore, M lacks standing to bring a public nuisance cause of action.

c. Statute of Limitations

The statute of limitations serves as an absolute bar to legal action. For most causes of

action, the statute of limitations is one year from the time the cause of action arises. However, continuous actions can be recovered for any violation within the previous year.

Here, L started using his smokehouse 3 years ago. While this initial use would be outside the statute of limitations, L has used the smokehouse continuously. M will still be able to obtain an injunction against current and future use.

2. Fetching the Dog

a. Trespass

A trespass is any physical occupation of real property without permission.

i. Intent

A trespass only occurs if the trespasser actually intended to occupy the land. The trespasser's knowledge about the ownership of the land is irrelevant. A mistaken belief that they had the right to enter the land is not a defense. In essence, trespass is a strict liability offense.

Here, L entered M's property past a fence with a no trespassing sign. L intended to enter the property, so the intent requirement is met.

ii. Physical Presence

The trespasser must be physically present on the property.

Here, L actually entered M's property. The physical presence test is met.

iii. Without Permission

The property owner must not have consented to the trespass, impliedly or expressly.

M did not expressly consent to the trespass. Any implied consent from the adjoining nature of their properties was withdrawn when M constructed the fence. M did not consent to the trespass.

iv. Damages

There is no requirement of actual harm. Nominal damages are recoverable.

Here, M can recover nominal damages for L's trespass. Additionally, she can recover from the actual harm she suffered when L cut the wires on the fence (cost of repairs).

b. Defenses

i. Necessity

a. Private Necessity

Private necessity exists when exigent circumstances cause the trespass. For example, docking a ship on a storm constitutes a private necessity, or swerving to avoid an obstacle on the road. Private necessity allows the avoidance of nominal damages and ejectment.

Here, L trespassed in order to retrieve his dog. L needed to trespass in order to ensure that his dog was safe and that it did not cause any damages to M's property without his supervision, since he could be held liable for such damages. As such, private necessity exists, and M cannot eject L or collect nominal damages.

I. Private Necessity - Limitations (Actual Damages)

Private necessity fundamentally involves a balancing of the risk of not trespassing and harm inflicted by trespassing. The trespasser has the ultimate decision on the balance of these factors. As such, the trespasser is traditionally held responsible for any actual damages that occur as a result of the trespass.

Here, L caused actual damages when he cut through M's fence in order to retrieve his dog. As such, L is responsible for actual damages despite the necessity.

b. Public Necessity

Public necessity exists when the trespass is necessary to prevent harm to the public at large. Unlike private necessity, the landowner cannot collect actual damages from public necessity.

Here, the necessity was solely to protect L's dog and prevent L's liability. There was no

benefit to the public at large, and therefore no public necessity. L remains liable for actual damages.

ii. Easement

a. Implied Easement by Prescription

Easements grant the dominant estate (or a party in limited circumstances) the right to use the subservient estate for limited purposes. An implied easement has no writing requirement. An easement by prescription functions similarly to adverse possession of a property, but only for a limited use. In order to establish that there is an easement by prescription, the seeker of the easement must demonstrate **(1) continuous use of the subservient estate**, **(2) for a statutory period, (3) that was open and notorious, and (4) hostile**. Unlike in adverse possession, there is no requirement that the easement holder have had exclusive use over the property, since the easement does not eliminate the property owners' rights entirely.

i. Continuous Use

The use must have been continuous throughout the statutory period. It need not have been constant, but must have been reliable enough for the scope of the easement sought.

Here, L claims that he had been fetching his dog for 10 years. Because he did so "frequently", this is likely continuous use.

ii. Statutory Period

The use must have lasted the statutory period (usually 7-14 years)

Here, it is unclear what the statutory period for adverse possession is in the jurisdiction. It is likely 10 years or less just based on average AP statutes. As such, the statutory period requirement is met.

iii. Open and Notorious

The use must have been such that an observant landowner would be aware of it. In essence, the landowner must have been put on inquiry notice of the use.

Here, L invaded M's patio. For 7 of the 10 years, M regularly spent time outside and

likely observed his actions. Furthermore, even after M abandoned the outside due to the smoke, she should have observed L walking on her patio. As such, the open and notorious requirement is met.

iv. Hostile

The use must have been without the permission of the landowner. Otherwise, there is a freely revocable license.

Here, it is unclear whether or not M consented to the use prior to erecting the fence.

b. Right to Protect Easement

An easement holder has the right to protect their easement from interference, even from the landowner. This includes the dismantling of any barrier erected as an impediment to that easement.

If L had not received permission to trespass on M's property at any point, then he likely has an easement (assuming the statutory period is met). However, if he had permission to retrieve his dog, then there will be no easement.

If there is an easement, L is not vulnerable to nominal damages or ejection for trespass, so long as the trespass is for the purpose of retrieving his dog. Additionally, L has the right to protect his easement by demolishing or circumventing barricades such as M's fence. As such, he is not liable for actual damages either.

3. Town's Suit

Government entities have the right to "take" property, providing that "just compensation" is provided. In order to take, the government must merely show that the taking is rationally related to a legitimate government purpose.

Town is a government entity.

a. Legal Taking

If the taking was illegal, than M may be able to retake her property or receive additional damage. As above, a taking must be rationally related to a legitimate government purpose. Here, T took the property for the purpose of building a public park. Building a public park is a legitimate purpose. Additionally

b. Just Compensation

Generally, the compensation must merely be equal to the full market value at the time of the taking, including the value of any improvements. Fair market value can be determined by appraisal or by the sale of comparative properties.

Here, the government determined the FMV by paying based on comparable properties in the area. Assuming that those properties actually were comparable, including the cost of any improvements, the compensation was just. If M can demonstrate that the other properties were defective, she can recover more.

However, the prior offer to purchase M's property is likely not relevant. Current FMV is the indicator for just compensation, not prior FMV. If the increased value was due to mineral rights or something, than M can likely recover more, but otherwise she is probably out of luck.

c. Relocation Costs

The government may be liable for losses resulting from reliance on the assumption that there would be no taking. For example, the government may be required to compensate a party for the cost of recent improvements. However, the government is not responsible for other costs, such as the costs of finding a replacement property.

Here, M is seeking relocation costs. However, these costs were not incurred on reliance of the assumption that her property would not be taken. Additionally, they were not incurred based on any recent improvement to her property. They are the types of cost incurred in almost every taking, and as such M is not entitled to additional compensation.

Answer B

1. Whether Michele may assert any claims against Len for his smokehouse.

Michelle is most likely to succeed against Len in a claim for private nuisance. To state a claim for private nuisance, the plaintiff must allege that the defendant's conduct constitutes a substantial and unreasonable interference with the use and enjoyment of her property. Interference is substantial if it would be annoying or offensive to an average member of the community. Interference is unreasonable if the harm to the plaintiff outweighs the benefit of defendant's activity. If there are other members in the community, Michelle may also make a claim for public nuisances. However, it is harder to plead these threshold elements. A claim for public nuisance requires that defendant's activity constitute a substantial and unreasonable interference with the use and enjoyment of the property of the public at large, and at least one homeowner suffers specific injury that is distinct from the common injury suffered by the community. Since the facts do not support a public nuisance claim and do not allege a community of homeowners, Michelle is best off bringing a claim for private nuisance.

What is the nuisance?

Michelle will argue that the smokehouse Len installed in his backyard is a nuisance because, while it smokes the meat, it produces smoke and smells that waft over to Michelle's property and prevent her use and enjoyment of it. Len installed the smokehouse three years ago and he uses it to supply smoked meats to his friends. Len is an excellent chef, so presumably his smoked meats are in high demand. Michelle enjoys the climate near her home and enjoys spending time outdoors. She used to have parties outdoors, but she stopped doing that after she received complaints from her guests. Even though she has asked Len to stop using the smokehouse, he has

refused.

Based on these facts, Michelle should argue that the smoke and smells from Len's smokehouse are a substantial and unreasonable interference with the use and enjoyment of her property because they prevent her from spending time outside.

Is it a substantial interference?

Interference is substantial if the interference would be annoying or offensive to an average person in the community. Based on these facts, the smoke and smells from Len's smokehouse is substantial. An interference is not substantial if it is annoying or offensive to the plaintiff because of her particular traits or sensitivities. Here, nothing in the facts suggests that Michelle has specific sensitivities. Moreover, she has guests over and they also find the smells and smoke to be annoying and they find it unpleasant to be outside. The smokehouse not only prevents her from having outdoor dinner parties (which Len will argue are a specialized use of the property and do not give rise to nuisance) but from spending time outdoors as she enjoys.

It is important for Michelle to focus on the harm that she suffers as an average member of the community. If she alleges that the harm is that she cannot have outdoor dinner parties anymore, her claim for nuisance may fail because Len will argue that the nuisance arises from her particular circumstances. It is important for Michelle to show that having a few friends over for dinner is a regular part of being a homeowner.

Michelle's strongest argument is that the smoke and smells prevent her from being outside and enjoying her property. She should use her friends as evidence that the smoke and smells are offensive to an average person.

Is it an unreasonable interference?

Interference is unreasonable if the harm to plaintiff outweighs the benefit to defendant. Here, the harm Michelle likely outweighs the benefit to Len. Michelle can no longer enjoy the outdoors on her property, something that she enjoys doing. Therefore, she has been deprived of the use and enjoyment of her property. Michelle will argue that Len's harm is slight - she is merely asking him to stop using the smokehouse in his backyard. Although Len is a chef, the facts do not indicate that he's smoking the meat for commercial gain or as part of his livelihood. Len is merely providing the smoked meats to his friends, gratuitously. Accordingly, the harm to Len is slight if he has to stop using the smokehouse. Len will argue that the smokehouse cost a lot of money, and he will be harmed greatly, because he will not be able to reap the benefit of his investment. On balance, Michelle will probably prevail that the interference is unreasonable.

Defenses

Len will probably assert the defense of laches and argue that too much time has passed for Michelle to assert this claim. He will argue that he installed the smokehouse 3 years ago, and this is the first time that she is alleging it is a nuisance. In response, Michelle will argue that she tried to live with it, but after three years, it was clear that the smokehouse would permanently deprive her of the use and enjoyment of her property. She will also bring up that she asked Len, multiple times, not to use the smokehouse, and tried to arrive at a compromise. Len, however, rejected her attempts to deal. Since she and Len were not able to resolve it privately, she is finally bringing suit. Len will probably not prevail on his defense of laches.

Outcome

Michelle is likely to prevail on her private nuisance claim. Since the remedy for nuisance is often an injunction, or a court order telling a person to act or not act, the

court may balance the harms. Instead of granting a complete injunction against Len using the smokehouse, the court may limit his use so that it does not substantially and unreasonably interfere with Michelle's use and enjoyment of her property. An injunction may permit Len to use the smokehouse for a certain number of hours or to give Michelle notice that he will use it. An injunction may also order Len to install some technology to limit the smoke and smells coming from the smokehouse. While Michelle will likely prevail on her claim, Len's own right to the use and enjoyment of his property will probably block her from obtaining a complete injunction.

2. Whether Michelle may assert any claims against Len for fetching his dog from her patio.

The issue here is whether Michelle may assert a claim against Len for trespass for fetching the dog (not for the dog itself), and whether Len has any valid defenses.

The elements of trespass are 1) intentional act, 2) entering the land of another, 3) causation, 4) damages. The interference with the property right is sufficient for damages. The facts state that Len's dog had been entering the property for years and that Len repeatedly entered the property to fetch the dog. Michelle will argue, on these facts, she has stated a valid cause of action for trespass. Len intentionally enters her land and retrieves her dog. Her damages/injury is the injury to her property right and her right to keep trespassers from her property. Len's conduct is the actual cause of her injury.

Len's Defenses

Privilege

Len will argue that his entrance onto the land was privileged because he was retrieving

his property, the dog. However, when an animal is on another's property, the owner is not privileged to go and retrieve it himself without giving notice to the landowner. Len's entrance onto the land would only be privileged if he informed Michelle that his dog was on her property and he intended to retrieve. She would then be compelled to allow him to retrieve it at a reasonable time and in a reasonable manner. The facts state that no such communications occurred. Therefore, Len's entrance onto land was not privileged.

Prescriptive easement

Len will argue that he has an easement by prescription to enter Michelle's property and retrieve the dog from the patio. An easement is a nonpossessory right in land. Here, Len will argue that there is an easement appurtenant. His land is the dominant tenement, and Michelle's land is the servient tenement. He has a right to use the servient tenement within the scope of the easement.

An easement by prescription is an easement that is acquired through use over time, and the elements are similar to those of adverse possession. The use of the land must be continuous for the statutory period (usually the same as adverse possession), open and notorious, and hostile to the landowner. Here, the facts state that Len has been entering the property and retrieving the dog from the patio for the last 10 years. In many jurisdictions, ten years is the applicable period for the statute of limitations. Therefore, the first element is likely satisfied. Second, his entrance has been open and notorious. First, Michelle knows that Len regularly enters her property, because sometimes the dog is there and sometimes it is not. Based on Len's statement to Michelle, he does not try to keep it a secret that he regularly enters her property. Additionally, Michelle installed a fence and 'no trespassing' signs, showing she was aware of the trespass. Therefore, the open and notorious factor has likely been satisfied. Finally, the entrance is hostile because Len enters knowing it is not his land and knowing that Michelle considers him a trespasser.

Michelle may argue that Len merely had a license to enter her property and remove the dog from the patio, and that she revoked his license to do that when she built the fence and put up the signs. A license is not a right in land, it is merely permission to enter the land of another. Michelle will argue that she implicitly granted Len a license to retrieve the dog from the patio, however she chose to revoke that license, and built a fence so the dog would not enter her property and Len would not retrieve it. Len then clipped the fence and trespassed onto her property.

Michelle may not succeed in an action alleging that all of Len's entrances onto her land constituted trespass. However, she will probably prevail in an action for any trespass that occurred after Len clipped the fence and re-entered her property. Moreover, clipping the fence on Michelle's property constitutes trespass to chattels (interference in the use and enjoyment of personal property) which is actionable.

3. Whether Michelle is likely to prevail in her argument for additional compensation from Town.

The issue here is whether Town has provided Michelle with just compensation for her property.

Takings

Under the 5th Amendment, the government is permitted to condemn private land for public use so long as it provides the landowner with just compensation. Just compensation is measured as fair market value at the time of condemnation. Here, the condemnation is likely valid because the government is taking the land for a public use, to create a public park. The facts state that Town has offered Michelle a sum "substantially exceeding the prices of comparable parcels recently sold in the neighborhood." Generally, the way to determine fair market value for real property is to look at recent sales of similar parcels in the area. Here, Michelle will receive even more

than the sale price of comparable lots. While this isn't a guarantee of fair market value, it makes it likely that she is receiving fair market value. However, Michelle will still point out the sum she turned down a few years ago. The fact is that the market a few years ago is not the current market, and a pass offer does not affect the value of property under takings law. She will also argue that the price is insufficient because it doesn't provide compensation for relocation. However, the Takings Clause does not require the government to compensate landowners for relocation costs. Accordingly, Michelle's challenges to the Town's taking will probably not prevail. If she wants to challenge the purchase price, she must have her land appraised and sue the government in court, arguing that what they offered her is below market compensation.

Q4 Criminal Law and Procedure

Claire, a four-year-old girl, went missing. Ike, who regularly provided reliable information to Officer Ava, told her that he had recently overheard Don planning to kidnap a child to raise as his own daughter. Officer Ava's partner, Officer Bert, hurried to the courthouse to apply for a search warrant for Don's house. Meanwhile, Officer Ava rushed to Don's house and knocked on the door. Don answered. Officer Ava told him, "I heard that a missing child might be here," and asked, "Can I come in and look for her?" Don replied, "No." Officer Ava said, "A life is at stake. I am searching your home, whether you want me to or not." Don stepped aside and allowed Officer Ava to enter.

Officer Ava searched the home thoroughly. In a closet in the bedroom, she found a bomb, measuring about 2 feet by 2 feet. In a medicine cabinet in the bathroom, she found several vials of cocaine. While looking under the bed, she found a plain sealed envelope, which she opened, that contained a map with a highlighted route from Don's house to Claire's house. She did not find Claire. Immediately after she completed the search, Officer Bert arrived with a warrant authorizing the "search of Don's home for Claire." Not long afterward, Claire turned up elsewhere unharmed.

Don was charged with: (1) possession of a bomb; (2) possession of cocaine; and (3) attempted kidnapping.

Don filed a motion, under the Fourth Amendment to the United States Constitution, to suppress evidence of the bomb, the cocaine and the map.

1. How should the court rule on the motion to suppress regarding:

    a. the bomb? Discuss.
    b. the cocaine? Discuss.
    c. the map? Discuss.

2. Can Don be found guilty of attempted kidnapping? Discuss.

Answer A

MOTIONS TO SUPPRESS

Under the Fourth Amendment of the U.S. Const., which applies to states via the Due Process Clause of the Fourteenth Amendment, all *unreasonable* searches and seizures of persons, properties, and papers are unlawful. Where an unlawful search has taken place, the exclusionary rule generally applies -- that is, the evidence wrongfully obtained will not be allowed in as evidence, although it can typically be used for impeachment and other limited purposes. Similarly, evidence *derived* from wrongfully obtained evidence is deemed "fruit of a poisonous tree" and will not be admitted unless there has been attenuation. All that said, courts will follow the "harmless error" rule and not overturn a conviction unless the admission of the wrongfully obtained evidence was material and affected the final judgment.

Reasonable Expectation of Privacy

In order to bring a suppression claim under the 4th Amendment, a person must have a reasonable expectation of privacy in the place searched. Here, Don's house was subject to a search. Don, who answered the officer's knock, undoubtedly has a reasonable expectation of privacy in his home.

Warrant Requirement

The Supreme Court has upheld a warrant requirement under the 4th Amendment. The warrant must describe in reasonable specificity the places and persons to be searched, and the types of things to be searched for. Therefore, barring certain exceptions to be discussed, an officer must have a warrant to search someone's house. There are six exceptions to the warrant requirement: (1) Search Incidental to Arrest, (2) Consent, (3) Hot Pursuit and Exigent Circumstances, (4) Automobiles, (5) Plain View, (6) Stop and

Frisk.

Here, the prosecution will argue that Officer Ava had both consent to search D's house and was compelled to search his house given the exigency of the situation.

Consent

An otherwise unlawful search is permitted if the searched party voluntarily consented to the search. The person need not have known that he was free to decline consent; however, officers cannot utilize coercive methods in obtaining such consent or else it will not be deemed voluntary.

Here, Ava asked D for permission to search the house but was flatly told, "No." Thus, D can, likely successfully, argue that there was no consent here. Prosecution will respond, however, that when Ava told D that "[a] life is at stake" and that she is therefore searching the house, D's stepping aside was implicit consent. That is unlikely to be a successful argument with a court, especially when it comes at the heels of being denied consent. A court will likely conclude that D felt that he had no choice but to allow the officer in -- indeed, the officer said she would search the home "whether you want me to or not."

Thus, consent is unlikely to provide the exclusion from warrant in this case.

Exigent Circumstances

There is also an exception to the warrant requirement where emergency circumstances require that the officer not wait for a warrant. Such circumstances exist where, say, a felon is fleeing or an officer is worried that defendant will destroy the evidence or instrumentality of the crime in the time it would take to obtain a warrant.

Here, prosecution would argue that Ava had just such a concern. After having sent Bert to obtain a warrant, Ava was worried (given the reliability of Ike) that it might be too late by the time the warrant came -- D might already have concealed or transported Claire by then. D, however, will respond that that does not qualify as an exigent circumstance that would warrant a non-consented, unwarranted search of a person's home. D would

argue that Ava, if she was so concerned about Claire's kidnapping, could have waited *outside* Don's house after he was refused consent -- that would have prevented Don from transporting anyone he had kidnapped. But that might have still given Don time to conceal a small four-year-old girl or perhaps even cause her harm.

Ultimately it will be upon the court to decide whether the "totality" of the circumstances are in favor of allowing the exigent circumstance exception. But even if the court chose not to do so, the government can rely on the inevitable discovery doctrine (discussed below) to argue in favor of admission.

Officer Bert's Search Warrant / Inevitable Discovery

The obtaining of a warrant *after* a search has been performed does not provide immunity to the unlawful search carried out. Thus, if Ava was unjustified in searching D's home, the warrant would not, by itself, render the search lawful.

Nonetheless, whether Bert's warrant was a valid one is important because, if the warrant was valid, it could render the search harmless under the inevitable discovery doctrine, which provides that evidence that otherwise should be excluded can be included where it would have been inevitably discovered by lawful means.

Here, first, the warrant was a valid one (nothing to the contrary in the facts; moreover, officers are allowed good faith reliance on a warrant they believe valid). Assuming Ava had waited to conduct the search until the warrant arrived, the warrant would have allowed her to then go ahead and conduct the same search that she did (that said, we discuss below how Ava exceeded the scope of her search under either the warrant or exigent circumstance theory).

Thus, between the exigent circumstance and warrant, the court will likely deem the search itself to be lawful, though that brings us to the specific search itself and how it might have exceeded its *lawful scope*.

Scope of Search

Under both exigent circumstances exception, whereby Don would be searching for a

little girl or other evidence of kidnapping, or under the explicit terms of the warrant, Ava's search was limited in scope to the "search of Don's home for Claire" and, perhaps under the former exception, also of evidence of kidnapping.

Bomb

Ava discovered the bomb in a closet in the bedroom. A closet, arguably, *is* a good place to hide a kidnap victim. Thus, Ava's search of the closet was proper. Once she had opened the closet, of course, the large 2'x2' bomb was in plain view, another exception to the warrant requirement which allows the search (and thus confiscation) of items found in plain sight in a location where the officer is lawfully present. Here, Ava was lawfully in the closet and the bomb was in her plain view. Thus, the court should deny the motion to suppress evidence of the bomb.

Cocaine

The cocaine was found in a medicine cabinet, which is probably too small to hide a child, even a little girl who is four. Prosecution would argue that, at least under exigent circumstance exception where evidence of kidnapping (and not just of Claire physically) would be allowed, Ava looked to find clues to any kidnapping. That, however, is likely to fail because under that theory almost every aspect of the house would be searchable -- courts find warrant exceptions to be narrow in scope. Under the express warrant itself, of course, Ava's search was limited to Claire, who could not have been found in the medicine cabinet. Thus, the court should grant the motion to suppress evidence of the cocaine.

Map

The map was found whilst Ava was looking "under the bed." Like the closet, under the bed is a location where a kidnapping victim might be tied or placed. However, the map was in an envelope that the officer had to open in order to access the map. Under the warrant, that is clearly beyond the scope. Even under the exigent circumstances exception, this is likely to come closer to the finding of the cocaine than the bomb. Unless the map was visible from the outside (facts do not state), Ava would be beyond her authority to search inside it. Thus, the court should grant the motion to suppress evidence of the map.

In conclusion, the court should admit the bomb, but not the cocaine or the map.

2. ATTEMPTED KIDNAPPING OF CLAIRE

Whether Don can be found guilty of Claire's attempted kidnapping.

Kidnapping

Under common law, the prosecution for kidnapping must prove the following elements beyond a reasonable doubt (the first two elements are essentially those involved in the lesser crime of false imprisonment): (1) confinement or restraint, (2) to a bounded area, **(3)** and victim was either moved or concealed. The confining or restraining must be of such a nature that the victim does not feel that she is free to leave. Similarly, the bounded area must prevent, at least in the victim's knowledge, her from escaping without harm. The confinement or the bounded area need not be physical -- being threatened with a gun on a porch could satisfy the requirements. In addition, kidnapping requires that the victim either be concealed or moved during her state of false imprisonment.

Attempted Kidnapping

Attempted kidnapping (AK) is an inchoate crime and would merge with the actual crime of kidnapping, if that were charged. AK is a specific element crime, which means that D must have had the particular intent to satisfy the elements of kidnapping as described above. In addition, attempt requires the presence of an overt act. Under common law, this meant that D had to be "dangerously close" to committing the actual crime. Modern courts have relaxed that rule some, although they still require more than mere preparation, which is what is needed to prove the overt act in a conspiracy. Typically, they require a "substantial step" in furtherance of the actual crime.

Here, a jury would be able to impute specific intent from both the actual and circumstantial evidence. Assuming Ike testifies, he will be able to tell them what he overheard regarding Don's plan to kidnap a child and the map found in Don's house

(assuming it is admitted) will confirm that the child to be kidnapped was in fact Claire. It is unlikely that the bomb and cocaine, assuming that they are admitted into evidence, will inform the charge of attempted kidnapping. Perhaps the bomb was going to be used to threaten or restrain Claire, but the facts do not say anything in that regard. Whilst the evidence is relatively slim, a jury could nonetheless reasonably find that D had the specific intent to commit the kidnapping of C.

The overt act is a closer question, and likely to ultimately resolve in D's favor. While the map is certainly an overt act that at least satisfies the "mere preparation" requirement of a conspiracy, it likely is *not* a "substantial step" in achieving the crime (and far from coming "dangerously close" to achieving it). The jury would perhaps have to rely on other circumstantial evidence to reach that conclusion, but the facts as presented do not state what other evidence might exist. Without the map, there almost certainly is no overt act.

Thus, under the circumstances and without more evidence of steps taken by D, D is unlikely to be found guilty of attempted kidnapping.

Defenses

According to the prompt, it does not appear that D has any valid defense to his specific intent crime, such as voluntary or involuntary intoxication, duress, entrapment, or insanity.

Answer B

1. DON'S MOTION TO SUPPRESS

The issue is whether the evidence of the bomb, cocaine, and the map were obtained in violation of Fourth Amendment to the US Constitution.

FOURTH AMENDMENT

The Fourth Amendment of the US Constitution protects citizens from unreasonable search and seizures.

Government Conduct

The Fourth Amendment applies to conduct by the government. There must be conduct by a publicly paid police or a person acting in the direction of the police.

Officer Ava (A) is a publicly paid police officer.

Therefore, there was government conduct.

Reasonable Expectation of Privacy

In order to have standing to challenge a search or seizure, the person must have standing. Standing exists where the person has a reasonable expectation of privacy over the place or item to be searched or seized. A person has a reasonable expectation of privacy over his home.

A searched Don's (D) home, so D had a reasonable expectation of privacy.

Therefore, D has standing to challenge the search and seizure.

WARRANT

A search and seizure are reasonable if it is based on a valid warrant. A warrant requires probable cause and particularity. Probable cause requires a fair probability that evidence of a crime will be found in the place or item to be searched. Particularity requires a description of the items that can be searched and seized. Probable cause may be based on information obtained from a reliable and credible source.

A had probable cause to believe that Claire (C) would be at D's home. A reliable informant, Ike, told A that she overheard D planning to kidnap a child to raise as his own, and C, a four-year-old girl went missing. Additionally, B obtained a warrant to search D's house for C, so the warrant contained particularity. However, even though Officer Bert (B) obtained a warrant, A did not have a warrant to search D's house when she conducted the search.

Therefore, the search was not based on a warrant. Since the search was not based on a warrant, the evidence of the bomb, the cocaine, and the map was obtained in violation of D's Fourth Amendment right.

WARRANT EXCEPTION

Absent a warrant, evidence obtained from a search and seizure will be inadmissible at trial unless the search falls within an exception to the warrant requirement.

Consent

A police officer may search an item or place with consent so long as the consent is voluntary and the person has apparent authority to consent.

A knocked on D's door and asked D if she could come in and search for a missing girl. D responded, "No." Although D stepped aside and allowed A to enter and search, D's consent was not voluntary because A told him that he had no choice, indicated by the fact that she said she would search whether D wanted her to or not.

Therefore, the search was not based on consent.

Exigent Circumstances

Under exigent circumstances such as emergency aid, a police officer may enter the home of another and conduct a search without a warrant.

C, a four-year old girl went missing and A had reliable information to believe that D had kidnapped her. The fact that a young child may have been in D's home and likely needed help to escape could constitute an exigent circumstance, which allowed A to enter D's home to render aid to C.

Assuming exigent circumstances exist, the next step is to analyze whether each item found in D's house was obtained through a valid warrant exception.

Plain View

Evidence may be seized without a warrant if (1) the police officer was legitimately on the premises, (2) the item was contraband or evidence of a crime was in plain sight, and (3) the police officer had probable cause to believe that the item was evidence of a crime or contraband.

B. THE BOMB

A searched D's home and found a bomb in a closet in the bedroom. Because there were exigent circumstances, A had a legitimate right to be in D's house. Additionally, A had reason to believe that C could be hidden in the closet, so A was legitimately in the closet, the bomb was in plain sight since A saw the bomb when she opened the closet, and the bomb was about 2 feet by 2 feet. Additionally, given the fact that A is a police officer and the bomb was clearly visible, A had probable cause to believe that the bomb was evidence of a crime.

Therefore, evidence of the bomb was not obtained in violation of D's Fourth Amendment rights.

C. THE COCAINE

It is unlikely that C could be found in the medicine cabinet in the bathroom, but A searched the medicine cabinet and found several vials of cocaine. Since A was searching for C, she did not have a reasonable belief to search D's medicine cabinet. Since A opened the cabinet, the cocaine was not in plain sight.

Therefore, the evidence of the cocaine was obtained in violation of D's Fourth Amendment rights.

D. THE MAP

A had a reasonable belief that C could be under the bed because she is a four-year-old girl and could fit there, so the envelope was in plain sight. However, A did not have probable cause to believe that the envelope was evidence of a crime, since C could not fit inside of it. Since A opened the sealed envelope that contained the map, the map was not in plain sight.

Therefore, the evidence of the map was obtained in violation of D's Fourth Amendment rights.

EXCLUSIONARY RULE

Evidence obtained in violation of a person's constitutional rights is inadmissible at trial. Additionally, evidence obtained from an illegal search and seizure will also be inadmissible as fruit of the illegal search and seizure. However, evidence that would be subject to the exclusionary rule may be admitted at trial if the prosecution can remove the taint of the evidence. The prosecution has the burden of showing by a preponderance of evidence that (1) the evidence would have been obtained through an independent source, (2) the evidence was inevitably discoverable, or (3) intervening acts broke the causal chain between the illegal conduct and the evidence obtained.

Because the map and cocaine were obtained in violation of D's Fourth Amendment right, the map and cocaine should be suppressed at trial unless the prosecution can remove its taint.

The prosecution cannot show that the evidence would have been inevitably discovered. Although A conducted an illegal search, B obtained a warrant to search D's home for Claire and arrived immediately after A had completed the search. The warrant authorized search of D's home for C and since C could not be found in the medicine cabinet or the envelope, A and B would not have been able to search those areas. Because the medicine cabinet and map exceeded the scope of the search warrant, the

cocaine and map would not have been inevitably discovered. Additionally, because D did not consent to the search, there were no intervening acts that broke the chain of illegality. Furthermore, it is unlikely that the cocaine and map would have been discovered from an independent source because they were in D's home and in his possession.

Therefore, the evidence of the map and cocaine should be suppressed.

Alternatively, if the court finds that exigent circumstances did not exist and the evidence of the bomb was obtained in violation of D's Fourth Amendment rights, the evidence of the bomb would have inevitably been discovered through the search warrant because the police officers would have had a reasonable belief that C could be hidden in the closet.

Therefore, the court should grant the motion to suppress regarding the cocaine and the map, but should deny the motion to suppress regarding the bomb.

2. ATTEMPTED KIDNAPPING

The issue is whether D can be found guilty of attempted kidnapping.

KIDNAPPING

Kidnapping is the act of confining another person with movement or in a concealed place. Kidnapping is a general intent crime and requires an intent to perform the proscribed conduct or an awareness of the circumstances of one's conduct or that a proscribed result may occur.

ATTEMPT

Attempt is an act to commit a proscribed crime, that falls short of the completed crime. Under the majority view, a defendant is guilty of attempt when he takes a substantial step in committing the proscribed crime. Under the minority view, a defendant is guilty

of attempt when he is dangerously close to completing crime. Attempt is a specific intent crime and the defendant must act with the specific intent to commit the crime. Attempted kidnapping requires an act with the intent to kidnap another person.

A searched D's home and found a map that contained a map with a highlighted route from D's home to C's house. Additionally, Ike overheard D planning to kidnap a child to raise as his own daughter. The prosecution will argue that D had the intent to kidnap C because he had a plan to kidnap a child, which shows that he intended to commit a kidnapping. However, D had not taken a substantial step in committing the kidnapping. Although D had the map, D was not in the course of a kidnapping. D was in his home when A arrived and C had already been kidnapped. D had not taken a substantial step to kidnap C and the map was an act of preparation that does not amount to a substantial step in the course of completing the crime. Additionally, D was not dangerously close to committing the kidnapping since he was at his home alone when A arrived.

Therefore, D cannot be found guilty of attempted kidnapping.

Q5 Wills / Community Property

In 2001, Ted, who was married to Wendy, signed a valid will bequeathing all of his property as follows: “$10,000 of my separate property to my daughter Ann; then $2,000 of my separate property to each person who is an employee of my company, START, at the time of my death; and all the rest of my separate property, plus all of my share of our community property to my beloved wife of 20 years, if she survives me.” No other gifts were specified in the will.

In 2003, Wendy died.

In 2005, Ted adopted a child, Bob.

In 2006, Ted signed a valid codicil to his 2001 will stating that, “I hereby bequeath $10,000 of my separate property to my beloved son, Bob. All the rest of my 2001 will remains the same.”

In 2011, Ted married Nell.

In 2012, Ted and Nell had a child, Carol.

In 2016, Ted died, leaving his 2001 will and his 2006 codicil as his only testamentary instruments. After all debts, taxes, and expenses had been paid, Ted’s separate property was worth $90,000, and his share of the community property was worth $100,000. At death, Ted still owned START, which by then had ten employees, none of whom had been an employee of START in 2001.

What rights, if any, do Nell, Ann, Bob, Carol and the START employees have in Ted’s estate? Discuss. Answer according to California law.

Answer A

The facts tell us that the 2001 will and the 2006 codicil were both valid so we do not examine their validity.

Nell

Ted's 2001 will provided for his "beloved wife of 20 years" to receive all his share of community property (CP) and the remainder of his separate property (SP). Under this calculation, the wife would receive $50k in SP and Ted's (T's) interest in the CP. Nell (N) will argue that the will specifically provided for this estate to go to his wife, Wendy (W), who he had been married to for 20 years. This gift failed because it was specifically conditioned on W surviving T. This provision would not be covered by the Anti-Lapse statute because the gift was specifically conditioned on the wife's survival. Had it been silent on this point, we would assess rules of lapse and anti-lapse. Anti-lapse would not apply because that saves gifts to kindred of the testator (not the testator's spouse) who die leaving surviving issue. Here, the gift was to a spouse, not kindred, so even absent the specific condition, the gift would not have been saved by the anti-lapse rules.

Instead, N will argue that she is an omitted spouse, so she is entitled to an intestate share of the estate. If T married N and never updated his will after their marriage, and his will does not provide a gift for his wife, or evidence a specific intent not to provide for his wife, and the wife does not get a gift outside the will (such as an annuity), the wife is considered an omitted spouse and she takes a share of the estate equal to what she would get if her spouse died intestate.

Here, T made his original will in 2001. He republished his will by codicil in 2006. He did not marry N till 2011. He did not update his will to provide for N after he married her. There is nothing to suggest that he intentionally wanted to exclude N from his will, and there is nothing to suggest he provided for her outside his will. Therefore, the only

question is whether he intended for N to receive W's share under the will, or whether she should be treated as an omitted spouse.

While a court would permit the introduction of parol evidence to aid in resolving the ambiguity, there are no facts to suggest any evidence that would be helpful. Therefore, the court will likely take the will at face value and find that the gift was meant for W (as she was T's wife of 20 years and N was only T's wife of five years), who died, so the gift failed according to its own condition, and N would take an intestate share. The intestate rules provide that a spouse receives all of her husband's estate if he died without issue or parents. If he died with one child/issue or parents, the spouse would take half his SP and all of the CP. If he died with two or more children/issue or parents, the spouse would get 1/3 of his SP and all of his CP. T died with three living children, so his omitted spouse gets 1/3 of his SP and all of his interest in the CP.

Under these calculations, N would get $30k (which is 1/3 of T's SP) plus all of the CP.

Ann

A was given $10k of T's separate property in the 2001 will. In 2006, T executed a codicil that said he was leaving $10k of his separate property to his beloved son, Bob and leaving the rest of his will unchanged. The court will have to determine whether the codicil was meant to take anything out of the 2001 will, or whether it was meant to simply add another gift to the 2001 will.

A will may be revoked explicitly by a later instrument, or by obliteration (lining out words) or by physical act such as tearing or burning. Here, there are no facts to suggest that A did any of these things. Therefore, the court will find that the 2001 will was not revoked at all, and the 2006 codicil simply added another gift to the 2001 will.

A will get $10k of T's SP.

Bob

B might have been treated as an omitted child (similar to the omitted spouse, as discussed above) except that after he was adopted, T republished his will by codicil and

provided specifically for B to take a gift of $10k of T's SP. (Adopted children are treated the same way biological children are treated.)

B will get $10k of T's SP.

Carol

C will be treated as an omitted child. She was born after T last updated his will. T did not evidence any intent to exclude her from his will. He did not provide a specific gift to her mother to care for her - her mother was omitted from the will, too. C was not given a gift outside the will. It appears T updated his will, had a child, and forgot to update his will again to include her. C will take her intestate share under the will.

As discussed above, since T died with more than 1 child (issue), and a spouse, the spouse gets 1/3 of T's SP and the children get 2/3 of the SP. The 2/3 is divided equally, per capita to the children, or per capita with representation if any of the children predeceased their father and left issue.

Here, T's estate consists of $90k in SP. Two thirds of $90k is $60k. C would be entitled to 1/3 (because she is one of three children) of $60k, which is $20k.

The other two children were provided for in the will, so they do not take their intestate share. They only get the gifts they were provided in the will.

START Employees

The court will determine whether the employees are sufficiently identified in the will. The will refers to "each person who is an employee of my company, START, at the time of my death." The court will find that these are facts of independent legal significance. T would have employed these people regardless of whether he wanted them to take under his will. He would employ them because they would make his business succeed. He acted to employ them for reasons other than making his will valid. Therefore, the court will allow the will to refer to these facts of independent legal significance and allow the gift to stand.

Each employee will get $2k. There are 10 employees. The START employees would get a total of $20k, which exhausts T's SP.

Answer B

2. CALIFORNIA IS A COMMUNITY PROPERTY STATE

California is a community property ("CP") state. Therefore, there is a presumption that property acquired during the marriage is community property. Separate property consists of property acquired before or after a marriage, property acquired during the marriage with separate property ("SP") funds, property acquired during the marriage by bequest, devise, or gift, and the rents, issues, and profits from the SP. Courts will trace the assets to determine the source of funds used to acquire the asset, to determine whether the asset is SP or CP. Courts will also look to see if any valid agreements or the spouses' conduct changes the character of assets. Via a valid will, each spouse may devise all of his SP and his half of the CP to any beneficiaries that he wishes.

NOTE: Wendy's Share

In the original will, Ted's gift to Wendy consisted of all of his share of the CP and any SP not devised by will (also known as the "residuary estate"). Ted included a survivorship requirement for Wendy's gift; Wendy did not survive Ted, so these gifts would not be valid. Furthermore, this gift would have failed anyway without this clause. Under California law, a beneficiary of a testamentary gift must survive the testator, or else the gift "lapses" (meaning it fails). If the gift lapses, the gift goes to the testator's residuary devisees, if any, and if not, it is distributed by intestate distribution. A testator's "residuary" estate is a gift of whatever is not specifically devised in his will to certain beneficiaries. California does have an anti-lapse statute. However, it only applies if the devisee is the kindred (blood relative) of the testator and the kindred leaves issue. Wendy was Ted's spouse, not his kindred. Therefore the anti-lapse statute does not save her gift under Ted's 2001 will, and the separate property and community property devised to Wendy by Ted's will therefore lapses and will be distributed via intestate succession (because Wendy was the residuary beneficiary - he devised whatever remained of his SP to Wendy, so it must instead be distributed

intestate). Therefore, Wendy's gifts under the will do not preclude others from inheriting Ted's SP.

3. NELL - The Pretermitted Spouse

California has a statute protecting spouses from being accidentally omitted from testamentary dispositions. If, after execution of all testamentary instruments (including wills and codicils, and any intervivos trusts), the testator gets married, the spouse is considered a "pretermitted spouse" and will be entitled to take her intestate share of the estate. Exceptions to this are if the will states on its face that it was not his intention to give this gift to a pretermitted spouse, the pretermitted spouse is otherwise provided for by nontestamentary transactions (for example, if the testator takes out an annuity for the spouse), or if the spouse waives her rights to make claims as a pretermitted spouse.

Here, the last testamentary instrument executed by Ted was in 2006 (his codicil). Ted married Nell in 2011, and no subsequent testamentary instruments were executed. There is no evidence that any of these exceptions to Nell's ability to claim as a pretermitted spouse exist. Therefore, Nell would be entitled to her intestate share of the Testator's estate; under California intestacy distribution laws, when as here, there is one surviving spouse and more than one surviving issue (here, Ted has three surviving children), the surviving spouse is entitled to the testator's one-half of the community property (so she ends up with 100% of the community property) and one third of the testator's SP. Therefore, Nell would be entitled to all of the CP ($100,000) and one-third of the SP ($30,000).

It is unclear whether the value of Ted's business, START, is included in his SP and CP discussed in the facts. If it is not, Nell would also be entitled to her intestate share of the SP and CP value of Ted's ownership of the business.

4. CAROL - The Pretermitted Child

Just like the pretermitted spouse, California protects children who have been unintentionally omitted from a testator's testamentary distributions when the child is born

or adopted after the execution of all testamentary instruments. Pretermitted children are entitled to their intestate share of the testator's estate, unless the face of the will indicates an intent not to do so, the child is provided for by a non-testamentary transfer, or all of the testator's assets are given to the mother of the pretermitted child when the testator has other children, with the indication that the mom take care of all the kids. Here, Carol was born in 2012, well after Ted executed his last testamentary instrument (the codicil in 2006), so she is a pretermitted child.

Here, there is no evidence that facts exist that would prevent Carol from making a claim as a pretermitted child. There are no apparent non-testamentary transfers to Carol to be taken instead of a testamentary gift, and in the original will, although Ted left a substantial portion of his estate to his then wife Wendy, he also left gifts to his other children - Ann and Bob. Therefore, Carol is entitled to her intestate share of Ted's estate, which under California's intestate distribution laws described above, would mean that Carol is entitled to her share of 2/3 of Ted's estate (Nell gets 1/3, and all the children would share the other 2/3 of the SP). Therefore Carol would get $20,000 of Ted's SP.

Again, it is unclear whether the value of Ted's business, START, is included in his SP and CP discussed in the facts. If it is not, Carol would also be entitled to her intestate share of the SP value of Ted's ownership of the business.

5. ANN and BOB

Neither Ann nor Bob is a pretermitted child. Ann was born prior to the execution of the 2001 will, and Bob was adopted prior to the 2006 codicil. Note that adopted children are treated the same as natural children for the purposes of distribution in California.

Ann and Bob both receive valid gifts from the will. Ann is devised $10,000 of Ted's SP, and Bob is devised $10,000 of Ted's SP. Unless their gifts have to be abated to accommodate the share of the estate given to Nell and Carol (which, it does not appear that this is the case), they would be entitled to this money.

6. START EMPLOYEES - ACTS OR FACTS OF INDEPENDENT SIGNIFICANCE

To take under a will, the beneficiary must be ascertainable. Usually all of the material terms of the will must be within the will itself, and extrinsic evidence is not allowed to supplement the will provisions. A potential problem with Ted's will is that he wants to give $2,000 to each employee who works at his company at the time of his death. These employees are not individually known at the time of the will, and their names are not included in the will. Generally, the court will not admit extrinsic evidence to probate a will due to fear of fraud. However, a gift to a group of individuals to be determined upon the death of the testator can be a valid gift. Under the theory of **acts or facts of independent significance,** the court may use external facts to fill in the gaps of a will if the external facts would be in existence regardless of the will. In other words, the existence of the extrinsic evidence is not testamentary in nature and therefore does not have the same concern of fraud. Here, who Ted's company employs exists separate and apart from the will. Therefore, the court will admit extrinsic evidence to determine who the employees were at the time of Ted's death in order to give effect to his testamentary dispositions. At the time of his death, START had ten employees. It does not matter that none of them were employed when the will was created in 2001, or re-published by codicil in 2006, because the will provision applies to the employees of START at the time of Ted's death. Therefore, each of the employees is entitled to $2,000.

Jul 2017

California Bar Examination

Essay Questions and

Selected Answers

The State Bar Of California
Committee of Bar Examiners/Office of Admissions

180 Howard Street • San Francisco, CA 94105-1639 • (415) 538-2300
845 S. Figueroa Street • Los Angeles, CA 90017-2515 • (213) 765-1500

ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2017

CALIFORNIA BAR EXAMINATION

This publication contains the five essay questions from the July 2017 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	Subject
1.	Community Property
2.	Professional Responsibility / Evidence
3.	Remedies
4.	Civil Procedure
5.	Torts

ESSAY EXAMINATION INSTRUCTIONS

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

Q1 Community Property

Wanda, a successful accountant, and Hal, an art teacher, who are California residents, married in 2008. After their marriage, Wanda and Hal deposited their earnings into a joint bank account they opened at Main Street Bank from which Wanda managed the couple's finances. Each month, Wanda also deposited some of her earnings into an individual account she opened in her name at A1 Bank without telling Hal.

In 2010, Hal inherited $10,000 and a condo from an uncle. Hal used the $10,000 as a down payment on a $20,000 motorcycle, borrowing the $10,000 balance from Lender who relied on Hal's good credit. Hal took title to the motorcycle in his name alone. The loan was paid off from the joint bank account during the marriage.

At Wanda's insistence, Hal transferred title to the condo, worth $250,000, into joint tenancy with Wanda to avoid probate. The condo increased in value during the marriage.

On Hal's 40th birthday, Wanda took him to Dealer and bought him a used camper van for $20,000, paid out of their joint bank account, titled in Hal's name. Hal used the camper van for summer fishing trips with his friends.

In 2016, Wanda and Hal permanently separated, and Hal filed for dissolution. Just before the final hearing on the dissolution, Hal happened to discover Wanda's individual account, which contained $50,000.

What are Hal's and Wanda's rights and liabilities, if any, regarding:

1. The condo? Discuss.

2. The motorcycle? Discuss.

3. The camper van? Discuss.

4. The A1 Bank account? Discuss.

Answer according to California Law.

Answer A

California is a community property state. Unless the parties have agreed otherwise in writing, all property acquired during the course of marriage is presumed to be community property (CP). Property acquired before marriage and after the marital economic community has ended is presumed to be separate property (SP). In addition, property acquired by gift, devise, or descent is presumed to be SP as well. To determine the characteristic of an asset, courts generally trace the property to the assets that were purchased.

At divorce, all CP is equally divided between the parties unless they have otherwise agreed in writing, orally stipulated to in open court, or an exception applies to the general rule of equal division of CP at divorce. A spouse's SP remains his or her SP at divorce. With these general principles in mind, each property will be assessed individually.

The Condo

At issue is whether the condo is completely part of Hal's (H) SP or whether the community estate has an interest in the condo. As stated above, property acquired by gift or devise, such as an inheritance, is presumed to be SP of the spouse receiving the gift/inheritance. Here, H's uncle left him the condo and Hal inherited it. Therefore, unless H and Wanda (W) expressly agreed in writing that it was to change from SP to CP, H owned it as SP alone. However, the facts indicate that H transferred the title to the condo to W into a joint tenancy with W to avoid probate. Therefore, at issue is whether this vested the community estate with an interest in the apartment.

In California, property that is held in joint form is presumed to be CP. Therefore, when H transferred his interest in the Condo to W as joint tenants, the law will presume

that he intended to gift the condo to the CP and for each to hold as joint tenants with right of survivorship. When property that is held in joint form is to be divided at divorce, two statutes apply. First, in order for the transferring spouse to have an interest of ownership it must establish that there was either a written agreement that he was to hold it as SP or that the deed itself contains language that the property is only to be SP. Here, no such written agreement exists. On the contrary, W and H agreed to transfer the condo to W and H as joint tenants. However, a spouse who "gifts" SP to CP is entitled to reimbursements for down payment, principal payments for the mortgage, and for improvements made to the property. Here, H essentially paid the price of the condo $250k when he transferred it from his SP to CP. Therefore, he will be entitled to receive a $250k return on the apartment's value if it is deemed to be CP. The remainder of the condo's apartment will be CP.

However, H can argue that the transaction should be set aside because it is presumptively obtained through undue influence and, therefore, void. In the course of dealing with one another, spouses owe the same duties as those who are in confidential relationships. This duty imposes upon them the highest duty of good faith and fair dealing when the spouses enter into transactions with each other during their marriage. If one spouse gained an unfair advantage over the other in a transaction, the court will presume that the transaction was obtained via undue influence and, thus, invalidate it. The spouse who obtained the advantage will have the burden to prove that the transaction was entered into by the other spouse freely and voluntarily with full knowledge of all the facts relevant to the transaction and the basic effect of the transaction.

Here, H will argue that W insisted that he transfer the property into both of their names as joint tenants to avoid probate. H will argue that because W was an accountant, he believed her word and relied on her professional experience to believe that the best move for the couple was indeed to hold it as joint tenants. Furthermore, he will argue that as an art teacher who knows nothing about estates and marital property, he relied on her word and did not know that holding as joint tenants will deprive him of

full interest in the condo if they were to divorce. W has the burden here. She will have to show that she explained everything to H and that she indeed told him of the basic effect of the transaction. However, this does not appear to be the case. It appears that all W did was insist that H transfer it to avoid probate, but did not inform him of any other consequences that such a transfer may have. Therefore, H has a good argument to void the transfer to W as joint tenants for the condo because W gained an unfair advantage over him.

If H is successful in arguing that the presumption that property held in joint form is CP, W may argue that the transfer constituted a valid transmutation. A transmutation is an agreement by the parties that changes the form of ownership from CP to SP, or SP to CP, or one's SP to the other's SP. However, to be valid, there must be a written agreement signed by the party whose interest is adversely affected and expressly state that a change of ownership is to occur. Here, this is not the case.

The Camper Van

At issue is whether the camper van is H's SP due to a gift from W or it remains as CP. During their marriage, the parties can enter into agreement to change the character of any particular property by transmutation. As stated above, transmutation is when the parties change CP to SP, or SP to CP, or one's SP to the other's SP. However, for a transmutation to be valid, it must be in writing, signed by the party whose interest is adversely affected and expressly states that a change in ownership is to take place. The general exceptions to writing requirements do not apply here. The only exception is when a spouse gives a gift of a tangible item of personal property to the other spouse. However, this personal gift exception only applies to gifts of low value and does not apply to those with substantial value.

Here, the wife purchased a camper van for $20,000 on H's 40th birthday using money paid from their joint bank account, titled in H's name. Title alone does not establish the characteristic of property for community law purposes. Rather what is

more important is the funds that were used to acquire the property. Here, the funds were used from a joint bank account. The joint bank account is indeed community property because both of them were depositing money into it from the income they earned from their respective jobs. Therefore, the camper van purchased with CP is presumed to be CP unless there was a valid transmutation or other exception. Here, there was no valid transmutation. When W gifted the camper van to H, it was not accompanied by any written agreement, signed by W, that stated that H was to own the property as his SP and that W was gifting it to him outright. The issue then is whether the personal gift exception applies here. It does not. Generally, the personal gift exception applies to gifts of personal property with low value (such as a piece of jewelry that was inherited by a spouse). A $20,000 camper purchased with CP will not be presumed to be a personal gift from one spouse to the other for community property law purposes. The subjective intent of the spouses does not matter.

In conclusion, the camper van is CP subject to be divided 50/50 between H and W because it was acquired with CP property and no exception applies to change its characterization.

The Motorcycle

To determine whether property is CP or SP, the courts will trace the funds used to acquire to purchase the property. Here, H used an initial down payment of $10,000 to purchase the motorcycle. This $10,000 was his SP because he had inherited it from his uncle and, as stated above, gifts acquired via inheritance are presumed to be SP. However, H then paid off the remainder of the 10k from a loan borrowed from a lender. Thus, the issue is whether then $10,000 credit to purchase the motorcycle was CP or SP. Each spouse has an equal right of management over CP and, therefore, has the right to individually enter into agreements to purchase property on credit without the approval of the other. Determining whether a property purchased with a credit from a lender hinges on the primary intent of the lender and where he was looking for assurances before giving out the credit. For example, if the purchasing spouse used his

own SP for collateral for the credit purchase, then it would be presumed to be SP because the lender's primary purpose for giving the loan was due to the collateral. However, where the lender relies on the purchasing spouse's good credit, the property purchased with that credit is presumed to be SP. This is because one's good credit or reputation as having good credit is community property.

Therefore, because the lender relied on H's good credit in giving out the $10,000 loan for the purchase of the motorcycle, the $10,000 is presumed to be CP. As a result, H owns a 50% SP interest in the motorcycle because he used $10k to purchase the property (50% of the purchase price) and shares the other half of the value of the motorcycle as CP with W. To conclude, H owns 50% of the motorcycle as SP and both H and W own the other half of the motorcycle as CP.

Additionally, even if the court determines that the lender's primary intent was based on H's SP and, therefore, the motorcycle was not presumed to be SP, the community estate will still have a 50% interest due to the principal debt reduction method. Where a spouse has acquired property before the marriage or acquired property through inheritance and then CP funds are used to pay for the principal of the property, the community estate obtains a pro rata interest in the property based off of the principal debt reduction due to funds paid from the CP. Here, the remaining $10k of the motorcycle’s balance was paid off with the joint bank account during the marriage, which is indeed CP. Therefore, the community estate would be entitled to a principal debt reduction of 50%, meaning it would have an interest of 50% of the total value of the motorcycle.

The A1 Bank Account

As stated above, all property acquired during the course of marriage is presumed to be CP, regardless of who holds title to the property. Here, W owned an individual bank account at A1 Bank without telling Hank and deposited some of her earnings into it. Earnings by each spouse are deemed to be community property when earned during

the course of the marriage. It does not matter where the spouse transfers the earnings or what type of account she transfers it into. The fact remains that the funds that she deposited in the A1 Bank were CP and she was not entitled from hiding CP or depriving H of his rights to the CP. The fact that she held the bank account solely in her name is not determinative here. Where the A1 Bank account would matter is if third party creditors of H's debts were seeking payment from him, they would not be able to attack this bank account because W expressly held the Bank account in her name, H did not have any rights of withdrawal and there was no commingling. However, at divorce, the bank account is subject to equal division as it was funded by W's earnings. Thus, H and W own 50% interest each in the bank account.

At issue is whether H may argue for an exception to the equal division of assets to apply here because W misappropriated CP. Although the general rule is that CP is to be divided 50-50 on divorce, a spouse who misappropriated community funds may not be entitled to receive an equal share due to her wrongful acts. H will argue that W misappropriated community funds here because she secretly opened up a bank account without informing H and deposited only her earnings in there. H will argue that because each spouse's earnings are CP he was entitled to those funds during the course of their marriage as it was supposed to be part of the community estate rather than W's private funds. Due to this misappropriation, H will argue that W should be forced to forfeit her interest in the A1 Bank and that he be entitled to take the 50k in full. Ultimately, this is a decision for the judge to make when he is ordering the divorce decree.

Additionally, H may argue that W again breached her duty of good faith and fair dealing by hiding the funds from him. He will argue that W had assumed control over the couple's finances and used that power to obtain an unfair advantage over H by hiding funds from him. He will argue that the agreement to allow her to control the couple's finances imposed a duty on W to use the duty of the highest good faith and fair dealing when she managed the finances and that she breached it by failing to disclose all the funds to H. W will have to overcome the presumption of undue influence by

showing that H knew of all the facts constituting the transaction. However, because H did not have any idea about the secret bank account it will be impossible for W to overcome this burden.

Therefore, H has a strong argument for having the court strip W's interest in the A1 Bank account funds and reward the full 50k to H for breaching her fiduciary duties as a spouse and for misappropriation of community funds. However, it is important to note that H's and W's marital economic community ended in 2016. The marital economic community ends when there is a permanent separation by the parties and an intent by one of the spouses to not resolve the marriage. The filing for a marriage dissolution is determinative evidence of such intent. Therefore, the marital economic community ended in 2016. From that time, any money that W deposited into the A1 Bank Account will be presumed to be her SP since the marital economic community has ended.

Answer B

General Presumptions

California is a community property state (CP) all property acquired from the date of the marriage until separation is presumed to be CP - owned by the spouses equally 50/50. All wages earned from the time or labor of a spouse during marriage are CP. Property acquired before marriage or after separation is presumed to be Separate Property (SP) of the acquiring spouse. Property received by gift, bequest, or devise is also the separate property of the receiving spouse, as are the rents, issues and profits produced by SP. The character of the property may not be changed simply by changing the manner in which the property is held, the property will be traced to its source and characterized according to the source used to acquire the property. Upon divorce, spouses are entitled to in kind 50/50 distribution of all property.

Transmutation

One spouse may not gift themselves community property. In order to change the character of property from CP to SP or SP to CP, there must be an agreement in writing signed by the spouse whose interest is adversely affected explicitly stating that the spouse intends and understands that she is altering the character of the property. Oral agreements will not be a valid transmutation.

1. THE CONDO

The general presumption is that property acquired during the marriage is CP. Hal acquired the condo in 2010 which was during his marriage to Wanda. However, by law, property acquired through inheritance is the separate property of the inheriting spouse. Since Hal acquired this property from his uncle through inheritance, the condo was Hal’s SP. The issue is that Hal, at Wanda's insistence, titled the property in Joint tenancy with Wanda.

Title in Joint Form

A married couple who takes title in joint form when it is inconsistent with the nature of the funds used to acquire the property will be presumed to have intended the property as CP. Taking title in joint form with no indication that a spouse wanted to reserve a separate property interest creates the presumption of CP. Here, Hal and Wanda took title in joint form and Hal did not reserve any separate property interest, there also is no other writing that evidences an agreement between Hal and Wanda for Hal to keep a separate interest so the court will presume that because they took title in a joint form that they intended the property to be CP.

Transmutation by Deed

In order for spouses to change the character of property from SP to CP as in the case with the condo being Hal's SP and then later conveying to CP, there must be a valid transmutation. The issue is whether the deed from Hal to Hal and Wanda will be a valid transmutation of his interest. Typically, a deed satisfies the writing requirement for the transmutation if signed by the party adversely affected, in this case Hal. However, Hal may not have intended for interest in the property to be adversely affected. The facts indicate that he only agreed to put the condo in joint tenancy after Wanda's insistence that he do so in order to avoid probate. It is likely that Hal being an artist relied on Wanda's assertion because Wanda was a successful accountant who would have known the consequences of such decisions as titling property in a particular manner. The courts have been unclear in whether or not they consider a deed by one spouse to other spouses to be a valid transmutation. Assuming that that the deed from Hal to Wanda is a valid transmutation, then at most Hal would be allowed reimbursement for his SP that was used to acquire the condo by the community. The reimbursement will be allowed without interest or apportionment of increase in value to the items. A court would likely use the value of the property at the time it became CP which for the condo was $250,0000, Hal would be reimbursed for the $250k at divorce and the remaining value of the condo would be divided in kind 50/50 between Hal and Wanda.

Fiduciary Duties of Spouses

Spouses owe one another the highest duty of care and are fiduciaries to one another. If one spouse breaches her fiduciary duty to the other and takes advantage of that spouse by gaining an interest financially or in an asset, then the non-breaching spouse may be able to set aside the conveyance on those grounds. Here, Wanda was a successful accountant and Hal was an art teacher, there is a strong possibility that but for Wanda's insistence that Hal put the condo in joint form that he would not have done so. By insisting that the condo be in joint title, Wanda gained a financial interest in property that she would have otherwise had no rights to because it was received by Hal through inheritance. If Hal can show that Wanda breached her duty to him in convincing him to put the condo in joint form only to benefit herself, Hal may be able to have the conveyance set aside.

Equal Rt of Mgmt

Each spouse has an equal right to manage the assets of the community and keep the other spouse reasonably informed as to the financial situation. Here the facts indicate that Wanda managed the couple's finances and that she also kept a secret bank account without Hal's knowledge. By doing this she breached the duty to share management with Hal and used it to her advantage to try to hide $50k - Hal will also be able to use this to bolster his case that Wanda breached her fiduciary duty to him and should not be allowed to take an interest in the condo.

Conclusion as to the Condo: Hal will likely be entitled to reimbursement for his contribution of SP to CP - in this case the condo was valued at $250k at the time he conveyed to Joint Tenancy so he will have a right to reimbursement of the $250k and the remaining value will be CP. However if the court finds that the deed was not a valid transmutation from Hal's SP to CP then the condo would remain Hal's SP.

2. THE MOTORCYCLE

One spouse may not appropriate CP to themselves by simply taking title to the property in their name alone. When both SP and CP are used for the purchase of an asset the

funds used to acquire the property will be traced to their source and the property will be characterized in accordance with funds used for acquisition.

Down Payment

Property that was initially SP will continue to be SP even if the SP is exchanged or sold and the form changes. Hal inherited $10k from his Uncle - inheritance is an area of SP. Hal then took his $10k of SP and used it for a down payment on a motorcycle that he took title to in his name alone. Had the motorcycle cost only $10k, there would be no issue here because the $10k used to purchase the motorcycle could be traced directly to the inheritance which was Hal's SP making the motorcycle then SP as well. The motorcycle cost $20k, though, so it must be determined where the other $10k came from and whether the additional $10k can be traced to other SP or to CP.

Credit - Intent of the Lender

The credit, good will and reputation of a spouse belong to the Community during the marriage, this also includes credit scores. A loan taken out during the marriage is a community debt unless it can be shown that the lender in determining whether to loan one spouse the money relied solely on the borrowing spouse’s separate property for repayment. The fact that a lender "relied" on one spouse’s good credit is not the determining factor because good credit of one spouse belongs to both spouses as community property. When Hal borrowed the additional $10k from the lender, the lender ,relied on Hals good credit - Hal's good credit belongs to the community and so therefore, the loan for the motorcycle was a community debt. If there were other facts that indicated that the lender relied on Hal's separate property interest - such as the condo - for repayment then the debt could belong to Hal alone, but based on the facts present that the lender relied on credit of Hal the debt was community debt.

Repayment of Loan w Joint Acct $

Wages and earning of a spouse are community property if earned during the marriage. Here Wanda and Hal were putting their earnings into a joint checking acct which was used to pay off the motorcycle loan. Because CP was used to pay off half of the

motorcycle loan, the community owns a 1/2 interest in the motorcycle.

Conclusion as to the motorcycle: Hal owns the motorcycle as 50% SP because half of the purchase price can be traced to his SP inheritance, the community owns the other 50% interest because community property was used to obtain the loan and pay off the loan.

3. CAMPER VAN

When one spouse uses CP to buy a gift for the other spouse and puts title into that spouse's name alone, it is presumed to be a gift. While one spouse may not appropriate CP, one spouse may make a gift of interest in CP to the other spouse as SP. In this case, Hal will argue that Wanda taking him out for his 40th birthday and buying the camper van was her gifting her interest in the CP to Hal as his SP. On the other side, Wanda will argue that she did not intend to make a gift to Hal as SP, but instead intended to retain a CP interest in the van and that there was no valid transmutation from CP to Hal SP.

Gift Exception to Transmutation

There is an exception to the requirement that all transmutation be in writing. The exception is for gifts given to one spouse that are for that spouse's personal use and that are not substantial in value. Here Hal may argue that the van would also fall into the gift exception even if there was no writing that evidenced Wanda's intent to may a gift. Hal did use the camper van for fishing and summer trips with his friends. There is no mention of Wanda participating in these trips which would indicate that the van was for her personal use. However the gift must also not be substantial in nature and the van cost $20k; whether or not this is of substantial value would be considered in light of Hal and Wanda's station in life - their assets etc. While this may be an arguable issue, courts have typically found that cars are not items that are personal enough in nature to fall within the exception.

Conclusion as to the Van: If a court finds that by purchasing the van and titling it in

Hal's name alone that Wanda intended a gift of her CP to Hal SP, then the van will be considered Hal's SP at divorce. Otherwise by tracing the funds to the CP checking account the van will be deemed cp.

4. A1 BANK

Wages earned by either spouse's time, labor, or skill during the marriage belong to the community. Here Wanda took her earnings during the marriage which are CP and deposited them into a secret acct w/o Hal's knowledge or name. Regardless of the fact that Hal's name is not on the account, Wanda's wages still belong to the community and, therefore all of the money in the account ($50k) is CP. A court may continue to have jurisdiction over the proceedings and assets until they are all disbursed. Just because in this case Hal did not discover the $50k until right before the final hearing will not affect his rights - and if Wanda purposely hid the money or failed to inform the court of its existence then she may be denied interest in the money to the extent that justice and fairness require.

Conclusion : The $50k in the A1 acct is CP subject to in kind division upon divorce.

Q2 Professional Responsibility / Evidence

Claire had been a customer of Home Inc., a home improvement company owned by Don. Dissatisfied with work done for her, she brought an action against Home Inc. and Don in California state court, alleging that they had defrauded her.

Don entered into a valid retainer agreement with Luke, engaging Luke to represent him alone and not Home Inc. in Claire's action. Luke then interviewed Don, who admitted he had defrauded Claire but added he had never defrauded anyone else, before or since. Luke subsequently interviewed Wendy, Don's sister. Wendy told Luke Don had admitted to her that he had defrauded Claire. Luke told Wendy that Don had admitted to him too that he had defrauded Claire. Luke drafted a memorandum recounting what Wendy told him and expressing his belief Wendy would be a good witness for Claire.

Shortly before trial, Don fired Luke. Don soon died unexpectedly.

Claire filed a claim against Don's estate and a claim against Home Inc., alleging as in her action that they had defrauded her. As the final act in closing Don's estate, the executor settled Claire's claim against the estate, but not against Home Inc.

At trial against Home Inc., which was now the sole defendant, Claire has attempted to compel Luke to testify about what Wendy told him, but he has refused, claiming the attorney-client privilege. She has also attempted to compel him to produce his memorandum, but he has again refused, claiming both the attorney-client privilege and the attorney work-product doctrine.

1. Should the court compel Luke to testify about what Wendy told him? Discuss. Answer according to California law.

2. Should the court compel Luke to produce his memorandum:

    a. To the extent it recounts what Wendy told him? Discuss. Answer according to California law.

    b. To the extent it expresses his belief that Wendy would be a good witness for Claire? Discuss. Answer according to California law.

3. What ethical violations, if any, has Luke committed? Discuss. Answer according to California and ABA authorities.

Answer A

1. Should the court compel Luke to testify about what Wendy told him?

Attorney-Client Privilege: Don and Luke

The attorney-client privilege protects confidential communications made to facilitate legal representation. It is narrower than the duty of confidentiality, which applies to any information related to the representation of a client, even if no attorney-client relationship is formed. The attorney-client privilege protects communications made by the client or the client's agent to the lawyer or the lawyer's agents. In the corporate context, the attorney-client privilege, in California, protects communications made by a spokesman for the corporation or by someone whose actions could be imputed to the corporations for purposes of liability.

The attorney-client privilege attaches and applies even if a lawyer is subsequently removed from a case. Thus, here, Don's decision to fire Luke did not prevent the privilege from applying to confidential communications made to facilitate legal representation. However, in California, the attorney-client privilege ends when the client dies and his estate is entirely disposed of. Consequently, here, the attorney-client relationship between Luke and Don ended when Don died and his estate settled Claire's claim against the estate. In California court, Luke would not be able to claim attorney-client privilege.

Moreover, the issue here is whether the attorney-client privilege covers communications between Wendy and Luke in the first place. As noted, in order for the privilege to apply, the communication must be confidential and it must be made for the purposes of facilitating a legal relationship. Additionally it must be communicated by either the client or the client's agents. Here, it does not appear that the communication was confidential or that Wendy was Don's agent. Wendy told Luke that Don had admitted to her that he

had defrauded Claire. By sharing this information with a third party, Don arguably made it unprotected because it was no longer confidential. Consequently, the attorney-client privilege would not apply on that basis.

Second, it does not appear that Wendy was Don's agent. The attorney-client privilege will potentially protect communications made by a client to the lawyer's agent, such as a physician hired to examine the client, or by the client's agent, such as an employee speaking on behalf of the corporation. But it does not cover statements made by everyone who knows the client or is in a familial relationship with him or her. Here, Wendy does not appear to have been acting in any way as an agent of Don, nor is she an agent of Luke. Consequently, the attorney-client privilege between Luke and Don would not apply.

Attorney-Client Privilege: Wendy and Luke

Additionally, Wendy was not speaking with Luke for the purpose of facilitating his legal representation of her--she was not a client. Moreover, as noted above, it does not appear the communication was confidential. Consequently, there does not appear to be an argument for an independent attorney-client privilege between Wendy and Luke.

Given that Wendy's statement does not appear to have been protected by the attorney-client privilege based on Luke's representation of Don or any purported attorney-client relationship between Luke and Wendy, the court should likely compel Luke to testify about what Wendy told him.

2. Luke's Memorandum

Attorney-Client Privilege

As noted above, the attorney-client privilege does not seem applicable here, either based on Luke's representation of Don or any purported attorney-client relationship

between Luke and Wendy. Consequently, the attorney-client privilege is not a basis for the court to refuse to compel production of the memorandum.

Work Product

In California, the work product privilege applies solely to materials prepared by the attorney in anticipation of litigation. This is unlike the federal rules, where the work product doctrine applies generally to materials prepared in anticipation of litigation. Materials prepared in anticipation of litigation that are comprised of the attorney's mental impressions, notes, or opinions, are absolutely protected and are not discoverable. Other materials prepared in anticipation of litigation received are qualified work product. These materials may be discoverable upon a showing of substantial need and inability to acquire the materials elsewhere.

a. Wendy's Statements

To the extent the memorandum recounts what Wendy told Luke, it is qualified work product. This portion of the memorandum would not constitute Luke's mental impressions or opinions regarding the interview. It is merely a factual recounting of the interview. Consequently, this portion of the memorandum would likely receive qualified protection. If Claire can show substantial needs and inability to acquire the information contained in the interview without compelled disclosure, then the court should compel Luke to produce his memorandum. However, this seems unlikely to apply here. The facts indicate Don died, but they do not state that Wendy died. Based on the facts, it appears that Claire could easily subpoena Wendy in order to ask her questions and try to establish the same information she is seeking from Luke. Without this showing of inability to get the information without compelled disclosure, it appears unlikely the court should compel Luke to turn over the memorandum.

b. Luke's Belief That Wendy Would be a Good Witness for Claire

To the extent the memorandum expresses Luke's belief that Wendy would be a good witness for Claire, it is absolutely privileged. This portion of the memorandum is made up of Luke's mental impressions and opinions. The court should absolutely not compel Luke to produce this portion of the memorandum. It is worth noting that the mere presence of an absolutely protected mental impression or opinion in a document does not make the entire document or the information contained therein absolutely privileged. If the court did determine there was substantial need and unavailability, and chose to compel Luke to produce the memorandum to the extent it recounts his interview with Wendy, then it could redact or eliminate the portions of the memorandum that are absolutely privileged.

3. What ethical violations, if any, has Luke committed?

Fee Agreement--Financial Duties

In California, fee agreements must be in writing unless the amount is less than $1,000, the work is for a corporation, the client agrees to forego a written agreement, the work is routine, or there is an emergency. Here, Don entered into a valid retainer agreement. Thus, there is an assumption that this requirement is satisfied. But if the retainer agreement was not in writing, it would likely be a violation of California ethical rules because none of the exceptions appear applicable. The ABA does not have a similar requirement for non-contingent fee agreements--they do not have to be in writing, although it is encouraged. Consequently, there is no ABA violation regardless of whether the fee agreement is in writing.

Luke's Decision to Tell Wendy about the Fraud--Duty of Confidentiality

The duty of confidentiality requires a lawyer not to disclose information learned in the course of representation. It attaches even when no attorney-client relationship is

formed, unless there is a disclaimer in plain English, so long as the information is related to legal representation. It survives the representation and the client.

Here, Luke violated the duty of confidentiality by telling Wendy that Don had admitted to defrauding Claire. Luke learned of this information in the course of representing Don, thereby making the information confidential. Luke then failed to safeguard this information by actively revealing it to Wendy.

California and ABA authorities provide exceptions to the duty of confidentiality when a client makes a claim against a lawyer, when the information relates to the services provided by the attorney, when disclosure is required by the court, and when the lawyer learns information relating to imminent death or substantial bodily injury of a third-party. An attorney is also allowed to reveal information that is necessary to represent the client or that the client consents to him revealing. The ABA permits disclosure when a client is using the lawyer's services to perpetrate fraud or commit a crime that is likely to result in substantial financial loss. It also permits disclosure when seeking an ethical opinion on a matter. California does not have an exception for financial loss. Here, none of these exceptions seem applicable. It does not appear that Don consented to Luke telling Wendy that Don had defrauded Claire, nor does it appear that such an admission to Wendy was necessary for Luke's representation of Don. Luke may argue that there was implied consent because Wendy told him that Don had admitted the fraud to her, but it does not appear that Don ever instructed Luke to share this information prior to the interview. Under ABA authorities, Luke could argue that his disclosure was necessary to prevent financial loss, but this argument would not prevail because Don was not using Luke's services to defraud anyone and, since the fraud had already occurred, there was no imminent, substantial financial loss to any party. Moreover, this exception is inapplicable in California.

Consequently, Don likely breached his duty of confidentiality by telling Wendy about the fraud.

Luke Testifying at Trial--Duty of Fairness

Under ABA authorities, a witness may not represent a client if he is likely to have to testify at trial. A client generally may not testify at his client's trial unless his testimony relates to his services, a breach of his duties, or his testimony is necessary to prevent undue hardship. In California, an attorney may testify at a bench trial and may testify if his client consents at a jury trial. Here, Luke would not breach his duty by testifying in the suit against Home Inc. because it was not his client.

Duty of Competence

An attorney owes a duty of competence to his clients. He must have the necessary skill, thoroughness, and preparation required for competent representation. The duty requires the attorney to communicate with the client about important matters. Here, Don fired Luke shortly before trial. Although these facts do not themselves implicate the duty of competence, it suggests that Luke may not have been acting competently in his representation of Don, leading Don to fire him from the case. Moreover, the fact that Luke chose to reveal confidential information, apparently without consulting with Don, further suggests a violation of the duty of competence. California punishes intentional, repeated, or reckless violations of the duty of competence. Here, the facts do not suggest one way or another whether Luke intentionally, repeatedly, or recklessly violated his duty of competence. Thus, it is unclear whether he would be subject to any discipline even if he did act incompetently according to ABA authorities.

Duty of Loyalty

The duty of loyalty requires an attorney not to use non-public information against a client in a subsequent proceeding. According to ABA authorities, if there is a significant likelihood that an attorney will be materially limited in his representation of a client by professional or personal interest, the attorney can only take on the representation if: he reasonably believes he can provide representation unaffected by the conflict, he informs

the client, and he receives consent. The informed consent must be memorialized in writing. In California, there is no reasonable belief requirement, both potential and actual conflicts require disclosure, and consent must be in writing unless it is based on an attorney's past representations or personal conflicts. Here, Luke took on the representation of Don, independent of Home Inc. If Luke had tried to represent both Home and Don, then he would have had a significant risk of material limitation and a potential conflict, which would have required informed written consent under the ABA and consent in writing in CA. Given that he did not appear to have any conflicts here, he is likely not in violation. However, if he testifies at Home Inc.'s trial, he may violate his continuing duty of loyalty if he reveals any non-public information he learned in the course of representing Don.

Duties on Withdrawal

When an attorney is fired, he must return all unspent retainer money as well as the client's papers and documents necessary for representation. California authorities specifically prohibit holding on to client documents for the purpose of getting paid. Here, so long as Luke returned Don's papers and any unspent retainer money, he likely did not commit a breach of his duties upon withdrawal from representation.

Answer B

1. LUKE'S TESTIMONY ABOUT WENDY'S STATEMENT

Protection by Attorney Client Privilege

At issue is whether Luke's interview of Wendy is protected by the attorney-client privilege.

In California, the attorney-client privilege attaches to a communication made in confidence between a client and his lawyer in the course of the representation. The client, the sole holder of the privilege, can bar the lawyer from testifying as to the content of the communication. However, the privilege does not survive the death of the client after the client's executor has finished distributing his estate. There are certain exceptions to the attorney-client privilege, including when the lawyer reasonably believes that disclosure would be necessary to avert serious bodily harm to others, and when the client is attempting to use the lawyer's services to perpetrate a crime or fraud.

Here, as part of his preparation for trial, Luke interviewed Don's sister, Wendy. Wendy told Luke that Don had admitted to her that he had defrauded Claire, but never anyone else. Nothing in the facts indicates that Wendy did not tell Luke this information in confidence. Her statement, however, was not a communication between a lawyer and client, but between a lawyer and a third party. It therefore falls outside the scope of the attorney-client privilege. Moreover, by the time Claire was attempting to compel Luke to testify at trial, Don had died. We also know that his executor had closed his estate, since the executor had settled Claire's claim against Don. Therefore, Don's ability to invoke the privilege died along with him, and there is no bar under the attorney client privilege to Luke's testimony. The court should compel Luke to testify.

2. LUKE'S MEMORANDUM

Attorney-Client Privilege with Regard to Wendy's Statement and Luke's Belief

At issue is whether Luke's description of Wendy's statement or Luke's belief about Wendy's suitability as a witness is protected by the attorney-client privilege.

As noted above, the attorney client privilege only attaches to confidential communications between lawyers and clients, and it does not survive the death of the client. Here, Luke wrote a memorandum after interviewing Wendy that contains two components: Wendy's statements, described above, that Don had admitted he had defrauded Claire; and Luke's belief that Wendy would make a good witness for Claire. Neither of these is a communication between Don, the client, and Luke, the lawyer. Moreover, because Don is deceased and his estate has been closed, no one survives to invoke the privilege. The attorney-client privilege does not provide a justification for Luke to refuse to produce the memorandum.

Work Product Doctrine with Regard to Wendy's Statement

At issue is whether Luke's memorandum, to the extent that it recounts Wendy's statement, is protected by the work product doctrine. California law privileges from discovery documents produced in anticipation of litigation. It also draws a distinction between a qualified privilege, which attaches to statements of fact recounted in work product, and an absolute privilege, which attaches to statements of belief or opinion by an attorney contained in work product. The qualified privilege may be overcome by a showing that there is a substantial need for the facts contained in the work product and that they are unavailable through other means, whereas the absolute privilege cannot be overcome. The work product doctrine survives the death of the client.

Here, Luke's memorandum contains Wendy's statement that Luke had defrauded Claire. Luke prepared this memorandum after Don retained him to defend him in the fraud action, causing him to interview Wendy. It was therefore made in anticipation of litigation, placing it within the scope of the work product doctrine. The description of what Wendy told Luke, however, is a factual one. It is therefore subject only to a qualified privilege, and Claire may be able to overcome it. Don's admission that he defrauded Luke would be damning evidence against Home Inc., the remaining defendant at trial. Claire can likely show that there is a substantial need for the testimony. However, it does not appear on these facts that Claire would not be able to

obtain this testimony by other means. She could simply subpoena Wendy, or she could have noticed Wendy's deposition during discovery, to obtain Don's admission from Wendy herself. If Wendy is for some reason unavailable, then Claire may be able to compel production.

Therefore, the qualified privilege that attaches to Wendy's statement likely protects the memorandum from discovery.

Work Product Doctrine with Regard to Luke's Belief

At issue is whether Luke's belief about Wendy's suitability as a witness is protected by the work product doctrine. As noted above, this belief is expressed in a memorandum that Luke prepared in anticipation of litigation; indeed, there would be no other reason to speculate as to whether Wendy would make a good witness. Luke's belief, however, is absolutely protected by the work product doctrine, since it expresses a lawyer's beliefs and opinions about the proper strategy for trial. Therefore, regardless of what showing Claire makes at trial, it is protected, and the court should not compel production.

Overall Conclusion

Neither Wendy's statement nor Luke's belief is protected by the attorney-client privilege, but both are likely protected by the work product doctrine. The court should deny the motion to compel.

3. LUKE'S ETHICAL VIOLATIONS

Duty of Confidentiality

At issue is whether Luke breached his duty of confidentiality to Don.

Under the ABA and California rules, a lawyer owes his client a duty of confidentiality. This duty prohibits a lawyer from revealing to any third party information learned from or about the client in the course of the representation, unless an exception applies. It attaches as soon as a lawyer-client relationship begins. Here, Luke and Don entered into a lawyer client relationship when they executed a valid retainer agreement. Luke

then interviewed Don and learned that Don had defrauded Claire-a fact learned about Don during the course of the representation. Luke then, in his conversation with Wendy, revealed this fact to Wendy. This was thus a disclosure of a client's confidential information, so unless an exception applies, Luke is subject to discipline under both the ABA and California rules.

Exceptions to the Duty of Confidentiality

i. Implied consent

A client may impliedly consent to a lawyer's use of his confidential information, when such disclosure would be a natural and necessary feature of the representation. Here, Luke could argue that Don impliedly consented for him to reveal this information to Wendy, since Wendy was Don's sister and Luke might need the information to build a rapport with her. However, especially since Luke only revealed the information after Wendy had told him what Don had told her, this exception does not apply.

ii. Averting physical harm

A lawyer may reveal a client's confidential information under the ABA and California rules if he reasonably believes that disclosure is necessary to avoid imminent bodily harm to a third person. In California, the harm must arise out of a criminal act, and the lawyer must first attempt to dissuade the client and inform him of the lawyer's intent to reveal. Here, Don admitted to past fraud, which seems to pose no risk of bodily harm-criminal or otherwise-to anyone. Therefore, this exception does not apply.

iii. Serious financial harm using the lawyer's services

The ABA, but not California authorities, allow disclosure if the lawyer believes it to be reasonably necessary to avoid serious financial harm to a third party, and the harm would be perpetrated using the lawyer's services. Here, Don admitted to fraud in the past, but said he had not defrauded anyone else since. Nor does he appear to have sought Luke's help in perpetrating any such fraud. Therefore, this exception does not apply.

iv. Fact has become generally known

Under both ABA and California rules, a lawyer may reveal a client's confidential information if that information is no longer confidential because it has become generally known. Here, Luke can argue that because Wendy already knew that Don had admitted to defrauding Claire, there was no breach of confidence by revealing what Don had told Luke. However, although this fact might have been known to Wendy, it was not *generally* known in the world. Therefore, this exception does not apply.

Conclusion

Luke is subject to discipline because he breached his duty of confidentiality and no exception applies.

Safeguarding the Client's Property

At issue is whether Luke violated any ethical rules by not returning the memorandum to Don when Don fired him.

A lawyer owes his client a duty to safeguard the client's property under both ABA and California law. This includes a duty to return to the client all materials related to the representation upon the end of representation. A lawyer may not retain a client's case file, including for the purposes of recovering his fee. Here, Don fired Luke before trial, but Luke appears to have kept possession of the memorandum recounting his meeting with Wendy until the time of trial. Therefore, by failing to return the memorandum to Don or his estate, Luke breached his duty to safeguard client property.

Q3 Remedies

Rick Retailer owns all pieces but the queen of a chess set carved by Anituck, a famous artist who carved 15 chess sets. No one today owns a complete Anituck chess set.

Six existing Anituck queens are owned by collectors. The last one was sold in 1983 for $175,000. The current owners have refused to sell their queens to anyone.

If Rick could exhibit a complete Anituck chess set, he would draw people worldwide who would buy memorabilia with pictures of the full chess set and other products. It is impossible to know exactly how much Rick would make, but a complete Anituck chess set could be worth in excess of $1 million.

Last week, Sam Seller brought to Rick an Anituck queen he found in his attic and asked if it was worth anything. Rick asked what Sam wanted for the queen. Sam asked whether $450 would be fair. Rick replied that $450 would be fair and offered to write a check immediately. Rick and Sam entered into a valid contract. Sam agreed to hand over the queen the next day.

The next day, Sam called Rick and said, “I learned that you defraud people out of expensive antiques all the time and that the queen is worth thousands of dollars. I am going to sell the queen to another collector.”

Rick has sued Sam for specific performance for breach of contract, and has sought a temporary restraining order and a preliminary injunction.

What is the likelihood that Rick will obtain:

1. A temporary restraining order? Discuss.

2. A preliminary injunction? Discuss.

3. Specific performance? Discuss.

Answer A

(1) TEMPORARY RESTRAINING ORDER

The issue is whether or not Rick will likely be successful in obtaining a temporary restraining order.

TEMPORARY RESTRAINING ORDER

A temporary restraining order (TRO) is an order granted in equity that preserves the status quo until a preliminary hearing on the matter can be heard. They are generally granted in emergency situations. For a TRO to be granted, the party seeking the TRO must show: (1) **irreparable harm** will occur in the absence of awarding the TRO; (2) **balance of hardships** favors granting the TRO; and (3) the party seeking the TRO is **likely to prevail on the merits**. While a TRO may be granted ex parte (without opposing counsel's presence), courts will generally requiring a strong showing of a good-faith effort to notify the opposing party or a strong showing of why notice could not be effectuated. TRO's are awarded for a short duration, typically 10-14 days, depending on the jurisdiction. Some courts also require a showing that damages are inadequate.

Here, Rick is seeking a temporary restraining order in order to prevent Sam from selling the Anituck queen to another collector. We do not know when Sam will find a collector or when the sale will be executed. Rick will likely be excused from providing **notice** of the TRO to Sam because Sam, agitated, may decide to expedite the sale to another collector. If the jurisdiction requires a showing that **damages are inadequate**, Rick will be successful because the chess piece is unique (there are only 15 chess sets made, 6 possessed by collectors who are refusing to sell). Moreover, as discussed further below, Rick's damages are speculative with respect to how much he would make if he had the complete chess set. Thus, the notice and inadequate damage elements are satisfied)

In all jurisdictions, in order to be successful, Rick must satisfy the elements:

(1) **Irreparable Harm**: irreparable harm may occur because it is possible that Sam will sell the queen to another collector before the preliminary hearings. If Sam sells the queen to another collector, Rick will suffer irreparable harm because there are only 15 pieces made in the entire world, 6 owned by collectors and all other current owners have refused to sell their queens. Thus, this factor leans in favor of a finding that Rick will suffer irreparable harm.

(2) **Balance of Hardships**: The balance of hardships must favor granting a TRO, which means that the party seeking the TRO will be substantially harmed if the TRO is not granted during the period before a hearing can be had. Rick will argue that the balance of hardships favors approving the TRO. If Sam does not go through with the sale, Rick will be prevented from obtaining another queen piece. Because Sam does not currently have an expiring offer from another collector, the court will likely find that the balance of hardships favors granting Rick a TRO until a full hearing on the merits can be had.

(3) **Likely to Prevail on the Merits**: While it is true that Rick will likely not be successful in being awarded specific performance (see below), the court does not analyze the parties defenses when granting a TRO. On its face, there appears to be a valid contract and Sam is repudiating on the contract: Rick offered to buy and Sam agreed to sell the chess piece for $450. Thus, it appears that Rick will likely prevail on his action for specific performance. At the later hearing, the court will consider defenses and other equitable remedies. Thus, the court will likely find that Rick will prevail on the merits.

CONCLUSION

Because the court does not consider defenses in granting a TRO, the court will likely grant Rick a TRO to restrain Sam from selling the piece until a hearing could be had on

the matter. If Sam fails to comply with the courts order, he will be held in contempt.

(2) PRELIMINARY INJUNCTION

The issue is whether or not Rick will likely be successful in obtaining a preliminary injunction.

PRELIMINARY INJUNCTION

Similar to a TRO, a preliminary injunction is an injunction issued to preserve the status quo until a full hearing on the merits can be had granted by equity courts. In addition to the elements of the TRO (irreparable injury, balance of hardships, likelihood to prevail on the merits, and in some jurisdictions, inadequate legal remedies), in order for a preliminary injunction to be granted, the opposing party must have notice and an opportunity to be heard at the hearing and no defenses may apply. Additionally, the court may require the plaintiff (here, Rick) to post a bond in case Rick is ultimately not successful in his claim for specific performance.

(1) **Irreparable Harm**. See above.

(2) **Balance of Hardships**. See above.

(3) **Likelihood of Prevailing on the Merits**. See above.

(4) **Inadequate legal remedy**. See above.

(5) **Notice**. Rick must give notice to Sam and give Sam an opportunity to be heard at the hearing for the preliminary injunction. At that point, Sam will be able to raise all of his defenses (see below). If Rick fails to give Sam notice, then the court will deny Rick's preliminary injunction.

(6) **Bond**. The court may require Rick to post a bond to cover any losses to Sam in the event Rick ultimately loses the claim for specific performance. Courts are more relaxed on this requirement if the plaintiff is indigent. There are no facts with respect to Rick's current earnings, thus it is not possible to ascertain whether the court will excuse Rick from the bond requirement.

(7) **No Defenses**. In order for the court to grant a preliminary injunction, there must not be any viable defenses raised by the defendant. Here, Sam will likely be successful in defending against the grant of the permanent injunction by claiming **unclean hands**.

Unclean Hands: Unclean hands is an equitable defense. Under this defense, a plaintiff who acted unfairly with respect to the current action will be barred from recovery because they too have "unclean hands." Here, Sam will likely successfully argue that Rick materially misrepresented the value of the chess piece. The last chess piece to be sold was for $175,000 and Rick knew this. Thus, it would be inequitable for him to buy the piece for $450, knowing the true value of the piece, and representing to Sam that $450 is a fair price. Rick will argue that he did not know the true value of the goods. However, this argument will likely fail because Rick understood and appreciated the value of the full set ($1,000,000) and how much money he could make selling memorabilia pictures of the full chess set and other products. Because injunctions are granted in equity, it will be unfair to allow Rick to recover when he was not acting fairly. Thus, the court will likely find the defense of unclean hands applies.

Laches: Laches is another equitable remedy in which case the plaintiff's unreasonable delay in bringing a claim caused substantial prejudice to the defendant. Here, Rick is seeking the preliminary injunction immediately after learning that Sam is repudiating on the contract and thus the laches defense does not apply.

Misrepresentation. See below in damages section.

CONCLUSION

The court will likely not grant the preliminary injunction because Sam will likely successfully raise an unclean hands defense.

(3) SPECIFIC PERFORMANCE

In order for Rick to be entitled to specific performance, there must be a breach of contract.

GOVERNING LAW

The UCC governs contracts for the sales of goods, which are tangible, moveable things. Common law governs all other contracts, including service and real estate contracts. Here, because the queen set is a good (tangible, moveable thing), the **governing law** is the UCC.

ANTICIPATORY REPUDIATION

Under the UCC, if a party unequivocally expresses their intent to not perform their obligation under the contract, the party has anticipatorily repudiated, which entitles the other party to stop performance and sue immediately. Here, under the terms of their contract (which was valid, see below), Sam was obligated to sell Rick the chess piece for $450. Sam called Rick and told him that he was going to sell the queen to another collector. Because Sam only had one queen piece, this expression evidences Sam's refusal to perform.

Accordingly, Rick is entitled to stop performance and sue Sam for damages or for specific performance.

SPECIFIC PERFORMANCE

The issue is whether or not Rick will likely be successful in obtaining specific performance.

In contracts, specific performance is a remedy in which the court orders the defendant to perform his obligations under the contract. This is usually available only for unique goods and for real estate transactions. In order for the court to grant specific performance, the following elements must be met: (1) valid contract with clear and definite terms; (2) inadequate legal remedy; (3) feasibility of enforcement; (4) mutuality of performance; and (5) no defenses.

VALID CONTRACT

In order for the court to order specific performance, there must be a valid contract with definite and certain terms. To be valid, a contract must have assent (offer and acceptance) and be supported by consideration. Here, because the queen set is a good (tangible, moveable thing), the **governing law** is the UCC. Under UCC principles, there was a valid contract formed, at least on its face: there was an offer (offer to buy the chess piece by Rick); there was acceptance (Sam agreed to sell the chess piece), and there was consideration ($450 in exchange for the good).

Additionally, because the contract price was for $450, evidence of the oral agreement did not need to be in writing because the Statute of Frauds does not apply.

Moreover, the facts state that the contract was valid. Thus, this element is satisfied.

However, as discussed below, Sam will likely be successful in raising defenses to the contract formation, including misrepresentation and unilateral mistake.

INADEQUATE LEGAL REMEDY

Money damages must be inadequate in order for a court to grant specific performance. Here, Rick will likely be successful in satisfying this element because the queen set is unique -- there are only 15 sets made and the current owners are refusing to sell their queens to anyone. Moreover, money damages are speculative. Rick does not know how much he would make if he has the full chess set -- he believes that people all over the world would come to him to take memorabilia pictures and purchase other products. He also speculates that the value of the entire chess set would be about $1,000,000. However, these calculations are entirely speculative. Because the goods are unique, the UCC will allow specific performance.

FEASIBILITY

This element refers to whether or not a court can enforce the specific performance. This is usually not a problem in situations where the court is ordering the defendant not to do something (negative) because of the court's power of contempt. Ordering behavior may be more difficult if the defendant is in another jurisdiction and there are oversight issues. Here, that doesn't seem to be the case. The court can order Sam to perform his contract obligations (sell the queen to Rick for $450), and if he fails to do so, the court can hold him in contempt.

MUTUALITY OF PERFORMANCE

Mutuality of performance requires each party to the contract to be willing and able to perform their obligations. Here, this element will be satisfied because Rick has the $450 to pay for the chess piece, and Sam still has the chess piece in his possession.

DEFENSES

Both equitable and legal defenses are available because specific performance is an

equitable remedy, but because it requires the existence of a valid contract, contract defenses also apply.

Misrepresentation. Misrepresentation is a defense in which case the party seeks to either rescind the contract or argue that the contract never existed because there was no meeting of the minds. Misrepresentation applies where a party (1) makes a misrepresentation; (2) about a material fact; (3) with the intent to induce reliance; and **(4)** the other party actually and justifiably relied. Here, Sam will likely be successful in invalidating the contract on this ground. Rick misrepresented the true and fair value of the chess piece, telling Sam that the offering price was fair. However, chess pieces are worth thousands of dollars. The material fact element is satisfied because the price is a fact of the basis of the bargain--the selling price. Rick intended to induce Sam's reliance into believing it was worth only $450 so that Sam would sell it to him for that price. Sam did enter into a contract on that basic assumption, and thus the elements are satisfied. Thus, Sam will likely be successful in defending this contract.

Unilateral Mistake. Unilateral mistake is generally not a defense to a contract. A mistake exists where the party is mistaken about a material fact that is a basic assumption of the contract. If the non-mistaken party knew or should have known that the other party was mistaken, the court will allow the contract to be rescinded. If the other party knew the other was mistaken, then the court will allow the contract be reformed to reflect the intention of the mistaken party. Here, Rick will argue that the court should not prejudice Rick just because Sam failed to do his research and learn the true value of the chess piece. This argument will likely fail because, as previously indicated, Rick knew, or at least should have known, of the true value of the chess piece and that Sam was mistaken. Here, Sam asked Rick if the asking price ($450) was fair... demonstrating his reliance on Rick's response. Thus he was mistaken.

Unclean Hands. See above.

Laches. Will not apply (see above).

CONCLUSION

The court will likely not grant Rick specific performance.

Answer B

1. Temporary Restraining Order ("TRO")

A TRO is a temporary injunction ordered by the court to maintain the status quo until a hearing for a preliminary injunction, and then ultimately a hearing and trial on the merits, can be heard. A TRO lasts no longer than necessary to have the hearing on the preliminary injunction and should not last longer than 14 days. In order to get a TRO, a plaintiff must show they will suffer irreparable harm in the amount of time it takes to wait for a preliminary injunction hearing and that they are likely to succeed on the merits of their case. Typically, the plaintiff must give defendant notice of the TRO and there should be a hearing, unless the plaintiff can show that he tried to notify defendant and failed, or notifying defendant may lead to the irreparable harm. In such case, a TRO hearing may be done ex parte. Here, there are no clear facts showing Rick attempting to notify Sam about a TRO hearing, but he may argue it would be counterproductive because Sam may sell the queen after being served notice of a hearing.

Irreparable Harm

Here, Rick is likely to suffer irreparable harm unless the court grants the TRO preventing Sam from selling the Queen. A TRO is necessary because Sam could likely sell the valuable queen in the amount of time it would take to wait for a preliminary hearing, and if he did so, Rick would be unable to retrieve the queen and unable to replace it because of how rare the Anituck queen piece is. The harm would be irreparable since there are only six existing Anituck queens and the last one was sold 20 plus years ago. Therefore, Rick can likely establish irreparable harm requirement for a TRO.

Likely to Succeed on the Merits

Rick must show/demonstrate a probability that he will be successful on the merits. Here, there was a contract to sell the queen piece between the parties, and the facts state there was a valid contract. Although Sam has many defenses, he can ultimately raise on the merits as to the validity of that contract, the showing of an agreement to enter the contract is likely sufficient to establish the likelihood of success for a TRO.

Balancing of Hardships and Placing of Bond

The court will also balance the hardships in determining whether to grant a TRO. The court will balance the hardship to the plaintiff (extent of the irreparable harm) without the TRO and the hardship to the defendant should the TRO be ordered. Here, the hardships clearly weigh in favor of Rick. Should the court deny the TRO, Sam may sell the queen. The last time a queen was for sale was 1983 and there may not be another opportunity to buy one for years. Moreover, the potential losses if this occurs are monumental, as the completion of the set with the queen could be worth millions to Rick. Meanwhile, the delay in selling the piece in the event that Rick loses on the merits is of very little effect on Sam. He will still possess the queen piece and be able to sell at just a high price. Therefore, the court should grant the TRO preventing Sam from selling the queen piece.

The court should, however, require Rick to post a bond to insure against any injuries that Sam may suffer in the amount of time it takes to have a preliminary hearing should Sam be wrong and lose on the merits.

2. Preliminary Injunction

The process and requirements for a preliminary injunction are almost identical to the requirements for a TRO. The preliminary injunction preserves the status quo for the time it takes to hear the case on its merits in trial. A preliminary hearing may never be

done ex parte, and so defendant must be given notice of the hearing. Like a TRO a plaintiff must show irreparable harm and likelihood of success on the merits. Here, for the reasons stated above, the court should grant Rick's request for a preliminary injunction preventing Sam from selling the rare Anituck queen until after a trial on the merits. Again, the court may require Rick to post a bond to cover any potential injuries Sam may suffer from a result of having to wait to sell until after the trial should Rick lose.

3. Specific Performance

Governing Law

The UCC governs all contracts for the sale of goods. Here, the contract is for the sale of a queen piece of a chess set, which is a movable, tangible thing, and therefore goods. Therefore, the UCC governs.

Specific Performance

Specific performance is an equitable remedy in which the court compels a party to a contract to perform his duties under the contract as he promised. A court will grant specific performance when (i) there is a valid, enforceable contract with certain and definite terms (ii) the plaintiff has already performed or is ready, willing and able to perform his duties under the contract, (iii) legal remedies are inadequate, (iv) enforcement of the contract by the court is feasible (v) and the defendant has no defenses to the contract.

(i) Valid, Enforceable Contract with Certain and Definite Terms

A court will not enforce a contract unless there is a valid contract and certain and definite terms so the court knows what to enforce. Here, the facts state Rick and Sam entered a valid contract. Moreover, the terms are certain and definite, the sale of the

queen in exchange for $450. Although it is not clear if there was a writing, the statute of frauds does not apply here because the contract is for the sale of goods for less than $500 since the price was set at $450.

(ii) Plaintiff is Ready to Perform

To receive specific performance, the plaintiff seeking performance must have been ready to perform himself. Here, Rick offered to write Sam a check immediately, thus indicating he was willing to perform his side of the contract.

(iii) Inadequate Legal Remedies

In order to receive specific performance, the plaintiff must show that legal remedies, typically damages, are inadequate. In the case of contracts for property, legal remedies may be inadequate if the property is rare or unique. Here, the chess piece is nearly a one of a kind. There are only six in the world and rarely do they become available for sale. Therefore, damages are inadequate because Rick could not use money to cover by going out and buying the queen somewhere else. Therefore, legal remedies are inadequate.

(iv) Enforcement is Feasible

A court will only grant specific performance if enforcement of the contract is feasible. The court enforces orders of specific performance through its contempt power, so the court must have jurisdiction over either the property or the person. Here, so long as Sam and Rick are before the court, there should be no issues of feasibility of enforcement. If Rick wins, the court will simply order Sam to perform under the contract and sell the queen piece to Rick or else be held in contempt of court, subjecting himself to civil and potentially criminal penalties. Therefore, the specific performance is feasibly enforced by the court.

(v) Defenses

The court will not grant specific performance if the defendant has a viable defense. Since specific performance is an equitable remedy, equitable defenses are available to the defendant. Here, Sam has multiple defenses he may raise against Sam to prevent specific performance.

Misrepresentation

A misrepresentation occurs when one party makes a false statement intended or reasonably known to induce action by the other party and the other party justifiably relies on that statement to his detriment. Here, Sam asked Rick if $450 was a fair price. Sam replied to Rick that $450 would be a fair price, even though he knew this was false. He also knew that Sam was likely to rely on this false statement because he had asked Rick if it was a fair price and clearly did not know for himself. Also, Rick clearly intended his response that it was fair to induce Sam to sell at that price. Sam may not have been justified in depending on Rick without seeking his own valuation, especially considering what Sam later learned about Rick's practice of swindling people. However, the court would likely find that Sam did in fact rely on the false statement by Rick, and that this misrepresentation would prevent a granting of specific performance.

Unilateral Mistake

A contract may be voidable by a mistaken party if the mistake was concerning a material fact of the bargain, the mistake had material effect on the bargained for exchange, the unmistaken party knew or should have known of the mistaken party's mistake, and the mistaken party did not assume the risk of the mistake. Here, Sam was mistaken as to the value of the queen piece. He asked for $450 when the queen was in reality worth thousands of dollars. This is a material fact and has a material effect on the bargained for exchange since it impacts how much Sam would have asked for the

queen and agreed to sell it for had he known its true value. Moreover, Rick had reason to know of Sam's mistake because he knew the piece was worth thousands of dollars as a collector of chess pieces and someone looking for the queen. When Sam suggested $450, Rick would have known he was mistaken as to its value. Finally, the risk is likely not one Sam assumed. Typically both parties assume the risk of a bad deal and over or under valuing the property. However, here Sam specifically asked Rick if $450 was a fair price and Sam had reason to know that Sam was relying on Rick's evaluation. As such he was not assuming the risk of being wrong. Therefore, the court may void the contract due to Sam's unilateral mistake.

Unclean Hands

Unclean hands is an equitable defense that prevents the court from granting equitable remedies when the one seeking performance has exercised some misconduct in the transaction at issue in the case. Here, Sam lied to Rick about the fairness of the price. As such he likely did not come to court with clean hands and will not be granted remedy in a court of equity.

UCC Good Faith and Fair Dealing

The UCC implies a duty of good faith and fair dealing in all contracts for sale of goods. Here, Rick breached this duty by lying to Rick. Therefore, it would not be enforced under the UCC.

Q4 Civil Procedure

Buyer, who was living in New York, and Seller, who was living in California, entered into a valid contract, agreeing to buy and sell a painting claimed to be an original Rothko, supposedly worth $1 million, for that amount. In a separate valid contract, Buyer agreed to buy from Seller a parcel of California real property worth $5 million, for that amount. Buyer and Seller completed the purchase of the painting on June 1; they were to complete the purchase of the real property on June 30.

On June 15, Buyer resold the painting, but obtained only $200, because the painting turned out to be a fake. Buyer promptly notified Seller of his intent to sue Seller for damages of $1 million. Seller then informed Buyer that Seller would not go through with the purchase of the real property.

Buyer filed suit against Seller in federal court in California. Buyer claimed fraud as to the painting, alleging only that Seller committed "fraud in the supposed value," and sought $1 million in damages. Buyer also claimed breach of contract as to the real property, and sought specific performance. Buyer demanded trial by jury on all issues.

1. May Buyer join claims for fraud and breach of contract in the same suit against Seller? Discuss.

2. Is Buyer's allegation sufficient to state a claim for fraud involving the painting? Discuss.

3. Does the federal court have subject matter jurisdiction over the suit? Discuss.

4. May the federal court apply California law to decide the breach of contract claim involving the real property? Discuss.

5. On what issues, if any, would Buyer be entitled to a jury trial? Discuss.

Answer A

1. JOINDER OF CLAIMS

Joinder of Claims

Generally, a plaintiff may bring any number of claims against the same defendant, even if they are unrelated or do not have a common nucleus of operative fact, in the same action. If the claims are brought in federal court, at least one of the claims must satisfy the requirements of subject matter jurisdiction.

Here, both the fraud claim with respect to the Rothko painting and the breach-of-contract claim with respect to the real property are being brought by the same plaintiff, Buyer (B), against the same defendant, Seller (S). Therefore, the two claims may be joined, and they may be brought in federal court if one of them satisfies subject matter jurisdiction. (The issue of subject matter is discussed below, in Part 3.)

Abstention

If a state law claim is joined to another claim, the federal court asked to hear those claims may abstain from hearing the state law claim, sever it, and remand it to a state court if the interest of the state in resolving the questions of law that are at issue are particularly high. There is a high threshold for abstention, such as in *Pullman* abstention, where a federal court will decline to address a constitutional question whose adjudication depends on the resolution of an unresolved issue of state law.

Here, the two claims, both based on state law, are for fraud and breach of contract. These are fairly common and ordinary common law (or possibly statutory) causes of action. Neither New York nor California would have a particularly strong interest in

divesting the federal court of the case, since the law is mostly, if not entirely in this case, resolved. Therefore, joinder will survive any abstention challenge, and neither claim will be subject to severance and remand.

Conclusion

The claims may be joined in the same suit.

2. SUFFICIENCY OF PLEADING

Well-Pleaded Complaint

To survive a Rule 12(b)(6) motion to dismiss for failure to state a claim on which relief can be granted, the pleading in a complaint must allege enough facts to give the defendant notice of the cause of action and the facts on which the claim is based. Under *Twombly* and *Iqbal*, a federal court must apply a two-part test to determine whether a complaint is sufficiently well-pleaded. First, the court strikes all conclusory legal allegations. Second, taking all remaining factual allegations as true, the court determines whether the facts as alleged would make it plausible for the plaintiff to succeed in obtaining the relief that is sought.

Here, B's complaint with respect to the Rothko painting alleged only that S committed "fraud in the supposed value." This pleading most likely fails the *Twombly-Iqbal* test. With respect to the first step, the pleading is essentially entirely a conclusory legal allegation. The complaint states only that fraud relating to the value of the painting occurred. Strictly construing *Twombly-Iqbal*, the entire allegation must be stricken when applying the first step of the test. The second step may be applicable if the test were loosely construed, and the court took the phrase "supposed value" to mean that fraud can be proved based on the fact that the painting's value as stated by S was false. But falsity alone does not give rise to an action for fraud. Fraud requires intentional, knowing, or reckless conduct with respect to a falsity. Thus, the pleading must allege,

in addition to the existence of a falsity, some indication of fault on S's part. Because it fails to do so, it is not well-pleaded.

Fraud Pleadings

For claims of fraud, the Federal Rules require fact-pleading, rather than the notice-pleading permitted by *Conley*, and, to a lesser extent, *Twombly* and *Iqbal*. The plaintiff must allege specific facts that made the defendant's conduct fraudulent.

B's cause of action with respect to the painting is one of fraud, meaning that the fact-pleading standard applies. As discussed above, B did not allege specific facts that demonstrate fraud. To meet the required level of specificity, B should have at least alleged that 1) S represented to B that the painting was a genuine Rothko, 2) that the painting was not a genuine Rothko, 3) that S had requisite mental state required for fraud, and 4) that the painting was not worth the value that S placed on it, and which B paid. Because the pleading did not allege any of these things, even if B can successfully defend his complaint from a notice/plausibility-pleading challenge, the complaint will not survive a fact-pleading challenge.

Conclusion

B's allegation is not sufficient to state a claim for fraud.

3. SUBJECT MATTER JURISDICTION

Federal Question Jurisdiction

Federal courts are courts of limited subject matter jurisdiction. Subject matter jurisdiction can be conferred on a federal court either through federal question jurisdiction or diversity jurisdiction. Federal question jurisdiction exists where the cause of action, as stated in the complaint, arise under a federal law or federal issue.

Here, B's claims are for fraud and breach of contract. Neither of these are federal claims, so the court does not have federal question jurisdiction.

Diversity Jurisdiction

Generally, diversity can confer subject matter jurisdiction on a federal court if 1) all plaintiffs are completely diverse from all defendants and 2) the amount-in-controversy exceeds $75,000.

Complete Diversity

Complete diversity is measured at the time a lawsuit is filed, and exists if no plaintiff is a citizen of a state of which any defendant is a citizen. For individuals, the state of citizenship for diversity purposes is the state of domicile, i.e. the state wherein the individual resides and has expressed or demonstrated an intent to reside permanently.

Here, B lives in New York. Although he sought to purchase real property in California, it is unclear whether he intends to leave New York. At any rate, as of the time the suit was filed, B was domiciled in New York because he was residing there at the time and expressed no intent to leave. Meanwhile, S is domiciled in California because he lives there and no facts suggest that he is domiciled in any other state. Thus, B is a citizen of New York, and S is a citizen of California. Complete diversity exists between all plaintiffs (B) and all defendants (S).

Amount-in-Controversy

The amount-in-controversy must exceed $75,000 in order for diversity jurisdiction to exist. This requirement is satisfied based on a good-faith pleading that the plaintiff is entitled to at least $75,000 in damages. In addition, where the relief sought is an injunction or specific performance, the amount-in-controversy may be satisfied if the

court finds that the economic value of the requested relief exceeds $75,000.

Here, both of B's claims against S satisfy the amount-in-controversy. The claim of fraud alleges damages of $1,000,000. The allegation is in good faith because the painting that B bought was supposedly worth $1,000,000, and B paid that much for it, to his loss of $999,800. Meanwhile, although specific performances rather than a specific monetary amount is sought as a remedy in the breach-of-contract case, the property to be awarded to B if the claim is successful is worth $5,000,000. Because both causes of action request relief that is worth well over $75,000, the requirement is satisfied.

Aggregation of Claims

A plaintiff may aggregate multiple claims against the same defendant in order to satisfy the amount-in-controversy requirement.

Had either or both of his claims been worth less than $75,000, B could have aggregated them in order to plead a total amount-in-controversy in excess of $75,000. Of course, since both claims independently satisfy the requirement, this rule does not control.

Supplemental Jurisdiction

A court may exercise supplemental jurisdiction over a claim if it arises out of the same transaction or occurrence as a claim, between the same plaintiff and defendant, over which the court already has subject matter jurisdiction.

If one or the other of the two claims B is bringing against S failed to meet the requirements of diversity jurisdiction, B could still argue that the two claims arose out of the same transaction or occurrence. Although S would respond that the contracts for the painting and the real property were completely separate and occurred nearly a month apart, B might counter that the breach of the contract for the sale of real property was causally connected to B's discovery of the allegedly fraudulent sale of the painting.

Indeed, S only informed B that S would not go through with the sale of the property after B notified S of his intent to sue S for $1,000,000. Both arguments are persuasive, so it is not clear what the result would be if the court were forced to decide the issue of supplemental jurisdiction. However, as analyzed above, the court need not decide this issue because each claim separately falls within the court's diversity jurisdiction.

Conclusion

The court has subject matter jurisdiction.

4. CHOICE-OF-LAW

Erie Doctrine

Generally, in diversity cases, the federal court applies state substantive law, based on the law of the state in which the court sits, and federal procedural law. First, the court must ask whether there is a conflict between state and federal law. If so, then the court must ask whether there is a federal statute or Federal Rule that addresses the issue. If such a federal statute exists, the court must apply it. If a Federal Rule addresses the issue, the court must ask whether the Rule expands, abridges, or modifies a substantive right. If so, then the court may only apply the Rule if its effect on the right is incidental. If there is no federal statute or Rule on point, the court must ask whether the failure to apply state law would change the outcome in the case. If so, then the court must apply the state law. Finally, if the inquiry reaches past this point, the court must consider the relative interests of the state and federal judiciaries in adjudicating the issue, as well as the need to dis-incentivize forum shopping.

That said, here the *Erie* analysis is simple. There is no conflict between state and federal law with respect to the breach-of-contract claim, because there is no federal law of contract. Moreover, the law of contract is inherently substantive. Therefore, because the court sits in California, *Erie* dictates that it should apply California substantive law to

resolve the claim.

Law of the Situs

The default choice-of-law for determining disputes over real property is to apply the choice-of-law (or the substantive law, if the choice-of-law is silent) of the state in which the property is located.

Based on this default rule, the federal court should apply California law to decide the breach-of-contract claim because the real property at issue is located in California.

Conclusion

The federal court may, and probably should, apply California law to decide the breach-of-contract claim.

5. JURY TRIAL

Right to Jury Trial

In federal cases, a plaintiff is entitled to a jury trial, per the Seventh Amendment of the Constitution, in any action at law. However, there is no entitlement to a jury trial in an equity action. Whether a case is one of law or equity is a purely federal question, and must be decided by the court according to federal law.

Here, the action for fraud is an action at law. The remedy sought is monetary damages amounting to $1,000,000. Therefore, B is entitled to a jury trial on that claim. Meanwhile, the action for breach-of-contract is an action in equity, because the remedy sought is the equitable remedy of specific performance. If B amended the complaint such that, in the alternative to seeking specific performance, it requested money damages, then the action would be at least in part at law and therefore subject to his

right to a jury trial.

Conclusion

As pleaded, B is entitled to a jury trial on the fraud claim but is not entitled to one on the breach-of-contract claim.

Answer B

Joinder of Buyer's Claims Against Seller

Joinder of claims in federal court is governed by the Federal Rules of Civil Procedure, regardless of whether or not the original claim was filed under diversity. This is because the FRCP are affirmative federal law under the Supreme Court's decision in *Hanna*, and they act to pre-empt any contravening state law, even if that state law is purely procedural and otherwise would govern under the Erie Doctrine.

Under the Federal Rules, a plaintiff may join any and all claims that he has against the defendant, regardless of whether or not they arise out of the same transaction or occurrence, a common nucleus of operative fact, or any other shared basis in law or fact. The plaintiff, in other words, is the master of his complaint. Here, the plaintiff has joined claims against this specific defendant. Regardless of whether or not they arise out of the same CNOOF they nevertheless satisfy the requirement for joinder of claims.

Sufficiency of Buyer's Allegation to State a Claim

Under Federal Rule 12(b)(6), which controls in a state law diversity action properly brought in federal court, the Supreme Court has held that a plaintiff must allege specific facts that operate to push the allegations over the line from speculative to plausible. This comes from the *Twombly and Iqbal* line of cases. This does not move the requirements for pleading from the traditional notice pleading requirement that only requires the plaintiff to provide a short and plain statement of the allegation to fact pleading requiring a detailed list of all facts in the case that make the claim likely to survive, which is what is required under California. Again, what is required to survive a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted is that the complaint does not allege sufficient facts to make the allegation of fraud plausible.

Fraud Requirements

In determining whether or not sufficient allegations exist to find that there was fraud in a contract, a federal court sitting in diversity in California will apply California law. In California, the common law of contracts applies. Fraud in contract requires that the plaintiff 1) knowingly 2) misrepresent 3) a material term in the contract.

12(b)(6) Analysis

Here, the facts demonstrate that the painting was claimed to be an original Rothko, supposedly worth $1 million, which the Buyer bought for $1 million. However, the Seller will argue in his 12(b)(6) motion that the complaint does not state factual allegations that tend to show that the plaintiff knew that the Rothko painting was a fake, nor even that if he did represent the Rothko as an original, that he had any reason to suspect it was false. Unless the Buyer is able to amend his complaint, which he is eligible to do once as of right within 21 days of the service of a motion to dismiss (or, under California law, before an answer is served) to allege facts with sufficient specificity that a reasonable finder of fact could conclude that the allegations were plausible, then the Buyer's allegation is likely not sufficient to state a claim for fraud involving the painting.

Subject Matter Jurisdiction

Federal courts are courts of limited subject matter jurisdiction. Unlike California state courts, which may hear any claims that are brought before it subject to other limits (including personal jurisdiction), there must be an affirmative grant of federal subject matter jurisdiction that allows for each claim to be properly heard.

<u>Federal Question Jurisdiction</u>

Federal courts have jurisdiction over any claim that arises under the Constitution, statutes, or treaties of the United States. Furthermore, they also have federal question jurisdiction where either there is an important federal interest at stake that effectively supersedes state law (such as in the foreign relations domain) through the application of the modern federal common law, as well as in state law questions that require the interpretation of federal law under the *Merrell Dow* and *Grable* doctrine.

In this case, the court is adjudicating claims of fraud and breach of an obligation to purchase real property. These are not federal questions; they do not arise under federal positive law, federal common law, nor do they contain substantial federal questions that must be answered in order to resolve state law claims. Therefore, there is no federal question jurisdiction over either claim.

Diversity Jurisdiction

In order for there to be diversity jurisdiction over a state law claim, the claim must both satisfy the diversity requirements and the amount-in-controversy requirement. Multiple claims can be aggregated in order to satisfy the amount in controversy requirement. I first consider diversity; then move on to the amount-in-controversy for each claim.

Diversity

Under a standard state law claim brought in diversity jurisdiction, there must be complete (so-called "*Strawbridge*") diversity between all plaintiffs and defendants. Each plaintiff must be a citizen of a separate state from each defendant. Citizenship for individuals, which is the fact pattern in question here, is determined by domicile, which is where a person resides with intent to remain. The facts state that Buyer lives in in New York, and Seller lives in California. There are no other parties to the suit. Assuming that both Buyer and Seller intend to remain in their states indefinitely and are therefore citizens of separate states, the requirement of complete diversity is satisfied.

Amount-in-Controversy

In order for diversity jurisdiction to exist over state law claims, the total amount in controversy must exceed $75,000. A plaintiff may aggregate all the claims that they have, even unrelated claims, to satisfy the amount in controversy requirement against the defendant. The amount-in-controversy claimed must have been arrived at in good faith, though it does not need to be precise.

Here, the amount in controversy substantially exceeds $75,000. The Buyer, in his fraud action, is alleging in good faith that he expected to receive a painting valued at $1

million dollars but instead received a painting valued at only $200 due to the defendant's fraud. That is a difference of $999,800, well over $75,000, and that would be the plaintiff's recovery in expectation damages. And the real estate property in question is valued at $5 million, alleged in good faith, and given that the title to that property is in dispute, the amount in controversy requirement there is also satisfied. Therefore, independently and together, the plaintiff has properly alleged an amount in controversy in excess of the federal requirement for diversity jurisdiction.

Therefore, the federal court has subject matter jurisdiction over these claims through diversity.

Supplemental Jurisdiction

Supplemental jurisdiction allows a state law claim that does not otherwise have jurisdiction to be attached to a federal claim that has subject matter jurisdiction. This is so-called pendent party or ancillary jurisdiction. Here, both state law claims together and independently meet the requirements for diversity jurisdiction, so supplemental jurisdiction does not apply.

Application of California Law to Decide Breach of Contract Claim

Erie

Under the Erie doctrine, there is no general or federal common law. A court sitting in diversity instead applies the substantive law of the state in which it sits, including choice-of-law law, in order to decide questions of law. A federal court sitting in California should apply California law to decide what law to apply.

California Choice of Law

The federal law should therefore apply California choice-of-law law to decide what substantive law to apply. California choice-of-law law for real property in state court requires that a California court use the law of the jurisdiction in which the property is located (as opposed to a contract, where the court will determine whether or not the contract itself has a choice-of-law provision - if that choice-of-law provision is not

contrary to public policy, it will apply it. If the choice-of-law provision is contrary to public policy or there is no choice-of-law provision, the California court will apply a governmental interest analysis to determine what law to apply. That analysis essentially queries the relative interests of the governments in question in order to decide what law to apply.)

Real Property

Here, because the situs of the property in question is located in California, a California court would apply its choice-of-law law to use California substantive law to adjudicate the claim as to the real property contract, unless there is a choice-of-law provision in the land sale contract that requires the application of the law of a different state. However, this fact pattern does not suggest any such choice-of-law provision, and so I do not assess this any further.

Contract

In the event, that the choice-of-law question is adjudicated according to contract principles, a federal court applying California choice-of-law law should proceed to balance the interest of the governments in having their law apply. The two states whose laws are implicated here are California and New York. California has an interest in protecting its citizens from claims of fraudulent sales; New York has an interest in protecting its citizens from fraudulent sales. These are relatively equal interests. However, the Buyer filed in California, which may indicate his willingness to have California law applied; the painting was also with the seller in California at the time the alleged contract was signed and fraud committed. These weigh in favor of imposing California law.

Therefore, in either case, the federal court, properly applying California choice-of-law law, may apply California law to decide the claim.

Issues in Which Buyer is Entitled to Jury Trial

Traditionally, under the Erie Doctrine, procedural questions are decided under federal

law and substantive questions are decided under state law (unless the procedural dispute is outcome-determinative between filing in a state or federal court, in which case the state procedural law trumps federal law). However, questions of jury procedure are Constitutional in basis and therefore federal law always trumps state jury procedural law.

The Seventh Amendment to the Constitution guarantees a jury trial upon timely demand to litigants in questions of law. There is no right to a jury trial for questions of equity. While under the Federal Rules of Civil Procedure, actions are no longer brought exclusively in law or equity - there is instead only the "civil action" - the application of the right to a jury trial is determined by whether or not the cause of action contained in the complaint would have qualified for a jury trial in 1789.

Fraud and Damages: Remedy at Law

Damages are a remedy at law. Therefore, the Buyer is entitled, upon timely demand, to a jury trial on the issue of damages (provided that the claim survives the various hurdles earlier laid out).

Real Property and Specific Performance: Remedy at Equity

Specific performance is a version of an injunction, which is a remedy at equity. A litigant is not entitled to a jury trial on an issue of equity; it may instead be decided by a bench trial.

Mixed Issues of Law and Equity

When a complaint alleges both legal and equitable remedies and demands a jury trial, the court should separate the questions and hold a jury trial on the legal question first. It can then move to a bench trial on the equitable question.

Therefore, in this case, Buyer is entitled to a jury trial on the question of his damages in fraud. That should be held first; the court can then move to his demand for specific performance on the real estate contract.

Q5 Torts

Concerned about the dangers of texting while driving, the Legislature recently enacted the following section of the Motor Vehicle Code:

> No person shall operate a motor vehicle upon a public road while using a mobile telephone to send or receive a text message while such vehicle is in motion.

Doug was driving down a busy street while texting on his cell phone. Doug lost control of his car, slipped off the road, and hit Electric Company's utility pole. The pole crashed to the ground, and the fallen wires sent sparks flying everywhere. One spark landed on a piece of newspaper, setting the paper on fire. The burning paper blew down the street, landing on the roof of Harry's house. The house caught fire and burned down.

A technological advance, the Wire Blitz Fuse (WBF), had made it possible to string electrical wires that would not spark if downed. Nevertheless, Electric Company had retained an old wiring system that it and other utility companies had used for years. Electric Company believed that adoption of the WBF system would require a significant increase in electrical rates, and that the WBF system had yet to gain widespread acceptance in the industry. Studies showed that utility companies that replaced their old wiring systems with a WBF system experience vastly increased safety and reliability.

Harry has sued both Doug and Electric Company.

1. What claims may Harry reasonably raise against Doug, what defenses may Doug reasonably assert, and what is the likely outcome? Discuss.

2. What claims may Harry reasonably raise against Electric Company, what defenses may Electric Company reasonably assert, and what is the likely outcome? Discuss.

3. If Harry prevails against Doug and Electric Company, how should damages be apportioned? Discuss.

Answer A

H v. D

Harry (H) can bring a negligence claim against Doug (D)

Negligence

A negligence claim consists of duty, breach, causation, and damages. All elements must be present for a plaintiff to recover.

Duty

A person does not generally owe a duty to act. However, if a person acts, they owe a duty to act as prudently as the reasonable man would and is liable for harms that come to foreseeable plaintiffs for the failure to act with reasonable care. In the majority *Cardozo* view, a foreseeable plaintiff is anyone who is in the zone of danger. Under the minority, *Andrews* view, a foreseeable plaintiff is anyone who is harmed if the defendant could have foreseen harming anyone, even if the person harmed was not the type of plaintiff the defendant foresaw harming.

Standard of Care

Generally, people owe a duty to act with the care a reasonably prudent man would take. There are different standards for landlords or other special relationships.

In this case, D was driving. A reasonably prudent man would have foreseen that bystanders or property could be harmed by inattention to driving. H can argue that D could foresee that texting while driving could have caused him to crash into a person's property. It was foreseeable that he would have run into H's mailbox. Therefore, it was foreseeable that H was in the zone of danger. The fact that D did not in fact run into H's mailbox but instead hit the utility pole which caused a fire is not too remote. D could have crashed into the utility pole that snapped and fell directly into H's house, rather than sparked and caught fire. H will argue that under *Cardozo* he was a foreseeable

plaintiff in the zone of danger because a driver should have foreseen that distraction would cause him to crash into a person's property. D will argue that this is too attenuated. While H may have been in the zone of danger for his mailbox being smashed, H was not a foreseeable plaintiff for having his house burned down. The key question, however, is not whether D could foresee the type or extent of harm, but rather could D foresee H as a plaintiff. As long as H's house was on the road, H was a foreseeable plaintiff in the zone of danger.

D will argue H was not foreseeable because the burning paper "blew down the street," implying that the crash occurred far from where he texted. However, H was in the zone of danger because he was on the street where D was driving and texting. It will be a close call, and many courts will not find H was a foreseeable plaintiff in the zone of danger under the *Cardozo* view. Under the *Andrews* view, H will certainly be a plaintiff D owes a duty of care to, because D could have foreseen his texting while driving would injure someone.

Breach

Assuming D owes H a duty of care, there must be a breach. A driver owes a duty to others to drive responsibly and not be distracted. A reasonably prudent man would not text and drive. Therefore, H will successfully argue that D breached his duty of care.

Negligence Per Se

H can also argue D breached his duty of care under a negligence per se theory. Under negligence per se, a defendant has breached his duty if he violated a 1) statute addressed at the behavior 2) the statute was designed to protect against a specific type of harm 3) the statute protected a specific class of people, and the plaintiff harmed is in that class of people in a way the statute was designed to protect against. Defendants can argue that in the situation it was more reasonable to not follow the statute, because the statute was vague and overbroad, or it would have been more dangerous to follow the statute than to violate it.

In this case, none of the defenses apply. D violated a statute that addressed his behavior. It said that no one should operate a motor vehicle upon a public road while using a mobile telephone and to send or receive a text message while the vehicle is in motion. D was driving the car. He was texting on his cell phone while driving down the street. Because he texted while he was driving, he lost control of his car and hit the utility pole. D will argue that the danger the legislature was trying to avoid was running over people. H will argue that it was to protect against people being run over and against property damage. D will rebut that even if it protected against property damage, the plaintiff it sought to protect would be the owner of the property. It is too much of a stretch to say the legislature intended to pass the statute to establish that a person who crashed while texting is responsible for a burning house down the street. It is simply too attenuated from the likely purpose of the legislature. Therefore, his negligence per se claim will not be successful.

Causation

For a negligence claim to succeed, there must be both actual (but-for) and legal (proximate) causation.

But for (actual)

But for causation means that but for the defendant's action, the plaintiff would not have been harmed. In this case, but for D crashing into the pole, the pole would not have crashed to the ground. But for the pole crashing into the ground, the wires would not have sent sparks up, and the burning paper would not have landed on the roof of H's house. There is but for causation.

Proximate (legal)

The breach must also be the proximate cause of damage. Proximate cause are foreseeable causes. There can be intervening events between D's breach and H's harm as long as D's breach was still a substantial factor in causing D's harm. However, superseding events breach the chain of causation. Superseding events are unforeseeable events such as a criminal act or act of god.

In this case, H will argue that it was foreseeable that Doug texting while driving could result in his house being damaged. As stated above, he will argue it is foreseeable that a distracted driver will drive into another person's property. Even though H's property was damaged in a different way, D could have still foreseen that his actions would lead to this result. However, D will argue that the burning paper is an unforeseeable event, more similar to an act of God. The odds that he would hit the pole just right, the wires would spark, and the wind would take the burning paper down the street onto H's roof is unforeseeable. This is a close case, and different courts might come out differently on it. Under the Andrew's perspective, there would be proximate cause. However, under the *Cardozo* perspective, this would be similar to the explosion in the train station -- the harm is too attenuated from the breach.

Damages

The damages must have been caused by D's breach. If there was causation, then the court will find there are damages. H was damaged by D's breach of care. His house burned down because of D's action.

Defenses

Contributory Negligence

D can argue that H was contributorily negligent. Good roofs will not catch fire if a sheet of burning paper lands on top of it. Roofs are treated to ensure fire cannot spread. If H's house can be burned so easily, it may be because H did not build to code or maintain his roof as he ought to. D might be successful in arguing H was contributorily negligent. That will reduce his damages but not prevent him from paying, unless they are in a contributory negligence jurisdiction.

Abnormally Dangerous Activity

H could also bring an abnormally dangerous activity claim against D. This claim would be unsuccessful. Abnormally dangerous activities are those that 1) present a substantial risk of bodily harm or death 2) are uncommon to the area and 3) cannot be

mitigated by sufficient care. In this case, driving is a common activity. Texting while driving, even if a stupid decision, is a common activity in the area. It can be mitigated by only texting while stopped or in other ways.

2. H v. EC

Abnormally Dangerous Activity

H could bring an abnormally dangerous activity claim against EC. This claim would be unsuccessful. Abnormally dangerous activities are those that 1) present a substantial risk of bodily harm or death 2) are uncommon to the area and 3) cannot be mitigated by sufficient care. The courts often look to whether the value to society of conducting the activity outweighs the risk and probability of harm. In addition, courts do not hold utility companies strictly liable for activities they are engaged in that makes them public utility companies. This is a matter of public policy.

In this case, utility poles are common to the area. While transmitting electricity can present a substantial risk of bodily harm or death, it can be mitigated by sufficient care. In addition, the value to society outweighs imposing strict liability for any damages that arise from running the pole. The wires are also a part of the activity that makes the utility company a public entity: transferring of electricity in the community.

Negligence

H can bring a negligence claim against EC. He has a greater likelihood of success than against D.

<u>Duty</u>

See above.

<u>Standard of Care</u>

See above. That of a reasonably prudent man.

EC owes a duty to all foreseeable plaintiffs to conduct its activities with the same

prudence a reasonable man would have. H is a foreseeable plaintiff, because it is foreseeable that wires can break, causing sparks that create fire. Under both the *Cardozo* and *Andrews* view, it is foreseeable that a plaintiff's house may be burned down by such a spark. Thus, H is a foreseeable plaintiff.

Breach

H will argue that it has not breached its duty of care because it is using the same wiring system that other utility companies use. Defendants can look to industry standards to show that they have not violated the duty of care. However, industry standards are not dispositive. H can argue that WBF would have prevented the fire, it was not reasonable to rely on old writing systems, and EC should have anticipated its wires sparking. EC will argue that WBF has not gained widespread acceptance among the industry and installing WBF would require significant increase in electrical rates. Ultimately, a court will have to apply Hand's theory to determine whether there was a breach. Hand's theory compares the burden against the probability and the risk. It will look at the expense of installing WBF and compare it to the risk of its wires being defective (and the cost of the resulting damage) against the probability that the wires would break. If the court finds installing WBF or something similar is less than the risk of the old wires causing a fire x the probability of the wires causing a fire, then EC will have breached its duty of care.

Causation

But For

See above. But for not updating the wire system, the wires would not have sparked and caused the fire that burned down Henry's house.

Proximate

See above. It was foreseeable that old wires could break and send sparks. It was foreseeable that sparks could catch fire and spread, causing property damage. EC can argue that the wind was a superseding cause. However, it is foreseeable that the wind would catch a spark and carry it.

Damages

The breach in the duty of care caused the spark to land on H's house which resulted in real property damage.

Defenses

Contributory Negligence

D can argue that H was contributorily negligent. Good roofs will not catch fire if a sheet of burning paper lands on top of it. Roofs are treated to ensure fire cannot spread. If H's house can be burned so easily, it may be because H did not build to code or maintain his roof as he ought to. D might be successful in arguing H was contributorily negligent. That will reduce his damages but not prevent him from paying, unless they are in a contributory negligence jurisdiction.

Defective Product

H can sue for a defective product. Products can be defective in design, manufacture, or label. For a company to be strictly liable, it must be a part of the distributor chain. It could be a manufacturer, distributor, or retail. Companies that do not regularly sell products cannot be held strictly liable.

In this case, EC does not sell its wires. It sells electricity, but that is not a product. Therefore, H's suit will be unsuccessful.

Warranty

N can sue for the breach of warranty of merchantability of fitness for the defective wires. However, to sue for breach of contract there must be privity or N must be a member of the household.

3. Damages

In the majority of states, plaintiff can recover from defendants in joint and several

liability. That means he can recover all of the damages from either of the defendants. However, he cannot "double dip" and recover anything more than 100% of his damages. A jury will apportion the fault. If the jury assigns 70% of fault to A and 30% of fault to D, and plaintiff recovers 100% from A, A can demand D reimburse him 30%. In the minority of states, plaintiff can only recover in several liability. That means he can only recover damages from the defendants in proportion to the fault they were liable for.

If the court does find that D and EC are both liable, then a jury should determine the fault. The jury may reasonably decide that the majority of the damages should be apportioned to D because without his negligence the pole would not have fallen down. His actions set it in motion.

Answer B

1. H's claims against D and D's defenses

Harry (H) will file a claim for negligence against Doug (D)

Negligence

To successfully assert a negligence claim, the plaintiff must show that the defendant (i) had a duty, (ii) breached that duty, (iii) the breach of that duty was the actual and proximate cause of the plaintiff's injuries, and (iv) that the plaintiff suffered damages.

Duty

All defendants owe a duty of reasonable care to all foreseeable plaintiffs. The majority (Cardozo) view is that all plaintiffs are foreseeable if they are in the zone of danger. The minority (Andrews view) is that all plaintiffs are foreseeable.

Here, D was driving down a busy street, and therefore owed a duty of care to all foreseeable plaintiffs. H will argue that he is a foreseeable plaintiff because his house is on the street, and houses on a street are within the zone of danger if someone is not driving carefully.

Breach

A defendant breaches a duty of care if the defendant does not act as a reasonably prudent person would in carrying out an activity. Here, H will argue that a reasonable person would not text while driving on a busy street. H will argue that reasonable people know that texting is distracting, and driving a vehicle while distracted is dangerous, and a reasonably prudent person would not drive while distracted. On the other hand, D will argue that that many people text while driving, and since many people do it, he did not act unreasonably while texting. D's argument will probably fail, and D will be considered to have breached his duty.

Negligence Per Se

Negligence per se is a doctrine that replaces the standard duty of care with a statute. If the legislator has enacted a statute with criminal penalties, and the statute is designed to protect against the harm caused, and the injured plaintiff is of the class that the statute was intended to protect, then the statute replaces the duty of care standard. If the defendant breaches the statute, then the majority view is that that conclusively proves that the defendant had a duty and the defendant breached that duty.

Here, the legislator recently passed a section of the motor vehicle code that stated that no person shall operate a motor vehicle upon a public road while using a mobile phone to text while the vehicle was in motion. Here, D was driving down a busy street, which was presumably public, while texting. Therefore, H violated the statute.

The statute will only replace the duty if H can prove that it was intended to protect against the harm caused and that H was part of the class of people intended to be protected by the statute. The legislator passed the law because they were concerned about the dangers of texting while driving. Presumably, the dangers of texting while driving include the distracted driver hitting a pedestrian, or hitting something and causing property damage. H will try to argue that D hit the pole, which then caused the fire, and this was within the property damage the legislator intended to protect. However, D will argue that although the statute was probably intended to protect property damage such as hitting the pole, it was not enacted to protect against fires caused by faulty wiring of a pole. D's argument will probably prevail because it was not likely that the legislator intended to protect homeowners from fires when they enacted the statute.

Even if H could prove that the fire to his home was the type of damage the legislator intended to protect, he also needs to prove that he was of the class of people the statute was designed to protect. H will argue that as a homeowner on a busy street, he

is of the protected class because the statute was designed to protect against property damage by distracted drivers. On the other hand, D will argue that the statute is designed to protect pedestrians who might be hit, or maybe owners or passengers of vehicles struck by distracted drivers. Again, D will probably prevail on this point, because the statute was probably not designed to protect homeowners.

Therefore, H will not be able to establish negligence per se. However, as discussed above, even without negligence per se, H can prove that D had a duty and breached the duty.

Actual Cause

A defendant is the actual cause of a plaintiff's actions if but for the defendant's conduct, the plaintiff would not have suffered the harm. Here, D was the actual cause of H's damage. If D had not been distracted while driving, he would not have hit the utility pole, and the wires would not have sparked when they hit the ground, and the paper would not have lit on fire and therefore H's house would not have lit on fire.

Proximate Cause

A defendant is liable for all foreseeable incidents of his actions. If a defendant’s actions combine with another force and then cause the damage, the defendant's action is only the proximate cause of the result if the intervening force was foreseeable. A dependent intervening force is a force that is foreseeable. For example, it is foreseeable that injury invites rescue, and therefore it is a dependent intervening force if someone tries to rescue someone injured by the defendant. On the other hand, an independent intervening force is one that is not foreseeable, and it cuts off liability of the defendant because the defendant was not the proximate cause of the injury.

Here, D will argue that Electric Company (EC)'s utility pole had old wiring, and that old wiring is not safe, and it was the old wiring that caused the fire. D will argue that the old wiring should be considered an independent intervening force, because it is not foreseeable that a company would use old wiring that would sent sparks flying

everywhere when it fell. He will argue that it is not foreseeable that the sparks would then light a piece of paper on fire, and then that paper would land on Harry's roof. However, D's argument will probably fail. H will argue that it is foreseeable that if you drive distracted and hit an electric company's pole that sparks would fly. H will point to the fact that the new Wire Blitz Fuse (WBF) systems have yet to gain widespread acceptance in the industry, and therefore most electric poles probably have old wiring. Further, H will argue that D was on a busy street, so it was likely that if D hit the pole and there were sparks, it was likely something would catch fire. H is likely to win this argument and therefore D's distracted driving will be considered proximate cause of H's injuries.

Damages

H will be able to show damages because his house caught fire and burned down as a result of D's actions.

Conclusion

H will be able to successfully assert a negligence claim against D, and all of D's objections will fail.

2. H's claims against EC and EC's defenses

H will assert a negligence claim and a strict liability claim against EC.

Negligence

To successfully assert a negligence claim, the plaintiff must show that the defendant (i) had a duty, (ii) breached that duty, (iii) the breach of that duty was the actual and proximate cause of the plaintiff's injuries, and (iv) that the plaintiff suffered damages.

Duty

All defendants owe a duty of reasonable care to all foreseeable plaintiffs. The majority (Cardozo) view is that all plaintiffs are foreseeable if they are in the zone of danger. The minority (Andrews view) is that all plaintiffs are foreseeable.

Here, EC has a duty to provide and maintain utility poles as a reasonably prudent electrical company would do.

Breach

H will argue that EC breached their duty in not using the new WBF technology, which made it possible to string electrical wires that would not spark if drowned. H will point to the fact that studies showed that utility companies that replaced their old wiring systems with a WBF system experienced vastly increased safety and reliability. H will argue that a reasonably prudent electrical company would have replaced their wiring with WBF since it is safer and more reliable, and because EC did not, they breached their duty.

On the other hand, EC will argue that they did not breach their duty. They will argue that many other utility companies had used the old wiring for years, and the WBF system had yet to gain widespread acceptance in the industry. Although evidence of other companies' actions and industry customs can be used to determine whether a duty has been breached, it is not dispositive. The court will apply a balancing test when deciding whether a company breached its duty in not implementing new technology. The court will look at the cost of the new technology, the amount the new technology would decrease the risk of harm to potential plaintiffs, and the magnitude of the harm suffered by potential plaintiffs. EC will argue that adopting the WBF systems would be expensive and therefore require a substantial increase in electrical rates. On the other hand, H will argue that the WBF systems would vastly increase safety and reliability, and the risk of harm by not replacing (more fires when people hit electrical poles) is great. This is a close call and the court could come out either way, although the court will probably determine that EC did breach its duty because although the WBF technology would be expensive, it would significantly increase safety.

Actual Cause

But for EC's replacement of the old wires with new WBF technology, the electrical wires would not have sparked if downed and therefore H's house would not have caught fire and burned down.

Proximate Cause

EC will argue that they were not the proximate cause of H's house burning down. They will argue that D's negligent driving is an independent intervening force, and therefore they were not the proximate cause. However, it is foreseeable that a driver would drive negligently and hit a pole. Therefore, D's negligent driving was foreseeable, and D's actions do not cut off EC's liability.

Damages

H suffered damages when his house burnt down.

Conclusion

If the court determines that EC breached their duty in not using the new WBF technology, then H will be able to successfully assert a claim for negligence against EC.

Strict Liability

H will try to claim that EC was conducting an ultrahazardous activity, and H was harmed as a result. A company is strictly liable if the company is conducting an ultrahazardous activity and a plaintiff is injured by the dangerous propensity of that activity.

Here, H will argue EC was operating an electric company, which included stringing live electrical wires on poles, and electrical wires are dangerous because they can start fires. When the pole was hit by D's car, the wires fell and sparked and started a fire. Therefore, H's injury was caused by the dangerous propensity of EC's activity.

However, H's arguments will fail because the court will determine that EC was not conducting an ultrahazardous activity. An ultrahazardous activity is one that cannot be done safely, no matter how careful anyone is in conducting the operation, and it must not be of common usage. Here, every city has electrical companies that string electrical wires on poles. Therefore, the electric company's operation will be considered common usage and not an ultrahazardous activity. Therefore, H's strict liability claim will fail.

3. How damages should be apportioned

If actions by two different defendants combine to cause injury to a plaintiff, neither of which alone would have caused the injury, the defendants will be held jointly and severally liable. If defendants are held jointly and severally liable, then the plaintiff can recover the entire amount of damages from either or both plaintiffs. (The plaintiff can only recover the damages once, but it can be from either defendant alone, or some from each defendant.) If the defendant pays more than their share of the damages, the defendant can recover that amount from the other defendant.

Here, D and EC's actions combined to cause H's injuries. H will be able to recover the damages for his burned down house from either D or EC or a combination of both. Depending on how the court rules, D and EC may be assigned different percentages of liability. D and EC will be responsible for paying the percentage of the damages proportional to their percentage of liability. If either D or EC pays H more than their share of the damages, the defendant who paid more can sue the other party for contribution.

Feb 2017

California Bar Examination

Essay Questions and

Selected Answers

The State Bar Of California
Committee of Bar Examiners/Office of Admissions

180 Howard Street • San Francisco, CA 94105-1639 • (415) 538-2300
845 S. Figueroa Street • Los Angeles, CA 90017-2515 • (213) 765-1500

ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2017

CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2017 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	Subject
1.	Wills
2.	Remedies / Torts
3.	Evidence
4.	Business Associations
5.	Professional Responsibility
6.	Criminal Law and Procedure

ESSAY EXAMINATION INSTRUCTIONS

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

Q1 Wills

Mary was a widow with two adult children, Amy and Bob.

In 2010, Mary bought Gamma and Delta stock. She then sat at her computer and typed the following:

> This is my will. I leave the house to Amy and my stock to Bob.
> The rest, they can split.

Mary printed two copies of the document. She signed and dated both copies in the presence of her best friend, Carol, and her neighbor, Ned. Carol had been fully advised of the contents and signed both copies. Although Ned had no idea as to the bequests, he declared that he was honored to be a witness and signed his name under Mary's and Carol's signatures on both copies. Mary placed one copy in her safe deposit box.

In 2014, Mary married John. She soon decided to prepare a new will. She deleted the old document from her computer and tore up one copy. She forgot, however, about the other copy in her safe deposit box.

On her corporate stationery with her business logo emblazoned on it, Mary wrote:

> I leave John my Gamma stock. My Delta stock, I leave to Bob.
> Amy is to get the house.

Mary signed the document. She neither dated the document nor designated a recipient for her remaining property.

In 2015, Mary sold her Delta stock and used the proceeds to buy Tango stock.

In 2016, Mary died, survived by John, Amy, and Bob.

Mary's estate consists of Gamma stock, Tango stock, her house, and $200,000 in cash in separate property funds.

What rights, if any, do Amy, Bob, and John have in the assets in Mary's estate? Discuss.

Answer according to California law.

Answer A

Validity of Mary's First Will:

The issue is whether the will that Mary signed in 2010 is valid. Because Mary typed this will out using her computer, this will needs to meet the requirements of an attested will. In order to be valid, an attested will needs to:

1) Be written, dated and signed by the testator or someone at testator's direction;
2) Be signed by Mary in front of two uninterested witnesses at the same time. These witnesses can either visually witness Mary's execution of the will, or be conscious of the execution in some way;
3) The two witnesses need to countersign the will at some point during Mary's lifetime, not necessarily when Mary signs the will, and not necessarily at the same time as each other;
4) Each witness needs to understand that they're signing Mary's will (as opposed to a non-testamentary instrument).

Here, we're told that Mary herself typed out, signed and dated both copies of her first will. Therefore, there's no issue as to the validity of Mary's first will as to whether Mary's first will is written, dated, and signed by a permitted party. The facts establish that Mary signed both copies of her first will in the presence of both Carol and Ned (both of whom constitute uninterested witnesses as neither benefit from the bequests stated in Mary's first will), and they further establish that both Carol and Need countersigned the will while Mary was alive. As for whether each witness understood that they were signing Mary's will, it's arguable that this requirement is met because Carol certainly was aware as to the contents of the will, and Ned, though unaware as to Mary's specific bequests, declared he was honored to be a witness. There's no requirement that the witness be aware of the specific details of a will in order for the attested will to be valid.

In addition, for Mary's first will to be valid, she needs to know the assets contained in her estate and she needs to know the natural bounty of her estate (i.e., spouse, issue

etc.). We're told at the end of the fact pattern that Mary's estate at the time of her death consisted of her stock, her house and cash in separate property funds. By devising the house to one recipient, her stock to another, and the residue to both of her devisees, Mary demonstrated that she both knew the natural bounty of her estate and the assets constituting her estate.

There are no indications here of any kind of undue influence or fraudulent behavior by any persons in Mary's life causing her to write and sign her 2010 will, so for this reason, Mary's first will is not invalidated as result of lack of intent. Similarly, there's no indication here that Mary lacked the capacity to enter into her first will, as she is an adult at the time she drafted her first will, and there is no indication she suffered from insanity at that time.

Revocation of Mary's First Will:

The issue is whether Mary's first will was effectively revoked by Mary's actions in 2014. A will can be revoked by physical act or implication. If a will is revoked by testator's physical act, the act needs to be one that effectively destroys the will (e.g., ripping the will in half, as opposed to tearing off a corner without any writing on it), and it needs to be done by Mary as testator (or by someone at her direction) with the simultaneous intent to revoke the will. Here, Mary deleted the old document from her computer, which demonstrates the required intent present when she additionally tore up one original copy of her first will. The act does destroy the will because she "tore it up." There's no indication in the facts that her act of tearing up that original of the first will was minor in any way so as to create a doubt as to whether or not she actually fully tore up the document. Lastly the act of tearing up the will was conducted by Mary herself, so there's no issue as to whether or not it was done by the testator.

Revocation of Safe Deposit Box Copy:

The issue here is whether the fact that Mary forgot about the other copy of her 2010 will in her safe deposit box affects the validity of the revocation of said 2010 will. There is a presumption that where there are two identical originals of one will, the revocation of one constitutes the revocation of the other. Here, we've established above that the

revocation of one of the originals of her will was effective and complete. For that reason, the revocation of the other original is also deemed valid and effective. There is no indication here of any intent in leaving the copy located in the safe deposit box untouched, so there are no grounds on which to rebut the presumption that all copies of Mary's 2010 will have been revoked.

Validity of Mary's second (2014) Will:

The issue here is whether Mary's second will, signed in 2014, is valid. The facts tell us that this will was written by Mary on her corporate stationery with her business logo emblazoned on it. This likely signifies that she did not type the will; rather this is a handwritten (holographic) will. A holographic will needs to be signed by the testator (anywhere on the document) and the material terms of testator's will need to be in handwriting as well. Unlike an attested will, there's no requirement that the will be witnessed by any witnesses. Here, the facts state that Mary signed the document, and all of the material terms of this second will were also presumably handwritten (as there's no indication that she started up her computer at any point to complete this second will). The material terms are that she left her Gamma stock to John, her Delta stock to Bob, and the house to Amy.

There's a related issue as to whether her 2014 will needs to be dated in order to be valid. It does not. The rule is that a holographic will does not need to be dated in order to be effective. There are exceptions to this rule relating to when the date becomes important because there are two undated wills under consideration. But these exceptions do not apply here.

There's another related issue as to whether Mary designated a recipient for her remaining property (i.e., her residuary estate). There's no need for a holographic will to devise the entirety of a testator's estate; when the testator's estate is not entirely devised by a testator's will, the testator's estate goes to Mary's heirs by intestate succession.

As with Mary's first will, there are no indications here of any kind of undue influence or

fraudulent behavior by any persons in Mary's life causing her to write and sign her 2014 will, so for this reason, Mary's second will is not invalidated as result of lack of intent. We're told that Mary decided to prepare a new will soon after marrying John, which is a natural thing to do upon marrying/re marrying. Similarly, there's no indication here that Mary lacked the capacity to enter into her second will, as she is an adult at the time she drafted her second will, and there is no indication she suffered from insanity at that time.

Amy's Rights in the Assets in Mary's Estate:

The issue here is what asset(s) Amy is entitled to. Mary's 2014 will, which was established by the above to be valid, devised "the house" to Amy. There is a related issue as to whether this instruction is valid, because Mary did not specify the address of her house, or any other details clarifying which house Mary was referring to. In such a situation, where there's ambiguity as to the meaning of language contained in a will, or when the language could mean two or more different things (e.g., two different houses), then parol evidence can be admitted into probate to resolve the meaning as to Mary's intent. Here, there's no indication that Mary has more than the one house she's been living in, so parol evidence can be admitted to show that Mary's gift to Amy of her house is valid and refers to Mary's one and only home.

Please see the last paragraph below as to my analysis of Amy's right to a portion of the $200,000 in separate property funds that Mary also left behind but didn't specifically give to anyone via her will.

Bob's Rights in the Assets in Mary's Estate:

Mary's 2014 will devises her Delta stock to Bob. The facts say that in 2015, Mary sold her Delta stock and used the proceeds to buy Tango stock. The issue, known as ademption by extinction, is whether Mary's specific devise of "my Delta stock" fails by ademption by extinction, or whether one of the California exceptions to ademption by extinction apply. The rule is that a specific devise (i.e., a gift of a specific item as opposed to a general item) fails by ademption by extinction when that item is no longer in the testator's possession at the time of her death. California recognizes three exceptions to this rule: 1) when the stock is changed to another form of stock (by

merger, etc.), 2) when the executor of the estate sells the property, and 3) when Testator receives condemnation proceedings and there's no issue of traceability. Here, the first exception applies. The facts state that Mary used the proceeds from the sale of her Delta stock to purchase Tango stock. The Tango stock can be clearly traced to the proceeds of her Delta stock. For this reason, the gift of the Delta stock to Bob should not fail because of ademption by extinction because it's clear that Mary intended for her Delta stock (and/or any replacement stock purchased in lieu of her Delta stock (i.e., her Tango stock) to go to Bob. There's no indication here of lack of intent because she didn't quickly die after purchasing the Tango stock, so she had an opportunity to revise her will had she intended a different result to occur.

Please see the last paragraph below as to my analysis of Bob's right to a portion of the $200,000 in separate property funds that Mary also left behind but didn't specifically give to anyone via her will.

John's Rights in the Assets in Mary's Estate:

Lastly, Mary left her Gamma stock via her 2014 will to John. This is just like her gift to Bob, without the added complication of ademption by extinction. We established that Mary's 2014 will is valid, therefore her specific gift of her Gamma stock to John is valid.

Please see the last paragraph below as to my analysis of John's right to a portion of the $200,000 in separate property funds that Mary also left behind but didn't specifically give to anyone via her will.

$200,000 in Cash in Separate Property Funds:

In addition to John's, Amy's and Bob's rights to Mary's stock and house, there's the issue of who is entitled to Mary's $200,000 in cash in separate property funds. The rule is that when a testator doesn't devise her entire estate away using her will, and doesn't name a beneficiary with respect to any remaining property, the remaining property goes to her heirs via intestate succession. And the rule of intestate succession is a testator's spouse is entitled to all of a testator's separate property if the testator didn't leave behind any parents or issue, 1/2 of the testator's separate property if the testator left

behind one child, and 1/3 of the testator's separate property if the testator left behind more than one child. Here, Mary the testator left behind 2 children, which is more than one, therefore her spouse John is entitled to 1/3 of Mary's separate property, while the remaining 2/3 get split evenly by Amy and Bob (i.e., each of John, Amy and Bob receive 1/3 of $200,000 in addition to the gifts specifically devised to them that are described above).

Answer B

As a threshold issue to determine the rights that Amy, Bob, and John hold in the assets of Mary's estate, we must determine if Mary died with a valid will and, if so, if the will to be probated is the 2010 instrument or the 2014 instrument.

2010 Instrument

The first issue is whether the 2010 instrument was a valid will and, if so, if it was revoked by Mary's tearing up only one copy of the will in 2014.

Valid Will Instrument

In order for a document to constitute a valid will under California law, (i) the testator must have the capacity and intent to form a will through that document and (ii) the will must meet the formation requirements. A testator will have adequate capacity to form a will if (i) they are 18 years of age or older, (ii) they understand the extent of their property (i.e., they know what property they own), (iii) they know the "nature of their bounty" (i.e., they understand who their issue and/or their spouse is, among other relatives), and (iv) they intend for the document to constitute a will.

For the 2010 instrument, each of the capacity elements is met. While not explicitly stated, Mary is clearly over 18, given the fact that she has two adult children. There is also no evidence that she does not understand the extent of her property. The fact that she leaves specific items to each of Amy and Bob strongly suggests that she knows the nature of her bounty, as it is an explicit recognition of both her children. Finally, there is clear intent to create a will, as the first line in the document states "This is my will." As such, Mary had capacity to create the will.

We then move on to formation requirements. For a non-holographic (i.e., not handwritten) will, there are five formation requirements. First, the will must be in writing.

Second, the will must be signed by the testator or by a third party under the direction of and in the presence of the testator. Third, the testator's signing of the will must be in the presence of two witnesses. Each witness must be present at the same time to see the signing. Fourth, the witnesses must sign the will during the testator's lifetime. Fifth and finally, the witnesses must know that they are witnessing the execution of a will.

Here, Mary typed the 2010 instrument rather than handwrite it, so it must meet the formation requirements described above. The will is clearly a writing, and Mary signed and dated both copies, meeting the first two requirements. She signed and dated both copies in the presence of two witnesses: Carol and Ned (note that neither Carol and Ned receive gifts under the 2010 instrument and therefore there is no issue with interested witnesses). Carol, having been fully advised of the contents, signed the will immediately thereafter, so at least one witness met the fourth and fifth requirements. One might raise issue with Ned, who signed without understanding the bequests, and therefore might have some issue meeting the fifth requirement. Ned, however, only had no idea as to the specific bequests, but he still appears to have understood that a will was being signed. The formation requirements only require awareness by the witness that the document is in fact a will, rather than the contents of each specific bequest in the will, and therefore Ned's lack of knowledge should not be an issue. Even if a court were to find it an issue, however, a California court is allowed to let a will into probate even if there have been minor violations of the witness requirements for will, so long as there is clear and convincing evidence that the testator intended the document to be his or her will. Given the clear language in the document and the substantial adherence to the formation requirements, Mary's estate should be able to prove that.

Therefore, Mary both had capacity and should be deemed to meet the formation requirements necessary to have a valid non-holographic will. As such, the 2010 instrument should be probated, unless it has been properly revoked.

Revocation of 2010 Will

Now that we know the 2010 instrument constitutes a valid will, the next issue is to determine whether the 2010 will was revoked.

A will may be revoked by either (i) physical revocation or (ii) a later testamentary instrument. Physical revocation occurs when, among other things, there is a burning, tearing, crossing out, or obliteration (i.e., erasure of terms) of the physical will document, and the testator through such actions intended to revoke the will. In the event that there are multiple copies of a will, the physical revocation of one copy will create a presumption that there has been a revocation of the will, even if other copies have not been physically revoked.

Here, Mary deleted the old document from her computer and tore up one copy of the 2010 will. The deletion from the computer does not constitute an obliteration of the document, as obliteration does not apply to electronic documents, and thus that act did not constitute a physical revocation. However, Mary's tearing up a copy of the 2010 will does constitute a tearing of the will and, under the rules described above, a physical revocation of the will. This act was intended to revoke the will, as can be proved through the circumstantial evidence that she also deleted the will from her computer (showing it was not a mistake) and that she then devised a new will. Moreover, even though Mary forgot to physically revoke the copy of the will in her safety deposit box, there is a presumption that the physical revocation of one copy creates a revocation of the will, despite other copies being preserved. Here, that presumption will exist, and it will be hard to rebut. The evidence shows a clear intent to revoke, as Mary deleted the will from her computer and drafted a new will after marriage, and there is no evidence showing hesitation on Mary's party to revoke.

Thus, the 2010 instrument was properly revoked through physical revocation.

In the alternative, the 2010 will may have been revoked through later

testamentary instrument. A later instrument revokes a prior will if (i) the later instrument expressly states that it revokes the prior will or (ii) the later instrument creates an implicit assumption that the former will is revoked. For (ii), a later will that deals with the entirety of the testator's estate, and therefore leaves nothing for the previous will to distribute, constitutes sufficient implicit evidence of revocation.

Here, one could argue that the 2014 instrument revoked the 2010 will. There is no express statement of revocation, so we must look to see if it implicitly revokes the 2010 will. While there is an arguable case for implied revocation, as the 2014 instrument deals with most of Mary's estate and there are circumstances surrounding the 2014 will that suggest Mary meant to revoke the 2010 will (as described above), one could argue that the lack of a residuary clause defeats the implied revocation, as it leaves something for the 2010 will to distribute.

While good cases can be made either way for revocation by a later testamentary instrument, it ultimately does not matter, as there is a proper physical revocation of the 2010 will. Therefore, the 2010 will does not govern the rights of Amy, Bob, and John.

2014 Instrument

The next issue is whether the 2014 instrument is a valid will and therefore governs the rights of Amy, Bob, and John with respect to Mary's estate. Note that, upon the physical revocation of the 2010 will, that will was permanently revoked unless there has been a revival. There is no indication of a revival of the 2010 will under these facts. As such, if the 2014 instrument is not a valid will, the estate will pass into intestacy and distribution will be governed by the intestacy rules.

The 2014 instrument is handwritten, and therefore if it is a will, we consider it a holographic will. In order to have a valid holographic will, the document must be (i) in writing, (ii) signed by the testator, and (iii) all of the material terms of the will must be in the testator's own handwriting. The testator must also have capacity to execute a will. The material terms are (i) each gift given under the will and (ii) who each gift should go

to. The lack of a date will not invalidate a holographic will, except in certain instances where there is an issue with the testator's capacity or there is the possibility that two or more wills should be probated.

Here, Mary wrote on her corporate stationery her bequests to each of John, Bob, and Amy, and signed the document. We first need to make sure there is no capacity issue. There is clearly no issue as to age or the extent of her property; this analysis is the same as what was discussed for the 2010 instrument above. There is also no issue as to the nature of her bounty, as she knows both her children and her spouse as evidence by her gifts. While one may argue that there was not an intent to create a will since there is no clear indication that this document is a will, the surrounding circumstances are sufficient to prove intent. She deleted and tore up the old will right before writing this document, and it is generally written as a will (e.g., it makes gifts as one would expect a will to make). Therefore, there is no capacity issue.

The document also meets the requirements of a holographic will. It is signed by Mary, and each of the gifts made, as well as who it should be made to, is handwritten on the corporate stationery. Given that there is no capacity issue or an issue with multiple wills that are each possibly valid, the lack of a date should be no issue here.

Therefore, the 2014 instrument is a valid holographic will and should govern the rights of Amy, Bob, and John.

Rights of Amy, Bob, and John Under 2014 Will

Now that we have determined what will should govern the distribution of Mary's estate, we will address each of Amy, Bob, and John's rights under the 2014 will in turn. We will lastly address the issue of the $200,000 in cash that is not subject to the will.

Amy

Under the 2014 will, Amy has been gifted Mary's house. This gift will be given to

Amy, pursuant to the 2014 will, unless there is an issue with the house as community property.

California is a community property state. Therefore, there is a presumption that all property obtained by a couple during marriage is community property. Upon the death of one spouse, the living spouse retains a one-half interest in all community property. In the event that a testator spouse's will devises more than one-half of the community property (and therefore intrudes upon the living spouse's one-half interest), then the living spouse may either elect to take its gifts under the will or to receive its proper community property share. Any property acquired prior to marriage, as well as any property acquired during marriage through the expenditure of separate property and the profits, rents, and issue arising from separate property, is considered separate property and is not subject to the community property rules stated above.

Amy's gift, the house, was purchased prior to Mary's marriage to John. Although we do not know the exact date of purchase, we know that it happened prior to marriage because it was described in Mary's 2010 will. Since it was purchased prior to marriage, it will be considered separate property, and therefore John may not assert any rights to it. Thus, Amy will receive her gift under the will, and should get the house.

Bob

Under the 2014 will, Bob is to receive Mary's Delta stock. Since Mary used the term "my" Delta stock, this is considered a specific gift under the will. A specific gift may be extinguished under the will in the event that the testator no longer owns the specific property to be gifted at the time of death. However, under California law, a specific gift will not be automatically extinguished because it is no longer part of the testator's estate if it can be proven that the testator did not intend to have the gift adeemed.

Here, Mary sold Delta stock and therefore the Delta stock is no longer in her estate. However, Bob may argue that this extinction should not cancel the gift, as Mary did not intend to get rid of the gift. He may prove this by showing that the proceeds of

the sale of the Delta stock were immediately used to buy Tango stock. Moreover, there is no evidence that the sale occurred because Mary was looking to get rid of Bob's gift. Therefore, given the direct tracing of proceeds and the lack of any evidence that Mary was looking to shut Bob out of the will, Bob has a good case to show that his gift should not be adeemed and he should receive the Tango stock, which can be directly traced from the proceeds of the Delta stock.

Likewise, there is no community property issue, as the Tango stock was bought from the proceeds of separate property (since the Delta stock was acquired prior to marriage).

John

Under the 2014 will, John is to receive the Gamma stock. There is no issue with this devise, and thus he will receive this gift.

$200,000 in Cash

The final issue is what to do with the $200,000 in cash. Since there is no residue clause in the 2014 will, this will pass by intestacy.

Under California's intestacy rules, in the event that there is a surviving spouse, the surviving spouse takes 1/2 of all community property and quasi-community property. The surviving spouse will also take a share of separate property, depending on whether the testator left living children. In the event that the testator left a surviving spouse and more than one living child, the surviving spouse receives 1/3rd of the separate property passing through intestacy, and the children receive the other 2/3rd, to be divided equally among them.

Here, there is a surviving spouse (John) and two living children (Amy and Bob). Therefore, the $200,000 will go 1/3rd to John under intestacy rules, and 2/3rd to Amy and Bob. Thus, each will receive 1/3 of $200,000.

Q2 Remedies / Torts

Steve agreed to convey his condominium to Betty for $200,000 in a written contract signed by both parties. During negotiations, Steve told Betty that, although there was no deeded parking along with the unit, he was allowed to park his car on an adjacent lot for $50 a month. Steve stated that he had no reason to believe that Betty would not be able to continue that arrangement. Parking was important to Betty because the condominium was located in a congested urban area.

On June 1, the conveyance took place: Betty paid Steve $200,000, Steve deeded the condominium to Betty, and Betty moved. She immediately had the entire unit painted, replaced some windows, and added a deck. The improvements cost $20,000 in all. She also spent $2,000 to remove the only bathtub in the condominium and to replace it with a shower, leaving the condominium with two showers and no bathtub.

On August 1, Betty discovered that the owner of the adjacent parking lot was about to construct an office building on it and was going to discontinue renting parking spaces. She also learned that Steve had known about these plans before the sale. She quickly investigated other options and discovered that she could rent parking a block away for $100 a month. At the same time, she also found that, immediately before Steve had bought the condominium, the previous owner had been murdered on the premises. Steve had failed to tell Betty about the incident.

Betty has tried to sell the condominium but has been unable to obtain offers of more than $160,000, partly due to the disclosure of the murder and the lack of a parking space. Betty has sued Steve for fraud.

What is the likely outcome of Betty's lawsuit and what remedies can she reasonably seek? Discuss.

Answer A

Steve's Breach in Respect of the Parking Space

The issue is whether Steve misrepresented to Betty the facts relating to the parking space in a way that would give cause to a right of action.

A misrepresentation is a (i) statement of fact, (ii) that is false, and (iii) either material or the known to the declarant to be untrue, and (iv) which induces a person to act to their detriment in reliance on the representation.

Steve made a clear statement of fact when he said there was an existing parking space available for rent at $50 a month and he had no reason to believe that the arrangement would not be continued. This fact is clearly false since the construction of an office building means that the parking arrangement will be discontinued.

Steve told Betty that he saw no reason she could not continue to park her car subject to the pre-existing arrangement (payment of a $50 a month fee). Parking was important to Betty given the nature of the area (a congested urban area) - a fact that Steve should have been aware of, having lived in the area himself. Betty will argue that this was a material fact of importance in her decision to enter into the condo sale. Steve will argue the opposite, that parking is ancillary to the property purchase and therefore lacks the materiality required for misrepresentation. As Betty later discovered, Steve knew about the plans to discontinue renting parking spaces before the sale occurred, therefore even if the statement is not considered material it will satisfy the requirement of knowledge that it was untrue.

Given the importance of parking to Betty, she will argue that the fact there was a parking arrangement in place was central to her decision to purchase the condo and she therefore acted in reliance on the statement. Again, Steve will try to argue that the parking is ancillary to the condo, it was not part of the deeded property and does not

sufficiently constitute reliance as there must have been many other factors that induced Betty to purchase the condo such as price, size and location.

Given that parking is something Betty probably does on a daily basis, the existence of adequate parking arrangements is likely to be viewed by the courts as sufficient motivation for reliance. Therefore Steve's statement is indeed likely to be viewed as a fraudulent misrepresentation.

Failure to Disclose the Murder

The issue is whether Steve was under a duty to disclose that a murder had previously occurred in the condo.

At common law, the seller of property had no duties of disclosure to the buyer, under the doctrine of caveat emptor. The buyer was entitled to inspect the property prior to purchase and had the obligation to discover any defects for herself. The modern trend is to impose on sellers a duty to disclose material defects of which the buyer was not aware and could not easily discover on inspection. Liability for failure to do so arises under the principles of concealment and fraud.

The fact that a murder had taken place in the condo itself is a fact very likely to affect the marketability of the condo. Indeed Betty found the value had dropped significantly once she disclosed this fact to potential new buyers. Betty will argue that Steve had a duty to actively disclose this information to her and his failure to do so constituted fraud. Steve, on the other hand, will argue that he made no representation about the murder and never stated that a murder had not happened and therefore cannot be found liable for fraud because he did not do or say anything dishonest.

The courts will likely find that Steve did have a duty to disclose this information to Betty, as it is a material fact concerning the property that will have an adverse effect on its value. Steve's failure to disclose will amount to concealment and consequently Betty should have a strong course of action against Steve for fraud.

Appropriate Remedies

Where there is fraud in the inducement of a contract, the contract becomes voidable and entitles the innocent party to treat the contract as void and seek remedies accordingly.

The appropriate remedies for Betty will depend on whether she wishes to stay in the condo, but make good her financial loss, or whether she wishes to force a sale of the property and move out.

Money Damages

If Betty decides to stay in the condo the most appropriate course of action will be to affirm the contract and seek money damages. The various money damages rules are all aimed at compensating for loss of expectation, where the expectation was simply no breach. Expectation damages will be used to put the plaintiff in the position she would have been in had the contract been as expected. In order to claim damages, the claimant must show that (i) the defendant's actions were the cause of the loss, (ii) the loss was reasonably foreseeable at the time the contract was entered into, (iii) the loss is certain and not too speculative, and (iv) it was unavoidable (meaning the claimant has taken all steps available to reduce her loss).

For the Parking Space - With respect to the parking, Betty's expectation was that she would have a place to park her car for $50 a month. Steve's misrepresentation is the clear cause of this loss and it was reasonably foreseeable at the time that if Steve's statement about the parking was false, Betty would suffer damage by either having no parking or potentially having to pay more for it. Betty has taken appropriate steps to find an alternative parking space and thereby mitigate her loss. But the parking space will be twice the cost of what she was expecting. This loss is certain in monetary terms (a clear $50 per month). Therefore Betty should have a successful claim against Steve for monetary damages to make good the loss of the parking place.

Judgment for money damages is normally made in one lump sum payment, discounted to today's value without taking account of inflation. However, the modern trend of some courts is to allow for inflation.

For the Loss in Value Due to the Murder - The courts will apply the same test to ascertain damages in respect of the drop in the condo's value due to the murder.

As before, the causal link is clear - Steve's failure to disclose the murder resulted in Betty paying an inflated price for the condo; this was foreseeable at the time, since it is clear to reasonable people that such a fact would necessarily result in the property being less marketable. Betty has attempted to sell the house but has been unable to do so for more than $160,000; therefore the measure of expectation damages will be $40,000. However, Betty has also spent $22,000 on making improvements to the condo and she will argue that they have raised the value of the condo and she should therefore be able to recover for these too under the consequential damages rule. Consequential damages may be sought in order to compensate the claimant for losses over and above expectation damages that were foreseeable.

Steve will argue that removing the only bathtub in the condo has in fact depreciated the property and that the drop in value is more due to this than the disclosure of the murder.

Rescission

Recission is an equitable remedy that the courts may use in their discretion when there is no available legal remedy. Rescission would allow Betty to treat the contract as void, the condo would be returned to Steve and her purchase money would be returned to her.

If Betty decides she no longer wants to live in the condo, this would be a more appropriate remedy. Since land is always considered unique, Betty may argue that the legal remedy of damages is not appropriate and she should be entitled to avoid the contract altogether.

In addition to obtaining back her purchase money, Betty could seek reliance damages for the amounts spent on improving the property. Reliance damages seek to put the claimant in the position she would have been in had she never entered into the contract.

This would allow Betty to recover the $22,000 spent on improvements.

Answer B

Valid Contract:

Governing Law:
The UCC governs contracts for the sales of goods. The common law governs contracts for services, the sale of land, and all others not under the UCC.

Here, the contract was for the sale of a condominium (condo) which is real property; thus the Common Law applies.

Contract formalities:
A valid contract requires: 1) offer, 2) acceptance, and 3) consideration. Further, a land sale contract must be in writing to satisfy the statute of frauds (SOF).

Here, there is a written contract by both parties relating to the sale of the condo, thus this satisfies the SOF. Steve agreed to sell Betty his condo for $200,000. Thus, this was a valid offer. On June 1, the conveyance took place. Steve deeded the condo to Betty; she paid the $200,000 and moved in. Thus, Betty accepted.

Thus, the parties had a valid contract.

Breach of Contract:

A breach of contract occurs when one of the parties fails to perform on the contract. With land sale contracts, once the conveyance is made, it extinguishes the contract and the parties can only sue on the deed and based on which future covenants were granted in the deed (further assurances, quiet enjoyment, or warranty).

Here, the conveyance had already occurred; thus the deed will control and Betty will not be able to sue for breach of contract relating to the land sale. However, a party can

nonetheless sue based on fraud if there was an intentional failure to disclose. If Betty can establish that there was fraud, she would be entitled to sue on a fraud theory.

Fraud:

Fraud requires 1) a misrepresentation, 2) of material fact, 3) known to induce reliance, 4) actual reliance, and 5) damages.

Parking:

On August 1, Betty discovered that the owner of the adjacent parking lot was about to construct an office building on it and would discontinue renting parking spaces and Steve knew about these plans. Here, there was a misrepresentation because during negotiations Steve told Betty that although there was no deeded parking, she would be allowed to park on an adjacent lot for $50 per month just as he had. Meanwhile he knew about the building owner's plans that Betty would not be able to park in that lot. Thus, there was a misrepresentation.

This was a material fact because parking was important to Betty because the condo was located in a congested urban area. The materiality is further evidenced by the fact that she is having a hard time reselling the condo because of the parking.

Further, Steve knew this misrepresentation would induce reliance because he told Betty that he had no reason to believe that Betty would not be able to continue that arrangement. This shows that he knew that Betty would rely on this fact in deciding to continue with the purchase.

The next element is met because Betty actually relied on the misrepresentation because she decided to continue with the purchase of the condo and she did not know about the lack of parking until after the sale had been completed.

Betty's damages are established because she will lose lost the ability to park in the

nearby lot.

Thus, there was a misrepresentation as to the parking.

Murder:

A misrepresentation does not have to be a lie, but can be an omission as well, if the seller knew of the defect and failed to inform the buyer of the defect.

Here, Betty learned in August, some two months after the purchase, that the previous owner had been murdered on the premises, and Steve failed to disclose to Betty about the incident. Steve knew about the murder but failed to disclose it to Betty. Such a failure to disclose would amount to a misrepresentation based on omission. Here, he knew that this was a material fact because a prospective buyer would want to know if a person had been murdered on the premises. Further, the failure to disclose such a horrible fact would result in an innocent buyer to rely on the fact that no such murders had occurred on the premises. He knew that if he disclosed the murder, Betty would back out of the deal. Further, Betty relied on the fact that there had been no murders in the condo when she decided to proceed with the sale. Had she been informed about the murder, she could have had the opportunity to decide if she nonetheless wanted to continue with the purchase. Lastly, Betty has suffered damages because she cannot sell the house for more than $160,000, partly because she has to disclose the murder to prospective buyers.

Thus, there was a misrepresentation about the murder.

In conclusion, because Steve engaged in fraud for the misrepresentation of the parking situation and the murder, Betty will be successful in her suit against Steve.

Rescission:

A contract can be rescinded based on a mutual mistake or fraud.

Here, Betty will seek that the contract be rescinded because she can successfully assert her claim for fraud against Steve, as established above.

Reliance:

Reliance damages can be obtained to avoid any unjust enrichment on the part of the defendant. Reliance seeks to put the non-breaching party in the position as if there had been no contract.

Here, Betty was excited to own her own condo. In anticipation of living in the condo for a long period of time, she decided to make improvements to it. Betty immediately had the entire unit repainted, replaced windows and added a deck. The total value of improvements cost $20,000. She also spent $2,000 to remove the only bathtub and replace it with a shower. Betty made such improvements because she had relied on the fact that there were no defects with the property. It would be unfair to rescind the contract and return the condo to Steve with $22,000 worth of improvements. Thus, Betty should be able to receive reimbursement for the $22,000 she expended on improvements to the condo.

Expectation:

Expectation damages seek to put the non-breaching party in the same position as if no breach had occurred.

Betty will seek expectation damages to put her in the same position as if she had never purchased the condo. When she purchased the condo she expected to live in a unit with nearby parking and no previous murder. But due to Steve's fraudulent misrepresentations, Betty will not be able to do so. As a result, Betty should be compensated as if no contract had occurred.

Betty has tried to sell the condo, but is unable to get offers of more than $160,000 because of the disclosure of the murder and the lack of parking. If Betty sells the condo for $160,000, Steve will be required to pay her for the difference in the original sale

price ($200,000) and the sale price of the condo. Assuming she can get $160,000 for it, Steve will be required to pay Betty $40,000.

Thus, Betty is entitled to $40,000 in expectation damages.

Incidental:

Incidental damages are those damages that the non-breaching party incurs as a result of the breach.

Here, Betty will be entitled to any funds expended in the attempt to sell the condo, such as brokerage fees and listing fees. Further, she should be able to recover the difference of the $50 to park in the current parking lot and the $100 to park in the other lot, until the condo sells.

Punitive Damages:

Punitive damages seek to punish the defendant for willful and wanton misconduct. Generally, punitive damages are not awarded for breach of contract actions. However, a plaintiff may recover punitive damages if there is an underlying tort.

Here, Betty's underlying theory for suit against Steve is for fraud, and fraud is a tort. The court may be compelled to grant Betty punitive damages to punish Steve for his fraudulent actions, and to teach him a lesson.

Thus, Betty may be able to recover for punitive damages.

Limitations on Damages:

Damages must be causal, certain, foreseeable and mitigated.

Here, Betty's damages are caused by Steve's fraud. Her damages are certain because we can place an exact dollar figure on her damages. Her damages are foreseeable

because it was foreseeable that she would have to obtain parking at another parking lot which could cost more money. It was also foreseeable that when she discovered the murder in the condo, she would not want to live there, thus motivating her to move out and sell the property. Lastly, damages must be mitigated. This means that Betty must make a good-faith attempt to sell the condo for a reasonable sum of money and within a reasonable time. Further, until she sells the property she will be

Steve's Defenses:

Parol Evidence Rule:
The Parol evidence rule (PER) seeks to prohibit prior oral negotiations of a contract because the parties intended to put their final expression in the writing itself.

During negotiations Steve told Betty that there was no deeded parking but she would be allowed to park on an adjacent lot for $50 per month, just as he had. Steve will argue that because such communications were oral and prior to the final contract, that the court should exclude them. This defense will fail because his actions constituted fraud, and the contract had already been performed.

Laches:
Laches seeks to bar a plaintiff's recovery if they wait too long to assert a claim and such delay of time causes an undue prejudice to the defendant.

Here, the sale occurred in June and Betty is suing in August. Thus, this was only a three month period and not an unreasonable delay.

Unclean Hands:
The court of equity will not aid suitors who come to the court with unclean hands.

Here, Betty did not engage in any misconduct. Rather, she was an innocent purchaser. Thus, this defense too will fail.

Q3 Evidence

Pete sued Donna's Pizza in federal court.

At trial, in his case-in-chief, Pete testified that, as he was driving his car one day, he entered an intersection with the green light in his favor. He further testified that when he entered the intersection, Erin, an employee of Donna's Pizza, was driving a company van, ran a red light, and collided with his car. He sustained serious injuries as a result and was taken to the hospital.

Pete then called Nellie, a nurse, who testified that she treated Pete when he was at the hospital. Nellie testified that Pete told her that, during the collision, his head struck the windshield and that he was still in a great deal of pain. Nellie, pursuant to standard hospital procedure, recorded the information on a hospital intake form. Pete moved the hospital intake form into evidence and rested.

During Donna's Pizza's case-in-chief, Erin testified that she had the green light and that it was Pete who ran the red light. Donna, the owner of Donna's Pizza, then testified that Donna's Pizza was not responsible for the accident. On cross-examination, Donna was asked whether she had ever offered to pay for any of Pete's medical expenses, and she denied she had. Donna's Pizza rested.

In rebuttal, Pete testified that, at the accident scene, Erin told him, "I was in a hurry to make a pizza delivery and that is why I ran the red light." Pete also testified that Donna visited him in the hospital and told him that Donna's Pizza would take care of all of his medical expenses. Pete testified that Donna's Pizza, however, never paid for any of his medical expenses.

Assume all appropriate objections and motions to strike were timely made.

Did the court properly admit:

1. The hospital intake form? Discuss.

2. Pete's testimony about Erin's statements at the accident scene? Discuss.

3. Pete's testimony about Donna's statements at the hospital? Discuss.

Answer according to the Federal Rules of Evidence.

Answer A

1. HOSPITAL INTAKE FORM

Logical Relevance

Evidence is logically relevant if it has any tendency to make a disputed fact more or less probable than it would be without the evidence. Here, Pete (P) is suing Donna's Pizza (D) for a car accident allegedly caused by D's employee, Erin (E). The hospital intake form is logically relevant because it tends to make the fact of P's physical injury, and therefore, damages, more probable.

Legal Relevance

Evidence must be both probative and material in order to be legally relevant. Relevant evidence may nonetheless be inadmissible if its probative value is substantially outweighed by a risk of unfair prejudice. Here, the hospital intake form is legally relevant because it is probative and material as to whether P suffered damages, and its probative value is not outweighed by a risk of unfair prejudice to D.

Witness Competence

A lay witness must have personal knowledge of a matter in order to testify about it. Here, Nellie is a nurse who treated P at the hospital. She was also the one who recorded the information on the hospital intake form. Therefore, Nellie is competent to testify.

Authentication

Tangible evidence must be properly authenticated, either through personal knowledge, distinct characteristics, by showing chain of custody, or, in the event of a reproduction of a photo, knowledge of the person who took the photo. Here, the hospital intake form can be authenticated by Nellie's personal knowledge, because Nellie was the one who filled out the intake form. Therefore, the intake form has been properly authenticated.

Best Evidence Rule

The best evidence rule applies when a witness is testifying about a document or the document is at issue. It mandates that in those circumstances, the original document or a properly authenticated duplicate be entered into evidence. Here, Nellie is testifying to her personal knowledge of what P said to her at the hospital. The best evidence rule does not apply, and the business records exception allows the intake form to be admitted.

Hearsay

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted and is generally inadmissible unless it falls under an exemption or an exception to hearsay. The hospital intake form may be hearsay because it was made out of court and is being offered to prove that P struck his head on the windshield and was in a great deal of pain. The intake form is hearsay within hearsay. However, it may fall under one of the following exceptions if both levels of hearsay are exceptions.

Statement for Medical Diagnosis/Treatment

When a statement is made for medical diagnosis or treatment, it falls under an exception to the hearsay rule regardless of whether the declarant is available to testify. Here, P told Nellie that during the collision, his head struck the windshield and that he was still in a great deal of pain. If these statements were made for medical diagnosis or treatment of his head injury, then it is likely the statement will come in.

Statement of Mental/Physical Condition

When a statement is made about a mental, physical, or emotional condition, it falls under an exception to the hearsay rule regardless of whether the declarant is available to testify. Here, P told Nellie that he was still in a great deal of pain. This will likely come in under this exception.

Business Records

Business records fall under an exception to the hearsay rule regardless of whether the

declarant is available to testify. The business records must be made in the regular course of business at or near the time of the event, by a person who had knowledge of the event. It must also be a regularly conducted activity of the business to make such records. Here, the facts indicate that Nellie recorded the information on a hospital intake form at or near the time of the event. Nellie had knowledge of the event because the person to whom P made the statements was Nellie and she recorded them during the regular course of her business as a nurse at the hospital. The facts also indicate that she recorded the information pursuant to standard hospital procedure, making the recording a regularly conducted business activity. Therefore, the hospital intake form is admissible under the business records exception to the hearsay rule.

Conclusion

The statement made to Nellie is a statement for medical diagnosis or treatment and also a statement of a physical condition; it is admissible despite the hearsay rule. The intake form itself is admissible under the business records exception. Therefore, despite being hearsay within hearsay, the court properly admitted the hospital intake form.

2. P'S TESTIMONY ABOUT E'S STATEMENTS AT THE ACCIDENT SCENE

Logical Relevance

Evidence is logically relevant if it has any tendency to make a disputed fact more or less probable than it would be without the evidence. Here, P's testimony about E's statements at the accident scene is logically relevant because they tend to make the fact that E was responsible for the accident more probable than without the statements.

Legal Relevance

Relevant evidence may nonetheless be inadmissible if its probative value is substantially outweighed by a risk of unfair prejudice. Here, P's testimony about E's statements is legally relevant because their probative value is not outweighed by the risk of unfair prejudice to D.

Witness Competence

A lay witness must have personal knowledge of a matter in order to testify about it. Here, P is testifying about statements E made to him at the scene of the accident; therefore, he has personal knowledge of the statements and is competent to testify about them.

Hearsay

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted and is generally inadmissible. P's testimony about E's statements at the accident scene is hearsay because they are out-of-court statements and they are being offered to prove E ran the red light. They will be inadmissible unless they fall under one of the exemptions or exceptions to hearsay discussed below.

Prior Inconsistent Statement

A prior inconsistent statement is admissible as an exemption to hearsay. Here, E testified during D's case-in-chief that she had the green light and that it was P who ran the red light. However, at the accident, P is willing to testify that E told him, "I was in a hurry to make a pizza delivery and that is why I ran the red light." As this statement is inconsistent with what E has testified during D's case-in-chief, it may be admissible under the prior inconsistent exemption.

Vicarious Admission

An employee's statement may be admissible in a case against the employer if the employee was acting within the scope of her duties. A vicarious admission is an exemption to the hearsay rule. Here, E is an employee of D's. She was making a pizza delivery, which is within the scope of her employment. Therefore, what E said at the accident scene is admissible as a vicarious admission in P's suit against D.

Statement Against Interest

A statement against interest is admissible as an exception to the hearsay rule, only if the declarant is unavailable. A declarant may be unavailable for a number of reasons

including she is dead, missing, or refuses to testify. Here, E's statement is a statement against interest; however, E is available, therefore, her statements to P at the accident scene will not come in under this exception.

Present Sense Impression

A statement of present sense impression is admissible as an exception to the hearsay rule, regardless of whether the declarant is available. The statement must be made at or soon after the event that is described. It is possible that E's statements could come in under the present sense impression exception because they were made to P immediately following the accident, at the scene of the accident, and they related to the circumstances of the accident--that she ran the red light because she was in a hurry. However, they are more likely to come in via the prior inconsistent and vicarious admission exemptions to the hearsay rule.

Excited Utterance

An excited utterance is admissible as an exception to the hearsay rule, regardless of whether the declarant is available. The declarant must make the statement while under the stress or excitement of the event. Excitement can be evidenced by shouting or other excited behavior. Here, there is no evidence to suggest E's statements were made to P under the stress or excitement of the accident. Therefore, they are not admissible under this exception.

Conclusion

The court properly admitted P's testimony about E's statements at the accident scene, because they were prior inconsistent statements as well as vicarious statements.

3. P'S TESTIMONY ABOUT D'S STATEMENTS AT THE HOSPITAL

Logical Relevance

Evidence is logically relevant if it has any tendency to make a disputed fact more or less probable than it would be without the evidence. Here, P's testimony about D's

statements at the hospital is logically relevant because they tend to make the fact that E, and therefore D, was responsible for the accident more probable than it would be without the statements.

Legal Relevance

Relevant evidence may nonetheless be inadmissible if its probative value is substantially outweighed by a risk of unfair prejudice. Here, P's testimony about D's statements is legally relevant because their probative value is not outweighed by any risk of unfair prejudice.

Witness Competence

A lay witness must have personal knowledge of a matter in order to testify about it. Here, P is testifying about statements D made to him at the hospital; therefore, he has personal knowledge about the statements and is competent to testify about them.

Hearsay

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted and is generally inadmissible. P's testimony about D's statements at the hospital is hearsay because it is being offered to prove that D offered to take care of all of his medical expenses. However, they are not admissible, even if they fall under the following exemptions or exceptions, because of the public policy exception regarding offers to pay medical expenses (see below).

Prior Inconsistent Statement

A prior inconsistent statement is admissible as an exemption to hearsay. Here, D testified during D's case-in-chief that D was not responsible for the accident. On cross-examination, D testified that she had never offered to pay for any of Pete's medical expenses. Since P is testifying that D had said before that she would pay for his medical expenses, these out-of-court statements may be admitted as prior inconsistent statements.

Statement of Party Opponent

A statement made by a party opponent is admissible as an exemption to the hearsay rule. Even though P's testimony about D's statements at the hospital may be a statement of a party opponent, because P is suing Donna's Pizza, it does not fall under this exemption due to the public policy exception regarding offers to pay medical expenses (see below).

Offers to Pay Medical Expenses

Offers to pay medical expenses are not admissible. Under the Federal Rules of Evidence, statements that accompany offers to pay medical expenses are admissible. Here, the only statement P is offering is D's statement that it would take care of all of his medical expenses. The offer is inadmissible under this public policy exception. Therefore, the court did not properly admit P's testimony about D's statements at the hospital.

Conclusion

The court improperly admitted P's testimony about D's statements at the hospital because an offer to pay medical expenses is never admissible. While not admissible as substantive evidence, it may be used to impeach D.

Answer B

1. Hospital Intake Form

Relevance

Evidence is logically relevant if it tends to prove or disprove a material fact. Evidence is legally relevant if its probative value is not substantially outweighed by the risk of unfair prejudice. Here, the hospital intake form includes Pete's (P) statement to the nurse regarding his injury and how it occurred. Thus, it tends to prove a material fact - damages. Additionally, there is little chance of unfair prejudice here as the statement relates directly to the accident and is not shocking to a jury. The form is relevant.

Hearsay

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Generally, it is inadmissible, unless an exemption or exception applies. Here, the hospital intake form is offered to show P's injury immediately after the crash. It was created out of court and is therefore hearsay. It is inadmissible unless an exception applies.

Double Hearsay

Documents or statements that have different layers of out of court statements are double hearsay, and each statement must be analyzed for admissibility. Here, not only is the hospital form hearsay, as discussed, but P's statement contained within is also hearsay, as it was made out of court and is offered to prove its truth. Thus, both the form and the statement must apply to a hearsay exception to be admissible.

a. Pete's Statement

Opposing Party

A statement made by an opposing party is not hearsay and thus is admissible. Here, P has offered the hospital record which contains his statement for evidence.

Accordingly, this is not an opposing party, and this exception does not apply.

Medical Diagnosis / Treatment

An out of court statement made to obtain a medical diagnosis or treatment is considered reliable. It is therefore excepted from the hearsay rule and admissible. Here, P had just been in a car accident and was transported to the hospital. There, he told the attending nurse that he "struck his head on the windshield," and that he "was still in a great deal of pain." Accordingly, P was making these statements to obtain a diagnosis and treatment for his pain. This statement is likely admissible as an exception to the hearsay rule.

Physical Condition

A statement by the declarant describing his current physical or emotional condition is admissible as a hearsay exception. Here, P was describing his current condition - he was in a great deal of pain. The defense may argue that the entire statement does not qualify: while the "great deal of pain" portion describes P's condition, the "my head hit the windshield" does not. It describes the reason for the condition, but not the current condition itself. Accordingly, D may move to strike that portion of the statement.

However, because the statement was made for medical treatment and diagnosis, and the "my head hit the windshield" was necessary to determine the type and extent of the injury, the entire statement is admissible.

b. Hospital Record

Business Record

A business record is an out of court statement and thus is hearsay. However, it may be admissible as an exception if it was created in the ordinary course of business, by someone with knowledge, and not in anticipation of litigation. Here, the facts indicate that Nurse Nellie created the document immediately after speaking with P. She had actual knowledge of the information she included in the form. Additionally, the form was created pursuant to standard hospital procedure. Accordingly, the hospital form is

admissible as a business record.

Authentication

Evidence must be authenticated. Typically, personal knowledge is sufficient to authenticate a document. Here, Nellie herself is available to testify as to the creation and the contents of the form. She has personal knowledge and the form is properly authenticated.

Best Evidence Rule

The Best Evidence rule states that an original document must be admitted whenever the contents of a document are at issue. The contents are at issue when a witness is testifying about its contents. Here, P has moved to admit the hospital form. Accordingly, the best evidence rule mandates that the original be admitted. The facts do not indicate that the form is a copy, or that the original is unavailable. It appears that the form is the original, and the best evidence rule is satisfied.

2. Erin's Statements

Relevance

E's statement to P at the scene admits liability, and therefore proves a material fact of the case. Further, there is no risk of unfair prejudice. D may argue differently, claiming that E was acting outside of the scope of D's control and thus the statement is irrelevant to the case against D, and unfairly prejudices her. However, as discussed below, this argument will fail. The statement is both logically and legally relevant.

Hearsay

See rule above. Here, Erin (E) told the P at the scene that she "was in a hurry to make a delivery and that's why [she] ran the red light." This is an out of court statement offered to prove that E ran the red light. It is hearsay.

Opposing Party

See rule above. An employee or agent may be considered as part of the opposing party, if the statement was made within the scope of employment. Here, E was a delivery driver for Donna's Pizza (D). She was delivering pizza when the accident occurred. Accordingly, she was acting within the scope of her employment. Subsequently, when she spoke to the officer at the scene, she was speaking within that same scope of employment. E's statement can be attributed to D, and is thus a statement by an opposing party.

However, D will argue that she is not responsible for the accident. She has claimed that she has no connection to the events. Thus, D will argue, E's statements cannot be attributed to her. However, because E is acting as D's driver, within the scope of her employment, the statement can be attributed to D, and it is admissible as a statement by an opposing party.

Excited Utterance

An excited utterance is admissible as a hearsay exception if the statement is in response to a shocking or startling event, and if the statement is made while the declarant is still under the stress of that shocking event. Here, even if E were not an opposing party, P may argue that her statement is an excited utterance. She was just in a car accident that resulted in injury, a startling event, and she was describing the event immediately after it occurred.

However, D will argue that E was not still under the stress of the accident; enough time had passed and the parties were speaking calmly after the fact. This is likely not an excited utterance.

Present Sense Impression

Like an excited utterance, a present sense impression is admissible if the statement describes an event and was made during or immediately after the event occurred. Here, P will also argue that E was describing the event immediately after it occurred. However, as above, it is likely that some time had passed, and a court may rule that this does not qualify as a present sense impression.

Because E was acting within the scope of her employment, the statement is likely admissible as an admission by an opposing party.

3. Donna's Statements

Relevance

See rule above. D's offer to P tends to prove her control over the car and E's conduct. It is relevant to D's liability.

Hearsay

See rule above. D's statement to P in the hospital in which D promised to pay for P's medical expenses is an out of court statement. It is hearsay.

Opposing Party

See rule above. D is the opposing party, and the statement likely qualifies as an admission by an opposing party. This is non-hearsay, and the statement is admissible barring some other limitation.

Offers to Pay Medical Expenses

Offers to pay medical expenses, even if admissible as a hearsay exception, are inadmissible as they violate public policy. However, the statements, though not admissible as substantive evidence, may be admissible as impeachment or to establish ownership or control of the thing in question. Here, D will argue that her offer to pay P's medical expenses is inadmissible, because public policy encourages these offers. Therefore, the statement is inadmissible.

Ownership: However, P may bring in the statement for two reasons. First, D has denied liability for the accident. An offer to pay medical expenses may be offered to show ownership or control of the subject matter in question. Her offer to P then, may be offered to establish that D owned and/or controlled both the car and her employee E. This is a disputed fact and highly relevant. Thus, the statement may be offered for this

purpose.

Impeachment: The credibility of a witness is always at issue. Thus, statements offered to rebut witness testimony are admissible as impeachment evidence. D has testified on the stand that she did not offer to pay P's medical expenses. Accordingly, P may offer D's out of court statement to him, offering to pay expenses, as impeachment evidence. This is a prior inconsistent statement offered to impeach, and it is admissible.

Q4 Business Associations

Years ago, Art incorporated Retail, Inc. He paid $100 for its stock and lent it $50,000. He elected himself and two family members to the Board of Directors, which in turn elected him as President and approved a ten-year lease for a store. He managed the store and was paid 10% of Retail's gross revenues as compensation.

Subsequently, Barbara bought 20% of Retail's stock from Art.

Retail's board approved a contract to buy 30% of the inventory of XYZ Co., a company owned by Art.

Subsequently, Art began taking home some of Retail's inventory without paying for it.

Retail had net profits in some years and net losses in others. It paid dividends in some years, but not in others. In some years, Retail's board met three times a year; in others, it never met.

Recently, Retail ceased business. Its assets were limited to $5,000 in cash. Among the claims against Retail was one by Supplier, who was owed $10,000 for computer equipment. Another claim was Art's, for the $50,000 that he had lent and had just become due. Supplier and Barbara, individually, filed lawsuits against Retail and Art.

1. On what legal theory, if any, can Supplier reasonably seek to recover against Art on its claim against Retail? Discuss.

2. Does Barbara have a cause of action against Art, either derivatively or personally? Discuss.

3. If Retail is forced into bankruptcy court, will Art be able to collect from Retail any portion of his $50,000 loan? Discuss.

Answer A

1. Recovery Against Art on Supplier's Claim Against Retail

Corporation

Retail, Inc. is a corporation, as indicated by the word "Inc." (for Incorporated) in its name and by the fact it was "incorporated". Perhaps the most important feature of a corporation is the limited liability of its shareholders. The shareholders of a corporation are generally not liable to the corporation's creditors, beyond the amount of their capital contributions (i.e. their stock ownership). There is an important public policy interest in preserving the limited liability of shareholders, so that corporations can feel free to take risks, which is good for the economy and society in general.

Limited liability can be ignored by the courts only in very particular circumstances. This is called "piercing the corporate veil", and requires that: (i) the corporation be a closely-held corporation, (ii) it be necessary to prevent fraud or abuse, and (iii) it would be unfair not to do so. Courts will rarely order a piercing of the corporate veil, but may do so in circumstances such as these ones, which require piercing to avoid unfairness to Retail. Where piercing is ordered, the shareholders involved in the wrongdoing can be held personally liable for the corporation's liabilities.

Here, Art incorporated Retail, Inc. and owned 100% of the stock. He later sold 20% of Retail's stock to Barbara. Accordingly, Retail is a closely held corporation (held by Art an Barbara only). Supplier has a claim against Retail, not guaranteed by Art personally, for $10,000 for computer equipment. Absent a finding by the court that the situation warrants piercing the corporate veil, i.e. that there is sufficient fraud or abuse, and sufficient unfairness, Supplier cannot seek recovery against Art.

Piercing the Corporate Veil

Piercing of the corporate veil can occur under either a finding of "alter ego", fraud or insufficient capitalization.

Alter Ego. Under the alter ego doctrine, the corporate veil can be pierced where the shareholders have sought to benefit from the benefits of incorporation but ignored all of its burdens. Factors which will be taken into consideration by the courts include: failure to observe corporate formalities, failure to keep the corporation's assets separate from that of its shareholders, failure to keep proper accounting, self-dealing, etc.

Here, there is some evidence that Art used the corporation as his alter ego. He elected himself and two family members to the Board of Directors and elected himself as President, all things which ensure that he keeps full control over the corporation, but which are not wrongful in any way. He then used that control to approve a compensation for himself of 10% of Retail's gross revenues, which is also not wrongful. Retail's board then approved a contract to buy 30% of the inventory of XYZ Co., a company owned by Art. Although XYZ Co. was owned by Art, the transaction is not necessary self-dealing, if it was fair to the corporation. The terms of the transaction are not known, but there is no indication of abuse or that the transaction was so much more detrimental than beneficial to Retail as to be "fraudulent" vis-a-vis Retail's creditors.

Art then began taking home some of Retail's inventory without paying for it. The facts do not state whether Art intended to return this inventory, or to keep it, or to use it for his own purposes, but it seems that he failed to keep the corporation's assets separate from his own. A court would frown upon this and see it as a relevant element in the action for piercing the corporate veil.

Retail had net profits in some years and net losses in others. It paid dividends in some years but not others. This in itself is perfectly normal.

In some years, Retail's board met three times a year; in others, it never met. This shows a disregard for corporate formalities, since a corporation's directors must meet on a regular basis. A board that does not meet at least twice a year is not complying with corporate formalities. A court would frown upon this and see it as a relevant element in the action for piercing the corporate veil.

Fraud. Under the fraud theory, the corporate veil can be pierced where the shareholders have been using the corporation merely as a shield against their existing liability and for the sole purpose of defrauding existing creditors.

Here, there is no indication that Art has used the corporation only to defraud existing creditors. The fact that the corporation is now insolvent and has unpaid debts is not in itself indicative of fraud.

Insufficient Initial Capital. Under the insufficient capitalization theory, the corporate veil can be pierced where the initial capital contributions of shareholders at the inception of the corporation were clearly insufficient to meet the corporation's foreseeable future liabilities, taking into account the corporation's foreseeable future revenues.

Here, Art incorporated Retail Inc. years ago. He paid $100 for his stock and lent it $50,000. Retail then entered into a ten-year lease for a store, approved compensation for himself, etc. The liabilities of a retail store are likely to quickly exceed $100. In particular, if Art had to lend the corporation $50,000 at its inception, it is an indication that Retail needed this amount of funding either to fund its initial operations or to induce potential co-contractants, such as the landlord, to enter into transactions. By choosing to do almost all of Retail's initial funding by loan rather than by capitalization, Art was likely trying to ensure his $50,000 would not be last in the waterfall in the event of a distribution in bankruptcy.

It is for situations like this one that the insufficient capitalization theory exists. It was foreseeable at incorporation that Retail would have liabilities greater than $100, yet its

initial capital was no more than $100. When Barbara became a shareholder, she bought 20% of the stock from Art, not in the context of a corporate issuance. The corporation's capital was not increased.

Art will argue that Retail is a retail store and that it has expected revenues, which should be sufficient to satisfy liabilities. He was not operating a highly risky business. The facts show that he has had net profits in some years and that at some point Retail probably had become capable of meeting its liabilities "on its own". However, the facts also show that the initial capitalization was extremely low and that large liabilities, such as the ten-year lease, were incurred immediately at Retail's inception.

It appears that Retail was inadequately capitalized at incorporation.

Unfairness. In all cases, the proponent of piercing the corporate veil must show it would be unfair if the veil was not pierced.

Here, Retail has ceased business and its assets ($5,000) are insufficient to satisfy all of its liabilities. If Supplier cannot seek recovery against Art personally, it will receive next to nothing on the dollar for its $10,000 debt. Among the reasons that Retail is insolvent, Art's wrongful conduct is likely responsible: Art took home some of Retail's inventory; Art had Retail enter into a transaction with XYZ Co., a company owned by Art - which transaction was potentially unfair to Retail (this will be up to Supplier to prove); one of the biggest claims on Retail's assets is a loan by Art himself (which he had to make to Retail to make up for the insufficient initial capital contribution), etc.

Supplier can make a strong argument that it would be unfair to allow Art to hide behind the corporate veil and not hold him directly liable for Retail's debt to Supplier.

Conclusion

Accordingly, Retail is a closely held corporation and there is evidence that Art, a

shareholder, has insufficiently capitalized it at incorporation (and perhaps even used Retail as its alter ego, although this will be much harder to prove), and that it would be unfair not to allow Supplier to seek recovery against Art directly. The court will likely pierce the corporate veil and allow recovery against Art.

2. Barbara's Cause of Action Against Art

Art's Duties to Barbara and Direct Action

Shareholders generally do not owe fiduciary duties to each other. Only in closely-held corporations, majority shareholders can be found to owe fiduciary duties of care and loyalty to the minority shareholders. In accordance with those duties, majority shareholders may not abuse their position of power to abuse the minority shareholders and deny them their rights as shareholders.

If they do, a minority shareholder can ask the court to order remedies in oppression, including a mandatory repurchase by the corporation of the minority shareholder's stock. Other remedies in oppression are available to the court, going all the way to mandatory dissolution of the corporation in particularly egregious situations of oppression. Where a minority shareholder is oppressed, the proper recourse is a direct recourse by the minority shareholder against the majority shareholder(s), seeking oppression remedies.

Here, while Art and two of his family members composed the Board of Directors, Retail's board approved a contract to buy 30% of the inventory of XYZ Co., a company owned by Art. If there is evidence that the corporation was not made on arm's length terms, Barbara could argue that the transaction was an abuse of power of a majority shareholder. Art began taking home some of Retail's inventory without paying for it, which Barbara can argue is an abuse of his power as a majority shareholder, director and President of Retail.

Because Retail is closely held, Barbara cannot simply sell her shares on a stock exchange and exit the corporation. Barbara could likely seek oppression remedies. If the corporation is ordered to buy out her shares for their fair value, this will likely be worthless to Barbara: her stock is worth nothing or next to nothing, since the corporation is insolvent, and even if it had a worth the corporation would not have sufficient assets to buy her back.

A dissolution of the corporation will not be helpful either, given that the corporation is insolvent and creditors will be paid first.

Accordingly, Barbara can likely take oppression remedies against Art, but unless she can convince the court to order damages in her favor (which would be extremely difficult), this recourse will not be useful.

Art's Duties to Retail

Shareholders generally do not owe fiduciary duties to the corporation, unless they participate in the management of the corporation to a great extent, either as directors or if a unanimous shareholders' agreement gives them the power to do so.

Here, Art is a director of Retail.

Directors owe fiduciary duties of care and of loyalty to the corporation.

Duty of Care. The duty of care requires a director to act as a reasonable, prudent person would do in the management of his own affairs. The directors are not "guarantors" of their bad decisions and will generally be protected by the business judgment rule (the "BJR"), and found not to have breached their duty of care even where they made a decision which later turns out to have been ill-advised. The BJR protects directors only where the decision has been (i) informed, (ii) made in good faith, (iii) made in the absence of a conflict of interest and (iv) had a reasonable basis.

Directors will also generally be found to have acted in compliance with their duty of care if they have relied on reports, opinions, information, etc. reported to them by directors, officers and employees of the corporation, by outside advisors or by a committee of the board of which they are not a member, in each case provided that the information reported was within the competence of the person(s) reporting it and that the reliance was reasonable, taking into account the directors' duty of care to the corporation.

Here, Art voted on his own compensation (10% of Retail's gross revenues) - this is not necessarily a breach of the duty of care or duty of loyalty, if the compensation is what a reasonable, prudent person would grant to a manager. 10% of gross revenues is not unreasonable for a store manager, although it could be unreasonable depending on the store's revenues. There is no clear breach of the duty of care here.

Here, Retail entered into a transaction with XYZ Co. There is no indication that Art breached his duty of care by entering into this transaction, because the terms of the transaction are not known. Art is not protected by the BJR here because he is in a conflict of interest, but again, there is no indication that the transaction was not one which a reasonable, prudent person would approve.

The distribution of dividends is at the directors' discretion - failure to pay a dividend in some years is not a breach of the duty of care or duty of loyalty and will not be reviewed by the court absent extreme circumstances.

Finally, Art began taking home some of Retail's inventory without paying for it. This is a breach of the duty of care and a breach of the duty of loyalty.

Duty of Loyalty. The duty of loyalty requires a director to act in good faith, in what he reasonably believes to be the best interests of the corporation. A director is in a conflict of interest if he (or a close relative or another of his corporations) has a personal interest in a transaction with the corporation.

In the event of such a conflict, the director will be found to have breached his duty of loyalty unless the transaction is shown either (i) to have been fair to the corporation, or (ii) to have been approved by a majority of disinterested directors or disinterested shares, after having been fully informed.

Here, the Retail/XYZ transaction involved a conflict of interest for Art. He should not have voted on it. Neither should the other board members have voted on it, since they are family members of Art, and therefore not "disinterested" directors. A vote of a majority of disinterested shares (i.e. Barbara's shares) should have been held to approve the transaction, and she should have been fully informed.

However, the facts do not describe the terms of the transaction. If Art can show the transaction was fair to the corporation, he will not be held to have breached his duty of loyalty.

Art breached his duty of loyalty by taking home some of Retail's inventory without paying for it, unless he reasonably believed this to be in the best interests of the corporation. There are no facts indicating that this might be the case, and the conduct appears improper. This is likely a breach of Art's duty of loyalty.

Derivative Action

Where a director breaches his duty of loyalty or his duty of care to the corporation, only the corporation has a recourse, not the shareholders individually. A shareholder may, however, take a derivative action provided that (i) the shareholder held stock at the time of the alleged breach and continues to do so throughout the derivative action, (ii) the shareholder can adequately represent the corporation's interests, (iii) the shareholder has made a written demand on the board to enforce the claim, but his demand was denied, and (iv) the shareholder joins the corporation as a defendant to the lawsuit.

In some cases, the court may accept a derivative action without a written demand

having been made on the board, if the shareholder can show such demand would have been futile (for instance, if he is asking the corporation to sue all of the directors, it is extremely unlikely that the directors will agree).

If the shareholder is successful in his derivative action, the corporation will receive the benefit of the judgment. The shareholder can be indemnified for his legal costs and fees. If the shareholder is unsuccessful, he will be personally liable for all legal costs and fees, including the other party's if their reimbursement is ordered.

The corporation itself can have the suit dismissed only if it can show to the court that the transaction was fair as determined by an independent committee of the board or outside independent advisors.

Here, Barbara was a shareholder at all relevant times. She can likely represent Retail's interests adequately - there is no indication she can't do so. As noted above, she would have to first make a written demand on the board to take action. If they refuse, she can then take a derivative action to enforce Retail's rights against Art.

Conclusion

Retail has a recourse against Art for any loss caused by a breach of his duty of care or duty of loyalty. The recourse can be taken by Barbara in a derivative action. However, except for a recourse for the value of items which Art took home without paying for it, it will be difficult to show that Art is otherwise liable to Retail.

3. Collection by Art of The $50,000 Loan to Retail

In bankruptcy, secured creditors have a priority. All unsecured creditors are treated the same, unless there has been subordination. Under the Deep Rock doctrine, when the corporate veil is pierced, the court can order that any loans made by the shareholders to the corporation be subordinated to the debts of the corporation to other ordinary

creditors.

Here, Art lent $50,000 to Retail. Given the piercing of the corporate veil described above, Art's claim can be subordinated to the claim of Supplier. Accordingly, Supplier will be able to recover the $5,000 if Retail is forced into bankruptcy.

Art will be unable to collect from Retail any portion of his $50,000 loan.

Answer B

1. Supplier's legal theories of recovery against Art on its claim against Retail.

Supplier's ability to recover from Art depends on what type of business entity was created and if Art has breached any duty to Supplier.

Corporation

A corporation is a business entity separate from its shareholders. Therefore, shareholders of a corporation are not personally liable for the corporation's obligations unless the corporation was not properly formed, or the shareholders abused its corporate form. A corporation requires proper formalities for creation, which include filing with the secretary of state. A closely held corporation is one in which there are few shareholders, and liability of the shareholders is more readily found because of its more intimate nature.

Here, it appears that Art incorporated Retail, Inc. years ago; therefore without any further facts it appears that Retail Inc. was properly formed with regards to formalities. Retail Inc. can also be seen to be a closely held corporation by the court.

Shareholder Liability: Corporate Veil

Assuming the corporation was properly formed at its onset, Art can only be liable if the corporation abused its corporate form and thus will not be afforded the protections of the corporate veil.

A shareholder is generally not personally liable unless the corporate form is abused. A court will disregard the separateness of a corporation and its shareholders and pierce the veil if it appears that 1) the corporation was undercapitalized at its inception, 2) the corporate formalities were not adhered to, or 3) the corporation was created to perpetrate a fraud. It will also consider whether a parent corporation was operating by mixing its directors and officers with another corporation owned by it.

Alter Ego

Art is a shareholder, director, and as president, he is an officer of Retail Inc., and at the same time he is XYZ Co.'s owner. Retail Inc.'s board approved a contract to buy 30% of XYZ's inventory, which alone may appear to only have an impact on Art's duty of loyalty as a director of Retail Co. who approved the transaction. However, it does not appear that Retail Co. owns or otherwise deals with XYZ other than the contract. Nonetheless, because Art is an owner of both, a court will consider it.

Undercapitalized

The shareholders of a corporation must put at risk enough unencumbered capital to take care of the corporation's potential liabilities.

When Art incorporated Retail, he paid $100, for its stock, and thus he became a 10% shareholder. He also lent the corporation $50,000 at its onset, which appears to have satisfied Retail Inc.'s potential debts because after years it had only owed $10,000 under a contract to outside creditors and ceased business with $5K left. Therefore, since it was able to operate for years with the $50K capitalization, this appears to be sufficient.

Formalities

Supplier would argue that Retail's board did not hold meetings every year, which shows that it was not a proper corporation. However, Art will likely argue that since Retail's board had no significant matters to discuss, it only met when necessary, which is apparent by the fact that it met three times a year in some years. Because a corporation should hold regular meetings, this appears to be against the proper corporate formalities.

Therefore, a court can use this to decide whether to hold Art liable.

Perpetrate a fraud

There appears to be no bad faith in creating the corporation so this will not be considered.

Overall, a court is reluctant to pierce a veil absent clear evidence of lack of separateness; therefore Art may be personally liable to Supplier, but it is unlikely.

Personal Liability

If the veil is pierced, Supplier will be able to obtain $10,000 personally from Art.

2. Barbara's cause of action against Art.

Barbara's Derivative Suit

Barbara may bring an action on her own or as a shareholder of Retail Inc. against the corporation.

Derivative Actions

A shareholder may bring a derivative action on behalf of the other shareholders of the corporation for a breach by the directors. Any recovery will go to the corporation rather than to the shareholder personally. To bring such an action, the shareholder must 1) have made a demand on the board for the complained-of action, to which the board either refused, or 90 days have passed without an answer, or demand would be futile;
2) the shareholder must adequately represent the other shareholders; and 3) the shareholder must hold shares throughout the entire suit.

Futile

Here, there are no facts to suggest that Barbara made any demand on the board, however, because Retail's board consists of Art and two of his family members, Barbara will argue that demand would be futile, because his family members would be biased in favor of Art. Art will argue that had she made a demand it would have been answered, and the derivative suit would be improper. Nonetheless, the fact that only three members are on the board and all three are related, would likely render the demand futile.

Adequately represents

The shareholder must have enough shares to adequately represent the shareholders.

Here, the only shareholders appear to be Barbara and Art; therefore, since Art took action with regard to the complained-of event, Barbara is essentially asserting it on her own behalf; therefore this is met.

Shareholder throughout suit

Barbara owns 20% stock and has retained that stock until suit, therefore this is met.

Therefore, Barbara can bring a derivative action.

Breach of Duty of Loyalty

A director has the duty to put the corporation's best interest before his own. The duty of loyalty can be breached in three ways: 1) usurping a corporate opportunity, 2) engaging in an interested director transaction, and 3) engaging in a competing venture.

Interested Director Transaction

A director is not permitted to engage as an interested party in a transaction, which essentially means that he may not sit on both sides of the transaction, or that the director may not engage in a transaction with one of his family members, unless he gets the approval of the majority of the disinterested board or its shareholders, or the transaction is substantively fair.

Here, Barbara can bring an action for a breach of duty of loyalty by Art for approving a contract to buy 30% of the inventory of XYZ Co., a company owned by him. Since Art is a director of Retail Inc. and also an owner of XYZ Co., he sat on both ends of the transaction when he approved a contract to buy inventory from a company he owned.

Approval by Board

However, Art will argue that the board approved the contract, and in the alternative that the transaction was substantively fair. However, since the board consisted of three

people, who were each related to one another, and the board also consisted of Art, who was the primary interested party, then the approval was not obtained by a majority of the disinterested shareholders, because family members are always interested parties in their family's affairs. This can be further shown by the fact that the family has close ties, since Art elected the two family members to the board, which in turn elected him as president.

Substantively Fair

If the transaction is substantively fair, an interested party transaction will be permitted after full and fair disclosure.

Even though the board could not have properly approved, the transaction involved buying 30% of XYZ's inventory, which is close to half of its inventory. While there is no price indicated, it is likely that Art gave a discounted price for the contract because he was a party to both sides. Art will argue that it was beneficial to the corporation to buy from XYZ since he could provide them with better quality inventory at a better price, whereas an outsider would have no such incentive. Nonetheless, he would have had to disclose the information to the board, and the board would have to agree. Since the board approved, he may be able to defend against the derivative suit for breach of loyalty under this theory.

However, if the court finds that the bias of his family members on the board is superior to the transaction being substantively fair, Barbara will prevail in showing a breach of the duty of loyalty.

Competing Venture

Art has taken Retail’s property for himself, and since XYZ appears to have a similar business as Retail, perhaps the inventory was that which originally came from the contract between them. Therefore, if so, he would be replenishing his inventory at XYZ at the expense of Retail Co., and thus would be engaging in a competing venture.

Therefore, Barbara can also prevail by showing this.

Duty of Care

A director owed the corporation a duty of care to act in good faith as a reasonable prudent director would under the circumstances.

Good Faith

Art's taking of the inventory from Retail without paying for it can be used to show bad faith by a director. He may also be seen as an officer because he managed the lease for a store and was paid 10% of Retail's gross revenues as compensation. Therefore, as an officer, he must have also acted in good faith for the best interest of the corporation.

Ordinary Prudent Director

Barbara can argue that an ordinary prudent director would not steal inventory from the corporation without paying for it; therefore he acted against his duty of care.

Business Judgment Rule

The business judgment rule protects the good-faith decisions made by directors in compliance with the duty of care that in hindsight end up being erroneous.

Here, Art did not act in accordance with the duty of care because he acted in bad faith with regards to taking the inventory. Therefore the BJR will not protect him.

Dividends

Barbara can also bring an action derivatively for the fact that the corporation did not distribute dividends in some years. However, a corporation has discretion whether to distribute dividends, because dividends are not a right of the shareholders.

Since Retail had net profits in some years and net losses in others, it was prudent for them to withhold dividends for the years they had no profits, assuming that the times corresponded. Even if they did not correspond, distributing dividends is in the discretion of the board.

Barbara's Personal Action

A personal action may also be brought by Barbara against Art (if the veil is pierced - as a director) and if it is not pierced, then as a shareholder.

Duty To Shareholders

Generally, shareholders do not owe a duty to other shareholders, however, a majority shareholder owes the duty to a minority shareholder not to use its majority share to discriminate against the minority shareholder, and not to sell his shares to a prospective looter.

There are no facts to suggest how much the stock of Retail Inc. cost; however Art paid $100 for its stock and Barbara owned 20% of the stock from Art. Assuming Art holds the remaining stock himself, Art would be a majority shareholder, and would thus be required to act fairly with regards to the use of his shares.

Here, Art's transaction with XYZ does not appear to prejudice Barbara as a shareholder in any way; therefore Barbara will not be able to prevail in a personal suit against Art.

3. Liability of Retail Inc. for Art's loan.

Liability of Corporation at Dissolution

A corporation that ceases business is still held liable for debts to creditors. A shareholder who contributes capital will receive reimbursement.

Equitable Subordination

Under equitable subordination, all creditors, whether shareholder creditors or outsiders, may seek to collect their debt to the corporation equally. However, if a shareholder acted wrongfully, the Deep Rock doctrine prevents him from recovering equally.

If Retail Co. is forced into bankruptcy, Art will be able to recover his loan in proportion to

the debt owed to Supplier. Since there is only $5,000 cash left, he will be able to obtain a proportional amount, taking into consideration Supplier's $10K debt. If Art is found to have acted wrongfully, however, then he will not be able to recover since there is only $5,000 left and Supplier would have priority over Art's debt.

Q5 Professional Responsibility

Claire met with Len, a personal injury lawyer, in his office and told him that she had burned her legs when she slipped on some caustic cleaning solution spilled on a sidewalk outside Hotel. Len agreed to take her case and they properly executed a retainer agreement. Claire showed Len scars on her legs that she said were caused by the cleaning solution. She also showed him clothes that she said were stained by the cleaning solution. Len took the clothes from her and put them in his office closet for safe keeping.

Len filed a lawsuit in state court against Hotel. Hotel's lawyer, Hannah, called Len. She told him that this lawsuit was the fourteenth lawsuit that Claire had filed against Hotel, and that she intended to move the court to declare Claire a vexatious litigant. Len and Hannah had been engaged two years ago before they amicably decided to go their separate ways.

Len called Claire and left a message asking her to call him "about an important update in the case." He also sent her an email with a "read receipt" tag, with the same request. He received a notice that she had read the email, but did not receive any response. Over the next week, he sent her a copy of the same email once each day with the same "read receipt" tag; each day, he received a notice that she had read the email, but did not receive any response. He then sent her a registered letter asking her to contact him, but again, did not receive any response. A week later, he sent her another registered letter stating that he no longer represented her and that he would return her clothing to her.

Claire soon called Len, begging him not to "fire" her, saying she had not responded to him because "I didn't think calling you back was such a big deal." He then asked her about "the thirteen prior lawsuits against Hotel." She replied: "What 'thirteen prior lawsuits'? Besides, Hotel's got more money than I do." He told her that he was sorry, but that he was no longer her lawyer.

The next day, Len went to his office closet to retrieve Claire's clothes to send them back to her. To his dismay, he realized that he had sent her clothes along with his to be dry-cleaned. He rushed to the dry-cleaner and learned that all of the clothes he had sent had been dry-cleaned and that all of their stains had been removed.

What ethical violations, if any, has Len committed? Discuss.

Answer according to California and ABA authorities.

Answer A

Under the ABA and CA rules, a lawyer owes a duty of loyalty to his or her clients to zealously advocate on their behalf and be free of conflicts of interest that have a significant chance of materially affecting their ability to do so. That duty begins, at the very least, at the execution of a retainer agreement. Claire and Len executed a retainer agreement, and thus the attorney-client relationship was formed and Len owed Claire all of the duties under the ABA and CA rules.

1. Duty of Loyalty

Moreover, under both, a lawyer is deemed to have a conflict if they represent a party who is adverse to another party that is represented by one of the attorney's immediate family members. In such an instance, the lawyer is required to get the informed written consent of their client before pursuing the representation. (Such personal conflicts would not be imputed on other attorneys in a law firm, however.) Ignorance of a conflict is not an excuse for failing to obtain consent or notify about the conflict. An attorney can still represent a client, notwithstanding such a conflict of interest, so long as the client consents and the lawyer reasonably believes that the conflict will not infringe on his or her ability to zealously and competently advocate on behalf of her client. While the ABA would require written consent for such a conflict, California requires only written notification by the attorney because the conflict is only personal.

The issue, though, is whether a former fiancee of two years representing the other party is a conflict of interest at all that need be reported to the client for her consent. Under a strict framework, a former fiancee would not qualify as a family member. It is true that a current fiancee qualifies as a family member, but this rule is unlikely to apply to former fiancees from over two years ago. The rationale for the current fiancee rule is that they are engaged to be members of the family; a former fiancee has, on the other hand, specifically decided *not* to be a part of the family. Therefore, for purposes of this rule, Hannah was not a member of the family and thus this did not trigger an ethical situation

under this rule.

Nonetheless, a lawyer has a general duty to remain loyal to a client, and being close friends with the attorneys on the other side could warrant notification and consent. Here, Len and Hannah "amicably" decided to go their separate ways and Hannah seemed to "call" up Len as more of a friendly notice than as an opposing party counsel. Therefore, it seems that Len and Hannah were quite close. Indeed, in response to the notification, there is no indication that Len looked into the truthfulness of the representation, but rather accepted it at face value, showing that he still trusted Claire quite a bit. This goes to show that Len was not, in fact, able to maintain a fiduciary relationship with Claire notwithstanding the personal connection with Hannah. As a result, Len violated an ethical rule by not disclosing this conflict as it came to pass to Claire.

2. Duty to Represent a Client

A lawyer is free to (more or less without restriction) take or not take clients and causes of action (although is encouraged to do pro bono). But once they decide to do take a client, many ethical rules apply. CA and the ABA allow an attorney to withdraw from representation under certain circumstances and require an attorney to do so under others. For example, if an attorney is not receiving their fees or other obligations pursuant to the attorney-client relationship and they have notified the client and given the client a reasonable time to remedy the situation, then the attorney is permitted to withdraw. Additionally, attorneys may withdraw if the clients are using their legal services for illegal purposes. Moreover, if the attorney finds the representation of the individual repugnant to their sensibilities, they may withdraw so long as they do not materially harm the client's interests. If representing the client would require the attorney to violate other ethical rules or laws, then the attorney must withdraw. Thus, for example, if representing a client would require the attorney to file a frivolous lawsuit, then the attorney must withdraw.

a. Frivolous lawsuits

Here, Len will argue that he had to withdraw from representing Claire because failing to do so would violate the rule that attorneys are not allowed to file frivolous lawsuits. He will point to Hannah's representation--whom he had been engaged to and amicably decided not to marry, and thus trusted--that Claire was a serial litigant that had filed fourteen other lawsuits against the Hotel and that Hannah intended to move the court to declare Claire a vexatious litigant. But having been a vexatious litigant does not, in and of itself, show that *this* lawsuit was frivolous. In fact, Claire showed Len scars on her leg and clothes that were stained by the supposed cleaning solution that caused the scars. Opposing counsel's representation that Claire was a vexatious litigant did not even include any allegation that *this* lawsuit was frivolous. Instead, it was merely that other lawsuits filed by her might have been. And indeed, only that they *might* have been because Claire did not even represent that these lawsuits were frivolous or that a court had yet deemed her a vexatious litigant. A reasonable lawyer would not have relied solely on these representations in determining to no longer represent Claire. Instead, a reasonable attorney would have looked into whether these allegations by Claire were true by searching court documents or, at the very least, asking Claire about these cases. And Claire's later response saying "what 'thirteen prior lawsuits'" indicate that doing so might well have revealed that Claire did not actually file those, or that they were not frivolous. In sum, Len did not take reasonable precautions to ensure that the lawsuit that he was attempting to withdraw from representing Claire was, in fact, frivolous, and as such cannot rely on this rationale for withdrawing from representing her.

b. Costs of representation

Len might also argue that because Claire was a vexatious litigant, representing her would unreasonably financially burden him. Indeed, California allows the unreasonable financial burden on the attorney as a justification for discontinuing representation of a client. Len appears to be a solo practitioner, this making this claim more reasonable.

However, Len has not shown any financial burden that would necessarily result in trying to defend a claim that Claire was a vexatious litigant (or even that he would have to defend that claim in court). Therefore, it is unclear what financial burdens this revelation would reveal. Moreover, as discussed above, Len did not make any effort at all to determine if there was any basis for determining that Claire actually was vexatious.

c. Lack of communication

Len's best argument is that Claire's failure to respond to his numerous requests constitute a permissible reason for him not to continue representing her. Indeed, the rules allow a lawyer to withdraw from representing a client when the client fails to communicate with the lawyer. Much like a lawyer has a duty to communicate with the client (as Len effectively did here once he learned of the potential vexatious litigant problem), a client must fulfill their side of the bargain and communicate back. Len left a voicemail saying that he had an "important update" and asking to be called back. He sent her one e-mail a week with the same request, and received confirmation that Claire had read the e-mails. He then decided to send her a registered letter asking her to contact him. Notwithstanding the three forms of communication asking for a reply because of an "important" update and the *registered* letter, Claire did not respond at all. Importantly, though, Len failed to mention the reason for why he wanted her to contact him. He might respond that he could not have provided details in e-mail, voicemail, or letter because it might have violated his duty of confidentiality to keep all information he learned about her secret absent her consent (which we have no evidence of here). This will likely be sufficient, especially considering the read receipts and the registered letter confirm that Claire actually received the communications.

Even more importantly, though, is the fact that Len never made clear the ramification of failing to respond. Much as in failures to pay attorney fees, the attorney must reasonably notify the client of the consequences of failure to and give them a chance to respond before withdrawing from representation. Here, Len violated that duty by never telling Claire that he would withdraw from representing her unless she responded.

Instead, he simply repeated the same content in different methods asking for a response. This, in conjunction with the fact that he waited what seems like no more than a little over two weeks before withdrawing from representation. If this speed were justified in light of approaching deadlines, that might be reasonable. But there is no indication here that such a rapid action was necessary or, more importantly, that Claire had any reason to believe that such a rapid action was necessary. Len did not tell Claire that he would withdraw if she didn't respond (and he cannot rely on Hannah's representation that she was a vexatious litigant without actually looking into that at all, as a reasonable attorney would, to augment the implication of her nonresponse). Taken together, Len violated his duty of continued representation by withdrawing for this reason.

d. Court's approval

Moreover, in California after a lawsuit has been filed, an attorney cannot withdraw from representing a client without attaining the judge's permission to do so. While he likely would have gotten it here, because of the failure to communicate because the case had just been filed and there is no indication that allowing withdrawal would otherwise prejudice Claire, that does not excuse his not following this rule. Therefore, regardless of the merits of any justification for withdrawal, Len breaches this rule.

3. Duty to the Court to Investigate Positions

Even if Len were correct that Claire's lawsuit was entirely without merit, he would have still likely violated ABA and CA ethics rules by filing the lawsuit in the first place. An attorney is required to investigate legal positions and pleadings taken and represented to a court before doing so. The standard for this is what a reasonable attorney would do in similar circumstances. Thus, if the lawsuit was entirely without Merit, Len likely violated his ethical rules in filing it in the first place. Len will argue that the scars and stained clothing were sufficient to file the suit, but the record does not indicate that Len provided *any* additional investigation or research into the merits of the claim. Whether

that is reasonable depends on how a qualified attorney in like circumstances would have acted.

4. Returning Property

A lawyer has the obligation to keep any property of the client's that is in his possession in a safe and secure location. Moreover, the lawyer certainly cannot destroy evidence that the client entrusts to him. The lawyer must take reasonable protective measures to safeguard such evidence, if the lawyer chooses to accept responsibility for possessing it. Here, Len accepted responsibility for maintaining Claire's clothes and those clothes were relevant to the legal claim that Claire was pursuing. As such, he had a duty to his client to implement effective measures for ensuring the safeguarding of the property entrusted in his care. However, he "sent her clothes along with his to be dry-cleaned." Thus, it seems that he did not put her property in a separate location or otherwise implement methods to ensure that the inadvertent destruction or disclosure of the evidence would not occur. Len, therefore, violated this duty to Claire.

If Len received any money following the "properly executed retainer agreement," he violated his duty by not attempting to give it back to her when he sent her the letter saying that he would send her the clothing. However, since there is no evidence that he had any property but for the clothing, he likely did not violate this duty.

Answer B

Attorney-Client Relationship

Len formed an attorney-client relationship with Claire. An attorney-client relationship is formed when the client reasonably believes the relationship formed. The attorney's beliefs are irrelevant. Within the scope of the representation, an attorney determines the means, including which claims to present and which witnesses to call, and a client determines the ends, including whether to accept a settlement offer and other duties.

Retainer

L and C executed a valid retainer agreement. In California, an agreement to represent that is worth more than $1,000 must be in writing. In ABA, it is strongly encouraged. Additionally, the fees must not be unreasonable under the ABA authorities, or unconscionable in California. Here, there is no indication that the fees were unreasonable/unconscionable. The retainer must describe the nature of the relationship, the responsibilities of the parties, and the method of determining fee. Here the facts tell us there was a properly executed retainer agreement.

Duty of Loyalty

An attorney owes a duty of loyalty to his clients, and cannot accept representation if it would result in a conflict of interest that would materially impair his representation of client. A conflict of interest may occur between an attorney and his client; between two clients, whether former and current or two or more current clients; between a third party and client; or between the members of an organization and the organization itself. A conflict of interest may occur between the attorney and his client when the attorney has a close relationship with opposing counsel in a case. Here, L has a close relationship with H, the Hotel's attorney. They were engaged for two years before amicably deciding to go their separate ways. L should have informed C of his relationship with H. In California, L needs to inform C in a written disclosure of his relationship with H. In the ABA authorities, L needs to obtain written consent from C with respect to his relationship with H. Because L did not inform C of his relationship with H or obtain

written consent, L violated his duty of loyalty to C by not disclosing his relationship with H.

Duty of Communication

An attorney must promptly and diligently communicate with his client. This duty includes a duty to inform the client of their responsibilities and obligations with respect to the representation. Here, L owed C a duty to tell her about the scope of her responsibilities, including communicating with him regarding material facts. When L met with C, he should have informed her about her duty to respond to his inquiries so that he could competently represent her. C's statement that "I didn't think calling you back was such a big deal" indicates that L neglected to tell her that she should promptly return his calls and inquiries because failure to do so may hurt her case. C has a responsibility to make decisions with respect to her representation. If L had received a settlement offer with a deadline, he could not have accepted it without C's permission. Because L failed to communicate her own responsibilities to C, L violated his duty of communication with C.

L also owed C a duty to communicate all of the material facts so that she could make an informed decision. L should have communicated with H regarding the "thirteen prior lawsuits" before attempting to withdraw from the representation. L called C and left her a message, and sent many emails and a registered letter. But none of the communications informed C that he was concerned about prior litigations or that he was considering withdrawing until he did attempt to withdraw. L owed a duty to C to communicate all of the material facts before he attempted to withdraw. Because L did not inform C of the material facts, L breached his duty of communication with C.

Duty of Competence

An attorney owes a client a duty of reasonable knowledge, skill, and ability in the scope of the representation. Here, L did not inquire into the prior lawsuits that C may have filed against Hotel. Instead, he relied on the word of opposing counsel and did not do his own research. Because L did not do his own inquiry, he violated the duty of

competence he owed to C.

Duty to Safeguard

L owed C a duty to safeguard the evidence she gave him. An attorney owes a duty to the client to safeguard possessions of the client, including money given as a retainer and any possessions or evidence entrusted to the attorney. Here, C gave L evidence related to her litigation, the clothes that were stained by the cleaning solution. L had a duty to diligently safeguard this possessions with reasonable competence. L placed the evidence in a closet and negligently sent them to the dry-cleaners, where they were cleaned. Placing material evidence in a closet is not a reasonable way to diligently safeguard important items. L should have placed them in a safe deposit box or other manner of safekeeping. Material evidence with respect to C's case was destroyed. L violated his duty to safeguard C's evidence and possessions entrusted to him.

Mandatory Withdrawal

An attorney may withdraw if representation will necessarily cause a violation of an ethical rule. Under the ABA, this extends to any law. An attorney must also withdraw if, because of his physical or mental condition, continued representation would materially impact the client. In California, an attorney must withdraw if the client insists on pursuing a claim without probable cause and with the purpose of harassing or maliciously injuring another person. Under the ABA authorities, an attorney must withdraw if he is fired. None of these events have occurred and L does not have a reason that would support mandatory withdrawal.

Permissive Withdrawal

An attorney is permitted to withdraw if a client insists on pursuing an illegal course of conduct. An attorney is also permitted to withdraw if they insist the attorney take actions against the attorney's judgment, violating the scope of the relationship so that the attorney is no longer dictating the means of the litigation. An attorney may also permissively withdraw if the client does not pay her fees or for any other "good cause shown." An attorney is also permitted to withdraw if the client makes representation

unreasonably difficult.

Here, L may argue that C has made the representation unreasonably difficult. He attempted on numerous occasions to contact C in order to inquire about the prior litigations and discuss the case with her. He called her and left a message, sent at least 7 emails that he knows she read but did not respond to, and sent a registered letter with a return receipt requested. A reasonable client would likely have understood that L had a matter of some urgency to discuss with L and would have returned his call. But a week is too short of a time for L to say that this behavior made the representation unreasonably difficult. C could have been on vacation or with limited access to email and phones, and she did not want to take the time to respond to L. A week or two is not an unreasonable amount of time for a client not to respond. He at least should have waited to withdraw until he had discussed with her the importance of returning his calls and communicating with him. It was perhaps L's failure to communicate the responsibilities of the client to C, to inform her of her responsibility to also communicate with him so that he could adequately represent her, that caused the breakdown in communication in the first place. Therefore, C's lack of communication for two weeks does not make L's representation of her unreasonably difficult.

There is no indication that C did not pay her fees. Her statement to L that "Hotel's got more money than I do" may suggest an inability to pay her fees in the future, but this is not a reason to permissively withdraw. Additionally, there does not appear to be any other "good cause shown" to permissively withdraw. L did not have any reason to permissively withdraw from the representation and therefore violated the ethics rules.

Additionally, in California, an attorney may not permissively withdraw if the matter is currently pending before a tribunal. Because L filed the lawsuit in state court, the matter is currently pending before a tribunal and L must seek court permission to withdraw. Because L did not seek court permission to withdraw, he violated the California ethics rules.

Withdrawal from Representation

When an attorney withdraws, either permissively or because the withdrawal is mandatory, he owes a duty to the client to mitigate the harm from the withdrawal. An attorney must timely inform the client of the withdrawal and give the client time to seek new representation. Here, L simply told C he was withdrawing. He did not give her adequate time to find new representation and she may therefore be prejudiced in her case if there are upcoming deadlines or other issues in the case and she is not adequately represented.

Additionally, an attorney must mitigate the harm by returning all papers or possessions to the client. Here, because he did not competently and diligently safeguard C's evidence, it was destroyed when he negligently sent it to the dry-cleaners.

An attorney may collect fees for reasonable compensation, but must return any remainder of fees to the client. In California, an attorney may retain a true retainer, meant to ensure the attorney's availability. Here there is no indication that L retained any unearned fees or was paid a true retainer.

Because L did not give C adequate notice and time to find new counsel, and failed to return C's possessions, his withdrawal from representation violated the ethics rules.

Q6 Criminal Law and Procedure

Ivan, an informant who had often proven unreliable, told Alan, a detective, that Debbie had offered Ivan $2,000 to find a hit man to kill her husband, Carl.

On the basis of that information, Alan obtained a warrant for Debbie's arrest. In the affidavit in support of the warrant, Alan described Ivan as "a reliable informant" even though Alan knew that Ivan was unreliable.

Alan gave the arrest warrant to Bob, an undercover police officer, and told Bob to contact Debbie and pretend to be a hit man.

Bob called Debbie, told her he was a friend of Ivan and could do the killing, and arranged to meet her at a neighborhood bar. When the two met, the following conversation ensued:

> **Bob:** I understand you are looking for someone to kill your husband.
>
> **Debbie:** I was, but I now think it's too risky. I've changed my mind.
>
> **Bob:** That's silly. It's not risky at all. I'll do it for $5,000 and you can set up an airtight alibi.
>
> **Debbie:** That's not a bad price. Let me think about it.
>
> **Bob:** It's now or never.
>
> **Debbie:** I'll tell you what. I'll give you a $200 down payment, but I want to think some more about it. I'm still not sure about it.

When Debbie handed Bob the $200 and got up to leave, Bob identified himself as a police officer and arrested her. He handcuffed and searched her, finding a clear vial containing a white, powdery substance in her front pocket. Bob stated: "Well, well. What have we got here?" Debbie replied, "It's cocaine. I guess I'm in real trouble now."

Debbie has been charged with solicitation of murder and possession of cocaine.

1. How should the trial court rule on the following motions:

    a) To suppress the cocaine under the Fourth Amendment? Discuss.

    b) To suppress Debbie's post-arrest statement under *Miranda*? Discuss.

2. Is Debbie likely to prevail on a defense of entrapment at trial? Discuss.

Answer A

SUPPRESSION OF COCAINE

The Fourth Amendment prohibits unreasonable searches and seizures, and is incorporated against the states through the Due Process Clause of the Fourteenth Amendment. For a search by a state actor to be valid, it must be conducted pursuant to a valid warrant issued by a neutral magistrate or an exception to the warrant requirement. In this case, Bob, who arrested and searched Debbie, was an undercover police officer, and therefore a state actor, so his search needed to comply with the Fourth Amendment.

Bob did not have a warrant to search Debbie. While the facts state that Alan obtained an *arrest* warrant, there was no warrant specifically for the search. That said, pursuant to a valid arrest, police can search the arrestee, including the arrestee's person and anything within the person's wingspan. Such searches are meant both to protect officer's safety and to ensure that the arrestee does not destroy any evidence with reach. The search must be at the same time and place as the arrest. Because, in this case, Bob found the white, powdery substance on Debbie's person - her front pocket - at the same time and place as her arrest, the search was lawful as long as the arrest was lawful.

Valid Search Warrant?

The first possible basis for the arrest was the arrest warrant that Alan obtained. The Fourth Amendment itself requires that warrants describe with particularity the place to be searched and the people or things to be seized. The warrant that Alan obtained appeared to satisfy this requirement, because it named Debbie as the person to be "seized," i.e., arrested.

That said, a warrant must be based on probable cause, which is defined as a fair

probability that the searched place will contain contraband or other evidence of crime, and that the arrested person has in fact committed the crime of which they are suspected. In this case, the arrest warrant was not supported by probable cause. It was based only on one statement by Ivan, an informant who had often proven unreliable. Probable cause is determined by examining the totality of the circumstances. While each determination is necessarily very fact-specific, the say-so of one unreliable informant cannot be enough to satisfy the probable cause requirement. Courts have held that a tip from an anonymous informant, while relevant to probable cause, cannot by itself establish probable cause. A tip from an unreliable informant is no more reliable than a tip from an anonymous one, so Ivan's statement did not provide probable cause for the arrest.

Good Faith Exception?

An officer can nonetheless rely on an invalid warrant if the officer relied on it in good faith, meaning the officer did not know that the warrant was lacking in probable cause. This exception is not available, however, when any of the following is true: (i) the warrant, on its face, is so lacking in probable cause that no reasonable officer would rely on it, (ii) the warrant, on its face, is so lacking in particularity that no reasonable officer would rely on it, (iii) the affiant officer misled the magistrate in issuing the warrant, or (iv) the magistrate was so biased against the object of the warrant that he could be said to have given up all neutrality.

Here, the warrant probably appeared, on its face, to be supported by probable cause. Alan had told the magistrate that Ivan was a reliable informant, and a tip from a reliable informant is enough to establish probable cause. Bob, who executed the warrant after Alan gave it to him, therefore fell outside the first two exceptions to the warrant requirement. However, the third exception clearly applies. Alan misled the magistrate by telling him that Ivan was a reliable informant, when in fact Ivan had often proven unreliable. Police cannot obtain a warrant through deception, but then take advantage of the good-faith exception by having an officer who doesn't know about the deception

execute the warrant. Debbie's arrest was therefore not permissible under the good-faith exception to the warrant requirement.

Valid Warrantless Arrest?

Police almost always need a warrant to conduct an arrest in a home or other private place, unless they are pursuing evanescent evidence, where they either have reason to believe that evidence in the house is being destroyed, or they are within 15 minutes of a suspect in hot pursuit. That said, Bob did not arrest Debbie in a private home; he arrested her in a neighborhood bar where they had arranged to meet. Police can generally effect a warrantless arrest in a public place whenever they have probable cause to believe that the person has just committed a crime. The validity of Debbie's warrantless arrest by Bob thus turns on whether he had probable cause to think she had just committed a crime.

Bob did in fact have probable cause. Just seconds earlier, Debbie had paid him $200 as a down payment for committing murder. This gave him probable cause, at the very least, to think that Debbie had just committed a crime. Murder is the intentional killing of another person with malice aforethought. In most states, premeditated murder is first degree murder, but murder is committed even by acting with reckless indifference to an unjustifiably high risk to human life. Hiring a hit man probably satisfies the former standard, and it certainly satisfies the latter. When she paid Bob, Debbie arguably committed solicitation. A person is guilty of solicitation where they urge, request, or pay another person to commit a substantive offense. By paying Bob an advance, Debbie was arguably soliciting his commission of the murder of her husband, Carl. Because she had just committed this crime in front of him, Bob had probable cause to arrest Debbie. The arrest was therefore lawful.

Debbie may argue that she did not actually commit solicitation in front of Bob, because she made clear that she was not yet sure she wanted him to kill Carl, and that she still needed some more time to think about it. It is not clear that this defense would work at

trial, because Debbie still paid money as consideration for keeping open the promise of committing the crime. Bob had said she needed to pay him now or never if she wanted him to commit the murder, and she did pay him, albeit not the entire amount. That said, it does not matter that Debbie might win this argument at trial, because the arrest only required probable cause - again, a fair probability that the person had committed the substantive offense. By paying money to a hit man, Debbie at least came within a fair probability of committing solicitation, such that the arrest was lawful.

Furthermore, Bob had probable cause to think that Debbie had committed solicitation by offering Ivan $2,000 to find a hit man to kill her husband. While Ivan's unreliable testimony might have not established probable cause on its own, Debbie corroborated his report by saying "I was," by showing interest in Bob's offer when she said "not a bad price," and by ultimately offering him the $200 to keep the offer open. This earlier solicitation could also be the source of probable cause.

As mentioned above, a search can occur incident to a valid arrest. The officer can search the arrestee's person and everything within her wingspan, as long as time and place are contemporaneous. Bob's search was at the time and place of the arrest, and did not go beyond Debbie's person. It was therefore a lawful search pursuant to arrest. Once such a search is carried out, any evidence found is not subject to suppression, even if it is not evidence of the same crime for which the person was arrested. Thus, although the white powder was not evidence of the crime for which Debbie was arrested - solicitation of murder - it is not subject to suppression.

The judge should therefore deny Debbie's motion to suppress the cocaine.

SUPPRESSION OF POST-ARREST STATEMENT

Debbie's post-arrest statement, on the other hand, is subject to suppression. Under the Self-Incrimination Clause of the Fifth Amendment (and the *Miranda* case implementing it), incorporated against the states by the Due Process Clause of the Fourteenth

Amendment, police must warn people of their rights to remain silent and to an attorney before commencing a custodial interrogation. The warning need not be verbatim, but it must convey that (1) the person has the right to remain silent, (2) anything they say can be used against them at trial, (3) they have the right to speak to an attorney, and (4) that if they cannot afford an attorney, one will be provided. The trigger for these warnings is custodial interrogation. An interaction is "custodial" any time a reasonable person would not feel free to leave, and would expect that the detention will not be of relatively short duration, as with a routine automobile stop or a *Terry* stop. Another test for whether the interaction is custodial is whether it presents the same inherently coercive pressures as a station-house questioning. The interaction is an "interrogation" any time the police act in a way that they know or should know is likely to elicit an incriminating response. They need not actually conduct a formal interrogation, as long as this likelihood exists. Violations of a suspect's *Miranda* rights provide grounds to suppress any incriminating statements, though they will not necessarily lead to the suppression of the investigatory fruit of such statements.

Here, Debbie was clearly subject to a custodial interrogation. She was in custody because she was being arrested. Bob had just identified himself as a police officer, handcuffed her, and begun searching her. No reasonable person would feel free to leave such an arrest, and any questions asked while being handcuffed and arrested are just as coercive as questioning at a police station-house. Moreover, Debbie was subject to interrogation, because Bob, upon finding the cocaine, asked her "What have we got here?" Bob should have known that this question, asked by a police officer about a suspicious substance found on Debbie's person in the course of an arrest, was likely to elicit an incriminating response. Therefore, Debbie's incriminating response identifying the substance as cocaine is subject to suppression. So is her statement about being in trouble, which has the tendency to incriminate her by demonstrating her awareness of culpability.

The court should therefore grant her motion to suppress her post-arrest statement under *Miranda*. That said, the physical evidence itself - the bag of white powder - need not be suppressed, because *Miranda* suppression applies only to testimonial

statements like Debbie's verbal statement, not physical evidence. Because the powder was not obtained in violation of *Miranda*, the police are free to test it and introduce it as evidence at trial if it proves to be cocaine. Debbie might argue that the nature of the bag's content is the fruit of an illegal interrogation, because Bob only knew what was inside because Debbie told him. This argument will fail for a number of reasons. First, Bob had an independent source for knowing that the bag might be cocaine - namely, his own eyesight and common sense. A bag of white powder carried around in a person's pocket is sufficiently likely to be drugs that a reasonable officer would have it tested no matter what. Second, and relatedly, the police could claim that discovery of the powder's chemical makeup was inevitable, because all suspicious powders found on arrestees are tested as a matter of course (assuming this is true, which it should be). Third, the fruit of the poisonous tree doctrine does not apply to evidence whose discovery can be traced back to a statement suppressible under *Miranda* - only the statement itself is subject to suppression. The Supreme Court has determined that the evidentiary value of such down-the-line evidence outweighs the deterrent effect of suppression, unless the officer's failure to give *Miranda* warnings occurred in bad faith. Here, there is no indication that Bob acted in bad faith, withholding a *Miranda* warning so that he could gather evidence from Debbie to be used to further an investigation. It appears that, in the heat of the arrest and subsequent search, he simply forgot to give the warning. That said, even if this third argument against suppression failed, either of the first two would be enough to make the cocaine admissible at trial.

ENTRAPMENT

The defense of entrapment requires a defendant to show (i) inducement and (ii) a lack of predisposition. Inducement occurs when a criminal design originates with the police. A lack of predisposition occurs when the defendant was not otherwise intending to commit the crime, but only did so because the police applied pressure or some sort of other unfair deceit. The defendant must establish both elements by a preponderance of the evidence in order to make out the defense of entrapment.

If Debbie is found to have committed solicitation, it is unlikely that she will be able to establish an entrapment defense. As to predisposition, while the specific plan - to have Bob kill Carl - may have originated with the police, the underlying idea to kill her husband through a hit man was Debbie's. She had already taken a major step to achieve the underlying crime by paying Ivan $2,000 to find a hit man - a fact that she confirmed when she said that she "was" considering it. (While she may argue withdrawal, from discontinuing her plan, the entrapment defense assumes that she has otherwise been convicted.) She will thus struggle to show that she was not already predisposed to commit the crime. The plan originated with her, and she had already put significant money toward showing that it was not a mere fancy, but in fact a serious plan.

As to inducement, Debbie would have a slightly better argument. When she told Bob that she had changed her mind because her original plan was too risky, Bob applied pressure in several ways. He told her that her change of heart was silly, because the plan was not risky at all; he tried to persuade her that her alibi would be "airtight"; he offered her a presumably unnaturally low price; and he told her that she needed to accept on the spot. These all show police attempts to induce the crime through a combination of emotional and financial pressure.

That said, mere precatory language like this is rarely enough to establish inducement, or to negate predisposition that otherwise appears to exist. Generally the government must apply more forceful pressure - like an affirmative threat - to reach entrapment. For drug stings, these elements can be satisfied by offers to buy or sell drugs at a price that is grossly more favorable to the defendant than the defendant could obtain in the real world. But for solicitation of murder, the fact of offering a discount is probably not enough to show inducement or lack of predisposition. A person who does not otherwise intend to engage in murder is generally not induced to solicit murder by being offered a low price. Debbie's entrapment defense is therefore not likely to prevail at trial.

She may have slightly better luck at sentencing, by offering either a sentencing entrapment argument or a sentencing factor manipulation argument. These typically

allow a judge to reduce a sentence, even to go below the guidelines, based on police conduct that is unfair or pressuring, but that does not rise to the level of entrapment. Bob's pressuring statements might satisfy these sentencing defenses, if Debbie can convince the sentencing judge that she in fact had decided not to carry out her plan, and indeed would not have carried it out, but for the officer's pressure. This may reduce her sentence, but it will not excuse her from criminal liability.

Answer B

Suppression of Cocaine Under the 4th Amendment

4th Amendment

Under the 4th Amendment to the U.S. Constitution, which has been incorporated to the states via the Due Process Clause of the 14th Amendment, the government must not conduct unreasonable searches and seizures.

Exclusionary Rule and Fruit of the Poisonous Tree

The Exclusionary Rule provides that the product of unreasonable searches and seizures in violation of the 4th Amendment and coerced confessions in violation of the 5th Amendment is to be excluded from any subsequent trial. The Fruit of the Poisonous Tree Doctrine states that all products/evidence derived from police illegality are excluded/barred from introduction at trial. The Fruit of the Poisonous Tree Doctrine can be overcome if (1) there is an independent source for the evidence/contraband; (2) there was an intervening act of free will on the part of the defendant; or (3) it was inevitable that the police would have obtained that evidence.

Harmless Error Rule

Even if there is a violation of the 4th Amendment and the Exclusionary Rule/Fruit of the Poisonous Tree Doctrine, a conviction will not be overturned unless there is a reasonable probability that the jury's determination would have been different but for the introduction of that information. This is called the "Harmless Error" Rule.

Search and Seizure of the Cocaine

As provided above, the 4th Amendment bars police from conducting unreasonable searches and seizures. There are a number of steps that we must go through in order to determine whether the seizure of the cocaine violated Debbie's 4th Amendment rights.

(2) We first need to determine whether this is government conduct. Government conduct occurs when the publicly paid police, or private police that are deputized with arresting power, conduct an action. Here, it appears as though it was government/police conduct. Alan was a detective and Bob was an undercover police officer. Accordingly, there was police/government action.

(3) Next, we need to determine whether Debbie had a reasonable expectation of privacy in the area searched or the item seized. Put another way, we need to determine whether she has standing to complain about this particular search. Standing is always present when (1) an individual owns a premises; (2) an individual is the possessor/leasor of the premises; or (3) the individual is an overnight guest at a premises. These do not apply to Debbie's particular situation. A defendant sometimes has standing if they have a reasonable expectation of privacy in the area searched. Here, the search took place on Debbie's person, in her pockets. Debbie undoubtedly has a reasonable expectation of privacy in her pocket. As such, the government/police must have had a valid warrant or a valid excuse for not having a proper warrant when they searched Debbie.

(4) As stated above, we next must determine whether Bob and Allan had a valid warrant for the search and arrest of Debbie. A valid warrant has two specific requirements: (1) particularity; and (2) probable cause. Particularity requires the warrant to state with relative specificity the items to be recovered, the person to be arrested, or the areas to be searched. Probable cause is the reasonable belief that contraband will be found in the area to be searched or reasonable belief that the individual to be arrested committed a crime. Here, there appears to be serious problem with the arrest warrant in this case, specifically with the probable cause requirement.

The particularity requirement appears to be satisfied because it is a warrant for the arrest of Debbie. This is a specific person and particular enough to satisfy the first prong of the valid warrant requirement. The problem arises with regards to the creation of probable cause. Alan obtained the warrant on the basis of an informant's information.

There are many circumstances where an informant's information may be used to establish probable cause. That being said, whether the informant may be trusted is based on the totality of the circumstances. This includes the informant's previous reliability, whether there is independent evidence to support the informant's testimony and, most importantly, whether the informant's testimony can be corroborated. Here, there does not appear to be any sort of corroboration of Ivan's testimony. Furthermore, it is made clear that Ivan has often proven unreliable. As such, there is no reason to believe Ivan's information without any additional corroborating evidence. Because probable cause is not based on sufficient information, there is a good argument to be made that the warrant was invalid to begin with.

(5) Even if a warrant is invalid, a search/arrest may still be considered legitimate if the arresting/searching officer uses good faith in the execution of the warrant. Here, there is no indication that Bob knew of the lack of probable cause, and appears to rely on the warrant in good faith. That being said, there are a number of situations where the arresting/searching officer's good faith does not excuse an invalid warrant: (1) when the warrant is so lacking in particularity that no reasonable officer could believe in good faith that the warrant is valid; (2) when the warrant is so lacking in probable cause that no reasonable officer could believe in good faith that the warrant is valid; (3) when the magistrate judge who issued the warrant is biased; or (4) when the officer who obtained the warrant lied in the warrant application. Here, there is nothing on the face of the warrant to demonstrate that it is so lacking in particularity or probable cause such that no officer could reasonably believe it valid. There is also no indication that the magistrate judge who signed the warrant is biased. There is, however, evidence that Alan lied in the warrant application in order to obtain the warrant. The facts indicate that Alan described Ivan as "a reliable informant" even though he knew that was not the case. Had the magistrate judge been aware that the warrant was solely based on information provided by an unreliable informant, they would probably not have issued the warrant because there is not sufficient probable cause to support the warrant. Accordingly, the warrant was invalid and the officer's good faith reliance on the warrant does not overcome that deficiency.

(6) If a warrant is invalid and the officer's good faith is not enough to overcome that deficiency, there are still some instances where a search and/or arrest is not required to be conducted pursuant to a valid warrant. Some such instances include, but are not limited to: (1) the plain-view doctrine; (2) searches incident to a valid arrest; (3) exigent circumstances; and (4) the automobile exception. Here, Bob may be able to validly argue that the search and seizure of the cocaine was valid pursuant to a search incident to a valid arrest. When an officer validly arrests an individual, they are allowed to search the clothes/body of the person, as well as any area around the person within their wingspan. Any contraband/evidence of crime that is obtained as a result of the search conducted pursuant to a valid arrest is admissible, despite the absence of a proper warrant. Here, Bob will argue that his search of Debbie and seizure of the cocaine was valid pursuant to a valid arrest. He will argue that he personally witnessed Debbie commit a crime (solicitation of a murder - which is discussed in greater detail below) and therefore was allowed to arrest her and entitled to search her person. Debbie will undoubtedly have a different view of the situation.

Debbie will argue that she committed no crime and that the search and seizure was not done pursuant to a search incident to a valid arrest. Solicitation requires (1) the defendant to request or ask another person to commit a crime; and (2) an intent that the requested crime be committed. Solicitation is a specific intent crime. If there is an agreement between the parties to commit the crime, solicitation merges with conspiracy and is no longer alive for purposes of prosecution. Here, it is unclear whether or not Debbie manifested the intent to commit the murder. If she did not have the requisite intent, she did not commit the crime of solicitation. Debbie used words such as "let me think about it," "I've changed my mind," and "I'm still not sure about it." While she did give Bob a down payment, she does not seem to express the necessary intent for Bob to commit murder against her husband. Her argument will be that no crime was committed, therefore there was no valid arrest and the search incident to the arrest was also improper.

Conclusion - Here, it appears a close call as to whether the court should suppress the

cocaine pursuant to the 4th Amendment. As an initial matter, there was not a valid warrant and the conducting officer's good faith reliance on the warrant does not save it because Alan lied in obtaining the warrant. There does appear to be a valid reason for the search conducted by Bob, but Debbie will argue that she did not commit the crime of solicitation because (1) she never expressly asked Bob to commit the crime of murder; and (2) she did not express the intent for Bob to commit murder. The government will counter that the down-payment was meant to obtain the services and the exchange of money was enough to establish solicitation.

Ultimately, it appears as though Debbie does not commit the crime of solicitation because she did not expressly ask Bob to commit the murder and she did not have the necessary intent. While she did provide money, there was no agreement to commit the murder or express request to commit it - it appeared to simply compensate Bob for his time spent during their meeting. If Debbie had called back later and said to apply that money towards the commission of the crime, then the money would have been given with intent for Bob to commit the murder. Accordingly, it seems as though no crime was committed and the search that Bob conducted that uncovered the cocaine was not incident to a valid arrest. Therefore, the cocaine should be suppressed.

Suppression of Debbie's Post-Arrest Statement Under Miranda

5th Amendment and Miranda

Under the 5th Amendment of the U.S. Constitution, which has been incorporated to the states via the Due Process Clause of the 14th Amendment, individuals are entitled to Miranda warnings prior to "custodial interrogation." Miranda warnings include (1) the defendant has the right to remain silent; (2) anything the defendant states can be used against them in the court of law; (3) the defendant has a right to an attorney; and (4) if the defendant is indigent and can't afford an attorney, one will be supplied to her. The warnings need not be verbatim. As previously stated, the trigger for Miranda warnings is "custodial interrogation." "Custody" means any situation in which an individual would not feel able to leave on their own volition. While this may be in a jailhouse, it can also

occur in any other situations where police conduct does not leave a reasonable belief that the person can wilfully leave. "Interrogation" occurs when the police can foresee that the line of questioning may elicit an incriminating response. Once there is custodial interrogation, the individual being questioned must be given the Miranda warnings. If not, the exclusionary rule and fruit of the poisonous tree doctrine may apply.

Exclusionary Rule and Fruit of the Poisonous Tree

The Exclusionary Rule provides that the product of unreasonable searches and seizures in violation of the 4th Amendment and coerced confessions in violation of the 5th Amendment are to be excluded from any subsequent trial. The Fruit of the Poisonous Tree Doctrine states that all products/evidence derived from police illegality are excluded/barred from introduction at trial. The Fruit of the Poisonous Tree Doctrine can be overcome if (1) there is an independent source for the evidence/contraband; (2) there was an intervening act of free will on the part of the defendant; or (3) it was inevitable that the police would have obtained that evidence.

Harmless Error Rule

Even if there is a violation of the 5th Amendment and the Exclusionary Rule/Fruit of the Poisonous Tree Doctrine, a conviction will not be overturned unless there is a reasonable probability that the jury's determination would have been different but for the introduction of that information. This is called the "Harmless Error" Rule.

Custodial Interrogation of Debbie

In order to determine whether Debbie's post-arrest statement violates Miranda and is thus entitled to suppression, we need to determine whether she was in a state of custodial interrogation. After receiving the $200 from Debbie, Bob identified himself as a police officer, handcuffed her, and searched her. During the course of the search, Bob found a vial of white, powdery substance and asked "well, well, what have we got here?" Based on the facts of this particular case, it appears as though Debbie was in custody at the time Bob made this statement. She was handcuffed and being searched by Bob. Accordingly, no reasonable person would believe that they have the right to leave on their own free will at that point.

Next, we need to determine whether Bob's question qualifies as "interrogation" under the meaning of "custodial interrogation" defined above. Bob's question is "What have we got here?" While this seems relatively innocuous, it is most definitely intended to elicit an incriminating response. When the police ask someone what the contents of a vial suspected to be contraband are, they are undoubtedly attempting to obtain a response that can incriminate the defendant.

Debbie was in "custody", as defined by Miranda, because no reasonable person would feel able to leave when they're handcuffed and searched by the police and she was being "interrogated" because Bob asked a question that is foreseeable to elicit an incriminating response, it appears as though she was entitled to her warnings under Miranda prior to Bob's questioning. Because Bob's questioning was a violation of Miranda, Debbie's response should be excluded pursuant to the 5th Amendment.

Debbie's Defense of Entrapment

As stated above, Debbie was charge with solicitation of murder. Solicitation requires (1) defendant to ask or request someone to commit a crime; and (2) specific intent that the requested crime is to be committed. Murder, the crime that Debbie supposedly wanted to commit, is defined as the unlawful killing of another human being with malice aforethought, expressed or implied. There are multiple "degrees" of murder - first and second degree. First degree is premeditated murder, with intent to kill, and knowledge, or felony murder (murder in the commission of a dangerous felony independent from the murder itself). Second degree murder is any other kind of murder. The intent required for murder is (1) intent to kill; (2) intent to commit serious bodily harm; (3) intent to commit a felony; or (4) depraved heart/reckless indifference.

While there is some question about whether or not Debbie manifested the intent necessary for solicitation, the defense determined that the defense of entrapment was a viable defense. In order to bring a successful entrapment defense, a defendant must show (1) the government unduly encouraged/enabled/aided the defendant in the

commission of the crime; and (2) the defendant would not have committed the crime but for the government's actions. This is an extremely difficult defense to establish and Debbie may have trouble succeeding in its presentation.

Initially, we must determine whether the government encouraged and/or enabled Debbie to commit the crime in question. Here, Debbie's actions seem to indicate that she was predisposed to committing the crime of solicitation of murder. First, Debbie agreed to meet Bob at a neighborhood bar when the only information he provided was that he was a friend of Ivan and could do the killing. When they met, Debbie stated "I was [looking for someone to kill my husband], but I now think it's too risky. I've changed my mind." This statement seems to suggest that Debbie is not withdrawing because she doesn't want to commit the crime, but that she is afraid of getting caught. Bob does not force her to continue, but states that "it's not risky at all" and gives her a price quotation. At this point, Debbie states "let me think about it." When Bob states that he needs an answer now, Debbie proceeds to put a down payment and states "I'm still not sure about it." Based on Debbie's statements and behavior, it does not seem that Bob unduly coerced her to commit the crime of solicitation. Bob merely provided her with the opportunity to do so. Debbie's statements seem to suggest that she has the desire to do it, but is simply afraid of getting caught. Bob's assurances that she won't get caught do not rise to the level necessary for the first prong of entrapment.

We also must determine that Debbie would not have committed the crime but for the government's actions. As established in the preceding paragraph, Debbie has the intent to commit the crime, but is simply afraid of being caught. The government will argue that the provision of money was a down payment to commit the murder and Debbie had the necessary intent to commit the underlying crime necessary for solicitation. Debbie will claim that she would not have given the money, but for the assurances made by Bob that she would not be caught. That is not enough to establish the second prong necessary for entrapment. If a separate/non-governmental actor had provided the same assurances, Debbie appears to have been likely to react in the same manner.

Because (1) the government did not unduly encourage or enable Debbie to commit the

crime of solicitation, and (2) Debbie would have still committed the crime without the government's interference, the defense of entrapment does not appear to be a valid defense for Debbie.

Jul 2016

California Bar Examination

Essay Questions and

Selected Answers

The State Bar Of California
Committee of Bar Examiners/Office of Admissions

180 Howard Street • San Francisco, CA 94105-1639 • (415) 538-2300
845 S. Figueroa Street • Los Angeles, CA 90017-2515 • (213) 765-1500

ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2016

CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2016 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	Subject
1.	Civil Procedure
2.	Real Property
3.	Contracts
4.	Constitutional Law
5.	Community Property
6.	Professional Responsibility

ESSAY EXAMINATION INSTRUCTIONS

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

Q1 Civil Procedure

Paul, a citizen of Mexico, was attending college in San Diego on a student visa. He drove to San Francisco to attend a music festival. While there, he bought and ate a bag of snacks from Valerie, a resident of San Francisco. The snacks had been manufactured in Germany by Meyer Corp., a German company with its sole place of business in Germany. The snacks contained a toxic substance and sickened Paul, who incurred medical expenses in the amount of $50,000.

Paul filed an action pro se against Valerie and Meyer Corp. in the Superior Court of California in San Diego. In his complaint, he alleged that Valerie and Meyer Corp. should have known the snacks were contaminated and demanded $50,000 in compensatory damages.

Paul drove to San Francisco where he personally handed Valerie a summons and copy of the complaint. He sent a summons and copy of the complaint to Meyer Corp. by ordinary mail to the company in Germany.

1. Did Paul validly serve the summons on:

    a. Valerie? Discuss.

    b. Meyer Corp.? Discuss.

2. Does the Superior Court of California in San Diego have personal jurisdiction over:

    a. Valerie? Discuss.

    b. Meyer Corp.? Discuss.

3. Does venue properly lie in the Superior Court of California in San Diego? Discuss.

4. Is Paul's action properly removable to federal court? Discuss.

Answer A

I. Service of Process

The issue is whether Paul properly served process over Valerie and Meyer Corp.

Service of process in California can be accomplished in a variety of ways. First and foremost, a defendant may be personally served with a summons and a copy of a complaint. When in-person service does not work, substituted service may be attempted by leaving the summons and a copy of the complaint with the defendant's registered agent or another person who resides at the defendant's domicile. The summons and complaint must also be sent via certified mail to the defendant's address of record. However, process must be served by a person over the age of 18 who is not a party to the case.

A. Valerie

Here, Paul personally served Valerie with process. Paul might be over the age of 18, but he is a party to the case and therefore cannot properly effect service himself. Though service by handing the defendant process personally is proper, Paul was not a proper process server. Accordingly, Paul did not validly serve process on Valerie.

B. Meyer Corp.

Paul's service of Meyer Corp. suffers from the same defect as his service of Valerie: he is not a proper process server because he is a party to the case. Additionally, service of process on an international is subject to different rules: process may be served either in compliance with governing international treaties, or via certified mail with a return receipt.

Here, Paul mailed the complaint via ordinary mail, rather than certified mail. Further,

there does not appear to be an international treaty governing service of process. Accordingly, Paul cannot have validly served process using ordinary mail; he did not validly serve process on Meyer Corp.

II. Personal Jurisdiction

The issue is whether the San Diego Superior Court has personal jurisdiction over Valerie and Meyer Corp.

In personam jurisdiction describes the personal jurisdiction of a court over the parties before it. There are three traditional bases of in personam jurisdiction: when a defendant consents to the court's jurisdiction, when a defendant is domiciled in the jurisdiction in which the court sits, and when a defendant is present in the jurisdiction and is properly served with process while present. When the traditional bases of in personam jurisdiction do not apply, a state long-arm statute may provide an alternative basis for jurisdiction.

A. Valerie

Here, Valerie appears to satisfy one of the traditional prongs of in personam jurisdiction. She is a resident of San Francisco, and so is domiciled in California and therefore subject to the personal jurisdiction of California state courts. While Paul personally served Valerie in San Francisco after driving there, this service of process was improper as discussed above. Nonetheless, because another of the traditional bases has been met, Valerie is properly subject to the San Diego Superior Court's personal jurisdiction.

B. Meyer Corp.

1. Traditional Bases

Here, Meyer Corp. does not appear to satisfy any of the traditional bases of in

personam jurisdiction. It does not appear that it has consented to California state courts' jurisdiction. Further, it is domiciled only in Germany. Finally, Paul did not serve process on Meyer Corp. in state. Accordingly, none of the traditional bases apply.

2. Long-Arm Statute and Constitutional Limitations

However, California also has a state long-arm statute that may provide an alternative basis for personal jurisdiction. California's long-arm statute goes to the full extent of the federal Constitution, subject only to Due Process limitations. For a court's exercise of personal jurisdiction to comport with Due Process, the defendant must have sufficient minimum contacts with the jurisdiction, the exercise of jurisdiction must be related to the defendant's contacts, and the exercise of jurisdiction must not offend traditional notions of fair play and substantial justice.

a. Minimum Contacts

For a defendant to have sufficient minimum contacts with California, it must have purposefully availed itself of California, such that it was foreseeable that its minimum contacts would cause it to be haled into the California courts. In stream-of-commerce cases, purposeful availment consists of some action by the defendant deliberately targeting the jurisdiction. Here, it is not clear whether Meyer Corp. has purposefully availed itself of California, as it is incorporated in Germany, headquartered in Germany, and conducts all of its manufacturing in Germany. More information is needed into its distribution chains. For example, if Meyer Corp. specifically shipped its snacks to Valerie for distribution in San Francisco, then Meyer Corp. will have purposefully availed itself by intending that its products be sold in California. By contrast, if Valerie purchased the snacks in Germany and decided on her own volition to sell them in California, then Meyer Corp. will not have purposefully availed itself. In the absence of such evidence, it appears that Meyer Corp. does not have sufficient minimum contacts with California.

b. Relatedness

Relatedness is satisfied either in a specific sense when a cause of action arises out of a defendant's contacts with a jurisdiction, or more generally when a defendant is domiciled in a jurisdiction and is essentially "at home" in that jurisdiction. Here, Meyer Corp. is domiciled in Germany and conducts all of its activities in Germany. Accordingly, it is not "at home" in California and does not satisfy the general relatedness criteria. However, the action arises out of Meyer Corp.'s snacks being consumed in California. Accordingly, the specific relatedness criteria is met.

c. Fair Play and Substantial Justice

Even when a defendant has sufficient minimum contacts and relatedness is satisfied, the exercise of personal jurisdiction must not offend traditional notions of fair play and substantial justice. In considered whether the exercise of personal jurisdiction does so, a court considers a multitude of factors, including the plaintiff's interest in relief, the forum state's interest in providing a forum such that the plaintiff can seek redress, and whether other forums might be more appropriate. Here, Paul was sickened quite extensively and incurred substantial damages. He has a strong interest in relief. Further, California has a strong interest in providing a forum. Even though Paul is not a citizen of California, California nonetheless has an interest in making sure that contaminated food products are not distributed within the state. Finally, while Meyer Corp. might claim that Germany is a more appropriate forum, given that the snacks were manufactured there and it conducts all of its business there, California nonetheless may be more appropriate, given that Valerie, Meyer's co-defendant, is a citizen of California. Given that she ultimately sold the snacks to Paul and is being sued jointly with Meyer Corp., California is a more appropriate forum than Germany. Accordingly, a California court's exercise of personal jurisdiction over Meyer Corp. would not offend traditional notions of fair play and substantial justice.

Therefore, whether the San Diego Superior Court can properly exercise jurisdiction over

Meyer Corp. depends on whether Meyer Corp. has sufficient minimum contacts with California. While more evidence is needed, it does not appear that Meyer Corp. has purposefully availed itself of California, and therefore, the court cannot properly exercise personal jurisdiction.

III. Venue

The issue is whether venue properly lies in San Diego Superior Court.

Venue in California is organized by each of the 58 counties in the state. Different rules apply based on whether the action is a local action or a transitory action. Venue is proper in a local action, one involving real property, in the county in which the real property lies. For a transitory action, venue is generally proper in a California Superior Court in any county where any defendant resides. For contract actions, venue is additionally proper in the county where the contract was entered into and the county where the contract was expected to be performed. For tort actions, venue is proper in the county where the act or omission giving rise to the tort occurred. If no venue is proper following the application of these rules, then venue is proper in any county in which a court has personal jurisdiction over the defendants.

A. Residence

Here, the action at issue is a transitory action as it does not involve any real property. Therefore, venue is proper in any county in which a defendant resides. In this case, the two defendants Valerie and Meyer Corp. are residents of San Francisco County and Germany, respectively. Because only Valerie's residence, San Francisco, is a county within California, the first venue provision only provides that the Superior Court in San Francisco is a proper venue.

B. Tort Actions

Here, Paul's claim appears to be a tort claim: he appears to be arguing negligence on behalf of Valerie and Meyer Corp. in producing the snacks, or possibly strict products liability. Accordingly, the venue rules for tort actions may also provide an alternative basis for proper venue. In this case, the acts or omissions giving rise to Paul's action occurred in both San Francisco County, where Valerie sold him the snacks, and Germany, where the snacks were manufactured. Accordingly, under the analysis for a tort action, venue remains proper only in San Francisco.

C. Contract Actions

Paul could also plausibly allege that his action is a contract action, and that Valerie breached, for example, an implied warranty of fitness for a particular purpose when she sold him the snacks. Accordingly, venue is additionally proper in the county in which the contract was entered into, as well as the county in which the contract was expected to be performed. Here, both of those locations are the City and County of San Francisco: Paul agreed to purchase, and did purchase, the snacks from Valerie there. Accordingly, under the analysis for a contract action, venue is proper only in San Francisco.

D. Fallback Venue

Because venue is proper in at least one county in California, the fallback venue provision of any judicial district in which the court has personal jurisdiction over the defendant does not apply.

In conclusion, venue is only proper in San Francisco County Superior Court. Venue is not proper in San Diego Superior Court.

IV. Removal to Federal Court

The issue is whether Paul's action is properly removable to federal court.

A case initially filed in state court is properly removable to federal court when the case could originally have been brought in federal court. Removal is accomplished by filing a notice of removal in federal court within 30 days of service of a document that shows the case to be removable, but cases removable to federal court solely on the basis of federal diversity jurisdiction cannot be removed more than one year after the filing of the action in state court. Here, nothing indicates that Paul's case would be subject to these time restrictions. Accordingly, the issue is whether the case could have initially been brought in federal court.

For a case to be properly brought in federal district court, the federal court must have subject matter jurisdiction. A federal court may have federal question jurisdiction or diversity jurisdiction over a case. In cases where at least one "trunk" claim is within the court's federal question jurisdiction or diversity jurisdiction, the court may have jurisdiction over additional claims that share a common nucleus of operative fact with the federal trunk claim.

A. Federal Question Jurisdiction

Federal question jurisdiction consists of claims arising under the Constitution, treaties, and federal laws and regulations. The question must appear on the face of a well-pleaded complaint. Here, Paul does not appear to be asserting any federal rights. Unless he is asserting any causes of action under federal food safety regulations, for example, he appears solely to be asserting state-law tort claims -- that Valerie and Meyer Corp. were negligent in failing to detect that the snacks were contaminated. Accordingly, the federal court does not have federal question jurisdiction over Paul's action.

B. Diversity Jurisdiction

Diversity jurisdiction arises when there is a diversity of citizenship between the parties and the amount in controversy in the action exceeds $75,000.

1. Diversity of Citizenship

To satisfy diversity of citizenship, each plaintiff must be fully diverse from each defendant. A U.S. citizen or permanent resident alien is considered to be a citizen of the state in which she is domiciled, an alien is considered to be a citizen of the country of his citizenship, and a corporation is considered to be a citizen both of all jurisdictions in which it is incorporated and the state in which it has its principal place of business. However, even when each plaintiff is fully diverse from each defendant, a federal court still will not have subject matter jurisdiction if both the plaintiffs and defendants are aliens and U.S. citizens are not present on both sides of the action.

Here, Paul is not a permanent resident alien, as he is present in the country only on a student visa. Accordingly, for diversity jurisdiction purposes, he is a citizen of Mexico. Valerie resides in San Francisco, which is her domicile. Accordingly, for diversity purposes, Valerie is a citizen of California. Meyer Corp is incorporated in Germany only and has its principal place of business in Germany. Accordingly, Meyer Corp is a citizen of Germany.

Accordingly, the parties are fully diverse from each other: Paul does not share citizenship with either Valerie or Meyer Corp. However, the alienage restriction nonetheless bars Paul's action from satisfying the diversity requirements. Paul, as the only plaintiff, is an alien. Valerie is a U.S. citizen, but Meyer Corp. is also an alien, as it is only a citizen of Germany. Accordingly, aliens are present on both sides of the action, but U.S. citizens are not. Therefore, diversity of citizenship is not met.

2. Amount in Controversy

The amount in controversy is the amount, when plaintiff asserts a monetary damages claim, that a plaintiff seeks from the defendants. When a claim asserted jointly against two defendants, the amount in controversy is the total relief sought from the defendants. For a federal court to have jurisdiction, the amount in controversy must exceed $75,000.

Here, Paul seeks $50,000 in compensatory damages jointly from Valerie and Meyer Corp. Accordingly, the amount in controversy is $50,000, which does not exceed $75,000. Therefore, the amount in controversy requirement is also not met for diversity jurisdiction purposes.

Because neither the diversity of citizenship nor amount in controversy requirements are met, a federal district court would have not diversity jurisdiction over Paul's action. Accordingly, because a federal court has neither federal question jurisdiction nor diversity jurisdiction over Paul's action, it could not have originally been brought in federal district court. Therefore, Paul's action is not removable from California state court to federal district court.

Answer B

1. SERVING A SUMMONS

A. WAS VALERIE SERVED PROPERLY

The issue is whether Paul properly served Valerie by personally handing her a summons and copy of the complaint.

PROPER SUMMONS

The Federal Rules of Civil Procedure allow for a party member to be served with process in a number of ways. One accepted method of service is personally serving the summons and complaint on the Defendant. A person may be served personally by any non-party who is 18 years or older. To effect proper service the Defendant should be given a summons and two copies of the complaint. Under California civil procedure, a person may similarly be personally served by a non-party 18 years or older by the same rules. This case has been filed in the superior court so it is under California rules. The CA rules prefer personal service.

In this case, Paul, a party to the case, drove to San Francisco where Valerie lived and handed her a summons and one copy of the complaint. This was improper. Paul was not allowed to serve Valerie because he is a party to the case. Further, there are no facts as to Paul's age, but service must be given by someone who is 18 years of age or older. Valerie was given one summons and one complaint. The rules require that Valerie be given two copies of the complaint. Because of this, service was not valid on Valerie.

B. WAS MEYER CORP SERVED PROPERLY

The issue is whether mailing a copy of the complaint and a summons by ordinary mail to Meyer Corp. in Germany was proper. The Federal Rules of Civil Procedure dictate

that it is proper to serve a Defendant by mail. The summons and two copies of the complaint must be sent by first class mail, postage paid, with a waiver and a pre-addressed and prepaid envelope in which the Defendant can return the signed waiver. California rules of civil procedure also allow service by mail to a person out of the country in a similar manner. CA rules prefer personal service, but the California rules specifically say that a defendant who is out of the country may be served by mail according to the California rules. However, in CA (which governs in this case) the mailing of service is not technically a waiver as it is in federal court but it operates in the same manner.

In this case Paul sent a summons and a copy of the complaint to Meyer Corp. in Germany by ordinary mail. This was improper. First, the complaint needed to be sent with one summons and two copies of the complaint. It should have been sent by first class mail, postage paid, and should have included a form for the Defendant to sign with a pre-addressed and prepaid envelope to send the signed documents back to the plaintiff who will file them. Under the California rules, the mailing of a summons and complaint is not actually waiver (it is a form of service) but it operates like the federal waiver. Thus, Meyer Corp. was not properly served.

2. PERSONAL JURISDICTION

A. DOES THE SUPERIOR COURT OF CALIFORNIA HAVE PERSONAL JURISDICTION OVER VALERIE

Personal jurisdiction over the Defendant is required for a court to hear a case. It refers to the court having authority over the defendant. To have personal jurisdiction (PJ) over a defendant traditionally occurs when a Defendant is served with process while voluntarily in the state, the defendant is domiciled in the state, or the Defendant consents to the court exercising its power over him/her. If there is not a traditional basis for jurisdiction the court will look to see if there are minimum contacts with the forum state so as not to offend traditional notions of fair play and substantial justice. In evaluating this the court looks to three factors: (a) contacts with the forum state focusing

on whether the defendant has purposeful availment and reasonably foresees being sued in the forum state; (b) Relatedness which occurs with general or specific jurisdiction in the forum state; and (c) fairness looking at if the defendant will be so gravely inconvenienced as to cause a substantial unfairness. The court will also look at the plaintiff's interests and the state‘s interest in effectuating justice under the fairness prong.

In this case Valerie is a resident of San Francisco. This means that Valerie is domiciled in California because she lives in a city (San Francisco) that is located in California. Therefore the court has personal jurisdiction over Valerie because she is domiciled in the forum state (California). Further, the court also has a traditional basis of jurisdiction over Valerie because she was personally served while voluntarily in California. Valerie was in San Francisco voluntarily because she lives there and was served with process while there. Thus, the court does have personal jurisdiction over Valerie according to two of the traditional bases of PJ.

B. DOES THE SUPERIOR COURT OF CALIFORNIA HAVE PJ OVER MEYER CORP

Personal jurisdiction over the Defendant is required for a court to hear a case. It refers to the court having authority over the defendant. To have personal jurisdiction (PJ) over a defendant traditionally occurs when a Defendant is served with process while voluntarily in the state, the defendant is domiciled in the state, or the Defendant consents to the court exercising its power over him/her. If there is not a traditional basis for jurisdiction the court will look to see if there are minimum contacts with the forum state so as not to offend traditional notions of fair play and substantial justice. In evaluating this the court looks to three factors: (a) contacts with the forum state focusing on whether the defendant has purposeful availment and reasonably foresees being sued in the forum state; (b) Relatedness which occurs with general or specific jurisdiction in the forum state; and (c) fairness looking at if the defendant will be so gravely inconvenienced as to cause a substantial unfairness. The court will also look at the plaintiff's interests and the states interest in effectuating justice under the fairness prong.

California's long-arm statute allows PJ over a defendant as long as it does not offend the constitution. Therefore the analysis of California's long-arm statute is merged with the constitutional analysis. The constitutional analysis is the minimum contacts test described above and analyzed below.

Meyer Corp. is a German company. It is incorporated in Germany with its sole place of business in Germany. Meyer Corp. was not served while voluntarily present in California. Further, there is no evidence that Meyer Corp. has consented to California having PJ over it. Because of this there is no traditional basis for personal jurisdiction. Therefore we must analyze PJ with the constitutional test of Minimum Contacts.

MINIMUM CONTACTS

There must be minimum contacts so as not to offend the traditional notions of fair play and substantial justice. This is analyzed looking at purposeful availment and foreseeability of being dragged into court.

PURPOSEFUL AVAILMENT

To have PJ Meyer Corp. must have purposefully availed itself into the forum state (CA) as such that it used the protections of its laws. In this case Meyer Corp. is a snack company. Its sole place of business is in Germany; however, the snack did get to California. If the company sold its products, advertised its products, or in some other way targeted California there will be purposeful availment. If Valerie brought these snacks back from Germany and the corp did not in any way reach out to CA, there will be no purposeful availment. There will be purposeful availment if Meyer Corp. directed sales to CA. It is unclear where and how Valerie came to get these snacks so the purposeful availment prong is unclear.

FORESEEABILITY

If Meyer Corp. did target CA in any way (by selling there, advertising there, selling

candy to CA over the internet) then it is foreseeable that they would be sued there. If, though, Valerie got these snacks in Germany and then sold them when she was in California then it is not foreseeable that Corp. would be dragged into court in CA.

RELATEDNESS

If the defendant is essentially at home in the forum state there will be general jurisdiction. Corp. is located only in Germany with its sole place of business in Germany. Therefore no general jurisdiction.

If the defendant's contact with the forum state results in the cause of action there will be specific jurisdiction. This is unclear because we don't know if Corp. was in any way targeting to sell in California. If they were then specific jurisdiction, if not then no specific jurisdiction.

FAIRNESS

We look at if it is so gravely inconvenient that it will put Defendant at severe disadvantage. In this case Defendant is a corporation and monetary concerns are not good arguments. Therefore it is probably fair. Further CA has an interest in adjudicating for its citizens. Paul the plaintiff is in CA.

CONCLUSION

There is PJ over Valerie. PJ over Meyer depends on its operations and how the snack got into CA.

3. VENUE PROPER

Under CA civil procedure, venue depends on the type of action. If it is not a local action (land action where the venue is where the land is) then venue is where any defendant resides. Further for a personal injury case venue is proper where the injury took place.

This is a personal injury case because Paul was sickened. Therefore venue is proper in San Francisco (where injury took place) and in San Francisco (where a Defendant lives). Neither of the defendants lives in San Diego (Valerie lives in San Fran and Meyer lives in Germany). Therefore venue in San Diego was improper. Proper venue would be in San Francisco.

4. ACTION REMOVABLE?

An Action is removable to federal court when there is a federal question jurisdiction. This occurs when the plaintiff is enforcing a federal right - when the cause of action arises under federal law. In this case the cause of action arises under state law because it is a tort or personal injury action. There is no federal law at issue. Any federal defenses do not matter in determining whether there is federal question jurisdiction. Therefore action cannot be removed under federal question jurisdiction.

An action can also be removed if there is diversity jurisdiction. Diversity jurisdiction requires that there be complete diversity (no plaintiff can be a citizen of the same place as any defendant) and that the amount in controversy be in excess of $75,000. Further, an action cannot be removed if the defendant is a citizen in the same state as the action is brought. A plaintiff may aggregate her claims against multiple defendants if the defendants are jointly and severally liable.

In this case the amount in controversy is $50,000. Paul can assert this amount against both defendants because it is a case where he is saying both are jointly and severally liable for the entire amount. This amount is below the required $75,000 so there is no diversity jurisdiction. Further Valerie is a citizen of California because she is domiciled in CA. This means that Valerie is a citizen of the forum state - this prevents her from removing the case to federal court in CA because she is a citizen of CA. Further, the case cannot be removed because there are aliens on both sides of the case. Paul is a citizen of Mexico and is the plaintiff. Meyer is a citizen of Germany and is a defendant. We have an alien on each side which prevents diversity. To remedy this there must be diverse citizens of the United States on each side.

In conclusion, the action cannot be removed.

Q2 Real Property

Al owned a farm.

In 1990, Al deeded an easement for a road along the north side of the farm to his neighbor Ben. Ben immediately graded and paved a road on the easement, but did not record the deed at that time. Al and Ben both used the road on a daily basis. The easement decreased the fair market value of the farm by $5,000.

In 2009, Al deeded the farm to his daughter Carol and she recorded the deed.

In 2011, Ben recorded his deed to the easement.

In 2012, Carol executed a written contract to sell the farm to Polly for $100,000. The contract stated in part: “Seller shall covenant against encumbrances with no exceptions.” During an inspection of the farm, Polly had observed Ben traveling on the road along the north side of the farm, but said nothing.

In 2013, Carol deeded an easement for water lines along the south side of the farm to Water Co., the local municipal water company. The water lines provided water service to local properties, including the farm. Water Co. then recorded the deed. The easement increased the fair market value of the farm by $10,000.

In 2014, after long delay, Carol executed and delivered to Polly a warranty deed for the farm and Polly paid Carol $100,000. The deed contains a covenant against all encumbrances except for the easement to Water Co. and no other title covenants. Polly recorded the deed.

In 2015, Polly blocked Ben’s use of the road and objected to Water Co.’s construction of the water lines.

Ben has commenced an action against Polly seeking declaratory relief that the farm is burdened by his easement. Polly in turn has commenced an action against Carol seeking damages for breach of contract and breach of the covenant under the warranty deed.

1. What is the likely outcome of Ben’s action? Discuss.

2. What is the likely outcome of Polly’s:

    a. Claim of breach of contract? Discuss.

    and

    b. Claim of breach of the covenant under the warranty deed? Discuss.

Answer A

QUESTION ONE

At issue is the outcome of Ben's (B) action against Polly (P) for blocking the access to the road that he received an easement from Al (A) to use.

Express Easement

An easement is the right to enter onto someone's land and use a portion of that land for a specific purpose. Easements may be granted expressly to an individual by deed. An express easement by deed must meet the deed formalities to be valid, including a valid writing, and other statute of frauds requirements. Moreover easements are deemed to be perpetual in nature unless otherwise indicated. Here in 1990, A deeded an easement to B for using a road along the north side of his farm. There are no facts indicating whether or not the deed itself meets the formalities of a valid writing; however it can be presumed here because there are no facts to the contrary. Therefore given that A created an easement by deed, that expressly named the easement in the deed, an express easement was likely created for B's use. Thus in 1990, after A's valid deed, B obtained an express easement to use the road on the farm.

Reasonable Use/Scope

An easement must usually be used reasonably within the scope of the granting instrument if an express easement. This typically allows the holder of the easement to improve the land where the easement lies and to enter on to it to repair it. Here after A granted B the easement, B immediately graded and paved the road for his use. These actions are likely valid given that B was entering onto the property to pave a road. It would be implied that the holder of this easement for use of a road could enter onto land to improve the land, grade it and maintain the road. Therefore it would appear that B has been validly using the easement and comporting with its ramifications.

Termination

The next issue is whether B's easement could be said to have terminated in any way after P took title to the land it was on. Termination of an easement may occur where the easement is abandoned, where the granting instrument states a specific condition to occur, or where the properties that the easement lies on and the adjacent property holder are merged. Typically easements are perpetual in nature unless stated otherwise. Here A granted the easement to B by deed. There was nothing in the deed that stated any kind of condition as to whether the easement could terminate. Therefore no conditions have occurred. Moreover there was no abandonment of the easement as B has used the road ever since he was granted it. Finally no merger occurred under these facts as B still maintains his own property and the property that the easement lies on is separately owned by P now. Thus the easement did not terminate.

Transfer of Land - Notice

Generally when land that is burdened by the easement, the servient estate, transfers title the easement runs with the land. Thus even though A transferred the land to Carol (C) and then C transferred the land to P, each time the transfer occurred the easement would automatically run with the land. However a subsequent bona fide purchaser may attempt to argue that they lacked notice of the easement. If a subsequent bona fide purchaser can do so and state that they did not have notice of the easement then they can typically defeat an easement holder’s title. The goal is to show that the subsequent bona fide purchaser did not have notice of the easement on the land. Thus P must show she did not have notice; this is done through a recording act.

Recording Act

Under the common law, title in land was measured by first in time, first in right. However under modern recording acts, people who record their interest in land can preserve their title by putting the world on notice of that interest in the land. There are jurisdictional splits as to what type of recording statute is used and there are three main ones: race, race-notice, and notice. Race recording statutes are used only in a minority of jurisdictions. Therefore notice and race-notice jurisdictions are typically the most

commonly used. Here in order to use a recording statute, P would have to show that she was a SBP and that she met the requirements of each recording statute.

Subsequent Bona Fide Purchaser (SBP)

In order to actually argue that one did not have notice to the easement, they must be a SBP. Typically a SBP is someone who took title to land subsequently to the current holder of the land and they did so for value. Here P paid for title to the farm in which B's easement lies. Moreover B's interest was received in 1990 and P's interest was received in 2014, so she was subsequent.

Thus P is a SBP who could seek to use a recording statute to take superior title in land and invalidate B's easement.

Notice and Race-Notice Jurisdictions

In a notice jurisdiction and a race-notice jurisdiction, the SBP must show that at the time that they took title to the land they did not have a notice of the competing interest. There are three kinds of notice: inquiry, actual and constructive. Inquiry notice occurs where the SBP is charged with looking at the property to examine it, and if they had examined it they may have found the competing interest. Actual notice occurs where the SBP is actually aware of the interest and recording notice occurs where the competing interest was recorded so that the SBP was on constructive notice via the recording. Here P actually saw the road that B had built on the property and she saw that B was using it. Therefore P likely had actual notice since she physically saw someone driving on the land. Moreover B recorded his deed in 2011 and P did not record until 2014. Thus she would be on constructive notice as well. At a very minimum P should have asked C who B was and what he was doing. Therefore notice would most likely be charged to P.

Thus P as a SBP cannot argue that she took title to the land without notice of the competing interest.

Race Jurisdiction

In a race jurisdiction, the person who records first wins and that is why it is not

used in many jurisdictions because it often results in unfair outcomes. Here B recorded in 2011 and P recorded in 2014. Thus under a race jurisdiction B would win as well.

Conclusion

In total, P cannot use a recording act to argue that she as a SBP should take title without B's interest. She had notice of B's usage of the land and moreover she did not record first. Thus the common law rule applies of first in time and first in right and B's interest is superior. P would lose to B's claim as B's easement would automatically run with the land.

Shelter Rule

Under the shelter rule, a SBP may be able to step into the shoes of a previous grantee and argue that the previous grantee could have validly used a recording in order to defeat a previous claim. The shelter rule may be used despite the fact that a SBP may have had actual knowledge. Here P could argue that C was a SBP under a recording act and therefore P could step into C's shoes to invalidate B's claim.

C as SBP

A SBP must typically pay value for title to the land and take subsequently to the competing interest. Here B got his easement in 1990 and C took title in 2009. Therefore C was subsequent. But it is not clear that C paid for the land. Her father was A and he just deeded her the land. If she did not pay value for the land then she was a mere donee and not a valid SBP. Any value is enough; typically only a "mere peppercorn" would suffice; but if someone did not actually give value then they are not a SBP. Thus if C was not a SBP then she could not use a recording act. As such it is unlikely that the shelter rule could be used here.

Recording Claim

Under a race notice and a notice jurisdiction it is likely that C would be charged with inquiry notice. Since B built and paved a road on the farm, that would have went from his farm to C's farm, any inspection of the farm that C was to take title to would

charge with her inquiry notice. She would have seen the road and been charged with asking what it was. Moreover given B's usage of the road, she likely would have seen him, especially if this was her father's farm before it was hers. Thus under a race and race-notice jurisdiction it is unlikely that C would prevail since she likely took title with notice.

Under a race recording statute C would probably prevail however, since she did record before B did, as she recorded in 2011 and B recorded in 2014.

Conclusion - Shelter Rule

In total, P cannot likely use the shelter rule here to step into C's shoes because C was probably not a SBP. Moreover under a notice and race-notice recording statute she would not win since she probably would be charged with notice of B's claim. However she may win under a race recording statute if she was a SBP because she recorded first.

Overall Conclusion

In conclusion, B's claim against P would likely be valid. B can establish that he had a valid express easement and that it automatically ran with the land when it was transferred from A to C and then to P. Moreover P cannot argue she did not have notice of the easement nor can she use a recording statute. Moreover she cannot use the shelter rule here either since C was not likely a SBP.

QUESTION TWO

At issue is the likely outcome of P's lawsuit against C.

Part A

At issue is P's claim for breach of contract. When parties convey land it is a two-step process: first the parties enter into a contract for the sale of land and then there is a period of escrow. Following escrow, closing occurs. At closing is where the actually deed is delivered and at that point the deal is finished. P's first claim arises under the

land sale contract.

Land Sale contract - Marketable Title

A contract for the sale of land is required to be in a valid writing satisfying the statute of frauds. Here on 2012, P and C executed a written contract to sell the farm to P for $100,000. The contract stated that the seller "shall covenant against encumbrances with no exceptions". This express provision essentially was stating that the land would not be sold with any encumbrances on it. An encumbrance is something that includes easements. In every contract for the sale of land there is the doctrine of marketable title however. This means that upon closing, the land would not have any defects of title in it, including easements. Therefore even though the contract stated that the land would not be sold with any encumbrances on it, this would be implied in the contract. Here at closing the land had an easement on it with the water company as well as B's easement as argued above. Thus at closing two easements existed on the land.

The problem however is that at closing, under the merger doctrine, the land contract merges into the deed and cannot be used to provide relief to a buyer.

Merger

Under the merger doctrine, the contract is said to merge into the deed and the buyer may not use the contract to recover for defects on the property. Here at closing the land sale contract that C and P entered into would be said to merge into the deed. Thus even though the contract was breached at closing, there could be no relief afforded under the terms of the contract. As such, P cannot make a breach of contract claim here.

Conclusion

In total, P's breach of contact claim would fail because the merger doctrine merged the contract into the deed and it can no longer afford relief to P.

Part B

The next issue then is the buyer's ability to recover under the warranty that was contained within the deed. Deeds contain covenants in them that allow for recovery to a buyer. Whether the buyer can recover depends on the type of deed and covenant contained in a deed.

Type of Deed

There are three kinds of deed: general warranty deeds, special warranty deeds, and quitclaim deeds. Quitclaim deeds do not provide any relief under a covenant. General warranty deeds provide relief under several different kinds of covenants. Here the deed that was given to P contained the covenant that stated there would be no encumbrances on the property, except the easement to Water Co. (W). Thus we must examine that covenant.

Covenant Against Encumbrances

The covenant against encumbrances states that at closing, there will be no encumbrances on property. This is breached immediately at closing and is considered a present covenant on the property. Here at the time of closing there were two easements contained within the property. Since both were on the property, they are both subject to the covenant against encumbrances.

B's Easement

As stated above B has a valid easement on the farm that P bought. Thus this easement will exist on the property and therefore at closing the deed covenant against encumbrances was breached. As such P has a valid cause of action against C for breaching this covenant with respects to B's easement. It does not matter that P saw B's using the road at the time of contract formation; notice is not material for purposes of the covenants. C specifically included a covenant against encumbrances in her deed. Therefore the presence of this one breached that covenant.

W's Easement

As explained above, an easement can be created by express deed. Here in 2013, C deeded an easement to W for water lines along the property. This was during the escrow period. Given that an express easement was likely created via deed to W, W had an easement on the property at closing. The covenant however specifically disclaimed liability for W's easement. Given that C specifically disclaimed the easement in her covenant, and P accepted closing at that time, P likely waived any argument she has that C breached this covenant.

Insofar as this was a present covenant the statute of limitations for it began to run at the time of closing. Therefore P should have raised any objection to this encumbrance at the time that it existed. However P went through with closing, specifically accepting the deed that contained a waiver with W's easement on it. Therefore P cannot likely recover for W's easement under the covenant in the deed.

P can attempt to argue for fraud or some other kind of defense to C's actions here but it is unlikely that such an argument would prevail. It does seem unfair that C would include in the contract a provision stating that there would be no encumbrances in the title, yet during escrow she actually put another on her property. But C specifically included a waiver of this encumbrance in the warranty in her deed. Therefore P would be charged with reading the warranty and seeing such waiver. If P did not like the waiver she should have raised the issue during closing and not accepted the deed as is. Therefore P likely waived any argument against W's easement given her acceptance of the deed with the waiver on it.

Remedies

Typically the remedy for a defect in title to land such as occurred here with B's easement is the difference of the value of the land with the easement on it and the value of the land without the easement on it. Here the difference in value of the land would be $5,000 as the facts indicate that the farm is worth $5,000 less with B's easement on it. Thus P can likely recover $5,000 from C for B's easement in violation of the covenant in her deed.

However P cannot recover the $10,000 that W's encumbrance decreases the

value of the land by since the covenant would not extend to that encumbrance as P likely waived it as stated above.

Conclusion

In total, P can recover under the covenant in the warranty deed for B's easement only and she would likely get only $5,000.

Overall Conclusion

P's cause of action against C for breach of contract would fail under the merger doctrine. Yet P can recover under her deed against C for B's easement on the property, but not W's easement.

Answer B

1. Ben v. Polly

Easements

An easement is a right in land granted to a third party. Easement may be created expressly or impliedly. Implied easements may be created by prescription, by prior use, or by necessity. Easements can additionally be classified as appurtenant or in gross. Easements in gross have no dominant estate and are personal in nature and are generally non-transferable.

Appurtenant easements are those which burden one estate (servient estate) while also benefiting another estate (the dominant estate). Appurtenant easements run with the land to subsequent takers who take with notice of the easement. Notice can be actual, constructive, or inquiry. Actual notice arises when the subsequent taker is actually aware of the easement. Constructive notice arises when the easement has been properly recorded. When an easement has been properly recorded, takers are put on constructive notice of the existence of the easement whether or not they were actually aware of the easement. Lastly, inquiry notice arises when based on the facts or circumstances of the property a reasonable person would have inquired about the existence of any easements or interests in land.

Express Easement

An express easement must be in writing.

Here, in 1990, Al deeded an easement for a road along the north side of his farm to his neighbor Ben. The facts indicate that Al deeded the easement to Ben thus satisfying the writing requirement and establishing an express easement. Further, the easement will be classified as an appurtenant easement because Al and Ben are neighbors and therefore the easement concerns the land and benefits Ben's land by allowing an access road, while burdening Ben's land by granting access to a third party.

Additionally, the facts indicate that the easement decreased the fair market value of Al's land by $5,000 which further shows that the easement burdened the farm (the servient estate) thus establishing an easement appurtenant. Because the easement granted to Ben was an easement appurtenant, it will run with the land to successive takers who take with notice of the land.

Priority

Here, because Al deeded the property to Carol who recorded her deed prior to Ben's recording of his easement, it must be determined who has priority. There are three methods of recording statutes in the different jurisdictions: race, race-notice, and notice. If the recording statute applied in the jurisdiction does not apply, the courts will resort to the common law principles of first in time to determine priority. Under the shelter rule, a subsequent purchaser in land may take shelter and be protected under a recording statute, if a previous transferee of land would have otherwise been protected by a recording statute.

Race

Under a race notice jurisdiction, priority goes to the first to record. Here, Carol recorded her deed in 2009 and Ben did not record his deed until 2011. Therefore, between Ben and Carol, in a race jurisdiction, Carol would have priority over Ben. Polly would then be able to use the shelter rule, if it applies, to be protected by Carol's priority under the recording statute and thus Polly would have superior title to Ben. However, if the shelter rule does not apply between Polly and Ben, because Ben recorded his deed in 2011 and Polly did not record her deed until 2014, Ben would take priority and Polly would be burdened by the easement.

Notice

Under a notice recording statute, priority is given to subsequent bona fide purchasers who took property without notice. Notice may be actual, constructive, or inquiry. Actual notice arises when the taker actually knew of the interest. An individual is deemed to have constructive notice when a look into the grantor-grantee index would have put

them on notice of the interest. Lastly, inquiry notice arises when the facts or circumstances would have led a reasonable person to inquire about other interests in the land.

Under a notice statute, Polly would have priority over Ben if she could establish that she took the property without notice of Ben's interest. Ben, however, will successfully argue that Polly had notice of his easement both under constructive notice and under inquiry notice. Because Ben recorded his easement in 2011, had Polly looked at the grantor-grantee index for the parcel of land, she would've seen Ben's easements. Further, because Polly had observed Ben traveling on the road, she likely was put on inquiry notice to inquire into Paul's right to be on the land at issue. Further, because Al deeded the farm to Carol and there is no evidence that she paid any value for the farm, she is not a bona fide purchaser protected by the recording statute and Polly could not use the shelter rule in a notice jurisdiction.

Race-Notice

Under a race-notice recording statute, priority is given to the first bona fide purchaser to record without notice. Here, Carol recorded her deed in 2009, Paul subsequently recorded his deed in 2011, and Polly lastly recorded her deed in 2014. Because Carol likely is not a bona fide purchaser since she did not pay value for the farm, priority would go to the next bona fide purchaser who records without notice. However, because Carol has recorded her interest, Polly will argue that Ben was put on notice of the conveyance to Carol. However, because Ben received the deed in 1990 there was likely no requirement for him to look into the grantor-grantee index after he received the easement. However, if so, he will be deemed to have been put on notice. Further, Polly cannot claim priority over Ben because, as discussed above, she also took with notice to the property; thus in a race-notice jurisdiction, the priority will resort to common law rules of first in time and Ben will have priority over Polly.

Therefore, it will likely be determined in any of the three jurisdictions that Ben had priority over Polly and thus Ben will be successful in his action against Polly.

Easement by Prescription

Alternatively, Ben can claim that he acquired an easement by prescription. An easement by prescription requires the holder to take actually, openly, and continuously use the land in a manner hostile to the true owner, for the statutory period. At common law the statutory period for adverse possession was 20 years. Thus, Ben will argue that because he used the land continuously and openly from 1990 to present day, he has acquired an easement by prescription. However, because Ben used the road with permission by Al, his use will not be hostile and he will not succeed on such a claim.

2a. Polly v. Carol (Breach of Contract)

Here, Polly has commenced an action against Carol seeking damages for breach of contract based on the clause in Carol and Polly's written contract stating that "Seller shall covenant against encumbrances with no exceptions." Polly's claim for such a breach may lie wither in the concept of marketable title or a breach of an express condition of the contract.

Implied in any sale of land is a warranty that at closing the seller will convey marketable title. Marketable title warrants that there are no encumbrances on the property which are defined as any interest in a third party that diminishes the value or use of the land but is consistent with a granting of a fee interest in the property. While a seller must convey marketable title at closing, once a deed to the property is delivered and accepted the land sale contract merges with the deed and any rights to sue under the contract are extinguished and the buyer may only sue upon the deed.

Here, Polly has commenced an action against Carol seeking damages for the breach of the clause in the contract covenanting against encumbrances. Polly's claim may arise out of a claim that title was not marketable based on the easement to Ben or the easement to Water Co., or breach of the specific covenant in the agreement. While the easements to Ben and Water Co. are encumbrances which would warrant a breach of the contract or of marketable title, provided that Polly was unaware of them at the time

of signing, because the facts indicate that in 2014 Carol executed and delivered to Polly a warranty deed which Polly accepted, the land sale contract has merged with the deed and Polly can no longer sue on the contract and must sue on the deed. Polly may, however, have a claim under the deed which is discussed below.

2b. Polly v. Carol (Breach of Covenant Under the Warranty Deed)

Type of Deed

Upon the transfer of land, the seller may execute and deliver to the buyer one of the following three types of deeds: general warranty deed, a special warranty deed, or a quitclaim deed. The parties' rights under the deed depend on the type of deed granted to the seller. A quitclaim deed contains no covenants or promises to the buyer and is essentially an "as is" deed leaving the buyer with no rights to sue the seller. Alternatively, warranty deeds may include all or any of the six covenants of title including: the covenant of seisin, the right to convey, the covenant against encumbrances, general warranty, further assurances, and quiet enjoyment. Warranty deeds can be classified as either general warranty deeds or special warranty deeds. General warranty deeds are the most protective deed and warrant that neither the seller, or anyone in the chain of title, has breached the covenants included in the deed. Alternatively, a special warranty deed only warrants that the seller has not breached the covenants of title.

Here, Polly is commencing an action for breach of the covenant under the warranty deed. The facts indicate that the deed was a warranty deed containing only the covenant against encumbrances. Because the covenant was included in the deed, Polly may properly sue Carol for breach of the warranty.

Covenant Against Encumbrances

The covenant against encumbrances in a deed warrants that there are no unknown encumbrances on the property. Under title, encumbrances are defined as any right in a third party that diminishes the value or interferes with the use and enjoyment of the

land. Such encumbrances include mortgages, liens, easements, and covenants. Here, Polly is suing for breach of the covenant against encumbrances. There are two possible easements on the property which may be the subject of her claim, the easement to Water Co. and the easement to Ben. Because the deed expressly warrants against any encumbrances other than the easement to Water Co., Polly cannot successfully claim a breach of the covenant in relation to that covenant because it was expressly excluded in the deed. However, Polly may be able to assert a breach based on the encumbrance to Ben. The determination of whether Ben's easement is valid is discussed above and, provided it is valid, Carol will likely argue that Polly was put on notice of such easement based on inquiry notice because the facts indicate that she had observed Ben traveling on the road along the north side, but said nothing. Polly will argue that those circumstances alone did not give rise to suspicion that he claimed an interest in the property; however, considering she was aware of his passing over the land, it is reasonable to assume that a buyer would have inquired into the circumstances. Further, Carol will argue that even if she did not have inquiry notice of Ben's interest, she would have constructive interest of Ben's interest because he recorded his deed in the easement in 2011 before Carol and Polly had entered into the land sale contract. Therefore, while Polly can properly claim a breach of the covenant based on the warranty deed received by Carol, provided it is valid, it will likely be determined that she had sufficient notice of the easement.

Q3 Contracts

Dirt, a large excavating company, recently replaced all of its gas-powered equipment with more efficient diesel-powered equipment. It placed the old gas-powered equipment in storage until it could sell it.

On May 1, Builder, a general contractor for a large office development, and Dirt signed a valid written contract under which Dirt agreed to perform all the site preparation work for a fee of $1,500,000. Dirt estimated its total cost for the job at $1,300,000. The contract states: “Dirt hereby agrees to commence site work on or before June 1 and to complete all site work on or before September 1.” Because no other work could begin until completion of the site preparation, Builder was anxious to avoid delays. To ensure that Dirt would give the job top priority, the contract also states: “Dirt agrees to have all of its equipment available as needed to perform this contract and shall refrain from undertaking all other jobs for the duration of the contract.”

On May 29, an unusual high pressure weather system settled over the state.

As a result, on May 30, in an effort to reduce air pollution, the state banned use of all diesel-powered equipment.

On June 2, Dirt told Builder about the ban and stated that it had no way of knowing when it would be lifted. Builder told Dirt to switch to its gas-powered equipment. Dirt replied that using its old gas-powered equipment would add $500,000 to its costs and asked Builder to pay the increased expense. Builder refused.

On June 4, seeing that no site work had begun, Builder emailed Dirt stating that their contract was “terminated.”

On June 8, Builder hired another excavating company, which performed the work for $1,800,000.

Dirt has sued Builder for terminating the contract. Builder has countersued Dirt for the $300,000 difference between the original contract price and what it paid the new contractor.

1. Is Dirt likely to prevail in its suit? Discuss.

2. Is Builder likely to prevail in its countersuit? Discuss.

Answer A

Governing Law

The contract involves excavation related to the construction of a large office development. Common law principles, rather than the UCC, will apply as the sale of goods is not implicated.

Dirt's Suit Against Builder for Termination of Contract

Builder's termination of the contract will be wrongful unless one of the relevant grounds for rescission is satisfied. Builder can argue, alternatively, that: 1) Dirt's breach was material; 2) Dirt's comment regarding costs constituted an anticipatory repudiation; 3) Frustration of purpose, or impossibility, gave provided grounds to discharge the K.

Minor versus Material Breach

Breaches of the promises or covenants contained in a contract provide grounds for the non-breaching party to sue for damages. The ability to treat the contract as discharged on the grounds of a breach, however, depends on the nature and extent of the breach itself. A material breach *does* provide the non-breaching party with grounds to discharge the contract. A minor (non-material) breach does not. Whether a breach is material or minor depends on a determination as to whether the non-breaching party received the "benefit of the bargain" sought under the contract. Courts will address an assortment of factors in seeking to arrive at such a determination, including the hardship to the defendant, the reason for the breach, whether the breach was willful or inadvertent, the cost of remedying the breach, the ability of damages to remedy the breach, and the overall degree of completion at the time of the breach.

If a promise or covenant is *implied* into a contract, courts will generally accept substantial performance (as to avoid a breach). If a promise or covenant is *express* in the contract, generally literal compliance is required. However, even when dates are included in a contract, including construction contracts, courts do not construe time to

be of the essence *unless otherwise clearly stated*.

Was Time of the Essence

Here, the contract itself reads "Dirt hereby agrees to commence site work on or before June 1 and to complete all site work on or before September 1." It additionally contains a promise from Dirt to have all equipment ready and to refrain from undertaking other jobs during the duration of the contract. Each party will seek to argue in the affirmative/contrary that time is/is not of the essence. Builder will argue that multiple contractual provisions outlining the importance of expediency and availability of supplies mandate a finding that time is of the essence in the contract. However, Dirt can argue that time of the essence was never explicitly stated in the contract, and that any such reading of such a promise would be implied only. Dirt will additionally argue that, if time is not of the essence, then not having started by June 4 -- three days after the intended start date -- would not constitute a material breach and thus Builder could not treat the contract as discharged. Builder will argue the opposite -- time was of the essence; three days late was therefore a material breach, and therefore the contract can be discharged.

Conclusion

A court is more likely to find in Dirt's favor based on these facts. Firstly, the contract did not explicitly state time is of the essence, despite multiple references to the timeliness of performance. Secondly, if time was of the essence, it would likely be in regard to the *completion* rather than the *starting* date. Starting three days late would not constitute a material breach; therefore, even if time was deemed of the essence. The conjunctive power of these two arguments likely means Dirt would prevail and would not have deemed to have been in material breach of the contract by failing to start performance by June 4. This would, therefore, make Builder's termination of the contract improper and Dirt would prevail in his suit, subject to the analysis below.

"Having All Equipment Available"

An explicit term of the contract between Dirt and Builder was that Dirt "agrees to have

all of its equipment available as needed to perform this contract..." When Dirt and Builder communicated on June 2, Dirt communicated to Builder that using its old gas-powered equipment would cost an additional $500,000 and asked for the increased payment. The parties will contest what was meant by the term of the contract, and whether Dirt breached the term of the contract by not having gas-powered equipment ready. Dirt will contest that "all of its equipment" refers to the equipment its business employs in carrying out excavation contracts, which, at present, is diesel-powered equipment. Builder will argue the equipment provision mandated for Dirt to have any and all necessary equipment ready to perform.

Builder *likely* has the stronger argument on these facts. Builder can likely demonstrate that the failure to have the necessary equipment to perform the excavation -- the very purpose for which Dirt was hired -- is a material breach of the contract. It is material, Builder will assert, because it deprives Builder of the entirety of the benefit of its bargain; without proper equipment, the contract cannot even begin to be performed. Therefore, as a material breach, Builder has grounds to terminate the contract. Dirt's counter-argument that it had the *reasonably foreseeable necessary* equipment to begin likely won't succeed -- Dirt did still have gas-powered equipment, although it was in storage; when Builder contracted with Dirt, it could expect that Dirt would employ all equipment that it owned in performing the contract. Therefore, Builder likely has a stronger argument that by not having gas-powered equipment ready Dirt was not able to meet the requirement of the contract to have "all of its equipment available as needed to perform this contract." Such a material breach would give proper grounds to terminate the contract on Builder's part, but Builder's argument is by no means a clear and certain winner.

<u>Anticipatory Repudiation Versus Perspective Inability to Perform</u>

An anticipatory repudiation occurs when one party, in a fully bilateral executory contract, communicates explicitly and unequivocally that it will not be able to perform its duties or obligations under the contract. An anticipatory repudiation discharges the non-repudiating party's duty to perform and that party can 1) treat the contract as discharged

2) sue immediately, 3) wait and sue on the contract date, 4) attempt to urge performance by the other party. A perspective inability to perform is a statement by one party to the other expressing doubts or reservations about a potential ability to perform an obligation or duty under the contract. It differs from an anticipatory repudiation in its explicitness and unambiguousness.

Here, Dirt told Builder that using its old gas-powered equipment would add $500,000 to its costs and asked Builder to pay the increased expense. Builder refused the request. Nothing in Dirt's language would rise to the level of an anticipatory repudiation -- it made no representation that it absolutely could not perform under the contract or that it would not, despite an increased cost. It merely requested a greater sum of money due to the elevated cost of performance. Builder could not justifiably have treated Dirt's comment as an anticipatory repudiation. Dirt's comment may have constituted a prospective inability to perform, but analysis as to whether it did or not is largely superfluous derivative of the fact that, even if it was, Builder's duties under the contract would only have been suspended. Builder could not treat the contract as discharged via a perspective inability to perform.

Concluding, Builder could not treat the contract as discharged on grounds of an anticipatory repudiation or perspective inability to perform based on Dirt's comments regarding the increased cost of performance.

Frustration of Purpose

Builder can seek to advance the argument that frustration of purpose provided grounds to discharge its contract with Dirt. Frustration of purpose occurs when a supervening event, which was unforeseeable to the parties, and which neither party expressly assumed the risk of, frustrates the purpose of the contract (i.e., deprives the contract of value and benefit.) Builder will seek to argue that the state's banning of diesel-powered equipment frustrated the purpose of its contract with Dirt, as state regulation due to the unusual weather system was unforeseeable, and that the value and purpose of the contract have been frustrated via this unforeseeable event. Builder will seek to argue

neither party assumed the risk, and the change was not foreseeable to the parties at the time the contract was entered into.

Dirt will likely have a winning counter-argument to Builder's claim of frustration of purpose. While the state regulation has changed the cost of the contract -- and has changed the cost of the contract *to Dirt alone* -- the underlying value and benefit of the contract has remained. The purpose for which the parties contracted is still achievable, and increased cost alone does not frustrate the entire purpose of a construction contract.

A court is more likely to favor Dirt's argument, especially because Builder, in seeking to advance an argument of frustration of purpose, is not in fact the party enduring hardship in this contract from increased cost. While the cost of performance has changed via the state regulation, the basic purpose and value of the contract remains -- the land can be excavated for the purpose of constructing a building subsequently.

Impossibility

Builder could seek to argue, ultimately unsuccessfully, that impossibility and impracticability should allow the contract to be terminated. Impossibility refers to the situation where a subsequent event, which was unforeseeable, which undermined a material element of the contract (or a basic assumption upon which it was formed), and which neither party assumed the risk of, has rendered performance of the contract (by one or both parties) illegal. One form of impossibility is illegality, occurring where the subject matter of the contract has subsequently become illegal after the contract was entered into.

Builder's arguments are likely to fail because, despite the intervening illegality of the use of diesel-powered equipment, the contract itself, and the purpose for which it was formed, has not been rendered illegal. A required-by-law change in the instrumentality used to carry out the contract would not render the contract itself dischargeable on grounds of impossibility. Impossibility would therefore not serve as a viable grounds for

discharge of the contract on the part of Builder.

Damages

If Dirt successfully prevails in its suit against Builder on the grounds that Builder impermissibly breached the contract, Dirt can recover its lost profits under the contract. As a general rule in construction contracts, Builder can recover lost profits if the owner breaches prior to commencement of the construction; if the owner breaches during construction, the builder can recover the contract price - the cost of completion. Here, Dirt would receive lost profits -- that is the $1,500,000 - $1,300,000 = $200,000.

Overall Conclusion

Builder's strongest argument to justify terminating the contract was that Dirt's breach of the material term of the contract to have all equipment available needed to perform the contract constituted a material breach by Dirt, and therefore provided grounds for discharge. This is not a clear-cut certainty, however. Impossibility, impracticability, frustration of purpose, and breach of the time for performance clause all would not be winning arguments to justify termination of the contract *for Builder*. However, even if Builder can show Dirt was in material breach of the contract, Dirt likely has some persuasive counter-arguments to avoid liability, found below.

Builder's Countersuit

Much of the analysis regarding potential avenues for Builder to seek to have the contract discharged (rescission) apply to excuse Dirt's performance under the contract. Frustration of purpose, impossibility, and impracticability all provide grounds by which a party's performance under a contract is excused, in addition to providing potential grounds by which a contract can be discharged between the parties. However, as we established above, the contract was likely rightfully discharged because Dirt breached a material term regarding having "all supplies available." That being said, if Dirt's performance was *excused* for a valid reason, Dirt will not be held liable for damages (amount discussed below) under the contract.

Impracticability

Dirt likely has a strong argument for impracticability. Impracticability encompasses the situation where a subsequent event, which was unforeseeable, and has a material effect on an element of the contract or a basic assumption upon which the contract was formed, and which neither party assumed the risk of, has rendered one party's performance extremely or unreasonably difficult or expensive. Here, Dirt will argue that the subsequent enactment of law was unforeseeable because it was the result of an unusual weather system, and that it was inherently unforeseeable. Furthermore, it has had a material effect on the contract (Dirt's cost of performance), and neither party expressly assumed the risk of the event. Builder can counter that Dirt assumed the risk of increased cost of performance via restrictions on the use of certain types of machines by law, but Builder's argument is not overly persuasive. Rather, the cost of increase in Dirt's performance will likely be determinative in the eyes of the court.

The subsequent enactment of new law has increased the cost of Dirt's performance by $500,000, out of an initial cost of $1,300,000 -- a cost increase of less than 50%. Courts, historically, have generally been unwilling to excuse performance under a contract due to the increased cost in performance unless such an increase is excessive and extreme. Here, a less than 50% increase in cost may not meet that standard; although the increase does make the performance on the contract a profit-negative transaction for Dirt, the increase in cost may not be so unreasonable as to excuse performance, a court may find. Nevertheless, Dirt can and should advance the argument -- likely, however, it will be a losing one.

Impossibility

As discussed in detail above, impossibility -- via illegality -- will not serve as a valid excuse to Dirt's performance because the contract itself did not become illegal, rather merely one means by which the contract could be performed became illegal. A court is unlikely to extend the reasoning so far as to entirely excuse Dirt's performance because diesel-powered equipment has been subject to regulation, especially considering the fact that Dirt has gas-powered equipment available. Dirt's arguments will fail on

impossibility grounds.

Frustration of Purpose

Dirt's arguments regarding frustration of purpose will similarly fail for the reasons outlined above -- the value, benefit, and purpose of the contract remains despite an increased cost to Dirt. The essence of the contract and its purpose was the excavation, not what type of machine Dirt used in the process. Dirt's arguments will fail on frustration of purpose grounds.

Mutual Mistake

Dirt could seek to argue that his performance is excused via mutual mistake. Mutual mistake applies when both parties are mistaken as to a basic assumption, material to the contract, upon which the contract was formed. Here, Dirt would argue mutual mistake occurred in regards to "equipment available." Dirt could seek to argue there is ambiguity in the term, as Dirt meant diesel-powered equipment while Builder expected the use of all of Dirt's equipment. Dirt's argument will likely not fail -- the term is plain on its face -- "all of its equipment" -- and would be interpreted to require of Dirt to employ all the equipment it owns, which includes gas-powered equipment. While Dirt may have intended a different meaning for the term, because the term is plain on its face and there was not an actual "mistake" regarding the meaning of the term, Dirt's argument will fail. Dirt's subjective belief will not constitute a mutual "mistake" in the eyes of the court.

Damages

An owner's countersuit in a construction contract which has not been fully performed by the breaching party can recover damages in the amount of the difference between the contract price (with the breaching party) and the cost of completion (obtained via the hiring of a third party.) Here, that would provide Builder with the $300,000 damages outlined as the amount of its lawsuit.

Conclusion

If Builder succeeds in showing that failure to have all equipment available was a material breach by Dirt, it can rightfully treat the contract as discharged. Furthermore, it can recover damages from Dirt *if* a court determines that the difficult to Dirt did not rise to the level of impracticability (the most likely finding). Alternatively, if no grounds existed to discharge the contract because the court does not find Dirt has breached a material term, then Dirt can recover the profits it would be entitled to from the contract. If the contract was rightfully discharged but Dirt's performance *did* rise to the level of impracticability, then Dirt would not be paid to force damages. Builder prevailing in regard to both breach and damages is the most likely outcome.

Answer B

Introduction

Applicable law

The issue is whether the UCC applies. The UCC applies to the sale of goods. Goods are things movable and identifiable at the time of contracting. Here, the contract is for the performance of construction services. Construction services are not goods. Therefore, the UCC does not apply. Therefore, the common law governs.

1. Is Dirt likely to prevail in its suit?

Anticipatory repudiation by Builder

The issue is whether Builder anticipatorily repudiated the contract. Anticipatory repudiation occurs when one party unambiguously and clearly states that it will not perform the contract. An anticipatory repudiation counts as a breach. The non-breaching party can either find someone else to do the performance, sue the breaching party, or do nothing. Anticipatory repudiation generally applies to executory contracts. In the event that the contract is wholly executory, then the non-repudiating party can immediately sue for damages, regardless of the date of performance. If the non-breaching party has already performed, then it cannot sue until the time for the other party's performance is due. For anticipatory repudiation in construction contracts before anything has begun, the general measure of damages is the non-breaching party's expected lost profits.

Here, the parties made a valid contract on May 1st. The contract provided that construction would begin on June 1 and that performance was due on September 1. On June 4, Builder stated that the contract was terminated. Saying that a contract is terminated is an anticipatory repudiation--is unambiguous and clear. Builder had no

intention of following through on the contract at that point. Moreover, the contract was still executory. Dirt had not commenced any sort of performance, and Builder had not paid anything. As a result, Dirt would have the option of suing for breach of contract at the time of breach. Because the contract was completely executory, Dirt would be entitled to its lost expected profits. In this case, the total fee was expected to be $1,500,000 and the expected cost was $1,300,000. As a result, the expected profits would be $200,000. Thus, Dirt would be likely to win $200,000 if there are no applicable defenses to enforcement.

Mitigating damages-defense

In order for a party to recover damages, they must be certain, causally related to the breach, foreseeable, and unavoidable. Here, the damages are foreseeable and caused by Builder's breach. Had Builder not breached, Dirt would have been paid, and non-payment is a foreseeable consequence of breach. Moreover, the damages here are certain--$200,000. We generally use expectation damages in contract law, which puts the party in as good of a position as they would have been had the contract been performed. Generally, the non-breaching party is required to mitigate damages, which means that they must try to reduce damages as much as possible. In the context of construction contracts that are anticipatorily repudiated, mitigating damages might involve taking other work during the time in which the party was expecting to work for the breaching party. Thus, Builder might claim that Dirt has failed to mitigate damages. However, the fact that Builder made Dirt refrain from entering into any other contracts during this time might hurt the mitigation argument -- Dirt would probably be able to show that it was unable to mitigate due to this clause in the contract. Had the clause not been present, perhaps Dirt would have been out finding other business.

Anticipatory Repudiation by Dirt-defense

The issue is whether Builder might be able to defend on the basis that Dirt actually repudiated first. However, this argument is likely to fail. On June 2, Dirt merely told Builder about the ban and asked Builder to shoulder the increased expenses, after

which Builder declined. However, this is not sufficiently unambiguous to constitute an anticipatory repudiation. If a party is uneasy about whether the other party can perform (due to an ambiguous situation like we have here), then the party can demand further assurances from the other party, and may temporarily suspend performance for a commercially reasonable time until it receives those assurances. Here, Dirt did not actually say that it was not going to be able to perform. Had Dirt been unambiguous, then perhaps Builder could have deemed it an anticipatory repudiation and hired another party (one of the options when there is an anticipatory repudiation). However, the June 2 conversation was not clear enough. It is perfectly possible that Dirt may perform the contract regardless. Therefore, this defense would be unlikely to be effective.

Breach of Promise/Condition by Dirt-defense

The issue is whether Dirt breached a condition of the contract such that Builder's obligation to perform was discharged. A promise is something that a party is supposed to do under a contract. A condition is an event that, if it does not occur, means the entire contract does not come into effect. Courts generally construe terms as promises as opposed to conditions, because they do not want an entire forfeiture of the contract.

Builder may argue that the June 1 start date was a condition precedent to the contract taking effect. Essentially, they would say that, because Dirt had yet to commence construction by June 1 (indeed, even by June 4), that the condition was not satisfied and the contract did not take effect. However, a court would probably not buy this argument. There are two types of conditions--express and implied. An express condition must be in the contract explicitly in conditional language ("on condition that"), which was not present here. An implied condition may arise from the intent of the parties. Here, Builder was worried about timing, but there is insufficient evidence to infer that the start date was a condition to Builder's entire performance. Thus, a court would likely construe the start date as a mere promise. Indeed, the courts abhor a forfeiture.

In the event that the start date is considered a promise, then the common law doctrine of substantial performance applies. Substantial performance holds that a non-breaching party has a duty to perform if the breaching party has still substantially performed her end of the bargain. There must be a "material breach" in order for the non-breaching party to be completely discharged. When determining whether there has been substantial performance, the courts take into account (i) prejudice to breaching party; (ii) prejudice to breaching party; (iii) amount of performance rendered; (iv) whether the breach was willful; (v) cost of fixing the problem; and (vi) a variety of similar factors.

In service contracts, time for completion is generally not considered a material breach if performance is completed slightly late. The only time when a complete breach and forfeiture might be found is when there is a "time of the essence" clause, which must be very explicit. There was no such clause in this contract, and the breach only applied to the *start* of performance, so it would be very unlikely for a court to find that Dirt materially breached to the extent that Builder will be completely discharged form performance.

Conclusion

Overall, it appears that Dirt would have a good case against Builder for breach of contract for the amount of $200,000.

Is Builder likely to prevail in its countersuit?

Anticipatory repudiation by Dirt

This is the same argument as has been described above. Essentially, Dirt's statements over the course of the June 4 conversation are unlikely to constitute a full-blown anticipatory repudiation. Builder should have first demanded further assurances before terminating the contract and hiring someone else.

Breach of promise/condition by Dirt

This is the same argument as has been described above. Essentially, it is unlikely that a court would find the start date to be a condition precedent to effectiveness of the contract. Moreover, it is unlikely that Dirt's failure to start completely on time would count as a material breach justifying Builder's non-performance.

Impossibility-defense

Dirt might argue in defense that it would be unable to perform its end of the contract due to supervening impossibility. Indeed, in many cases, a subsequent law or regulation may render a party's performance illegal or impossible. In such case, that party may be excused from performing. Generally, the party claiming excuse must have not expressly borne the risk.

Here, the government banned all diesel-powered equipment two days before Dirt was supposed to commence performance. This was certainly unexpected, and was the result of the May 29 high-pressure weather system. However, performance is definitely not impossible. Dirt still has its gas-powered equipment, which it could use to complete the project. It might be more expensive to do so, but mere increase in expense is insufficient for an impossibility defense. Therefore, impossibility would not be an effective defense.

Impracticability-defense

Dirt might argue in defense that it should be excused from performance due to supervening impracticability. Impracticability is a defense where the occurrence of an unforeseeable event happens, which renders performance impracticable. The unforeseeable event must affect an underlying assumption of the agreement. The party claiming excuse must not have borne the risk. Generally, the mere inability to make a profit is not sufficient for a claim of impracticability.

Here, the high pressure system was characterized as unusual. Builder might argue that strange weather systems are foreseeable, and that Dirt should have known that this was a possibility. On the other hand, Dirt would claim that a weather system resulting in the banning of all diesel-powered equipment is not foreseeable at all. Overall, it would probably be seen as unforeseeable. Moreover, the ban had an effect on an underlying assumption of the contract. Dirt was expecting to use its diesel equipment--it had put all of its old equipment in storage. Moreover, if Dirt knew that it would have to spend an additional $500,000, it would not have accepted a $1,500,000 contract price. There is no evidence that either party expressly assumed the risk (though sellers generally bear the risk in sale of goods contracts, and a court could, by analogy, deem that Dirt was allocated the risk). The key question is whether the ban makes performance impracticable. Dirt is a large excavation company, which presumably has a lot of contracts. If Dirt had to use its gas equipment, it would expect to see a $300,000 loss on this job. It is unclear the effect that such a loss would have on Dirt, but a court would probably find that such a loss is insufficient to make performance of the contract wholly impracticable. It is possible that a court could find that performance is impracticable, but it is rather unlikely.

Mistake-defense

Dirt might try to argue that there was a mutual mistake, which should lead to discharge of contractual duties. Mutual mistake occurs when both parties were mistaken about a fundamental aspect of the contract. Dirt could argue that both parties mistakenly assumed that Dirt would be able to use its diesel-powered machines. The fact that a basic assumption has been violated (by Dirt having to use gas-powered equipment) could perhaps render the contract unenforceable and both parties would be excused. This is somewhat of a stretch of an argument. It depends on whether Builder actually had diesel as a basic assumption of the contract, and whether either side assumed the risk.

Damages

$300,000 would be the proper expectation damages. Builder would get the difference between the contract price and the reasonable cover price.

Conclusion

For the reasons mentioned, Builder would be unlikely to win its countersuit.

Q4 Constitution

State X has a valid contract with public school teachers providing a fixed salary schedule. State X recently passed legislation to address its failing public schools. Now, when a school falls below established standards, each teacher at that school has 10% of his or her salary withheld each pay period for a maximum of two years. The withholding ends, and the money is returned with interest, upon the completion of a ten-hour certification program or termination of employment.

City High is a public school in State X where salary withholding has begun.

Bob has been a teacher at City High for the past three years. Paige is a highly-regarded probationary teacher at City High. A probationary teacher may be terminated for any reason upon written notice within the first year of employment.

Bob and Paige have been outspoken opponents of the State X law and its application to City High, appearing at various community and school board meetings throughout the school year.

Shortly before the end of Paige's first year of employment, City High served her with written notice terminating employment, and refunded the money withheld with interest.

Bob and Paige have sued State X, the Attorney General of State X, and City High in federal court seeking damages and injunctive relief. State X and the Attorney General have moved to dismiss the suit based on standing and the Eleventh Amendment.

1. Did City High's termination of Paige without a hearing violate the procedural due process guaranty of the Fourteenth Amendment to the United States Constitution? Discuss.

2. How should the court rule on the State and the Attorney General's motion? Discuss.

Answer A

1. WHETHER PAIGE'S TERMINATION VIOLATED HER FOURTEENTH AMENDMENT PROCEDURAL DUE PROCESS RIGHTS

The Due Process Clause of the Fourteenth Amendment prohibits the states from depriving any person of life, liberty or property without due process of law. Due process generally requires a fair procedure, usually notice and a hearing. Under procedural due process analysis, the first inquiry is whether the plaintiff had a constitutionally protected liberty or property interest. If the plaintiff has a protected interest, the court will then balance that interest against the state's interests under *Matthews*. The court will also look to the risk of erroneous deprivation and whether additional procedural safeguards would reduce such risk. The issue for Paige (P) is therefore (1) whether she has a protected liberty or property interest, and (2) whether she was entitled to a fairer process.

WHETHER PAIGE HAS A CONSTITUTIONALLY PROTECTED LIBERTY OR PROPERTY INTEREST

Property Interest

The issue is whether P's probationary employment at City High is a protected property interest. Traditionally, the Supreme Court differentiated between "rights" and "privileges" and provided that only "rights" are protected under the Due Process Clause. The Court since *Goldberg*, however, has held that a property interest is protected by the Due Process Clause if the plaintiff has a "legitimate claim of entitlement."

Under Supreme Court precedent, a tenured public school teacher has a protected property interest in their employment; however, a teacher does not have a protected interest if she is terminable at will during an initial probationary period. *Kelly*. P is a probationary teacher and may be terminated for any reason upon written notice within the first year of employment. There is also no indication that City High made her any

assurances that she would not be fired during the probationary period. P, therefore, does not have a legitimate claim of entitlement to her job and thus has no protected property interest.

Liberty Interest

The Court has also recognized that when a person's freedom of movement is restrained (e.g., detention) or when a person's constitutional rights are denied, the person has a liberty interest that is protected by the Due Process Clause. P may argue that she was terminated during her first year, not because of poor performance, but rather in retaliation for her exercising her First Amendment rights in speaking out against the State's law that withholds teachers' salaries based on the school's performance. If P can make a showing that her First Amendment rights were violated, she could trigger due process protections and seek additional termination procedures beyond the written notice provided to her before she was fired.

Some speech is not protected under the First Amendment. Generally, the speech of a public employee made in the course of their employment can be regulated by the government employer. Employees' speech outside the scope of their work and regarding public issues, however, is protected by the First Amendment. P will argue that her outspoken criticism of the State law at community and school board meetings was not related to her job duties and therefore is protected. City High may argue that it was related to the job and therefore not protected. A court will likely find her speech protected.

Content-based regulations of speech must meet strict scrutiny; the restriction must be necessary to achieve a compelling government purpose. Content-neutral restrictions must meet intermediate scrutiny; they must be substantially related to and narrowly tailor to achieve an important government purpose. P would need to show that her termination was in relation for her speech, which would constitute a content-based regulation because it is based on her viewpoint. If P can make this showing, the state would have to meet strict scrutiny, and would likely fail. Regardless, P may be able to

show that she had a protected liberty interest in her Free Speech rights under the First Amendment.

MATTHEWS BALANCING TEST

If the court recognizes P's liberty interest, it must apply the *Matthew* balancing test to determine whether she should have been entitled to any additional procedures beyond her pre-termination notice. The court will balance: (1) the private interest affected by the government action, (2) the government's interest including administrative and fiscal burdens, and (3) the risk of erroneous deprivate and the value of additional procedural safeguards.

First, P has a relatively strong private interest in her job. Employment is the way individuals earn money to support themselves. Generally courts have viewed employment interests as quite weighty. Second, the state has an interest in not having to provide a full hearing on this type of probationary termination. The state likely saves a lot of money by not having to develop elaborate procedures to ensure that all of its termination decisions are fair. This interest is therefore quite strong. Finally, P will argue that the risk that she was fired because of her First Amendment rights is high, and that a few additional procedures such as allowing her to present countervailing evidence, or a hearing in front of the school board or committee would allow her to challenge the basis of the decision and force City High to justify their actions, or at least show that the basis of the decision was not to silence her.

The outcome of the *Matthews* test is difficult to predict. However, a court may require City High to provide at least minimal additional protections such as a post-termination hearing.

2. WHETHER THE COURT SHOULD GRANT THE STATE AND ATTORNEY GENERAL'S MOTION TO DISMISS

STANDING

The State and the Attorney General (AG) filed a motion to dismiss for lack of standing and under the Eleventh Amendment. First, standing is the issue of whether the plaintiff is the proper party to bring the claim before a federal court. The plaintiff must have a concrete stake in the outcome of the litigation. The Court has interpreted Article III's conferral of the judicial power over "cases" and "controversies" to require the plaintiff to show (i) that he has suffered an injury in fact (injury in fact), and (ii) that the defendant's conduct was the cause of that injury such that a favorable court decision will remedy the injury (causation and redressability). The issue for Bob (B) and P is therefore whether they can demonstrate injury in fact, causation and redressability.

First, the requirement that the plaintiff prove an injury in fact is generally satisfied if the plaintiff shows that they suffered an injury that was actionable at common law, such as pecuniary loss. However, the Court has also recognized an injury in fact where the plaintiff's constitutional or statutory rights have been violated. Environmental, aesthetic, and stigmatic injuries are also judicially cognizable. However, when a plaintiff is seeking injunctive relief, he must show that there is a concrete, imminent threat of future injury that is neither conjectural nor speculative. *Lyons*.

Here, B and P are challenging the State law seeking damages and injunctive relief. They would argue that they have suffered a pecuniary injury because a portion of their salaries was withheld. This is likely sufficient. City High may argue that because their salaries are refunded with interest if they are terminated or complete a certificate program, that there is no real financial loss. B and P, however, will probably succeed in arguing that even a temporary pay cut is a sufficient financial injury. The extent of the injury is generally de minimus. With regard to the injunction, B and P will likely succeed in arguing that they are presently suffering from the financial injury and that will continue in the future; therefore it is sufficiently imminent and concrete. In conclusion, the court should likely find that B and P have shown an injury in fact based on the loss of income, even if temporary. P may have an additional basis for standing by arguing that she was

terminated based on protected First Amendment activities. Either would likely be sufficient.

Second, causation and redressability are easily met here. B and P can clearly show that lost earnings are directly caused by the pay withholding required by the statute, and that a court order reimbursing them or enjoining enforcement of the statute would remedy this injury. In conclusion, B and P will likely succeed in showing that they have Article III standing, and therefore the court should deny the State and the AG's motion to dismiss.

ELEVENTH AMENDMENT

The State and the AG also seek dismissal of the suit based on the Eleventh Amendment, which provides that a state is immune from suit in federal court. The Eleventh Amendment is similar, if not identical, to the doctrine of state sovereign immunity, which also applies to suits against states in state court. *Alden v. Maine*. A state may waive sovereign immunity under certain conditions, and Congress can override state sovereign immunity by statute using its enforcement powers under Section 5 of the Fourteenth Amendment. In addition, state officers may be sued in their official capacities to enjoin the enforcement of a state law under *Ex Parte Young.* A state officer may also be sued in his or her individual capacity for retroactive damages, and may be indemnified by the state. So the question depends on the party being sued and the basis of the claim.

The State may not be sued in federal court under the Eleventh Amendment. The court will therefore dismiss B and P's claims against the state. The AG, however, may be sued in his individual capacity to enjoin him from enforcing the state law being challenged. If B and P's claims allege that the AG is liable for their financial losses, he may also be sued in his individual capacity for money damages. However, B and P do not appear to have alleged that the AG is personally liable, or liable under a theory of respondeat superior; therefore he is likely not a proper party for the individual damages

action.

In conclusion, the court should grant the motion in part. The claims against the State should be dismissed. The claim for injunctive relief should be upheld against the AG, and potentially also the claim for damages if B and P allege that the AG is liable for damages.

Answer B

1. City High's Termination of Paige

14th Amendment--Due Process

The Due Process clause of the 14th Amendment prevents the government from taking a person's life, liberty, or property without first giving them due process of law. The due process clause has been interpreted to have two sets of rights: substantive due process and procedural due process. Substantive due process prevents the government from arbitrarily denying rights. Procedural due process requires notice and a hearing before (or sometimes after) the government takes a person's life, liberty, or property. Here, Paige is claiming that she was deprived of her right to liberty in her freedom of speech and her right to government employment without procedural due process.

In analyzing a procedural due process claim, the court first determines whether a person's life, liberty, or property has been taken from her. Then, the court determines what process, if any, was due before or after the taking of this right. The Supreme Court laid out this analysis in Matthews v. Eldridge. The court balances three factors: (i) the individual's interest in the right at issue, (ii) the government's interest in efficiency, and (iii) the likely added value of additional protective procedures.

Paige's life has not been taken; thus her claim must be that she was deprived of a liberty interest or a property interest.

A person has a liberty interest in being free from being restricted in movement and in being free to engage in constitutional rights. Paige was not restricted in movement, but she may argue that she was restricted from engaging in a 1st Amendment right, the right to free speech. Sometimes the right to free speech intersects with government employment and the right of the government to control its employees. This is the case here because Paige is a government employee, but she also has been engaging in free speech as an outspoken opponent at various community and school board meetings of

a State X law that affects teacher pay. Generally, a government employee has a right to free speech on matters not connected with her employment, and any government restriction of this right is subject to strict scrutiny; it will only be upheld if the government action is necessary to achieve a compelling government purpose. This is a very high burden to satisfy and the government will usually lose. Here, Paige was engaged in speech not associated with her employment because she spoke out against a State X law in her individual capacity as a citizen, not as an employee. Thus, a court could find that if her firing was based on her speech (as she was a "highly regarded" probationary teacher) then she was denied her right to liberty without due process. To determine the amount of process that was due, the court will balance the Matthews factors and likely find that she was entitled to a hearing before termination. The right to speech is great and highly regarded in society and a hearing would be likely to remedy the wrongful termination to great process is added. Moreover, the government interest in efficiency would not overcome these other two factors.

Alternatively, Paige will argue that she has a property interest in her employment. For a person to have a property interest, the Supreme Court has explained that the person must have an entitlement to the property. This entitlement must come from something concrete such as a state law. Generally, employment is at will. In other words, either an employee or an employer can terminate a contract at any time without notice and for any reason (except an illegal reason). Such an employee does not have an entitlement to property because there is no promise of future employment. A tenured employee who can only be fired for cause, on the other hand, has an entitlement to continued employment and is entitled to notice and a hearing before her employment is terminated by the government.

Here, Paige was a probationary teacher at City High, a public school. As a probationary teacher, she could be terminated for any reason upon written notice within the first year of employment. While still in this probationary period, City High notified Paige of her termination. City High is a government actor because it is a public school. Thus the only issue is whether Paige had a property interest that could give rise to a right to due process before her termination. A court will likely find that because Paige's employment

was essentially at will during the probationary period, she had no right to continued employment. She was not entitled to future employment because as a probationary employee her contract clearly stated that she could be terminated for any reason. Thus, when City High terminated her employment, it did not deny Paige any property interest and no process was due.

If a court were to find that Paige had a property interest in continued employment at City High, then the next step the court would engage in is determining what process is due before the government can lawfully take the person's property.

Here, the individual's interest is great. Employment is an important aspect of a person's life because it is generally a person's greatest (if not their only) source of income. Being deprived of an income can have serious consequences on a person's life as they may be unable to pay their bills, put food on the table, etc. Thus, a person has a strong interest in continued employment. The government too has a strong interest here, though. The government would incur a significant cost by having to hold a hearing every time that it discharges a government employee. This could have a number of negative consequences. For one thing, it may result in ossification in government hiring because the government would be weary of entering into employment contracts if terminating such contracts would require a hearing. It would also place a financial burden on the state as it would have to pay for the procedures necessary for the hearing, which would be due every time the government seeks to fire an employee. Finally, as to the last factor--the value of the added protections to the individual's rights-- a court would likely find this to be relatively little. There are many reasons for which the government may choose to discharge an employee, particularly a probationary employee, and most of these would be legal because employment is presumed at will. Thus, the hearing would probably provide little use, as the government would only need to show that it sought to discontinue the employment relationship.

In conclusion, a court may find that termination of Paige without a hearing violated the procedural due process guarantee of her liberty. However a court is unlikely to find that City High's termination of Paige without a hearing violated the procedural due process

guarantee of the 14th Amendment on the grounds of denial of a right to property.

2. State's and Attorney General's motion

The State and the Attorney General have moved to dismiss on standing grounds and the 11th Amendment. Each will be handled in turn.

Standing

A plaintiff must have standing to assert a claim in federal court. Standing is a judicial doctrine developed from interpretation of Article III of the United States Constitution, which requires that courts can only hear "cases and controversies." The Supreme Court has interpreted this to mean that courts cannot give advisory opinions. For a case or controversy to exist, the plaintiff must have an injury in fact, caused by the action which the plaintiff is challenging, and the injury must be capable of being remedied by a judgment in his favor. An injury in fact occurs when a plaintiff has a concrete stake in the litigation that is not generally held by all other people. The injury is typically an economic injury, but need not necessarily be.

Here, Bob has standing because he can show injury in fact, causation and redressability. He is a teacher at a school that withholds 10% of his salary each period. This injury was caused by the State X legislation which Bob is challenging and it will be redressed by a judgment in his favor because such a judgment would rescind the legislation resulting in Bob receiving his full salary.

Paige too has standing. She can show injury in fact because she lost her job so she lost the income stream associated with that job. This job loss was caused by the fact that City High terminated her employment. And this injury can be redressed by an injunction requiring City High to rehire her and damages for her lost wages.

11th Amendment

The 11th Amendment to the United States Constitution has been interpreted by the U.S. Supreme Court to provide state governments with immunity from suit by private citizens

or foreign countries suing in federal court. There are a number of exceptions to the 11th Amendment's bar on private individual suits against the State, including when the State waives its sovereign immunity, and when Congress authorizes suit within its 14th Amendment powers. Moreover, even though the 11th Amendment bars federal courts from hearing suits brought by individuals against States, it does not prevent courts from hearing cases brought by individuals against State officers in their individual capacity or in their official capacity. However, the Amendment does bar suits brought against State officers in their official capacity if the suit seeks damages to be paid out of the State's treasury.

Suit Against the State

Here, the suit against State X will be prohibited by the 11th Amendment. This is a suit by private individuals, Bob and Paige, against a State, State X, brought in federal court. As such, it falls within the 11th Amendment's immunity. Moreover, there is no evidence that the State has waived its sovereign immunity. Nor is there any evidence that Congress has abrogated sovereign immunity in accordance with its 14th Amendment powers for cases brought by teachers against the State for termination or withholding of wages. Thus, the case against State X should be dismissed.

Suit Against the Attorney General

Bob and Paige have also named the Attorney General of State X in their suit. Whether this claim will be barred by 11th Amendment sovereign immunity will depend on whether Bob and Paige are suing the Attorney General in his individual capacity or his official capacity. If they are suing him as an individual, the suit, both for injunctive relief and damages, will not be barred and the Attorney General's motion to dismiss will be denied. The reason is that the 11th Amendment does not protect officials from suit in their individual capacity.

If Bob and Paige have sued the Attorney General in his official capacity, the 11th Amendment will have different effects on the suit for an injunction than on the suit for damages. The suit for an injunction will not be dismissed under the 11th Amendment because it does not prevent individuals from suing officials for injunctive relief. The 11th

Amendment will, however, bar the suit if the suit is for damages to be taken out of the State's coffers. Such a suit is barred by the 11th Amendment and the Attorney General's motion to dismiss should therefore be granted.

Q5 Community Property

In 2003, while planning their wedding, Harry and Wanda, a California couple, spent weeks discussing how they could each own and control their respective salaries. Sometime before their wedding, they prepared a document in which they stated, “After we marry, Wanda’s salary is her property and Harry’s salary is his property.” At the same time, they prepared a separate document in which they stated, “We agree we do not need legal advice.” They signed and dated each document. They subsequently married.

In 2004, Harry used his salary to buy a condominium and took title in his name alone. Harry and Wanda moved into the condominium.

In 2005, Harry and Wanda opened a joint savings account at their local bank. Each year thereafter, they each deposited $5,000 from their salaries into the account.

In 2015, Harry discovered that Wanda used money from their joint account to buy rental property and take title in her name alone.

In 2016, Harry and Wanda permanently separated and Wanda moved out of the condominium. Wanda thereafter required emergency surgery for a medical condition, resulting in a hospital bill of $50,000. Harry later filed a petition for dissolution of marriage.

What are Harry’s and Wanda’s rights and liabilities, if any, regarding:

1. The condominium? Discuss.

2. The joint savings account? Discuss.

3. The rental property? Discuss.

4. The hospital bill? Discuss.

Answer according to California law.

Answer A

Community Property and Separate Property

California is a community property (CP) state. Property acquired during a valid marriage while domiciled in CA is presumed to be CP. Property acquired before marriage or after permanent separation is presumed to be separate property (SP). Property acquired during marriage through gift, bequest, devise or descent is also presumed to be SP. Under the source rule, tracing will be permitted to determine the source of the funds, and therefore the character of the asset as CP or SP. Upon divorce, CP will be divided equally in kind unless some special rule requires deviation from this equal division, or the spouses agree otherwise in writing or orally in open court.

Prenuptial Agreement

Spouses may deviate from the community property presumption by agreeing that their salaries, for instance, which normally would be a product of community labor during the marriage and thus CP, be SP. They may do so before the marriage through a written prenuptial agreement. Prenuptial agreements must be voluntary and not unconscionable. A court will find a prenup to be unconscionable if the terms are unfair, or if a spouse did not know the extent of the other spouse's property before signing the agreement. Additionally, prenuptial agreements must be in writing. A court will find that a prenup is not voluntarily executed if a spouse is not represented by counsel before signing the agreement. In order to rebut the presumption of involuntariness without counsel, the spouse not represented by counsel must be advised to seek the advice of counsel in writing, and must waive that right in writing, and if she does waive that right, she must be allowed 7 days between the presentation of a prenuptial agreement and the signing of it, and she must also write, in a separate writing, that she understands the rights she is giving up, and from whom she received the information regarding what the extent is of her spouse's property.

Here, while planning their wedding, Henry and Wanda, both California residents, spent

"weeks" discussing "how they could each own and control their respective salaries." Although it is not clear how long before the wedding this occurred, merely, "sometime before their wedding," they jointly "prepared a document in which they stated, 'After we marry, Wanda's salary is her property and Harry's salary is his property.'" They both signed and dated this document. Simultaneously, they "prepared a separate document in which they stated, 'We agree we do not need legal advice,'" which was also signed and dated by both of them. After doing so, they married.

Formalities of Prenuptial Agreement Not Followed: Voluntariness and Unconscionability

As discussed above, a prenuptial agreement must be in writing. It appears from the facts that Henry and Wanda were attempting to create a prenuptial agreement through the "document" that they prepared "sometime before their wedding" in which they agreed that Wanda's salary is her "[separate] property" and Harry's salary is his "[separate] property." Although couples may choose to contract around the general CP presumption through a prenuptial agreement, they must do so voluntarily and it must not be unconscionable. Because neither spouse was represented by counsel, the agreement is presumed to be involuntary. As stated above, this presumption can be rebutted if the spouses who are not represented by counsel are advised to seek counsel and explicitly waive that in writing. Here, it appears that the couple attempted to waive this right to counsel by stating, "We agree we do not need legal advice." This may be a sufficient writing in a court's opinion to waive the right to counsel. Nonetheless, there is still a problem with voluntariness, here. Even if this right is waived in a signed writing, the unrepresented couple must still be given 7 days with which to mull over the prenuptial agreement.

Either spouse (depending on the asset discussed below) may argue that because they spent "weeks discussing how they could each own and control their respective salaries," this was more than enough to satisfy the 7 day rule. However, because the agreement was signed simultaneously with their waiver of counsel, and there is nothing in the facts to demonstrate that there was a period of 7 days AFTER presentation of the document and signing, given that the facts only state "sometime before their wedding" they prepared a document. If this document was prepared and signed 2 hours before

the wedding, this would not be deemed voluntary, and may even be deemed unconscionable by a court given its unfairness.

Additionally, neither spouse executed an additional separate document stating that they understood the rights that they were giving up and that they stated the source where they got information about the other spouse's financial assets and liabilities. Therefore, this prenuptial agreement will not be deemed voluntary. However, it probably will not be deemed unconscionable because it does not appear that the terms were patently unfair, given that both spouses were attempting to transmute their salaries into SP, and it does not appear that either spouse was hiding substantial debts or liabilities or significant assets from the other spouse.

In sum, this prenuptial agreement is not likely effective. This will mean that the analysis below will reflect the fact that earnings during marriage will remain CP for purposes of the analysis. Nonetheless, I will still discuss the possibility that this agreement is valid within each spouse's argument, and how that may arguably alter the characterization of property, below.

What are Harry's and Wanda's rights and liabilities regarding:

1. The Condominium

Title Presumption

Property titled in one spouse's name alone is *not* presumably SP in CA.

Here, Henry will argue that he took title in the condominium alone, and therefore it is his separate property.

Wanda will argue that this is not conclusive in California, because ownership does not necessarily follow title. Wanda has the stronger argument here. She will argue that the court must trace, using the source rule to determine the character of the condo.

General CP Presumption

Assets acquired during marriage are presumably CP.

Wanda will argue that because the condo was purchased during the marriage, in 2004, it was presumably CP. She will argue that it is irrelevant that the condo was titled in Henry's name alone, because the court can trace.

Tracing: Source Rule

Under the source rule, a court will trace the assets used to purchase a particular property during marriage to determine its character.

Wanda will argue that by tracing, the court will determine that the condo was purchased with Harry's salary during marriage, and therefore it is CP.

Harry will argue that the prenup was valid, in which they agreed that his salary during marriage would be his separate property, and therefore by purchasing the condo with his salary, which is SP, and since SP breeds SP, the condo is also his SP.

Harry's argument will likely fail because, as discussed above, the prenup is likely invalid and therefore the salaries of both spouses earned during marriage will be community property, and therefore by purchasing the condo with CP funds, the condo itself is CP and it is immaterial that it is titled in Henry's name alone.

Transmutation

Spouses may alter the character of property from CP to SP, or from one spouse's SP to the other spouse's SP, or from SP to CP. After the "easy transmutation period" ended, courts now require transmutations to be in writing, and consented to or accepted by the spouse whose property is changing in nature, and the writing must explicitly state that a change in property is occurring.

Harry will argue that a transmutation of the CP condo occurred when he titled it in his sole name. He will argue that this was a gift from the community to his separate

property, and that titling it in his own name was sufficient for a transmutation.

Wanda will argue that this was not sufficient for a transmutation because she did not consent to the change of CP to SP and given that she is the adversely affected spouse, her consent or acceptance was required, and that there is also no writing in the title document stating that the property is changing in form from CP to SP. Wanda has the stronger argument here, and the title of the property will not be deemed a transmutation.

Gifts Between Spouses

As a last ditch effort, Harry will argue that the condo was a gift between spouses and therefore was a valid transmutation that did not need to be in writing. An exception to the writing requirement for valid transmutations is when a gift of a personal nature is given from one spouse to another, and that gift is used primarily by the recipient spouse and is not substantial in nature, taking into consideration the financial situation of the couple.

Wanda will argue that a condo is not tangible personal property, and a condo is also substantial in nature, financially, given that they did not come into the marriage with significant amounts of SP, and moreover, the condo was used by both of them because they both "moved into the condominium." Therefore, Harry's argument that the condo was a gift from CP to SP will fail.

Conclusion

The condo is CP because it was purchased with earnings during marriage and the prenup is likely invalid. Therefore, it will be subject to equal division in kind upon divorce and Harry and Wanda will each take 50% of the proceeds from the sale of the house, assuming it is sold.

2. The joint savings account

Jointly Titled Property CP Presumption

In CA, when title to property is taken in joint form, there is a presumption that the

character of the property is CP unless in the title document or elsewhere it is stated that a portion or all of the property is to be reserved as an SP ownership interest. In this case, under *Lucas*, a court will not allow tracing to determine the funds used to purchase a jointly titled home through the source rule and the property will be deemed CP. However, this joint presumption does not apply to bank accounts. With bank accounts, a court will allow jointly titled bank accounts to be traced to determine the source of funds and how it should be characterized.

Tracing

Because both spouses deposited $5,000 each from their salaries during the valid marriage in 2005 into the account, and these salaries were earned during marriage, property earned during marriage through community labor during the economic community is CP. In light of the fact that the prenuptial agreement is likely not valid, both spouse's salaries would be CP, and therefore the court would trace to the source of these funds and determine that the bank account is CP. If, for some reason, the court found that the prenup was valid, and therefore each spouse's salary was SP, then the account would be comprised of $5,000 worth of Wanda's SP and $5,000 worth of Harry's SP. However, this is unlikely.

Conclusion

Presuming that the prenup was invalid, the characterization of the joint savings account would be 100% CP, and therefore should be subject to the equal division in kind rule upon divorce, and whatever is left in the account will be divided equally between the spouses.

3. The rental property

Title Presumption

Property titled in one spouse's name alone is *not* presumably SP in CA.

Here, Wanda will argue that she took title in the rental property alone, and therefore it is

her separate property.

Harry will argue that this is not conclusive in California, because ownership does not necessarily follow title. Henry has the stronger argument here. He will argue that the court must trace, using the source rule to determine the character of the rental property.

General CP Presumption

Assets acquired during marriage are presumably CP.

Harry will argue that because the rental property was purchased during the marriage, in 2015, it was presumably CP. He will argue that it is irrelevant that the rental was titled in Wanda's name alone, because the court can trace.

Tracing: Source Rule

Under the source rule, a court will trace the assets used to purchase a particular property during marriage to determine its character.

Harry will argue that, by tracing, the court will determine that the rental was purchased with both spouses' salaries during marriage, and therefore it is CP. He will argue that because the funds were taken from the joint savings account, which is conclusively CP if the prenup was invalid, therefore Wanda used CP funds to purchase the rental, and therefore since CP breeds CP, the rental property is also CP.

Wanda will unconvincingly argue that the prenup was valid, in stark contrast to her earlier argument, stating that the couple agreed that her salary during marriage would be her separate property, and therefore by purchasing the rental with her salary, which is SP, and since SP breeds SP, the rental is also her SP.

Wanda's argument will likely fail because, as discussed above, the prenup is likely invalid and therefore the salaries of both spouses earned during marriage will be community property, and therefore by purchasing the rental with CP funds held in the bank account, the rental itself is CP and it is immaterial that it is titled in Wanda's name

alone.

Transmutation

Spouses may alter the character of property from CP to SP, or from one spouse's SP to the other spouse's SP, or from SP to CP. After the "easy transmutation period" ended, courts now require transmutations to be in writing, and consented to or accepted by the spouse whose property is changing in nature, and the writing must explicitly state that a change in property is occurring.

Wanda will argue that a transmutation of the CP rental occurred when she titled it in her sole name. She will argue that this was a gift from the community to her separate property, and that titling it in her own name was sufficient for a transmutation.

Harry will argue that this was not sufficient for a transmutation because he did not consent to the change of CP to SP and given that he is the adversely affected spouse, his consent or acceptance was required, and that there is also no writing in the title document stating that the property is changing in form from CP to SP. Harry has the stronger argument here, and the title of the property will not be deemed a transmutation.

Gifts Between Spouses

Finally, Wanda will argue that the rental was a gift between spouses and therefore was a valid transmutation that did not need to be in writing. An exception to the writing requirement for valid transmutations is when a gift of a personal nature is given from one spouse to another, and that gift is used primarily by the recipient spouse and is not substantial in nature, taking into consideration the financial situation of the couple.

Harry will argue that a rental property is not tangible personal property, and a rental property is also substantial in nature, financially, given that they did not come into the marriage with significant amounts of SP.

Wanda will counter that she, alone, was using the rental property, and therefore that property and any income, profits, or rents derived from it should be her SP because it

was used primarily by her. This argument will fail because it is not an item of tangible personal property and thus was not an exception to the transmutation in writing rule.

Wanda's argument that the rental was a gift from CP to SP will fail.

Rents, Issues and Profits

The rents, issues, and profits of CP will be CP, and the rents, issues, and profits of SP will be SP.

Because the rental property is CP, any rental income that Wanda derives by renting it out (the facts are silent about whether she has a tenant) will be CP, and therefore will be subject to the equal division in kind rule. Half of rents must be therefore shared with Harry.

Equal Management and Control

Each spouse has equal ability to manage and control CP. However, this is subject to certain limitations. For instance, a spouse may not sell or encumber personal property in the home or CP clothing belonging to either spouse or children without consent of the other spouse.

Gifts of CP

Moreover, spouses may not make gifts of CP without the written consent of the other spouse. A spouse may void the gift upon finding out about it.

Harry will argue that he did not consent to Wanda sneaking off and using money from their joint savings account to purchase the rental property and take title in her name alone. He will argue therefore that he should be allowed to void this transaction within one year of finding out about it. He will also argue that he can void this transaction because Wanda disposed of the CP without his written consent.

Wanda will argue that because she has equal management and control of the property, she does not need his consent to purchase a rental property with money from their joint

savings account because she has a community interest in both of their salaries, and therefore can do what she wants with the money given that she had equal withdrawal rights on the bank account. She will also argue that this was not a "gift" of CP because she got her substantial benefit of the bargain from it: namely, a rental in exchange for the funds.

Wanda, unfortunately, likely has the stronger argument here, and she did not need Harry's consent before purchasing the rental and he likely cannot void it and cause the seller to return any of the purchase price despite finding out about the sale/purchase within one year.

Breach of Fiduciary Duty

Spouses owe each other fiduciary duties similar to those of business partners. They owe each other the highest duty of good faith and to avoid self-dealing.

Harry will argue that Wanda breached her fiduciary duty to him as a spouse by going behind his back and taking their joint CP funds and buying a rental and titling it in her own name without his knowledge. He will argue that this breaches her duty of loyalty to him and that this act was not in good faith.

Harry likely has a strong argument here, and he may also argue that this lack of good faith should cause the court to deviate from the equal division in kind rule.

Conclusion

The rental is CP because it was purchased with earnings during marriage, which were held in the bank account which is CP, given that the prenup is likely invalid. Therefore, it will be subject to equal division in kind upon divorce and Harry and Wanda will each take 50% of the proceeds from the sale of the rental, assuming it is sold, and assuming the court does not find justification for deviating from this, in light of Wanda's lack of good faith and fair dealing when going behind Harry's back to purchase the rental.

4. The hospital bill

End of the Economic Community: Permanent Separation

The economic community begins during marriage, and ends upon permanent separation. Permanent separation is understood through physical separation plus an intent not to resume the marital relationship.

Separate Debts of Spouses

Debts acquired after permanent separation are SP and the debtor spouse will be liable to his creditors for such debt incurred.

Here, Harry will argue permanent separation occurred in 2016 per the facts when "Wanda moved out of the condo" demonstrating an intent to not resume the marital relationship, and therefore the hospital bill incurred is her SP and only she will be liable for it because the economic community had ended.

Wanda will argue that Harry had not yet evidenced an intent not to continue the marital relationship because he only filed for divorce after her surgery and therefore the economic community was still intact, and thus the debt is CP to be shared between both of them.

Harry has the stronger argument, because per the facts, Harry and Wanda had "permanently separated" prior to the surgery.

Necessaries of Life

Despite the general rule that debts incurred post-separation are the SP debt of the debtor spouse and that spouse only will be liable for that debt to creditors, there is an exception for the "necessaries of life" and debts incurred on their behalf post-separation but before divorce, because of the duty spouses owe to each other to take care of each other during marriage.

Wanda will argue that her surgery was an "emergency surgery for a medical condition,"

and therefore was a necessary of life similar to food and water. Harry will have a difficult time countering this, because a court is likely to hold that this is a necessary.

Therefore, despite Wanda being the debtor spouse, if she does not have sufficient SP to pay for the $50,000 hospital bill, the hospital can attach to the CP of either spouse, and Harry may also be required to pay for the debt using his SP, because of the duty owed to take care of one's spouse prior to divorce, even after separation for necessaries of life.

Conclusion

In sum, the condo is CP and subject to equal division, the bank account is CP and subject to equal division, the rental property is CP and subject to equal division unless the court finds that it should deviate from this rule because of Wanda's breach of her fiduciary duty, and the hospital bill, despite being Wanda's separate debt, is a necessary of life which Harry may be required to pay for with CP and/or his SP.

Answer B

Harry and Wanda's Rights and Liabilities

California is a community property state. In a community property state, the marital economic community begins on the formation of a valid marriage, and ends with the death of a spouse, divorce, or permanent physical separation with intent of one spouse not to resume marital relations. Property, earnings, and debt acquired during the marriage is presumed to be community property. Property acquired by either spouse before the marriage, or at any time via gift, devise, or inheritance, is presumed to be separate property. Property acquired by the couple while living in a non-community property state, if it would be considered community property if acquired in California, is considered quasi-community property upon death of a spouse or divorce.

Valid Marriage

A valid marriage requires mutual consent, sufficient age (at least 18 years old) and legal capacity, and formalities, including a license and solemnization. Here, though the facts do not specify the details of Harry and Wanda's marriage, we can assume for the purposes of this question that they were validly married.

A valid marriage ends upon the death of a spouse, divorce, or physical separation of the spouses with intent of one spouse (or both) not to resume the marital relationship. Here, Harry and Wanda permanently separated and Wanda moved out of the condominium where they had been living together in 2016. Harry also filed a petition for dissolution of the marriage. These actions--the physical separation of the two and the petition for dissolution--indicate that the spouses intended to permanently separate and not resume the marital relationship in 2016.

Premarital Agreements

Before analyzing Harry and Wanda's rights and liabilities in specific pieces of property, we first must determine whether their premarital agreement is valid and effective. A premarital agreement may alter the couple's ownership status in property if it is valid. To be valid, a premarital agreement must be in writing and signed by both couples, though there does not need to be valid consideration exchanged. Additionally, the proponent of the premarital agreement (as of 2005) bears the burden of proving that the agreement was neither involuntary nor unconscionable at the time it was executed.

Voluntariness

To prove that the agreement was voluntary, the proponent of the premarital agreement must prove (1) that the other party was represented by independent counsel, or had knowingly waived in a separate, signed writing the rights to separate counsel after being fully informed of the advantages of such separate counsel, (2) that the other party, if not represented by independent counsel, was fully informed of the rights it was giving up, (3) that the agreement was not obtained by fraud, duress, or undue influence by one of the spouses, and (4) other factors that the court may think appropriate and just.

(1) Here, neither party was represented by independent counsel. Though the proponent of the premarital agreement may argue that the parties waived their right to independent counsel by saying, in a separate signed document, "We agree we do not need legal advice," it is not clear that this waiver was valid, because the parties likely were not fully informed of the advantages of obtaining legal counsel. It is possible that they could argue that they were both legally sophisticated--as evidenced by their knowledge that they needed a separate signed document to waive--but in the absence of additional evidence of this sophistication, a court would likely hesitate to enforce the agreement on this basis.

(2) Similarly, it is not clear from the writing signed by the parties--either the agreement

or the separate signed writing--that the parties were fully informed of the rights that they were giving up. Unless the proponent can produce evidence that the other party was fully informed, the court may decline to enforce the agreement.

(3) Here, the facts are unclear regarding whether there was fraud, undue influence, or duress. The party seeking to enforce the agreement would bear the burden of showing that these factors did not exist at the time the agreement was signed.

Unconscionability

To prove that the agreement was not unconscionable at the time it was executed, the proponent of the agreement would need to prove that the other party was fully informed of the assets and liabilities of the proponent party, or that the other party had waived such a right to full disclosure of the assets and liabilities of the proponent party, or that the other party actually knew or had reason to know of the assets and liabilities of the proponent party. In the absence of facts speaking to such disclosure, we assume that the agreement was not unconscionable for the purposes of this analysis.

Transmutation

Finally, in order to be a valid transmutation (agreement that changes the status of ownership of property), a premarital agreement or other agreement must expressly declare the intent of the parties--particularly the adversely affected spouse--to change the ownership status of property.

The spouse aiming to defeat the premarital agreement will argue that saying that "Wanda's[/Harry's] salary is her[/his] property" is insufficiently clear to demonstrate intent to make the property separate property because it does not use the word "separate." However, the other spouse will argue that the intent is clear. Since the earnings acquired during marriage would otherwise be community property, saying that it would be the earning spouse's property is sufficient to demonstrate the parties' intent

to make it separate property. The court would likely agree with the latter argument, since the intent to change the ownership status is clear.

Ultimately, however, since there was no independent legal counsel and the parties were likely not fully informed of the rights they were giving up, the party opposing the premarital arrangement will likely be able to prevent it from being enforced on the basis that it was not voluntarily signed.

The Condominium

Source of Funds and Time of Purchase

Property acquired during marriage from community property funds is presumed to be community property. This presumption holds true even if the spouse takes title in his or her name alone. The general community property presumption may be rebutted by a preponderance of the evidence.

Here, Harry used his salary to buy a condominium in 2004. The condominium was purchased after the marriage, using Harry's salary. Assuming that Wanda were able to defeat the premarital agreement and prevent it from being enforced, Harry's salary earned during the marriage would be community property. As a result, property purchased with this salary, as the condominium was, would be community property.

The Community Property Presumption

Harry will argue that the condominium should be his separate property. He may succeed in this argument if he can rebut the community property presumption by a preponderance of the evidence. Harry will argue that his title to the property in his name alone indicates his intent that the property should be his separate property. This alone, however, is not sufficient evidence to rebut the general community property presumption. Harry may also argue that he used separate property funds earned from

before the marriage to purchase the condominium in addition to some of his salary after the marriage. Harry may be able to prove that separate property funds were used to purchase the condominium by either directly tracing the funds used in the purchase to a separate property source (by showing that separate property funds were available and that he intended to use them in this purchase) or by indirectly tracing the funds via the exhaustion method (showing that community property funds commingled with separate property funds were exhausted by family expenses such that only separate property funds remained in the account that was used for the purchase). If Harry can succeed in this tracing, it will not change the status of the property, but Harry may be entitled to an equitable right of reimbursement for the separate property funds that he used in purchasing the property (without interest), and he may be entitled to a pro rata share of the property as separate property in proportion to the part of the purchase price paid with separate property funds.

However, in the absence of such evidence--and there is no such evidence suggested by the facts--we assume that Harry's salary referenced in the facts was earned between 2003 and 2004, and that it was thus community property.

The Special Presumptions

Harry may also argue that the Special Presumption of Title should be applied to the property. The Special Presumption of Title states that the property's title and the manner in which it is held is presumed to reflect the status of the property. But this presumption only applies at death, so it is inapplicable.

Instead, the Special Presumption that applies at divorce is the Special Community Property Presumption. This presumption states that any property jointly held by the spouses (as joint tenants or as tenants in common) is presumed to be community property at divorce. Wanda will likely argue that this presumption applies. Harry may attempt to defeat this presumption via clear and convincing evidence, which evidence (after 1984) must include an express statement in writing, demonstrating that the

property should be held as separate property. To defeat the presumption, Harry would need to produce in addition to this express statement--and there does not seem to be such a statement referring to the condominium--evidence of the sort discussed three paragraphs above. Again, in the absence of such evidence, Harry would not be able to rebut the community property presumption.

There are no transmutations suggested by the facts (again, assuming that the premarital agreement is unenforceable) that would change the ownership status of this property.

Dispositions

Thus, again assuming that the premarital agreement is unenforceable, the condominium is likely community property.

Upon divorce, the equal division rule applies, and community property is divided evenly between the spouses. Thus, Harry and Wanda are likely each entitled to 50% of the value of the condominium.

The Joint Savings Account

Source of Funds and Time of Purchase

The joint savings account was created in 2005. Both Harry and Wanda deposited $5,000 from their salaries into the account. These deposits of $10,000 a year over the course of 10 years would likely amount to $100,000, plus whatever interest the account has earned in that time. This $100,000 stemmed from Harry and Wanda's salaries. Again assuming that the salaries were community property, because they were earned during the marriage and the premarital arrangement is likely unenforceable, this bank account and the $100,000 it contains is community property.

At divorce, the special community property presumption applies (see rule above). Since the bank account is held in both of their names--it is a joint account--it is presumed to be community property, and the income earned on the account is also presumed to be community property.

There is no transmutation affecting this joint account.

At divorce, community property is divided equally between the spouses. Thus, not addressing for the moment the funds removed from the account to pay for the rental property, which will be addressed below, Harry and Wanda are each entitled to 50% of the account. This would be $50,000 (plus half of the interest) to Harry, and $50,000 (plus half of the interest) to Wanda.

The Rental Property

Source of Funds and Time of Purchase

The rental property was purchased by Wanda in 2015, during the marriage. Wanda used funds from the joint account to purchase the property. Assuming that the funds in the joint account were community property, this would make the rental property presumptively community property, as it was acquired during the marriage with community property funds.

Wanda will argue that the rental property was held in her name and that it should thus be separate property. However, this is not enough to rebut the community property presumption. Additionally, the special presumption of title does not apply at divorce, only at death. So, unless she were able to enforce the premarital agreement, which she will likely not be able to do, Wanda will not be able to argue that the rental property is her separate property.

Breach of Fiduciary Duty

Spouses owe each other fiduciary duties. These duties include the duty to inform the spouse of the status of community property and the duty to obtain consent for major decisions affecting the disposition of community property. If a spouse violates his or her fiduciary duty to the other spouse, as a remedy, the other spouse may have his or her name added to the title of the affected property, the spouse may be entitled to a larger share of the community property, or, if the property was fraudulently concealed, the innocent spouse may request that the court order the other spouse to forfeit the property entirely to the innocent spouse.

Here, assuming the joint account was community property funds, Wanda may have breached her duty to obtain consent for major decisions. She did not notify Harry about using money from their joint account to purchase the rental property, and she took title in her name alone. It is possible that she also intended to keep the proceeds from this rental property, which would be community property themselves, for herself, which would be a violation of the duty of loyalty and highest good faith owed to her spouse. Since there is insufficient evidence of fraudulent concealment of this property, the court is not likely to order that Wanda forfeit the property entirely, but the court may award Harry a larger share of the community property as a result of Wanda's breach.

The rental property is thus community property. At divorce, it will be divided evenly between the two spouses, with Harry receiving a larger share as the court deems just due to Wanda's breach of her fiduciary duties.

The Hospital Bill

Debts of spouses acquired after permanent physical separation are generally the liabilities of the debtor spouse, with that spouse being responsible for the debt payment after divorce. However, even after separation, both the debtor and the non-debtor spouse may be personally liable for payments for the necessities of life of either spouse.

The court may divide liability for such debts according to each spouse's ability to pay.

The hospital bill was for an emergency surgery. Such an emergency surgery is a necessity of life, and, as such, both Wanda and Harry will be personally liable. Harry may have an equitable right of reimbursement for any of his funds used in payment for the hospital bill, however, if he can show that Wanda had separate property funds available at the time the hospital bill was paid.

At divorce, either Harry or Wanda may be personally liable for the hospital bill. Assuming that Wanda's $50,000 share of the joint account is still intact, she may have had funds available for the payment herself. If this is true, Harry may be entitled to an equitable right of reimbursement for his own funds used to pay the hospital bill. Any funds that he used that made up for funds that Wanda did not have available will not be reimbursed to Harry.

Q6 Professional Responsibility

Len, an attorney, is a member of Equal Ownership Inc. (Equal), a nonprofit organization that seeks to help low-income families purchase homes throughout the state. Len does not represent Equal as an attorney. Equal helped to get a statute enacted that requires that all new residential developments contain a certain percentage of low-income housing.

ABC Development Corp. (ABC) is a corporation that wants to challenge the statute. Pat, the President of ABC, asked Len to represent ABC and Len agreed. Len does not personally agree with ABC's objective, but moves forward with the representation nonetheless by filing a complaint challenging the statute. Len personally thinks the statute is a good law and secretly hopes that ABC is not successful in its lawsuit.

During the course of Len's representation of ABC, Pat informs Len that he (Pat) has filed false reports with the State Environmental Protection Agency regarding the disposal of non-hazardous waste, and is planning to file another false report next month. Filing a false report makes a person and his or her employer liable for a substantial civil fine. Len does not take any action with respect to the impending filing of the false report.

What ethical violations, if any, has Len committed? Discuss.

Answer according to ABA and California authorities.

Answer A

Attorney-Client Relationship

An attorney-client relationship is formed when the client reasonably believes it has been formed. The existence of an attorney-client relationship triggers numerous duties, including the duties of competence, confidentiality, loyalty, and fiduciary duties. Breaching one of these duties is a violation of the Model Rules and California Rules.

Here, ABC has hired Len (L) to represent them in an effort to challenge the residential housing statute. Thus, it is likely that they reasonably believe an attorney-client relationship exists. One has therefore been formed. The duties mentioned above now apply to this relationship, and any breach will be considered an ethical violation.

For similar reasons, L does **not** have an attorney-client relationship with Equal. Although he has helped them get the housing statute enacted, he does not represent them as an attorney. Thus, we may assume that Equal would not reasonably believe such a relationship existed. Even in the absence of a formal relationship, however, his association with Equal may raise other problems, as discussed below.

Corporation as a Client

An attorney may represent a corporation as a client. The corporation acts through its duly-appointed representatives, usually officers. However, the corporation, not the officers, is the actual client and the attorney must be careful not to provide legal information to the officers in a personal capacity or to mislead them into believing that the attorney represents them personally.

Here, ABC, a corporation, has retained L to handle the representation. This is permissible under both sets of rules. ABC, acting through Pat (P), will likely give L

instructions on how to proceed and define what the goals of the representation are. However, L must remember that he represents ABC and not P.

Duty of Loyalty

An attorney owes his clients a duty of loyalty. The duty of loyalty includes the duty to refrain from conflicts of interest. Conflicts of interest take several forms: conflicts personal to the lawyer, conflicts between current clients, and conflicts between current and past clients.

Lawyer-Client Conflict

A lawyer may breach his duty of loyalty by representing a client with interests adverse to his own. This often arises when litigation the attorney is handling is adverse to one of his personal interests. When an attorney has a conflict between his or her personal interests and the interests of the client, under the California Rules he or she must provide the attorney with written disclosure of the interest. The model rules, by contrast, require that the attorney get informed consent from the affected client before continuing with a representation that raises a personal conflict. Further, under the Model Rules, the lawyer must reasonably believe that he will be able to provide competent and diligent representation in the face of the conflict.

Here, under either rule, L has breached his duty of loyalty. L is a member of Equal, an organization that helped to pass the statute his new client, ABC, is now challenging. L has admitted that he thinks the law is valid and that he hopes ABC is not successful in its suit. Under the Model rules, this would be a violation because he cannot reasonably believe he will be able to provide diligent and competent representation in the face of this admission. Further, under the California rules, there is no indication that he has provided written disclosure to ABC of his personal interest. He may argue that ABC only knew about him because of his work with Equal, and thus ABC was necessarily informed of his interest. However, California requires written disclosure, which was not

provided. L has breached his duty of loyalty by representing a client in the face of a personal conflict without disclosure and without a reasonable basis for believing he can continue to provide competent and diligent representation.

Client Conflicts

A lawyer may breach his duty of loyalty by representing current clients with interests adverse to one another or by representing a current client whose interests are adverse to a former client.

Current Clients

A lawyer may breach his duty of loyalty by representing current clients whose interests are adverse to other current clients. Under the Model Rules, a lawyer must get informed consent from the adversely affected client and reasonably believe that they can undertake the representation in spite of the conflict. The Model Rules require this consent only for **actual** conflicts of interest. By contrast, California requires informed consent for either **actual** or **potential** conflicts of interest. However, California does not require that the attorney reasonably believe he can prove competent representation in the face of the conflict.

Here, although Equal might argue that there is a client conflict, it is unlikely that L has breached either the model or California rules by agreeing to represent ABC. L was a member of Equal, but there was never an attorney-client relationship between L and Equal. There would therefore be no need to get informed consent from ABC or Equal before pursuing the representation of ABC.

Former Clients

Like a conflict of interest arising from the representation of current conflicting clients, an attorney may likewise breach their duty of loyalty by representing a client with an

interest adverse to a former client. In this case, the test under the California rules is generally whether the attorney learned any confidential information in the previous representation which could harm the client.

Here, like above, there is likely no former client conflict because there was no attorney-client relationship with Equal. However, Equal's argument on this front would be stronger--there is a strong possibility that as a lawyer-member of Equal, he learned information about Equal's litigation and lobbying strategies that could be used by ABC to defeat the statute. If he obtained confidential information from Equal, some courts might treat it as an ethical violation to use this information in subsequent litigation against that organization without getting informed consent. However, because there was no actual attorney-client relationship between Equal and L, it's unlikely that he breached his duty of loyalty by not getting Equal's informed consent.

Duty of Competence

An attorney owes a duty of competence to his client. Under both the Model rules and the California rules, this requires that he or she have the requisite knowledge, skill, thoroughness, and preparation necessary to handle the case. If a lawyer is not competent to handle the representation, he must become competent before proceeding, associate with a competent lawyer, or withdraw.

Here, although there is nothing to suggest that L is technically incompetent to represent ABC (he likely has experience in this area of law through his membership in Equal), it is possible that his affiliations and loyalties make it such that he cannot provide competent representation. He has admitted that he secretly hopes ABC is not successful in its lawsuit. This signals that he is biased against his client and therefore might be tempted not to use the requisite knowledge, skill, thoroughness, and preparation the representation deserves. If this is the case, then L will have breached his duty of competence to ABC.

Duty of Confidentiality/Disclosure

An attorney owes a duty of confidentiality to his clients. This requires, under both sets of rules, that they keep any information related to the representation confidential and inviolate. The duty of confidentiality is not absolute, and the Model rules and California rules both have exceptions for disclosure in case of fraud or financial harm (Model rules) or the threat of serious bodily harm or death (both sets of rules).

Here there are two potential issues related to confidentiality: (i) the possibility that L will breach his duty of confidentiality and provide information related to the representation of ABC to Equal, and (ii) whether L has a duty (or permission) to disclose information related to ABC's filing of false reports.

(ii)Threat of Disclosure to Equal

As mentioned above, a lawyer must not disclose <u>any</u> information related to the representation to an outside source.

Here, his close association with Equal, a company whose law he is now attempting to strike down on behalf of ABC, presents a serious risk that he will violate the duty of confidentiality by disclosing information related to ABC's challenge of the law. Although there is no indication that he has yet made such a disclosure, if he does, he will have violated the duty of confidentiality and thus have committed an ethical violation.

(iii)Reporting ABC's False Reports

The Model rules and California rules treat the disclosure of confidential corporate information differently. When an attorney discovers that a corporation has undertaken an unlawful act, such as filing fraudulent documents or committing a criminal act, under both sets of rules an attorney must first **report up**. Reporting up requires that the attorney take the matter to the most senior member of the corporation. Under the

Model Rules, if the executives of the corporation refuse to take action, the lawyer may **report out** if he believes it is in the best interest of the corporation. This is an exception to the duty of confidentiality and allows the lawyer to report misconduct to an outside agency. California does not permit reporting out for financial crimes. California permits reporting out only when he or she has reason to believe that (i) the client or a third party will commit an act that creates a **risk of death or substantial bodily harm**, (ii) he or she has **remonstrated** the client to not take this action, and (iii) the disclosure is **reasonably necessary** to prevent the harm. Under the California rules, a lawyer may not disclose financial harms, although he may choose to withdraw from the representation.

Here, L has discovered that P has filed false reports with the State EPA regarding the disposal of non-hazardous waste and is planning to file another false report soon. Filing this false report opens the corporation up to a substantial civil fine. As a threshold matter, L should report this matter up the chain of command of the company. However, as it appears that P is the president, it is not apparent who else this could be reported to. Under the Model Rules, since L has exhausted his "reporting up" options, L is permitted to disclose the false report to an outside agency, since this involves a threat of substantial financial harm to the corporation. He may also withdraw from representation. He does not violate the Model Rules by <u>not</u> filing the report, although he may not counsel them on committing this type of fraud.

By contrast, L has no ability to report the fraud under the California rules. California permits reporting outside the corporation only where there is a risk of death or substantial bodily harm. The facts indicate that the waste is non-toxic, and thus it is unlikely that there is any risk of bodily harm. Although L may choose to withdraw from the representation and may not counsel the corporation on filing such documents, he is not required (or allowed) to disclose--to do so would be a breach of the duty of confidentiality.

In short, L's responsibilities in the situation depend on the rules applied. Under either

circumstance, he can likely withdraw from the representation since the client is committing fraud. Under the Model Rules, he may, but is not required to disclose the fraud to an outside agency. Under the California rules, he may not disclose the fraud and would be liable for a breach of confidentiality for doing so.

Duty of Candor to the Court

In addition to duties owed to the client, an attorney also owes a duty of candor to the court. As part of an attorney's duty of candor to the court, the lawyer owes a duty not to advance or file frivolous claims under both the California and Model Rules. This requires that they not knowingly put forward a claim that is unsupported by the law, although a good faith argument for modification or reversal is not considered frivolous.

Here, L has filed a claim seeking to invalidate the residential housing statute, a law that he helped pass. He has admitted that he secretly hopes that ABC is not successful in its lawsuit and that the statute is good law. Thus, there is a substantial likelihood that he will violate the duty of candor by filing a suit seeking to invalidate the law. This is because, if the law is valid, then claiming it is not valid without a reasonable basis is considered a frivolous claim. L will argue that he does not know that the law is good law, he just believes it is. Therefore, because he does not know whether the law is good or not, he is not prohibited from putting forth a good faith argument that it should be modified or overturned. Whether this argument succeeds depends on whether or not he believes there is a good faith basis for challenging the law. If he does not, and he proceeds to litigate the claim anyway, he will have violated his duty of candor to the court.

Answer B

DID LEN COMMIT ANY ETHICAL VIOLATIONS IN CHOOSING TO REPRESENT ABC?

Duty of loyalty

A lawyer owes to their client the duty of loyalty. Under the ABA rules, the duty of loyalty requires that a lawyer not take a representation when there is a conflict of interest, unless the lawyer: (1) reasonably believes that his ability to represent the client will not be materially limited by the conflict of interest; and (2) the lawyer discloses the conflict to the client and receives their informed consent to continue with the representation. The California rules are quite similar, except the lawyer only needs to have a good faith subjective belief that his ability to represent the client will not be materially limited by the conflict of interest, and if the conflict is a personal conflict, the lawyer only needs to provide a written disclosure of the conflict in writing to the client. However, if the conflict is not a personal conflict, the client's consent itself, and not just a confirmation of consent, must be in writing.

Conflict of interest #1: Len's membership of Equal Ownership Inc. (Equal)

Did a conflict of interest exist?

Although Len did not represent Equal, a conflict of interest still likely existed because Len was a member of Equal, yet he agreed to represent ABC in its suit to challenge the statute. Equal was the nonprofit organization that helped to get the statute in question enacted. As a member of Equal, Len likely assisted or at the very least approved of and supported Equal in its mission to help get the statute enacted. Now, Len is on the opposite side of the same conflict, seeking to get this same statute struck down.

Accordingly, Len had a conflict of interest due to his membership of Equal and his representation of ABC, as Len was required to essentially fight a statute that was supported by the nonprofit which he was a part of.

Did Len take appropriate steps to represent ABC notwithstanding this conflict?

ABA MODEL RULES

Under the ABA model rules, Len could still represent ABC notwithstanding this conflict if: (1) he reasonably believed his ability to represent ABC would not be materially limited by this conflict; and (2) Len obtained ABC's informed consent in writing. Note that Len was not required to obtain Equal's informed consent, because Len does not represent Equal as an attorney.

Here, Len would argue that Len could reasonably believe he could represent ABC notwithstanding this conflict because even though he was a member of Equal, Len did not necessarily participate in the specific lobbying strategies or otherwise directly work on/contribute to Equal's efforts to enact the statute. Len could argue that though he supported Equal's mission at the time, this past support would not undermine his ability to represent ABC, despite the fact that ABC's objectives sought to tear down this specific statute.

On the other hand, it could be argued that Len's belief was not reasonable. Len was a member of the organization that supported and helped to enact the low-income housing statute. It could be argued that it would not be reasonable for Len to believe he could represent ABC and somehow place his membership of Equal and his support of Equal in an "isolated mental box" in his mind, which would not affect his ability to represent ABC, because the interests directly and squarely conflict with one another.

Overall, Len may very well succeed on his argument that he reasonably believed that this conflict of interest would not have materially limited his ability to represent ABC. Len was only a member of Equal, and the facts do not suggest that Len spearheaded or otherwise was deeply involved with the Equal's work in helping the statute get enacted.

However, despite this fact, Len did not disclose the conflict to ABC at the time he chose

to take on the representation. The facts do not suggest that Len told Pat he was a member of Equal, and that Pat consented to the representation notwithstanding this consent. Moreover, even if Len may have told Patrick about it and Patrick consented, such consent was not obtained or otherwise evinced by a writing.

Therefore, Len breached his duty of loyalty under the ABA model rules by improperly accepting a conflicted representation.

CA RULES

Here, Len would argue that he at the very least had a subjective good-faith belief that he could represent ABC notwithstanding his membership of Equal. A court would likely agree with Len, on grounds that as discussed above, while Len was a member of Equal, Len did not represent Equal, nor do the facts indicate that Len was directly or deeply involved with Equal's efforts to enact the statute. Accordingly, regardless of whether this belief was reasonable or not, Len may have had a good faith belief that he could have represented ABC notwithstanding this conflict.

However, Len did not provide a written disclosure of this conflict to ABC in writing. Indeed, this was a personal conflict, as it related to Len's membership with Equal and not some other conflict due to representation of other past or present client. However, under the ABA rules, Len was required to give ABC notice of this conflict and obtain its informed consent in writing. Len did not provide such a disclosure or obtain informed consent.

Therefore, Len breached his duty of loyalty under the ABA model rules by improperly accepting a conflicted representation.

Conflict of interest #2: Len's personal disagreement with ABC's objective

Did a conflict of interest exist?

In addition to being conflicted due to his being a member of Equal, another potential conflict of interest existed because Len did not personally agree with ABC's objective. Len personally thought that the statute was a good law, and secretly hoped that ABC was not successful in its lawsuit. Len's interests therefore directly diverged and conflicted with those of the objectives of his client. Accordingly, a conflict of interest also existed as regards Len's personal sentiments as to the merits of ABC's lawsuit, which Len was working on.

Did Len take the appropriate steps to accept the representation notwithstanding the conflict of interest?

ABA MODEL RULES

Len would argue that he reasonably believed that he could still represent ABC despite the fact that he did not personally agree with ABC's objectives, and believed that the statute was good law. He would argue that it is common for lawyers to personally disagree with their client's positions, but for them to nonetheless do the work as required and necessary to further their interests in the current matter.

However, it could be argued that Len's belief was not reasonable. Len's beliefs **directly and completely** diverged from that of his client's objectives. Such a strong, powerful belief, which even led Len to secretly hope that ABC was not successful in its lawsuit, would have inevitably affected Len's ability to represent ABC fully and to his utmost ability. Accordingly, it could be argued that due to the divergent disparity between his beliefs, and the objectives of his client, which even led him to essentially root for his client's failure, Len could not have reasonably believed he could represent ABC despite his personal beliefs.

A court would likely find that Len's belief that he could represent ABC effectively notwithstanding his personal beliefs was likely to be unreasonable. While it is common for a lawyer to disagree to an extent with the client's objectives, here Len was completely against them. The severity of his belief, and the likelihood of his personal sentiments materially impairing his ability to represent ABC is strongly evinced by the fact that he was rooting against his own client's victory.

Moreover, as discussed above, Len did not disclose such a conflict in writing to ABC, nor did Len obtain their informed consent.

Therefore, Len breached his duty of loyalty in accepting this representation with a conflict of interest.

CA RULES

Indeed, it is still possible that Len had a good faith subjective belief that he could represent ABC notwithstanding his strong feelings against their objective. However, as discussed above, Len did not disclose the nature of the conflict in writing.

Therefore, Len breached his duty of loyalty under the CA rules in accepting the representation with a conflict of interest.

Duty of competence

The duty of competence requires that a lawyer pursue a representation with the knowledge, skill, prudence, and effort that is reasonably required for the representation. Under the California rules, the lawyer only violates his duty of competence if he intentionally, recklessly, or repeatedly commits ethical violations.

ABA MODEL RULES

Under the ABA Model Rules, it could be argued that Len violated his duty of

competence in choosing to represent ABC notwithstanding such a conflict. A lawyer acting with appropriate knowledge and skill would have been aware that Len faced multiple conflicts of interest, and should not have taken on the representation. A lawyer acting with sufficient prudence would have been aware of the risks that his ability to represent the client would have been limited, and that he would be subject to discipline for taking on such representation. On the other hand, it may be argued that even a lawyer with appropriate knowledge, skill, and effort would have taken on this representation, as they would have had sufficient knowledge and skill to further ABC's interests notwithstanding the conflict of interest.

Under the ABA Rules, it is likely that Len breached his duty of competence. He did not act with the proper prudence in representing ABC, given the conflicts of interests that had existed.

CA RULES

Under the CA Rules, it is possible that Len did not violate his duty of competence. Len may have failed to act without prudence in accepting such a conflicted representation, but the facts do not suggest that Len had intentionally acted or even recklessly acted incompetently. Rather, he may have merely been negligent in taking on this representation, and this would not have been sufficient to support a finding of a breach of the duty of competence in California.

Conclusion

Len may have violated his duty of competence under the ABA model rules, but likely did not violate the CA rules.

DID LEN COMMIT ANY ETHICAL VIOLATIONS IN FILING THE COMPLAINT ON BEHALF OF ABC?

Duty to avoid filing frivolous lawsuits with the court

A lawyer has a duty to the courts and the judicial system to refrain from filing frivolous lawsuits with the court. A lawsuit is frivolous if the suit as filed was not warranted by the current law, or by a good-faith argument for a change in the law.

Here, Len personally thought that the statute is a good law. Yet, he still filed the lawsuit challenging the suit. Thus, it could be argued that Len breached his duty to the courts to avoid frivolous lawsuits, as he filed the suit without a good-faith belief that the suit was warranted by existing law or by a good-faith argument for a change in the law. However, it could also be argued that Len did not breach this duty because while Len may have personally believed the statute is good law, there is a possibility that other precedent and jurisprudence would have provided a good argument to strike it down.

It is likely that a court will find that Len did not breach this duty to the court. The facts indicate that Len **personally** thought that the statute was **a good law.** The statute was not necessarily founded on solid principles and immune from attack on other legal grounds. Thus, though Len personally disagreed with the filing of the complaint, there are insufficient facts to establish that it was frivolous to do so.

DID LEN COMMIT ANY ETHICAL VIOLATIONS FOR HIS FAILURE TO TAKE ACTION WITH RESPECT TO THE IMPENDING FILING OF THE FALSE REPORT?

Duty to protect the interests of the corporate client

When the lawyer represents a corporate client, the lawyer owes a duty to act in the corporate client's best interests. The duty to corporate clients provides that if the lawyer learns that the corporation, or one of its agents or employees, were to commit an act of wrongdoing or other act that would be harmful to the corporation's interests, or be imputed to the corporation to expose it to liability, the lawyer has a duty to report such

information to the highest authority in the corporation, such as the corporation's CEO or Head of Counsel. If such reporting is not possible, or would not be effective at preventing the harm, under the ABA model rules, the lawyer **may** report the information to an outside authority to avoid **harm** to the corporation. In California, however, although internal reporting is still required, reporting to an outside organization is **not permitted** except when necessary to comply with the requirements of the Sarbanes-Oxley Act.

Len **may** have breached his duty to the corporation under the ABA and California model rules. Here, Len found out that Pat had filed false reports with the State Environmental Protection Agency (EPA), and that Pat is planning to file another false report next month. Len was also aware that filing a false report makes a person **or his or her employer** liable for a **substantial civil fine.** Accordingly, Len was aware that one of the employees of his client (ABC), had taken actions, and was going to take actions, that could both be **imputed** to the corporation, AND would expose the corporation to liability. Therefore, Len was required to "run the information up the corporate flagpole."

The facts do not indicate whether Pat was the highest authority in ABC or not. Indeed, Pat was ABC's president. However, it is possible that there were other corporate officers (i.e., a CEO or something) or directors that were higher up on the "corporate flagpole" than Pat. If there were such individuals available, Len was required to inform them of Pat's actions to avoid having civil liability imputed to his client, ABC, and his client being subject to potential civil liability by having to pay a fine. Assuming that there were other individuals who were higher up than Pat on the corporate flagpole, Len may have violated his duty to protect the corporation's interests in failing to take any action with respect to the impending filing of the false report.

Note that under the ABA Model rules that if, however, Pat was the highest authority at ABC, Len was **permitted, but not required** to disclose the information regarding the false report to the State Environmental Agency. Len was not mandated to disclose, but only was permitted to do so. Accordingly, under these circumstances, because Len did

not have an affirmative duty to disclose, but only had the right and the privilege to disclose to an outside authority, Len did **not** breach his duty to protect the corporation's interests by failing to report the false reports to the State EPA.

Conclusion

Therefore, Len **may** have breached his duty to protect the interests of his corporate client under the ABA and California rules, depending on whether there were other individuals on the "corporate flagpole" that Len could have reported this information to in order to protect the corporation from having liability imputed onto it by an action of one of its employees.

Duty of confidentiality - was disclosure required or permitted in these circumstances?

Because Len was not required to disclose the information to the State EPA due to his duties to protect the interests of his corporate client, the only other means by which Len may be disciplined is if he was **required** to make such a disclosure and breach his duty of confidentiality.

A lawyer owes to his clients a duty of confidentiality. The duty of confidentiality requires that a lawyer may not disclose or reveal any information that the lawyer receives as part of the representation. The duty of confidentiality continues even after the representation has ended, and even after the death of the client.

Under the ABA model rules, the lawyer is **permitted** to reveal confidential information from the client in the following circumstances: (1) Where necessary to avoid serious bodily injury or death to others; (2) Where necessary to avoid or ameliorate financial injury to others that was a result of crime or fraud that was accomplished with the lawyer's services; (3) Where reasonably necessary to further the representation; and (4) Where reasonably necessary to comply with other ethics obligations, such as the disclosure of limited client information for conflicts checks. In California, however, the lawyer is only permitted to disclose confidential information to avoid physical injury or

death to others, **and** if reasonable, before disclosure, the lawyer must first: (1) reason with the client and attempt to persuade him not to follow through with his acts AND (2) tell the client of his intent to disclose.

Avoid serious bodily injury or death

Here, Pat had filed false reports with the State EPA regarding the disposal of **non-hazardous waste.** While ABC may have been improperly disposing waste, such waste was non-hazardous. Therefore, it is likely that the disclosure of this confidential information was not reasonably necessary to avoid serious bodily injury or harm, as the waste was not hazardous waste.

Moreover, even if the waste was hazardous, the lawyer's duty to disclose was **permissive, and not mandatory.** Accordingly, Len did not breach his duty of confidentiality under either the ABA or CA rules, as this exception was not applicable, and Len was **permitted, but not required** to provide such disclosure.

Avoid financial injury to others due to crime/fraud procured through use of lawyer's services

Here, Len's representation concerned challenging the low-income housing statute. However, Pat's statements to Len were completely unrelated to the scope of his representation and provision of legal services, as Pat's false reports were related to the disposal of non-hazardous waste, and false reports in connection with such disposal to the EPA.

Though the disposal of non-hazardous waste may have harmed other individuals' financial interests, as the non-hazardous waste may have caused damage to others' property, such harm was not procured using Pat's legal services. Moreover, as with the duty to disclose information to prevent physical injury or death, the duty to disclose to avoid financial injury is also **permissive,** rather than mandatory.

Therefore, even if this rule was applicable, Pat did not violate any duty in failing to report

or disclose this information, as his duty to disclose was **permissive,** not mandatory. Note, moreover, that California does not have this exception.

Conclusion

Len was not required to disclose the information regarding the filing of the false report in the present case. Although he may have been permitted to do so under two exceptions to the duty of confidentiality under the ABA Model Rules, Len was not required to do so.

Feb 2016

California Bar Examination

Essay Questions and

Selected Answers

The State Bar Of California
Committee of Bar Examiners/Office of Admissions

180 Howard Street • San Francisco, CA 94105-1639 • (415) 538-2300
845 S. Figueroa Street • Los Angeles, CA 90017-2515 • (213) 765-1500

ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2016

CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2016 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	Subject
1.	Trusts
2.	Torts
3.	Professional Responsibility
4.	Remedies
5.	Evidence
6.	Contracts

ESSAY EXAMINATION INSTRUCTIONS

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

Q1 Trusts

Wendy, a widow, owned a house in the city and a ranch in the country. She created a valid inter vivos trust, naming herself and her daughter, Dot, as co-trustees, and providing that she had the power to revoke or amend the trust at any time in writing, by a document signed by her and delivered to her and Dot as co-trustees. At Wendy's death, Dot was to become the sole trustee, and was directed to hold the assets in trust for the benefit of Wendy's sister, Sis, until Sis's death. At Sis's death, the trust was to terminate and all assets be distributed to Dot. The sole asset in the trust was Wendy's ranch.

Years later, Wendy prepared a valid will in which she stated, "I hereby revoke the trust I previously established, and leave my house and my ranch to my son, Sam, as trustee, to be held in trust for the benefit of my brother, Bob. Five years after my death the trust shall terminate, and all assets then remaining in the trust shall be distributed outright to Sam."

Wendy died. Following her death, both Dot and Sam were surprised to find her will.

Dot has refused to serve as trustee under the inter vivos trust, and claims that, as a result, the trust fails and that the ranch should immediately be given to her.

Sam has agreed to serve as trustee under the testamentary trust, and claims that the ranch is part of the trust. Sam then sells the house, at fair market price, to himself in his individual capacity, and invests all the assets of the trust into his new business, Sam's Solar. Bob objects to sale of the house and to Sam's investment.

1. What interests, if any, do Dot, Sam, and/or Bob have in the house and the ranch? Discuss.

2. What duties, if any, has Sam violated as trustee of the testamentary trust, and what remedies, if any, does Bob have against him? Discuss.

Answer A

1. What interests held?

Dot

Valid trust

A valid trust is created when a settlor has the intent to give property (res) to the beneficiary in a bifurcated transfer. The settlor gives the res to the trustee, who has legal title, to hold for the benefit of the beneficiary, who holds equitable title. The trust need not be in writing unless required to by the statute of frauds, for example transferring an interest in land. The beneficiary need be ascertained but the trustee does not have to be. The trust can be revocable or irrevocable and it is presumed irrevocable unless otherwise stated.

Here, Wendy created a trust which had an ascertained beneficiary, her sister, and named herself and her daughter, Dot, as trustees. The res is the ranch. She further explicitly stated in the trust that it is revocable. The facts further state that the trust is a valid inter vivos trust.

Revocation/Termination of trust

A trust can be revoked if the settlor is alive and has explicitly reserved the right to revoke the trust. Otherwise it can only be terminated if the material purposes of the trust have been fulfilled.

Here, Wendy explicitly reserved the right to revoke the trust. She further explicitly stated the way in which the trust must be revoked. She stated that the trust can be revoked or amended "at any time in writing, by a document signed by her and delivered to her and Dot as co-trustees." Wendy later executed a valid will explicitly revoking the

trust. This satisfies the writing requirement. It can be assumed that the will was "delivered" to Wendy because it was found at her death. However, the will was not delivered to Dot. Dot and Sam were both surprised to find the will at Wendy's death and it seems were surprised by its contents as well. It seems Wendy never gave Dot any other writing indicating the revocation of the trust or informed her verbally. Since Dot was not delivered a writing revoking the trust, and since that was one of the explicit conditions upon which the trust could be revoked, the trust was not properly revoked by the will. Therefore, the trust is still valid and still contains the ranch property.

Appointing a Trustee

A trust will fail if it does not have an ascertained beneficiary or if it does not have any property currently in it, except for a pour-over trust. However, the trust will not fail if a trustee has not been named or if a trustee either refuses to serve or needs to be removed by the beneficiaries or the Court. The Court will appoint a trustee, or the beneficiaries may vote on a trustee.

Here, Dot claims that she will refuse to serve as trustee and as a result the trust will fail. This is not the case. Instead, the court will appoint a trustee to hold the res for the benefit of Sis. Alternatively, Sis may argue that she should be allowed to vote for who will be appointed trustee and the court may allow that as an alternative. Either way the trust will not fail.

Remainder Interest

A remainder is a future interest that vests upon the termination of a life estate. It is vested if the beneficiary is ascertained and there are no conditions precedent.

Here, the trust states that the res is to be used for the benefit of Sis until her death. Upon the death of Sis all assets will be distributed to Dot. Dot is ascertained and there are no conditions precedent to her taking; she will take immediately upon the death of

Sis. Therefore, Dot has a vested remainder interest in the trust property. Dot will receive the trust property upon the death of Sis, but not before. Therefore, Dot does not have any present possessory interest in the trust property but does have a future interest as a remainder.

Sam

Valid Will

A formal valid will is created when there is a writing that is signed by the testator and indicates present testamentary intent (intended this document to be her will) and is witnessed by two witnesses who sign the document as well.

Here there are no facts as to whether or not witnesses signed but the facts do say that Wendy prepared a valid will, therefore it can be assumed. Further it was in writing and establishes present testamentary intent as it contemplates her death.

Pour-Over Trust

A trust can be created by the language of the will. Therefore, the property is held in trust upon the death of the testator instead of being distributed through probate.

Here, Wendy created a pour-over trust when, in her will, she wrote that she leaves her house and her ranch to her son Sam "as trustee, to be held for the benefit of my brother, Bob." The will further states that five years after her death the trust shall terminate and the remaining assets will be distributed to Sam.

Specific Devise/ Res of the pour-over trust

A specific devise is a devise of property that can be distinguished from the other assets of the estate.

Here, Wendy left her house to Sam as trustee to be held for the benefit of Bob. Although Wendy also indicated that she wished to leave her ranch as well, the will did not properly revoke the prior trust (see argument above), so the ranch is not included in the current pour-over trust.

Shifting Executory Interest

An executory interest is a future interest that will divest (cut off) a prior interest upon the happening of a stated event. A shifting executory interest is one that divests a prior grantee.

Here, Sam's interest will divest Bob's interest (a prior grantee) upon the happening of a stated event (five years after Wendy's death). Therefore, Sam has a valid future interest in the house.

Bob

Present possessory Interest subject to an executory interest

A present possessory interest is when a person has a current interest in property. It is subject to an executory interest if it can be divested by a third party.

Here, Bob has a present possessory interest in the trust property. He does not have legal title over it because that is held by the trustee, but he has the right to receive the benefits of the trust as the beneficiary. He has this right until five years after Wendy's death when it will be cut off by Sam's interest. Therefore, it is subject to an executory interest.

2. What duties violated and what remedies available?

Duty of Loyalty

A trustee as a fiduciary has the duty of loyalty to the trust. He has the duty to act in a reasonable manner to ensure the best interests of the trust beneficiaries. He can violate this duty by self-dealing with the trust or by taking an action that would be adverse to the trust beneficiaries.

Here, Sam has engaged in self-dealing of the trust property. He has sold the house to himself in his individual capacity. Although he sold it at fair market price, this is still a breach of the duty of loyalty. It is never considered reasonable for a trustee to engage in self-dealing, unless the trust specifically states that he can do so and it still must be fair to the beneficiaries. Here the power to engage in self-dealing was not explicitly given to him in the trust. He further engaged in self-dealing by investing the assets of the trust into his own business. By selling the house to himself and by investing the assets in his own business, Sam has breached the duty of loyalty.

Duty of Care

A trustee also has the duty to act as a reasonable person would in caring for the trust. He has the duty to use any special skills he may have and to treat the trust property as his own in his care for it.

Here the duty of care was broken because it is not reasonable for a trustee to sell assets of the trust to himself. It is further unreasonable to invest all the assets of the trust property in a single business.

Duty to Invest

At common law a trustee was limited to a specified list of investments that he was approved to make. Now trustees are expected to diversify investments in order to spread the risk of loss and the whole portfolio will be considered.

Here, Sam did not diversify the investments. He invested all the trust assets into a single business. This does not spread the risk of loss. If the business fails, the trust will lose all of its assets. Sam has breached this duty.

Duty of impartiality

The trustee has the duty to fairly balance the trust assets so that the current beneficiaries and remainder beneficiaries are treated fairly. The current beneficiary is entitled to the income and the future beneficiary is entitled to the principal. The trustee must make sure to balance the income and principal when making his investments so that one does not increase drastically while the other depreciates.

Here Sam has not been impartial. He has sold the trust property to himself and invested all of it in his own business. This may yield high income or it may not. Even if this will benefit Bob more than it will benefit him, he still had the duty to be impartial when making his investments so that neither the income nor the principal drastically decreases. He has breached this duty.

Duty to inform beneficiaries

The trustee also has the duty to keep beneficiaries reasonably informed about major decisions including the trust property.

Bob knows and objects to the sale of the house and the investment. It is unclear whether Sam told him about this before taking the actions. If he did not, he has breached his duty to keep the beneficiary informed.

Removal as trustee

A trustee who breaches his duties may be removed as a trustee. A trustee can also be removed for other reasons such as death or incapacity or if a serious conflict exists with the beneficiary.

Here, Sam has breached a number of his duties as discussed above. Therefore, Bob may seek to have him removed as a trustee and the court will likely approve it.

Monetary damages

A beneficiary is entitled to seek monetary damages from a trustee who has breached his duty. He can seek damages that the trust would have been entitled to absent the breach. He may be able to instead get unjust enrichment damages from the trustee.

Here, Bob can likely get either the profits that Sam received from the sale or of the house and the investment in the business or he can receive the full value of the house back.

Answer B

I. What Interests if any, do Dot, Sam, and/or Bob have in the house and the ranch?

First Inter Vivos Trust

An inter vivos trust is created during the life of the grantor. There are two types: private express trusts and charitable trusts. There must be some indication that the grantor intends to part with the property if the grantor is the sole beneficiary. Here, the facts indicate that Wendy created a valid inter vivos trust.

Private Express Trust

A private express trust is where the grantor creates a trust for the benefit of one or more ascertainable beneficiaries. It must comply with the valid trust requirements.
Here, Wendy created a trust during her lifetime. The beneficiaries are Sis and Dot. Thus, because Sis and Dot are ascertainable beneficiaries, this is a private express trust. It must comport with the trust requirements.

Valid Trust

A valid trust requires (i) a grantor, (ii) intent to create a trust, (iii) ascertainable beneficiaries, (iv) a trustee, (v) trust property, or res, and (vi) a valid trust purpose.

Grantor

The grantor is the person who creates the trust.

Here, Wendy is the person who created the trust and is thus the grantor.

Intent to Create a Trust

The grantor must intend to create the trust.

Here, the facts indicate that Wendy created a valid inter vivos trust.

Thus, there is intent to create a trust.

Ascertainable Beneficiaries

The trust must have ascertainable beneficiaries to whom the trust property can be transferred to.

Here, Sis and Dot are the beneficiaries.

Thus, there are ascertainable beneficiaries.

Trustee

A trust must have a trustee although a lack of one at creation does not create an invalid trust. Instead, the court will appoint a trustee.

Here, Wendy and Dot are co-trustees.

Thus, the trust has trustees.

Trust Property

A trust must have trust property. This can be tangible or intangible assets and can include land property.

Here, the trust property is Wendy's ranch.

Thus, the trust is properly funded.

Trust Purpose

A trust must be created for a valid trust purpose. Generally, any purpose is valid as long as it is not illegal.

Here, the trust is created for the benefit of Sis and Dot.

Thus, there is a valid trust purpose.

Revocation of Trust by Will

Generally, a trust is presumed to be irrevocable unless the grantor expressly reserves the right to modify or terminate the trust.

Here, Wendy expressly reserved her right to revoke or amend the trust at any time in writing, provided that the document be signed by her and delivered to her and Dot as trustees. Wendy did in fact attempt to revoke the trust when she prepared a valid will stating that she revokes the trust previously established.

Dot has two arguments that the trust has not been revoked. First, as a co-trustee, she will argue that there needed to be unanimous agreement between her and Wendy in order to revoke the trust. This argument would fail though because the grantor is the one who gets to reserve the right to revoke. This does not depend on whether or not the grantor is also a trustee. Thus, Wendy could have acted on her own.

Dot's second argument would be that Wendy did not follow the instructions for revoking the trust. The trust states that a signed document needed to be delivered to Wendy and Dot as co-trustees. However, Dot was surprised to find the will when Wendy died.

Thus, it is debatable whether or not the trust was properly revoked. If the court chooses to strictly read the instructions provided for in the original trust, then it might find that the trust was never revoked because Wendy failed to deliver the signed document to both Wendy and Dot. Therefore, the trust would still be valid and Dot would be entitled to the ranch once Sis died, as provided for in the trust.

Trustee Termination

As mentioned before, a trust does not terminate because there is no trustee. If a trustee has not been named, or a trustee does not wish to serve as trustee, then the court will designate a trustee.

Here, the facts indicate that Dot does not want to serve as trustee. Therefore, the court will appoint one instead.

Thus, Dot's argument that the trust fails and she should be given the ranch is incorrect. Instead, a trustee will be appointed to carry out the trust duties. The ranch will be held in trust for the benefit of Sis until her death. At that time, Dot will receive the ranch.

Testamentary Trust

A testamentary trust is one that is created in the grantor's will. It must comply with all wills requirements in the state where the will is executed.

Here, the facts indicate that Dot executed a valid will creating a new trust. As mentioned before, the trust must also comply with specific requirements.

Trust Requirements

A valid trust requires (i) a grantor, (ii) intent to create a trust, (iii) ascertainable beneficiaries, (iv) a valid trust purpose, (v) trust property, and (vi) a trustee.

Here, Wendy is the creator of the trust and she intended to do so as stated in her will. Bob is a valid ascertainable beneficiary. Keeping the trust for Bob and Sam's benefits are valid trust purposes. There is trust property, although as mentioned before the ranch is likely not going to be held in this trust because Wendy failed to properly revoke her earlier trust. However, even without the ranch, the house is still included in the trust property and satisfies the trust res requirement. Finally, there is a trustee - Sam.

Thus, Wendy has created a valid testamentary trust but it will only hold the house as trust property.

Disposition:

Ranch:

The ranch is still held in the first trust because the first trust was not validly revoked. A new trustee will be appointed and it will be held in trust for the benefit of Sis for her life. Upon Sis' death, Dot will receive the remaining assets of the ranch.

House:

The house should be held in trust for Bob and in five years, the house will go to Sam.

II. What Duties, if any, has Sam violated as trustee of the testamentary trust, and what remedies, if any, does Bob have against him?

Trustee Duties

A trustee is tasked with safeguarding the trust assets and holding them for the benefit of the beneficiaries. He must distribute the trust assets in accordance with the trust terms. He owes the beneficiaries duties of loyalty and care.

A trustee is tasked with safeguarding the trust assets and holding them for the benefit of the beneficiaries. He owes the beneficiaries a duty of loyalty and care. He must distribute the trust assets in accordance with the trust. Traditionally, there was an enumerated list of statutory duties a trustee owed to the trust. Today, the standard is more along the lines of acting as a reasonably prudent person would.

Duty of Loyalty

A trustee owes a duty of loyalty to the trust. This can be broken when the trustee puts his interests before the trust's. Specifically, this can be broken through self- dealing.

Self-Dealing

A trustee can breach the duty of loyalty through self-dealing. This occurs when the trustee interacts and benefits with the trust assets for his own benefit. Self-dealing is a per se breach of the duty of loyalty. Once self-dealing has been proven, there are no further questions asked. It does not matter that the self-dealing was beneficial for the trust or at the fair market price. Furthermore, even if the trust allows for self-dealing, it must be reasonable.

House:

Here, Sam is the trustee of Wendy's second trust. He has sold the house to himself at fair market value. This is per se self-dealing. As mentioned before, it is not a defense that Sam sold the house at a fair market value.

Trust Assets:

In addition to selling himself the house, he also invested all assets of the trust into his new business. This is another instance of per se self-dealing.

Thus, Sam breached his duty of loyalty.

Duty of Care

A trustee must act as a reasonably prudent person would. He must reasonably believe in good faith that his actions are for the benefit of the trust. A trustee has the normal powers to sell, buy, and invest trust property as a reasonably prudent person would. This includes duties of prudence and duties of impartiality.

Duty of Prudence

A trustee must act as a reasonably prudent person would under the circumstances. If the trustee has any special skills, then he is held to the standard of that skilled person. This duty extends to investments of the trust property.

Here, Sam sold the entire house - which constitutes the entire trust property, thus ending the trust. A reasonably prudent person would not do this especially since the reasonably prudent person is tasked with managing the trust property for the benefit of the life beneficiaries and the remaindermen. Sam might argue that the house was going to go to him in five years anyways, but this disregards the duties he owes to Bob during the current five years. Sam might also argue that he believed the ranch was in the trust and thus the trust would still properly be funded. This argument will also likely fail because Sam and Wendy both knew about the will and likely knew that the ranch was contested. If Sam truly believed that the ranch was part of his trust, he should have at least waited until that was concretely determined.

Thus, because Sam sold all of the trust property, and did not act as a reasonable prudent person, he breached his duty of prudence.

Duty of Impartiality

Traditionally, in a trust, the principal went to the remaindermen and the income went to the life beneficiaries. Modernly, the trustee is instead to balance the interests of the remaindermen and the principal equally instead of favoring one over the other.

Here, Sam sold the entire house; this is not only a breach of the duty of prudence, as mentioned before, but also a breach of duty to be impartial. As mentioned previously, nothing remains now for Bob. The interests of the life beneficiary have not been taken into account.

Thus, Sam has breached his duty of being impartial.

Remedies

Constructive Trust

A constructive trust can be imposed on the person holding the trust property if they improperly received the trust property, there is inadequate legal remedy, and the person currently holding the property would be unjustly enriched.

Here, as described above, Sam improperly holds the trust property because he received it by breaching his duty of loyalty and duty of prudence. Furthermore, because the property is a house, it is considered unique and thus there are inadequate legal remedies. Finally, Sam would be unjustly enriched because he would be allowed to keep the house and he is doing so for five years more than he should have.

Thus, the court can impose a constructive trust on the house for Bob's benefit.

Trustee Removal

When a trustee has breached his duties, the beneficiaries can seek to remove the trustee.

Here, as described above, Sam violated trustee duties - particularly that of the duty of prudence and the duty of loyalty.

Thus, the court should remove Sam as a trustee and should appoint a different trustee should the trust continue.

Tracing

Finally, when there is self-dealing and assets are invested, the beneficiaries can seek to retrieve the funds through tracing.

Here, Sam invested the trust assets in his new business.

Thus, Bob can seek to trace these funds and retrieve them for the benefit of the trust.

Q2 Torts

Jack believed that extraterrestrial aliens had come to earth, were living undercover as humans, and were planning a full-scale invasion in the future. Jack believed that his next-door neighbor, Nancy, was one of these aliens.

One day, Nancy called Jack on the phone to complain that Jack's children were playing in her yard. Jack yelled that his children could play wherever they wanted to. He also said that he was going to kill her.

The next day, Nancy approached Jack, who was playing in his yard with his children. She reminded him to keep his children out of her yard. Jack picked up a chainsaw and said, "When the invasion comes, I am going to use this baby to cut off your head!"

From the other side of the street, Ben saw Jack angrily raise the chainsaw at Nancy. Ben ran across the street and knocked Jack to the ground and injured him.

Later that week, Jack decided that he could wait no longer. He saw Nancy's car, which he believed to be an alien spaceship, parked on the street. He snuck over to her car and cut the brake lines, hoping Nancy would have a minor accident and be taught a lesson.

Unaware that her car had been tampered with, Nancy lent it to Paul. When the brakes failed to work, Paul drove off a mountain road and was severely injured.

1. What tort causes of action, if any, may Nancy bring against Jack, and how is each likely to fare? Discuss.

2. What tort causes of action, if any, may Jack bring against Ben, and how is each likely to fare? Discuss.

3. What tort causes of action, if any, may Paul bring against Jack, and how is each likely to fare? Discuss.

Answer A

Whether Jack can be held liable for Intentional Torts

As a preliminary matter, the overarching issue is whether Jack can be found guilty of intentional torts, where he believed that extraterrestrial aliens had come to earth, were living undercover as humans, and were planning a full-scale invasion in the future. Jack further believed that his next-door neighbor, Nancy, was one of these aliens. Jack will argue that, because of his delusions, he does not have the requisite intent necessary to be liable for an intentional tort. Nancy will argue that, so long as Jack intended his actions, it does not matter that the action was motivated by a delusion. A court is likely to find that Jack can be found liable for intentional torts, as he had both the intent to act and the intent to achieve certain results from those actions. The fact that the actions were motivated by an insane delusion will not be a valid defense to the intentional tort actions that may be brought by Nancy and Paul.

Nancy's Tort Causes of Action Against Jack

Assault

At issue is whether Jack assaulted Nancy when he threatened to kill her when they were talking on the phone, and/or when he raised the chainsaw up while they were talking in the yard.

Assault is the intentional creation of apprehension in another of immediate bodily harm. "Apprehension" means that the victim must be aware of the threat against her. Assault requires more than just threatening words alone - the words must be accompanied by an action. Conversely, words may negate immediacy by attaching a condition or time frame to a threat. Here, Nancy could argue that Jack assaulted her twice - once when he said that he was going to kill her when they were talking on the phone, and once when he threatened her with a chainsaw when they were on the lawn.

As to the phone conversation, Jack yelled that he was going to kill Nancy while they were talking on the phone. Nancy will likely not succeed on this claim of assault because the conversation took place over the phone, and, thus, was not accompanied with a threatening action (that Nancy could see, at any rate) that would cause Nancy to believe that she was in danger or immediate bodily harm. Because she and Jack were in separate houses during the phone call, Nancy would likely not be able to demonstrate that she was in apprehension of *immediate* bodily harm. Thus, this cause of action for assault would fail.

Nancy's cause of action for assault relating to the chainsaw incident is stronger, although it is still likely to fail. After Nancy approached Jack outdoors, reminding him to keep his children off her lawn, Jack raised a chainsaw and said "When the invasion comes, I am going to use this baby to cut off your head!" Raising the chainsaw definitely qualifies as an action that would accompany the threatening words to create an apprehension of immediate bodily harm in Nancy. Additionally, the threat of cutting off Nancy's head would cause apprehension. Jack will argue, however, that his words negated the immediacy required for an assault cause of action, because he stated that he would cut off Nancy's head "when the invasion comes." These words attached a future time condition to the threat, thereby negating the immediacy. Nancy could argue, on the other hand, that since the "invasion" was a delusion by Jack, the time frame could be immediate, not future, as it is possible that, in Jack's mind, the invasion was going to happen right away. If Nancy's point of view prevailed, Jack would be liable for assault. However, since Jack was not screaming that the invasion had arrived, but rather was speaking of the invasion as if it were a future event, a court will likely find that his words negated immediacy, and despite the threatening action he is not liable for assault.

Intentional Infliction of Emotional Distress

The next issue is whether Jack's threats to kill Nancy, and to cut her head off with the chainsaw made to her face, make him liable for intentional infliction of emotional distress, even where she does not appear to have suffered any distress.

Nancy could raise a claim of intentional infliction of emotional distress, which requires for a defendant to commit outrageous conduct that causes severe distress in a plaintiff. Here, Jack's conduct was certainly outrageous, that is, it was outside the bounds of decency as upheld in society. By threatening to kill Nancy and threatening to cut off her head with a chainsaw, Jack clearly made outrageous statements that exceed the bounds of decency. However, there is no indication from the facts that Nancy was emotionally distressed as a result of Jack's statements. Although IIED does not require a showing of physical distress symptoms, there must be at least some allegation that the plaintiff suffered from severe distress. Absent that allegation, as here, there is not sufficient grounds for an IIED cause of action.

Battery

The next issue is whether Jack's tampering with Nancy's car results in a battery against Nancy.

Battery is the intentional infliction of bodily harm caused by harmful or offensive touching to another's person. Here, Jack intended to cause Nancy bodily harm - he was hoping that she would "have a minor accident" to be "taught a lesson." This indicates that, even if he only wished minor harm upon Nancy, Jack intended to cause Nancy bodily harm. Less clear is whether Jack's tampering with Nancy's car resulted in a "harmful or offensive touching to her person." A "person" may be construed liberally to include objects connected to a plaintiff's body, such as her purse. Nancy's car, however, when it was parked on the street, was not connected to her body and it is unlikely that a court would construe the car to be an extension of Nancy's person.

Nancy would argue, however, that battery need not be immediate, and that by cutting the brake lines Jack intended future harm to Nancy's person. Nancy would argue that Jack's actions were akin to poisoning someone - which is a battery even though the harm to a plaintiff's body does not occur until the future. Nancy would likely be successful on this argument if she had actually been injured by Jack's actions. Since

Paul was injured instead, the doctrine of transferred intent may apply (see below), but Nancy did not actually suffer a harm or offense to her person, and, ultimately, she will not be successful in her battery cause of action.

Trespass to Land

Trespass to land occurs when the Defendant unlawfully enters the land of the Plaintiff. Here, Jack cut the brake lines on Nancy's car while it was on the street, and there is nothing to indicate that he trespassed onto her land. Thus, Nancy does not have a claim for trespass to land.

Trespass to Chattel and Conversion

Trespass to chattel and conversion are property torts that occur when the Defendant damages or steals the property of a plaintiff. The difference between trespass to chattel and conversion is one of degree - trespass to chattel occurs where property is harmed but not completely destroyed, and conversion occurs when the property is destroyed or stolen. Here, Jack could be liable for both torts. He intentionally cut Nancy's car's brake lines, and, in so doing, could be liable for trespass to chattel, which means he would owe Nancy the cost of repair for the break lines. Subsequently, however, when Paul drove the car, he drove off a mountain road. These facts indicate that the car was destroyed. If that is the case, Jack could be liable for conversion, which means he would owe Nancy the market value of the car at the time the conversion occurred.

Jack's Tort Claims Against Ben

At issue is whether Jack may bring a claim of battery against Ben, where Ben knocked Jack to the ground and injured him after Ben saw Jack "angrily raise the chainsaw at Nancy." As discussed above, battery occurs when a defendant commits harmful or offensive touching to another's person. Here, Ben did harmfully touch Jack -

he "knocked Jack to the ground" and injured Jack, thereby meeting the requirements for a prima facie case of battery.

The next issue becomes whether Ben may raise any defenses against the battery cause of action. Ben may raise the defense of "defense of others" to protect him from liability for any battery committed against Jack. A person may use reasonable force in defense of another when that person believes that the other is in danger of immediate bodily harm. The force used must be proportionate to the threat. Here, it appears that Ben knocked Jack over in order to protect Nancy, whom he reasonably believed was in danger of being attacked by Jack with his chainsaw. Ben used reasonable, non-deadly force to defend Nancy (even though it could be argued that Jack's chainsaw was a deadly weapon). Ben did not escalate the force, but rather responded proportionately. Thus, Ben is likely to be found not liable for battery, because his defense of protection of others would be valid.

It should be noted that, even if Ben was mistaken about his need to defend Nancy, because Jack did not actually intend to harm Nancy until "the invasion comes", this mistake will not negate Ben's defense. Mistaken self-defense (or defense of others) is still a valid defense to an intentional tort so long as the mistake was reasonable. Here, it was reasonable for Ben - who was standing across the street and likely could not hear what Jack was saying - to believe that Nancy was in danger when Jack raised his chainsaw in an "angry" manner.

Paul's Tort Claims Against Jack

At issue is whether Paul may bring a battery cause of action against Jack, where Jack tampered with Nancy's car, which Paul then borrowed. Specifically, the issue is whether, because of the doctrine of transfer of intent, Jack's intention to harm Nancy could be transferred to Paul. Under the doctrine of transferred intent, the intent to commit an intentional tort, such as battery, against one plaintiff may be transferred to another plaintiff if the harm actually befalls the second plaintiff. As noted above, it is

unlikely that a court will find that Jack committed battery against Nancy, because Nancy was not actually harmed or touched by Jack's actions. Paul, however, was "severely injured" as a result of Jack's attempt to commit a battery against Nancy. As a result, Paul may sue Jack under a theory of transferred intent, and Paul will likely be successful.

Answer B

1. Nancy's Tort Claims Against Jack

A. Assault for Threat over Telephone

Nancy may bring an assault claim against Jack for the threat to kill her that he made over the phone, but this claim will not succeed.

To establish a prima facie case of assault, the plaintiff must show: (i) an act by the defendant that brings about a reasonable apprehension in the plaintiff of an immediate harmful or offensive contact to the plaintiff's person; (ii) intent by the defendant to cause such apprehension; and (iii) causation.

The facts show that while speaking over the phone, Jack told Nancy that he was going to kill her. A threat to kill someone is generally enough to create a reasonable apprehension in that person that they will suffer a harmful contact.

For the element of intent under most intentional torts, the defendant need not actually intend the specific result, but rather just be substantially certain that such result is likely to arise as a result of the act (general intent). Jack's intent to cause such apprehension can be shown by the fact that he can be substantially certain a threat to kill someone would cause them to fear a harmful contact. And causation may be shown because Jack's threat was what caused the apprehension of an immediate harmful contact.

However, Nancy's claim for assault will fail because the intentional tort of assault requires that the apprehension, or fear, be of an immediate harm. A threat of future harm is not sufficient for the tort of assault. Moreover, the reasonable apprehension may not be created by words alone--there must be some threatening act in addition to the words.

Here, Nancy was speaking to Jack over the phone, and thus was not in his presence when he made the threat. Therefore, her apprehension could not have been of an immediate harm, because he was not present to execute on his threat. He would have had to run next door to make good on his threat to kill her (at which point the threat would have been immediate, but not until then).

B. Assault with Chainsaw

Nancy may also bring an assault claim for Jack's threat with the chainsaw. Here, Jack's conduct amounted to more than a mere threat, as he was brandishing a chainsaw. The combination of telling Nancy he would cut off Nancy's head while lifting a chainsaw is certainly enough to cause a reasonable person to fear that she will suffer a harmful contact--here, in the form of a chainsaw to the head.

Nancy will argue that the immediacy requirement is fulfilled because Jack is standing right next to Nancy, and thus can cause the harm at that moment. However, Nancy is likely to lose on this claim as well, because the existence of conditional words will neutralize the immediacy of the threat. Jack told Nancy he will cut her head off "when the invasion comes." Nancy probably has no idea what he is talking about and when that invasion will supposedly arrive, but from Jack's words it seems clear that the invasion will come in the future. Since he is threatening to cut off her head in the future, there is no reasonable apprehension of an immediate contact to Nancy's person, and thus no assault.

C. Intentional Infliction of Emotional Distress (IIED)

Nancy can bring IIED claims for both Jack's threat over the phone and the threat while picking up the chainsaw, so long as she is able to show that she suffered severe emotional distress as a result of such threats.

To establish a prima facie case of IIED, the plaintiff must show: (i) an act by the defendant amounting to extreme and outrageous conduct; (ii) intent by the defendant to cause the plaintiff severe emotional distress; (iii) causation; and (iv) the plaintiff suffered damages in the form of severe emotional distress.

Both the threat over the phone call and the threat in the yard amount to extreme and outrageous conduct, because both involve threats to kill Nancy. A threat to kill someone is definitely extreme and outrageous, and would shock the sensibilities of an ordinary, reasonable person.

The intent element for IIED requires that the defendant intend to cause severe emotional distress, or recklessness as to such a result. Here, the required consent will be found via recklessness--Jack's threat to kill Nancy is a complete disregard of a substantial risk that such a threat will cause his neighbor to fear for her life and safety, and thus suffer severe emotional distress.

Nancy's only potential pitfall on this claim is that there is nothing in the facts that show she suffered severe emotional distress. Such distress does not need to take the form of a physical manifestation, but she does need to show substantial distress (e.g. severe anxiety or fear for her life). Assuming she is able to show such distress, Nancy will prevail on an IIED claim against Jack.

D. Conversion/Trespass to Chattels

Nancy can also bring a claim for conversion for Jack's act of cutting the brakes on her car.

To establish a prima facie case of conversion, the plaintiff must show: (i) an act by the defendant that interferes with the plaintiff's right of possession in a chattel; (ii) intent by the defendant to so interfere; and (iii) causation.

The claim of trespass to chattels has the identical elements, the difference between the torts being in degree of the interference. Conversion requires that the interference with the plaintiff's possession interest be so substantial in quality or nature that it justifies forcing the defendant to pay the full fair market value of the chattel, whereas a more minor interference constitutes trespass to chattel (and Jack would need to pay only the amount of damage caused by the interference).

Here, Jack cut the brakes on Nancy's car, which led the next person driving the car to crash it and presumably damage it further. Thus causation is shown, and the facts show Jack intentionally cut the brakes. Because of the severe damage to her car, Nancy will be able to recover under conversion for its full value.

E. Trespass to Land

Finally, Nancy may bring an action against Jack for trespass since his kids were on her property. However, this action is unlikely to succeed, since a parent is not vicariously liable for the actions of his children. Nancy would need to bring this action against the children themselves.

2. Jack's Tort Claims Against Ben

A. Battery for Tackle

To establish a prima facie case of battery, the plaintiff must show: (i) an act by the defendant bringing about a harmful or offensive contact to the plaintiff's person; (ii) intent by the defendant to bring about such contact; and (iii) causation.

Here, Ben tackled Jack to the ground and injured him, which shows a harmful contact and causation. From the facts, it appears that Ben intended such a contact because he ran across the street and knocked Jack to the ground to protect Nancy.

Jack will have a strong argument against the battery via defense of others. Defense of others is a defense that will prevent Jack from succeeding on this claim. One has the right to defend another if the defendant reasonably believes that that person would be entitled to defend themselves. Here, Ben saw Jack raise the chainsaw and may have even heard him threaten to cut off her head. A reasonable person would believe that Nancy was in danger, and thus Ben acted reasonably by defending her. He used non-deadly force in confronting Jack's potentially deadly force, and thus the type of force he used was appropriate.

Thus Ben will not be liable for battery.

B. Trespass to Land

Jack may also bring a claim for trespass to land against Ben for running onto his property. To show this tort, the plaintiff must show that the defendant interfered with his possession of land; intent; and causation. By intentionally running onto his property, Jack will claim Ben committed this tort.

However, Ben will argue that he was justified in running on his property as a result of a public necessity. A public necessity creates an absolute privilege to enter the land of another. Here, the necessity was Nancy's potential decapitation. Thus Ben will not be liable for this tort.

3. Paul's Tort Actions Against Jack

A. Battery

Paul should bring an action against Jack for battery (see elements above). Paul will show that by cutting the brakes on the car, Jack was substantially certain that a harmful contact would arise in the person of the driver.

Transferred Intent

While Jack may argue that he only intended to harm Nancy, rather than Paul, the doctrine of transferred intent will provide the intent needed to find Jack liable for the tort of battery against Paul.

Under this doctrine, when a person intends to commit an intentional tort against another, but instead: a different tort results against that same person; the same tort arises against a different person; or a different tort arises against a different person; the tortfeasor's initial intent to commit the first tort will provide the requisite intent for the second tort. Transferred intent is available for the intentional tort of battery.

Here, Jack intended to cause a harmful contact to Nancy. The fact that Paul was the first to drive the car, rather than Nancy, will not relieve Jack of liability. Jack's intent to harm Paul will be found via the doctrine of transferred intent, and Jack will be liable for battery.

Defense of Insanity

Jack may argue he did not have the intent necessary to commit the tort because of his insanity, given his belief that the car was an alien spaceship. However, insanity is not a defense to an intentional tort unless the mental defect is such that the tortfeasor does not understand the nature of his act. Here, Jack was aware that he was cutting the brakes with intent to harm Nancy, and thus insanity will not be a valid defense.

Q3 Professional Responsibility

Contractor and Lawyer had been in a consensual sexual relationship for months. Contractor could not afford to hire an experienced lawyer to defend him against Plaintiff's complex construction defect case and to bring a cross-complaint. Contractor told Lawyer, who had never handled such matters, that he wouldn't sue her for malpractice if she would defend him for half her regular rate. Lawyer felt pressured because of their relationship.

Lawyer told Contractor she would defend him for half-price, but she would only bring his cross-complaint on contingency at her regular rate of 30 percent of any recovery. Contractor agreed. Although they continued to have sexual relations, their personal relationship deteriorated. Lawyer forgot to make a scheduled court appearance in the case.

At trial Plaintiff lost, and Contractor won $100,000 on his cross-complaint. Lawyer deposited the $100,000 in her Client Trust Account. She told Contractor she would send him $70,000. Contractor said Lawyer must send an additional $15,000 because she agreed to represent him for half-price on everything, including the contingency fee.

1. Did Lawyer commit any ethical violation by agreeing to represent Contractor? Discuss.

2. Did Lawyer commit any ethical violation by failing to make the court appearance? Discuss.

3. What should Lawyer do with the money in the Client Trust Account? Discuss.

Answer according to California and ABA authorities.

Answer A

1. L committed several ethical violations when she agreed to represent C:

The ABA Model Rules of Professional Conduct ("ABA Rules") and the California Rules of Professional Conduct ("CA Rules") both contain provisions relating to sexual relationships with clients. The ABA Rules prohibit sexual relationships with clients, unless there was a preexisting sexual relationship. The CA Rules also allow for a preexisting sexual relationship, but also allow for new sexual relationships so long as sex is not a condition for professional representation, the client is not unduly influenced or coerced into sex, and the lawyer's performance is not negatively affected by the sexual relationship. Here, Contractor ("C") and Lawyer ("L") had already been in a consensual sexual relationship for months prior to L agreeing to represent C. Therefore, this would not be an ethical violation under the ABA Rules by itself because the sexual relationship was already existing at the time L agreed to represent C. The relationship may be considered a violation under the CA Rules, because while it was a preexisting relationship, L's performance and representation of C deteriorated such that she forgot to make a court appearance in the case.

L may have also violated the duty of loyalty. When there is a significant risk that the interests of another client, the lawyer, or a third person could materially limit the representation of the client, there is a conflict of interest. Here, the lawyer's own personal interest in attempting to appease her lover could be seen as materially limiting her competent representation of C, as it would be difficult to separate their personal relationship from the professional one. Further, L felt pressured to take on the case, and it is arguably likely that her professional obligations could be also subject to pressure from C.

L also agreed to represent C despite not having any experience in complex construction defect cases. Under the ABA Rules, a lawyer has a duty of competence, which is to possess the necessary skill, knowledge, preparation and thoroughness reasonably

necessary to represent the client. If the lawyer does not have the requisite competence, the lawyer must either learn the law without undue delay or expense, or associate with a lawyer who is well-versed in the law (subject to client approval in bringing on this new lawyer). Since L was not experienced in complex construction defect cases, and does not appear to have taken any action to educate herself in this field of practice or associate with a lawyer who is experienced in these matters, she breached her duty of competence. Further, she failed to appear at a scheduled court hearing, which is also a violation of her duty of competence that may subject her to disciplinary action. Under the CA Rules, a lawyer has breached her duty of competence if the lawyer intentionally, recklessly or repeatedly fails to provide competent representation would they be subject to discipline. Here, L may be found to have been in violation of the CA Rules as well since she intentionally or at least recklessly took on the matter while knowing she was not qualified to do so (and only took it on because she felt pressured). The failure to appear at court because she forgot may not rise to a violation of the CA Rules; however, since it does not appear to be intentional, reckless or repeated - it is probably negligent at the most.

L also agreed to represent C if he wouldn't sue her for malpractice if she would defend him for half her regular rate. Under the ABA Rules, a lawyer may not limit a client's right to seek disciplinary action or to participate in an investigation. The ABA Rules allow for the client and lawyer to limit malpractice liability, so long as the client is represented by independent counsel. The CA Rules, however, expressly forbid any limitation of malpractice liability. Therefore, L is in breach of the ABA Rules because C was not represented by an independent attorney when L's malpractice liability was limited, and is in breach of the CA Rules because they do not allow for any limitation on malpractice liability.

Further, L agreed to represent C for a contingency fee for the cross-complaint, but it does not appear the fee agreement was in writing. A contingency fee agreement under the ABA Rules must be in writing, state the percentage of fees that the lawyer would receive, what expenses would be deducted from recovery, and whether the lawyer's

percentage would be deducted before or after expenses were deducted. Under the CA Rules, the fee agreement must also state how other costs will be paid, as well as that the fees are negotiable. Here, it does not appear that L and C entered into a fee agreement, but rather orally agreed on the contingency.

Note that the agreement to represent C for half price under the ABA Rules did not have to be in writing, but under the CA Rules likely should have been. The CA Rules require written agreements for non-contingency fees unless the fees will be under $1,000, is for a corporate client, is for routine matters, the client agrees otherwise in a separate writing, or there is an emergency or other good reason. Here, it is likely even with L's fees being half price for defending C, the fees will be over $1,000; the matter is not for a corporate client but is instead for C individually; the case is not a routine matter that L normally handles for C; C has not agreed otherwise in a separate writing; and there is no emergency or other good reason. Therefore, L would be in violation of the CA Rules because her agreement to defend C for half her normal price was not in writing.

2. L committed several ethical violations when she failed to make the court appearance:

As stated above, L owed C a duty of competence. She breached this duty under the ABA Rules by agreeing to take on his matter without experience, and also by failing to appear at court. She likely breached this duty under the CA Rules by intentionally agreeing to take on a matter in which she was not experienced, but would probably not be in breach under the CA Rules for failing to appear, as this did not appear to be intentional, reckless or repeated conduct on her part.

L also breached her duty of care. A lawyer must act in good faith and as a reasonably prudent person with the same care, skills and caution as would be expended on her own matters. L breached this duty by failing to appear at court, as a reasonably prudent person would not have forgotten to make a scheduled court appearance.

L also breached her duty of diligence to C. A lawyer has a duty to pursue cases to completion, and to diligently represent clients in their matters. Part of this duty under the ABA Rules is the duty to act promptly and expedite a client's case if it is in the client's best interest. Under the CA Rules, the lawyer may not unduly delay for improper purposes or for her own convenience. She breached the duty of diligence because she failed to appear. If she caused a delay in the proceedings due to the rescheduling of the court appearance, she again breached this duty.

3. L should send C the undisputed amount from the Client Trust Account, and is entitled to keep the disputed amount in the Client Trust Account until the dispute is settled.

A lawyer has the duty to notify the client and distribute client funds promptly when funds have been received on the client's behalf, and to distribute funds to third parties (if the client knows and has consented to having third parties being paid out of the client trust account). Here, it appears L has properly maintained a separate client trust account for C. When L deposited the $100,000 in the Client Trust Account, she also appeared to have promptly told C that the funds had arrived. However, C disputed the amount L was to send - L said she would send $70,000, which reflects the $100,000 minus her 30% contingency fee, but C said the contingency fee should also have been half price, so only 15%. Therefore, C claims L should send him $85,000. When there is a dispute as to the fees owed, the lawyer must send the undisputed portion to the client, and is entitled to keep the disputed portion in the client trust account until the dispute has been resolved. As a result, L should send C $70,000, which they have both agreed to, and can transfer $15,000 to her own account as part of her fees. The disputed $15,000 must remain in the client trust account until the dispute has been resolved.

As a side note, the ABA Rules encourage arbitration to resolve fee disputes, while the CA Rules mandate arbitration if the client demands it.

Answer B

1.

Consensual Sexual Relationship

Under the ABA Model Rules (ABA), it is permissible for an attorney to represent a client with whom she has a pre-existing relationship, as long as the sexual relationship will not compromise the attorney's competence or duty of loyalty to the client. However, the ABA, lawyers may not enter into sexual relationships with clients that begin after they take on the clients. In California, attorneys may carry on sexual relationships that pre-existed the lawyer-client relationship, as well as being sexual relationships during the pendency of the representation, as long as competence and loyalty are not compromised. In addition, under CA rules, an attorney cannot condition acceptance of a client on agreement to have sex with the attorney. Here, the contractor and the lawyer had a preexisting sexual relationship, so their relationship did not automatically violate ABA or CA rules. However, the sexual relationship may have violated both ABA and CA rules because it conflicted with the duties of competence and loyalty (see below).

Duty of Competence

An attorney has a duty to competently represent her client which means using the knowledge, skill, thoroughness and preparation reasonably necessary for the representation. However, an attorney is permitted to take a case which she might not otherwise be competent to take if she can acquire through study the skills/knowledge necessary to represent the client and/or work with another attorney who specializes in that area.

Here, the attorney had never handled a complex construction defect case before. Thus, it appears she was not competent at the outset to do so. We have nothing in the facts

to indicate that the attorney studied day and night to become reasonably competent to represent her client in this matter. And she did not partner with another attorney with expertise in construction defect cases.

Therefore, she violated her duty of competency when she agreed to represent contractor.

In addition, it appears that lawyer's pre-existing sexual relationship with client encouraged her to take a case for which she was not competent ("Lawyer felt pressured because of their relationship" may refer to taking the case as well as the fee she accepted.) Therefore, the lawyer also violated the duty not to let sexual relationships with clients interfere with your work, in violation of both ABA and CA rules.

Agreement not to sue for malpractice

Under ABA rules, a client can only contract away her right to sue an attorney for malpractice if the she is represented by outside counsel and agrees in writing. CA rules prohibit attorneys from contracting out of malpractice liability under any circumstances.

Here, Lawyer violated both ABA and CA rules. There is nothing on the facts to indicate that client was represented by outside counsel when he agreed not to sue for malpractice, or that the agreement was in writing. Thus, the ABA rules were violated. Because it is an agreement to limit malpractice liability the attorney violated CA law when she agreed to take on the case on this basis.

Duty of Loyalty

The duty of loyalty is always potentially implicated when a client and a lawyer have a sexual relationship. The duty of loyalty requires an attorney to avoid conflicts of interest. A conflict of interest exists when the interests of another client, a third party or the attorney herself are adverse to materially conflict with those of the client. Here,

there is a potential conflict of interest between the lawyer's personal interest (her relationship with the client) and the representation. Under the ABA, when a conflict exists, an attorney can only represent a client if she reasonably believes she can do so competently, she discloses the conflict to the client, and gets the client's consent in writing. In CA, the belief need not be reasonable but only sincerely held, and personal conflicts only require written disclosure, not written, consent. Here, the attorney should have disclosed the nature of the potential conflict and gotten written consent at the outset (ABA). If she reasonably believed she could represent the client she could have done so with written consent, but here her belief would not be reasonable because she already felt pressured at the outset. Therefore, she violated ABA rules by taking on the case. Under CA rules, she would have had to provide only written disclosure (there is no indication of this on the facts) and the fact that her belief she could competently represent him would not matter. However, mere failure to provide written disclosure means that she already violated the CA duty of loyalty when she took the representation.

Fee agreement

Under the ABA, fee agreements must be reasonable. They don't have to be in writing, unless they are contingency agreements, in which case they must state the percentage of the attorney's fee, what expenses will be deducted, whether expenses will be deducted before the attorney’s fee, and must be signed by the client. Under CA rules, all agreements over $1000, not with corporate clients, regular clients, or under exigent circumstances must be in writing. In addition to the ABA contingency fee requirements, CA contingency fees must include in writing that attorney fees are negotiable and state how non-covered services will be paid. In addition, the entire fee must not be unconscionable.

Here, attorney agreed to defend client at half her regular price, but his cross-complaint on a 30% contingency basis. Under ABA rules, the first part of the agreement did not need to be in writing but the second part did. There is no indication of a writing;

therefore the contingency agreement violated ABA rules. In addition, the agreement was probably per se unreasonable because it was the result of duress or undue influence exerted by the client.

Under CA rules, the whole agreement would have to be in writing unless they regularly worked together as lawyer-client or the first part was under $1000. Definitely the second contingency part had to be in writing, as it was not here, and lacked everything required in CA. In addition, despite the fact that 30% seems reasonable, it may be considered unconscionable because it was agreed to under duress and undue influence.

2. Failure to make court appearance

When the attorney failed to make the court appearance, she violated her duty of loyalty and competence to the client, and duty to pursue the case diligently. She didn't come to court due to what appears to be the deterioration of the sexual relationship. This means that she violated the duty not to let sexual relationships interfere with the representation, as well as the duty not to let her personal interests conflict with those of her client. In addition, she failed to pursue her case diligently in violation of her duty to her client and to the judicial system.

3. When there is a dispute over fees, the lawyer must retain the disputed portion in the client trust account pending resolution of the dispute. Here, the lawyer can send the 70k to the client, but must retain the additional 15k in the client trust account until the dispute is resolved.

Q4 Remedies

Pop obtained a liability insurance policy from Insurco, covering his daughter Sally and any other driver of either of his cars, a Turbo and a Voka. The policy limit was $100,000.

On the application for the policy, Pop stated that his cars were driven in Hometown, a rural community, which resulted in a lower rate than if they were driven in a city. However, Sally kept and also drove the Voka in Industry City while attending college there.

Subsequently, Pop asked Insurco to increase his coverage to $500,000; Insurco agreed if he paid a premium increase of $150; and he did so. Days later, as he was leaving for Sally's graduation, Pop received an amended policy. He failed to notice that the coverage had been increased to $250,000, not $500,000.

Unfortunately, while driving the Turbo in Industry City, Pop caused a multi-vehicle collision. At first, Insurco stated it would pay claims, but only up to $250,000. Six months later, Insurco informed Pop that it would not pay any claim at all, because of his statement on the application for the policy that both the Turbo and the Voka were located in Hometown.

Insurco filed a complaint against Pop for rescission of the policy. Pop filed a cross-complaint to reform the policy to increase coverage to $500,000.

1. What is the likelihood of success of Insurco's complaint, and what defenses can Pop reasonably raise? Discuss.

2. What is the likelihood of success of Pop's cross-complaint, and what defenses can Insurco reasonably raise? Discuss.

Answer A

(1) Likelihood of Success of Insurco's Complaint for Rescission

Rescission Generally

Rescission is an equitable remedy, under which a court will invalidate a contract in its entirety, such that the parties to the contract are completely excused from continued performance under the contract. Generally, rescission is available when one party has a valid defense to the formation of the contract. Moreover, typically only the wronged party can seek rescission.

Because rescission is an equitable remedy, a court has broad discretion in deciding whether it should be awarded. The court will consider the equities of the situation, taking into account the fairness of rescission to both parties. In addition, as an equitable remedy, rescission is subject to equitable defenses, such as acquiescence, estoppel, laches, and unclean hands.

Here, Insurco seeks rescission of the insurance policy so that it will not be required to reimburse Pop for his liability.

Insurco's Likely Grounds for Rescission

Fraud/Misrepresentation

Insurco's primary grounds for rescission will likely be on the basis of fraud. A contract may be invalid on the basis of fraud where: (1) a party made a false statement of past or present fact; (2) the statement was either fraudulent or was material to the contract; and (3) the other party relied on that statement of fact in entering into the contract.

Insurco can likely make out a claim of fraud under the facts of this case. Here, in applying for the liability insurance, Pop made a misstatement of fact--i.e., that his cars were driven solely in Hometown, a rural community. This was a false statement because one of his cars was driven by his daughter, Sally, in Industry City. Moreover, Pop was driving the other car in Industry City when he was involved in the collision.

Second, this statement may be deemed fraudulent, as it can probably be shown that Pop was aware of the falsity of the statement. It is very likely that Pop knew that the car was not being used solely in Hometown, as his daughter, Sally, used the car while she was attending college in Industry. Moreover, pop certainly knew that he was driving the Turbo in Industry City when he was involved in the accident.

Even if Insurco cannot establish that the statement was fraudulent, the elements of fraud are still likely established because it is clear that this statement was material to the contract. The location of the use of the cars appears to be a key factor in determining the insurance rates, and indeed, the facts make clear that Pop received a lower rate given this false statement of fact.

For this same reason, Insurco can establish that it relied on Pop's false statement in entering into the contract. As made clear in the facts, Insurco would not have entered into the contract at that lower rate, had it been aware that the car was used in Industry City.

Notably, this original contract is not the one Pop is intending to enforce. Rather, he is attempting to enforce the amended contract, in which Pop sought to increase his coverage. Because Pop paid consideration for this increase in coverage ($150), this modification of the contract is valid under the common law. In any event, this amended contract is subject to the same claim of rescission as the original contract, as there is no indication that Pop corrected his false statement when requesting the amended contract. Thus, Insurco's same arguments for establishing fraud discussed above apply equally with respect to the amended contract.

Accordingly, Insurco has a strong case for seeking rescission on the basis of fraud or misrepresentation.

Mistake

Insurco also may seek to rescind the contract on the basis of mistake. Under the doctrine of mutual mistake, a contract may be invalidated where both parties are mistaken about a material fact, that is, a fact that was a basic assumption of the contract. Under the doctrine of unilateral mistake, a contract may be invalidated where one party is mistaken about a material fact underlying the contract, and the other party knows or has reason to know about that mistake.

Here, to the extent Pop was unaware that Sally was using the car in Industry City, and somehow unaware that he was driving the car in Industry City when he entered into the accident, both he and Insurco were mistaken about this fact. Thus, the doctrine of mutual mistake of fact may be found to apply.

Moreover, to the extent Pop was aware of Sally's use of the car, or his use of the car in Industry City, he clearly also knew that Insurco would be mistaken as to this fact, given his false statement in applying for the insurance. Accordingly, under that scenario, the doctrine of unilateral mistake may apply. Note that unilateral mistake can serve as grounds for rescission of the contract only where the unmistaken party had actual knowledge of the other party's mistake.

However, because this situation involves a false statement of fact, this issue is more properly analyzed under the doctrine of fraud, for the reasons discussed above.

<u>Pop's Likely Defenses</u>

As noted above, a court will consider any equitable defenses before choosing to order rescission of a contract.

Laches

Pop will first rely on the equitable doctrine of laches. That defense applies where a claimant unreasonably delays in bringing suit, and where that suit prejudices the plaintiff.

Here, Pop will argue that Insurco's delay in bringing suit for rescission of the contract--six months after the accident, and even longer after Pop entered into the contract with Insurco--was unreasonable. The facts here are unclear as to the reasonableness of this delay, as it is not clear when Insurco became aware of Pop's misstatement. Given the fact that Pop's accident occurred in Industry City, however, there is a strong argument to be made that Insurco should have been aware of the use of Pop's cars in Industry City at the time Pop made his claim for reimbursement. Thus, Pop may be able to show the delay was unreasonable.

That said, there is no evidence that the Pop was prejudiced by the delay. Pop clearly will be prejudiced by not receiving payment for his liability, but there is no indication that the delay itself in seeking rescission caused Pop any harm. Thus, the defense of laches is likely unavailable.

Acquiescence

Pop may also rely on the equitable doctrine of acquiescence, which serves as a defense where the plaintiff has previously acquiesced to similar conduct on the part of the defendant for which the plaintiff is now seeking relief.

Here, Pop will argue that this defense is appropriate because Insurco has not previously objected to coverage on the basis of Pop's misstatement in applying for coverage, and that Insurco stated that it would pay his claims. However, Insurco will respond that it had no reason to be aware of Pop's misstatement until Pop sought reimbursement under the policy, and that this is the first time Pop has sought such reimbursement.

Insurco likely has the better argument here, given that it has never previously paid Pop under the policy in spite of the misrepresentation.

Unclean Hands

Unclean hands is an equitable defense available where the plaintiff has engaged in some wrongful or inequitable conduct with respect to the same underlying transaction for which the plaintiff is seeking relief.

Here, Pop may attempt to point to Insurco's previous statement that it would pay out on Pop's claim, and then its reversal of course. However, a court is unlikely to deem this inequitable or wrongful conduct, especially if Insurco was not aware of Pop's initial misstatement when it first agreed to pay Pop's claims.

Estoppel

Estoppel is an equitable defense available where a defendant reasonably, foreseeably, and detrimentally relied on a plaintiff's statement that the plaintiff's conduct is permissible, and where it is equitable to enforce that promise.

Pop will attempt to argue that Insurco is estopped from refusing to pay out on the claim, given its previous statement to Pop that it would reimburse him for his claim. However, there are no facts indicating that Pop relied on this promise to his detriment. Rather, the only harm Pop appears to have suffered is the fact that Insurco refuses to pay out on his claim. The facts do not indicate that Pop changed his position in any way in reasonable reliance on Insurco's promise itself.

Thus, this defense is unlikely to succeed.

(2) Likelihood of Success of Pop's Cross-Complaint for Reformation

Reformation Generally

Like rescission, reformation is also an equitable remedy. However, under the doctrine of reformation, a court will not invalidate the contract in its entirety, but rather will rewrite the contract to conform it to the parties' original intent. Moreover, like rescission, reformation is typically only available to the wronged party.

Again, because reformation is an equitable remedy, a court has broad discretion in deciding whether it should be awarded, taking account all of the equities. Reformation too is subject to equitable defenses, such as acquiescence, estoppel, laches, and unclean hands.

Pop's Likely Grounds for Reformation

Mistake

Pop will likely seek rescission on the doctrine of mutual mistake. As discussed above, that doctrine applies where both parties are mistaken about a material fact--i.e., a fact that was a basic assumption of the contract.

Here, the elements of that doctrine appear to apply. It seems that both parties intended that the amended contract increase the coverage limit to $500,000, as opposed to $250,000. In reducing the contract to writing, it appears that a clerical error was made, and that the contract was mistakenly written to state that the limit is $250,000. This appears to have been a mutual mistake, as the facts indicate that both parties initially intended that the limit be $500,000. Moreover, the mistake clearly regards a basic assumption of the contract, as a liability limit is one of the key elements of an insurance contract.

The doctrine does not apply where the party seeking to reform the contract assumed the risk of the mistake. That exception does not apply here, however, as it was Insurco, not Pop, who drafted the contract.

Accordingly, Pop has likely made out a prima facie case for mistake, and a court will likely reform the contract to make it consistent with the parties' intent that the liability limit be $500,000.

Insurco's Likely Defenses

Parol Evidence

Insurco may first rely on the parol evidence rule, which generally holds that where a contract is integrated (intended by the parties to be a final agreement), a party may not admit evidence of a prior agreement that is inconsistent with the contract's terms.

However, there is an exception to the parol evidence rule where a party seeks to provide evidence of mistake or clerical errors in reducing the contract to writing. This exception will apply here.

Unclean Hands

As noted above, the equitable defense of unclean hands applies where the plaintiff has engaged in some wrongful or inequitable conduct with respect to the same underlying transaction for which the plaintiff is seeking relief.

Here, Insurco has strong arguments for application of this defense, given that it can likely show that Pop fraudulently induced the contract. For the reasons discussed above, this claim will likely succeed. Accordingly, Pop's wrongful conduct in inducing the contract will likely serve as a defense to any claim for reformation.

Acquiescence and Laches

Insurco may also assert the defense of acquiescence and laches, the elements of which are discussed above.

With respect to both of these defenses, Insurco will argue Pop did not seek to reform the contract until many months after the amended policy went into effect, thus prejudicing Insurco. Insurco will focus on the fact that Pop had the policy in his possession at this time, and easily could have become aware of the mistake and sought reformation at an earlier time.

However, this argument is unlikely to be successful. A court will likely note that Insurco had a greater ability to have found the mistake, given that it was the party that reduced the contract to writing. Moreover, there do not appear to be facts indicating that Insurco was prejudiced by Pop's delay in seeking rescission.

Answer B

1. INSURCO'S COMPLAINT

APPLICABLE LAW

The contract at issue is an insurance contract. UCC Article 2 governs sale of goods. All other contracts are governed by the common law. Accordingly, the common law would control.

RESCISSION

The issue in Insurco's complaint is whether it is entitled to rescission of the contract. The remedy of rescission allows the party asserting rescission to avoid its obligations under the contract. Rescission is allowed if there is a valid basis for rescission and there are no valid defenses. The remedy of rescission is meant to cure a problem that occurred during contract formation. Typical bases for rescission include: mutual mistake; unilateral mistake; fraudulent misrepresentation; misrepresentation of a material fact (even if not fraudulent); and ambiguous terms in the contract that neither party understood. The applicable bases for rescission in this case will be discussed in turn below.

A. Misrepresentation

Misrepresentation occurs when one party: (i) states a fact to the other party; (ii) the fact turns out to be false; (iii) the other party relied on the false statement when agreeing to enter the contract; and (iv) the party making the false statement either did so fraudulently, or the statement involved a material part of the contract (i.e., even if the statement was not made fraudulently, if it involved a material fact, that is still enough to make out a claim of misrepresentation).

Here, Insurco will argue that Pop made either a fraudulent or material misrepresentation in his application for insurance. In the application, Pop stated that his cars were driven in Hometown, which is a rural community that presumably has less traffic and less risk of accident than an urban center. In reality, however, one of the cars to be insured, the Voka, was also driven in Industry City by daughter while attending college. This made a difference to Insurco, as evidenced by its later refusal to pay once it realized that the application had only listed Hometown as the location of the cars, when in actuality the Voka was located much of the time in Industry City. The issue, however, is whether that discrepancy in the application was either fraudulently represented or material to the contract.

Fraud

There is no indication in the facts regarding whether Pop acted in good faith when he listed Hometown as the location of both cars. It is possible that Pop thought because the Turbo was always located in Hometown, and the Voka was only located in Industry City when college was in session, that he only needed to list Hometown. Pop would argue that Hometown was really the Voka's homebase, and that the car was only temporarily in Industry City for periods of time when college was in session.

Insurco would argue that Pop fraudulently listed only Hometown. Insurco would argue that anyone who drives a car knows that insurance rates go up in urban centers and will be lower in rural areas.

Based on the limited facts, Pop will likely prevail on the issue of fraud. Pop may still be on the hook for misrepresentation, however, if the fact at issue was material.

Materiality

A material fact is one that both parties needed to agree on for the contract to be valid--it is a term that cuts to the heart of what the contract is about. Here, the fact of where

both cars were located most likely would be considered a material term. It would be considered a material term because the price of car insurance is affected greatly by where a car is driven. In urban centers the rates may be considerably higher than in rural areas. Accordingly, the fact of where the cars were located likely would be considered material.

Pop may argue it was an innocent mistake that he did not include Industry City in his application. Nonetheless, this is not a defense to mutual misrepresentation of a material fact. It does not matter whether the person who made the statement intended to defraud, it only matters whether they made an untrue statement of material fact.

Pop would further argue that he did not make an untrue statement. His statement that the cars were driven in Hometown was true, although incomplete. Although a party to a contract does not have a duty to disclose facts he is not asked about, he is not allowed to conceal facts or fail to disclose facts he is asked about. Here, Pop was asked in the application where the cars were located. By failing to answer the question completely, it is more likely a court would consider this a misrepresentation or concealment as opposed to a mere failure to disclose. Accordingly, Insurco can likely establish that the location of the cars was material.

Other Elements

In addition, Insurco can likely establish that Pop made a statement that turned out to be false regarding the location of the cars and that Insurco relied on that information when entering into the contract. As discussed above, Pop's intent is not what is at issue, it is only whether his answer turned out to be false. Here, the answer did turn out to be false because the Voka was also driven in Industry City.

Finally, Insurco also relied on the fact when it entered the contract. Insurco's rates were tied to the location of the cars. The fact that Insurco later refused to pay out the claim

based on the location of the cars is evidence that it relied on the fact when entering into the contract.

Based on the above, Insurco can likely make out a claim of misrepresentation of a material fact. Thus, Insurco would be entitled to rescission unless Pop raises a valid defense.

B. Mutual Mistake

Mutual mistake occurs when both parties to a contract made a mistake regarding a material term of the contract on which the contract was based. For a party to successfully assert mutual mistake, that party must not have assumed the risk of the mistake occurring. A classic example of mutual mistake was the case involving the sale of a cow that both parties believed was barren, but that later turned out to be able to have children. In that case the two parties made a contract for the sale of a barren cow. The fact that the cow was barren was a mistake that involved a material issue that the contract was based on. In that case, if the seller could have easily had the cow examined to find out whether it was actually barren, then the seller assumed the risk and would not be able to assert mutual mistake.

Here, Insurco would argue that even if it cannot establish the misrepresentation discussed above, it can establish mutual mistake. The mutual mistake would be the fact of where the cars were driven. It was a mistake from Pop's end because he mistakenly forgot to include the fact that the Voka was driven in Industry City. It was a mistake from Insurco's end because it mistakenly thought the cars were driven only in Hometown even though the Voka was also driven in Industry City.

This argument is weaker than the misrepresentation argument. Here, Insurco's mistake was not really based on the terms in the offer or acceptance, but instead was based on Pop failing to disclose information. Mutual mistake usually applies in situations where a fact in the offer or acceptance turns out to be different than both parties thought. Here,

Pop knew the Voka was driven in Industry City, and Insurco did not know because Pop failed to disclose that information. Accordingly, mutual mistake is not as strong an argument for Insurco as misrepresentation.

C. Unilateral Mistake

Unilateral mistake can serve as a basis for rescission when one party made a mistake in the contract formation that the other party knew or should have known about. The typical example arises when many subcontractors are bidding for a construction contract and one subcontractor's bid is so low that the general contractor should know that the subcontractor made an error in its bid. In such a situation, the subcontractor who made the error can rescind the contract based on unilateral mistake because the general contractor knew or should have known of the mistake. In unilateral mistake, the negligence of the party that made the mistake is not a defense to rescission of the contract.

Here, Insurco would argue that it made a unilateral mistake in issuing the insurance policy under rates applicable only to Hometown. Further, Pop knew or should have known of the error. It appears Pop reviewed the initial policy because he requested an increase in coverage. Accordingly, Pop should have known that there was a mistake in the initial policy based on Insurco's misunderstanding of where the cars were located.

Unilateral mistake is a difficult claim to make out, and Insurco would likely not succeed in this argument. The doctrine would be more applicable if Insurco made a mistake in information it provided to Pop. Here, the real issue is information Pop provided to Insurco. Accordingly, misrepresentation is a stronger basis for Insurco's argument.

D. Ambiguity

If a term in contract formation is ambiguous, such that it is open to multiple interpretations, then one of the parties to the contract can later avoid the contract based

on that ambiguity. The classic example of ambiguity is the case of the Peerless, where one party thought the shipment referred to the November Peerless, and the other party thought the shipment referred to the December Peerless. In that case, because the term Peerless was open to multiple meanings, it was considered ambiguous, and the party was able to avoid the contract as a result. However, if one party knows that the ambiguous term could refer to multiple interpretations, then that party is charged with knowledge and the unknowing party can enforce the contract based on what it believed the ambiguous term to mean.

Here, Insurco would argue that the term regarding where the cars were driven was ambiguous. The term was ambiguous because Pop understood the term to refer only to where the cars were located much of the time, whereas Insurco believed the term to refer to where the cars were located all of the time. Under such an argument, Insurco would claim that because Pop had reason to know that the Voka was driven in Industry City as well, Pop was the party with knowledge, and the contract should be construed against Pop to Insurco's benefit.

This argument is also a difficult one. Usually ambiguous terms refer to the word itself. Here, the word "Hometown" was not ambiguous. What was ambiguous was the question on the application of where the cars were located. If Insurco can establish that the question was ambiguous to the point it led to miscommunication, then it may be able to succeed in its argument. Still, the stronger claim for Insurco is misrepresentation.

E. Defenses

Rescission is an equitable remedy, so equitable defenses apply. The defenses of unclean hands and laches are the most common. Unclean hands refers to the plaintiff taking inequitable actions regarding the contract itself. Laches refers to an unreasonable delay in bringing a claim that prejudices the defendant.

Laches

Here, Pop would argue that the claim for rescission is barred by laches. After the accident, Insurco agreed to pay out the $250,000. Only six months later, did Insurco inform Pop it would not pay the claim at all. Pop would argue the six month delay was unreasonable. After the accident occurred, Insurco had all the information it needed to make its decision about paying the claim. If Insurco intended not to pay out the claim, it should have made that clear right away after the accident. By waiting six months, Pop and Sally were prejudiced by the delay. They likely incurred many costs associated with the accident, and were depending on the insurance payout to be able to cover those costs.

Insurco would counter that it was unable to ascertain the fact that the Voka was located in Industry City until doing in-depth investigation. The facts do not state how Insurco ultimately learned the Voka had been located in Industry City. If it is true that that information was difficult to find out, then Insurco has a good argument for the delay. If, however, it was easily ascertainable that the car was located in Industry City, Insurco's argument is weaker.

Because rescission is an extreme remedy here given the damage in the accident and also given that the most Insurco is willing to pay out is only $250,000 and not $500,000, the court would likely not find rescission to be the appropriate remedy.

2. POP'S CROSS-COMPLAINT

Pop's cross-complaint asserts a claim to reform the contract to allow for the full $500,000 in coverage. For reformation to be available, there must be a valid contract, grounds for reformation, and no valid defense. Reformation is typically ordered in situations where both parties agreed to certain terms of the contract, and those terms did not end up in the finalized contract due to an error such as a scrivener’s error.

Here, Pop will argue that he and Insurco made a valid contract modification to increase the coverage of the insurance policy from $100,000 to $500,000. For a contract modification to be valid, there must be consideration for the modification. Here, there was $150 in consideration paid, and as a result, both Pop and Insurco agreed that the coverage would be increased to $500,000. Here, Pop paid the additional $150, and at that point the agreement was complete and the modification should have been for coverage of $500,000.

Pop will further argue that even though there was a valid modification, the increase was only to $250,000. Pop will claim this must have been due to a scrivener's error or some other error, because the agreement he had made with Insurco before receiving the amended policy was clear.

Based on the facts, Pop has a strong argument for reformation of the contract because it appears that the clear intent of the parties was to modify the contract for $500,000 coverage, and Pop complied with his end of the bargain by paying the $150.

Defenses

Lack of Initial Contract

Insurco can argue that reformation is not permitted because there was never a valid contract in the first place. For reformation to be a possible remedy, there first must have been a valid contract. Insurco would assert the same arguments discussed above regarding contract formation (i.e., mistake, misrepresentation, ambiguity) to argue there never was a valid contract in the first place, and therefore reformation is not allowed.

Parol Evidence

Insurco would also argue that the oral agreement between Pop and Insurco regarding the increase in coverage is inadmissible under the parol evidence rule. Under the parol

evidence rule, if there is a final, fully integrated contract, then any communications regarding the contract terms that contradict or supplement the contract either before or contemporaneous with the contract being finalized are inadmissible.

Here, Insurco would argue that the amended policy was a final integration of the contract, and that any evidence of what happened leading up to the amendment is inadmissible parol evidence.

Pop would counter that because the agreement served as the basis for the contract itself, it would not be considered parol evidence, but rather was the basis for the entire modification. Based on the facts, however, it appears the amended policy was a final integrated contract. Accordingly, Pop's arguments would likely fail.

Unclean Hands

Finally, Insurco could assert a defense of unclean hands. Insurco would argue that Pop intentionally misled Insurco into believing the two cars were located solely in Hometown, when in reality the Voka was located in Industry City. Insurco would make similar arguments as discussed above in its claim for rescission. Ultimately Pop would probably prevail on this argument, because there is no evidence he acted in bad faith.

Conclusion

The court would probably not grant Pop's claim for reformation of the contract because of the parol evidence rule. However, they could probably also not grant Insurco's claim for rescission. Acting in equity, the court would most likely find that the contract for $250,000 of coverage controlled.

Q5 Evidence

Mike, Sue, Pam, David, and Ed worked at Ace Manufacturing Company. Mike had been the president and Sue supervised Pam, David, and Ed.

Pam was fired. A week later, David circulated the following email to all the other employees:

> I just thought you should know that Pam was fired because she is a thief. Sue caught her stealing money from the petty cash drawer after Pam's affair with Mike ended.

A month later, Mike died.

Pam sued David for defamation.

At trial, Pam testified that, although it is true she was fired, the remaining contents of the email were false. Pam called Ed, who testified that he had received the email at work, that he had printed it, and that he had received hundreds of other unrelated emails from David. Pam introduced a copy of the email through Ed.

In defense, David called Sue, who testified that she had caught Pam stealing $300 from the petty cash drawer, and that, when Sue confronted Pam and accused her of taking the money, Pam simply walked away. David himself testified that the contents of the email were true. He also testified that he had overheard Pam and Mike yelling at each other in Mike's office a few weeks before Pam left; that he recognized both of their voices; and that he heard Pam cry, "Please don't leave me!," and Mike, in a measured tone, reply, "Our affair is over — you need to get on with your life."

Assume all appropriate objections were timely made.

Should the court have admitted:

1. The email? Discuss.

2. Sue's testimony? Discuss.

3. David's testimony about

    a. what Pam said to Mike? Discuss.

    b. what Mike said to Pam? Discuss.

Answer according to the California Evidence Code.

Answer A

Because this is a civil case, Proposition 8 does not apply.

1. The email

The issue is whether the court properly admitted the email.

Relevance

The first question is whether the email was relevant. Under the California Evidence Code (CEC), evidence is relevant if it tends to make an issue of consequence (a material fact) more or less probable. In other words, evidence must be material and probative (although the level of probativity is very low--it must only affect probability to a slight degree). Under the California rule, the issue must be actually disputed (this is different than the Federal Rules). Relevance is in general a low bar.

Here, the email is relevant. First, it is relevant to the issue of whether the allegedly defamatory statements were made at all. It is also relevant to the question of publication. Defamation requires publication (dissemination) of a statement to a third party. Here, the existence of the email is relevant (although the printing of the email was not necessary for publication). There may be some argument that the issue of the statement and the publication are not disputed, but this would probably not succeed, especially given that under the secondary evidence rule, the email itself should be admitted rather than mere testimony as to its contents.

The next issue is whether the relevance is substantially outweighed by the likelihood of unfair prejudice. It is important to note that any prejudice must be unfair--any evidence counter to a party's case will be prejudicial. The prejudice must actually be unfair--the type that would unduly influence a finder of fact. Here, it is highly unlikely that the email would be found to be unfairly prejudicial.

Authentication/Foundation

The next question is whether the email was properly authenticated/whether a proper foundation for introduction of the email was made. Here, the email has likely been properly authenticated. Ed testified that he has personal knowledge of the email--he received it. Moreover, his testimony that he had received hundreds of other emails from David supports a finding that the email did in fact come from David. It should be noted that the evidence need not be proven to be conclusively authentic. Rather, a jury must be able to conclude that the email is authentic.

Hearsay

Next, there could be an argument from David that the email is inadmissible hearsay. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Here, the email is an out-of-court statement made by David. However, it is not being offered for the truth of the matter asserted. The email is not being introduced to prove its contents (Pam is in fact arguing the email was false). The email is of independent legal significance--the fact that the statement was made is relevant to the cause of action. Moreover, even if the email were hearsay, it would be admissible under the exception for statements of a party-opponent (California does not make party-opponent statements exempted from hearsay; they merely fall under an exception).

Therefore, the email was properly admitted.

2. Sue's testimony

Relevance

The first issue is whether the testimony is relevant, under the standard recited above. Here, Sue's testimony is relevant to the issue of whether the contents of the email were truthful, which is an issue disputed in the case. Her testimony makes it more probable

that the email is true (as compared to the likelihood without her testimony). And there does not appear to be any unfair prejudice that would substantially outweigh the relevance.

Foundation

The next issue is whether Sue has personal knowledge and the proper foundation has been laid. Here, Sue is testifying based on her own personal knowledge that she saw Pam stealing. Therefore, the proper foundation exists.

Character Evidence

Pam may object to the evidence being introduced as character evidence. Normally, character evidence is not admissible in civil cases. An exception applies when character is at issue. Here, Pam's character is at issue. Her argument is that the email was false. Therefore, whether Pam embezzled or not is directly at issue, and evidence on embezzlement is relevant and admissible. Therefore, Sue's testimony that she had seen Pam stealing money from the cash drawer is not inadmissible as character evidence.

Hearsay

Pam may also argue that the testimony about her walking away is inadmissible hearsay. As discussed above, hearsay is an out-of-court statement offered to prove the truth of the matter above. "Statements" can include assertive conduct, such as nodding or hand gestures. Here, Pam would argue that her walking away was an assertive act and therefore a statement. It is questionable as to whether her act in walking away is a statement. But even if it is, here the statement is admissible under the hearsay exception for party-opponent statements. Pam is a party to the lawsuit and she is David's opponent (David is offering the testimony).

Pam could further try to attack Sue's testimony that she "accused [Pam] of taking the money" as inadmissible hearsay. It is unclear exactly how Sue's testimony was phrased. However, even if the testimony did constitute an out-of-court statement, David has several arguments for admitting the testimony. First, he could argue that Pam adopted the statement and that therefore it falls under the party-opponent statement. A statement is adopted where a person could reasonably be expected to respond to a statement but does not. Here, David would argue that Pam could reasonably be expected to deny the accusation and that her silence and walking away adopts Sue's statement. However, this is not a typical situation where the adopted statement theory would apply, since it is unlikely that Pam would adopt a statement that she had stolen the money. There could also be an argument that the statement is not hearsay at all because it is not being offered to prove the content of Sue's statement. For example, it could be argued that the statement is being offered to show its effect on Pam (although this argument does not seem particularly strong). It could also be argued that the statement goes to a fact of independent significance, since it shows the fact that Sue caught Pam stealing money (as asserted in the email).

It seems most likely that this testimony was not recounting an out-of-court statement at all, and was merely discussing Sue's action. But the other arguments above may also allow admission, even if it is testimony of an out-of-court statement.

David could also argue that, if it were determined that Pam had adopted Sue's statement, it was a prior inconsistent statement (Pam testified that the email was false), and that therefore the statement was admissible under the CEC for both impeachment and to show the truth of the matter asserted. However, as discussed above, the argument that Pam adopted the statements seems likely to succeed.

Overall, the court was likely correct in admitting the testimony.

3. David's testimony

The next issue relates to David's testimony.

a. Pam's statements to Mike

Relevance

As to Pam's statements to Mike, the first issue is relevance. This testimony is relevant because it again goes to whether the contents of the email were true. With the testimony, it is more likely than without the testimony that the email's contents about David's and Pam's relationship is true. Pam could argue that her statement by itself does not establish that there was any relationship--it was ambiguous. But, the evidence need not be sufficient to establish the ultimate fact at issue. Instead, it merely needs to make the likelihood that there was an affair (a disputed issue) more probable than it would be without the evidence. The testimony here clears that low bar. And again, there does not seem to be any unfair prejudice that would substantially outweigh the relevance.

Foundation

The second question is foundation. David testified that he recognized Pam's voice. Without more, that assertion may not be enough to show foundation and personal knowledge. But if David were to testify, for example, that he had long worked with Pam and had previously heard her voice, the foundation would likely be sufficient.

Hearsay

Pam may attempt to argue that this testimony is inadmissible hearsay. The statement is likely hearsay--it was an out-of-court statement. And it is being offered to show that Pam made that statement to Mike (because they were having an affair). But this

statement falls into the party-opponent exception for hearsay. Even if it did not, it may also fall under the excited utterance exception since Pam's emotions seem to have been aroused the time of her statement. A witness need not be unavailable for that exception to apply.

Moreover, David could argue that this statement is admissible as a prior inconsistent statement. Pam testified that the email was false. David could argue that this statement was a previous inconsistent statement, which under the California Evidence Code would be admissible for both impeachment purposes and to show the truth of the matter asserted.

b. Mike's statements to Pam

The next issue is whether the court previously admitted David's testimony about what Mike said to Pam.

Relevance

The first question is relevance. As discussed above, the question of whether there was an affair is at issue in the case because Pam is arguing falsity of the email. David's testimony about Mike's statements makes it more likely that the email was true than without his testimony. Again, the testimony need not conclusively establish truth. Rather, it must only make it more likely than it would be without the evidence. Mike's statement is even more clearly relevant than Pam's statement, since it explicitly references an affair.

Foundation

The next issue is whether David testified with the appropriate foundation and personal knowledge. As mentioned above, Pam may argue that David lacked the foundation to testify based on only hearing the voices rather than actually seeing the argument.

Without any testimony as to how David knew that Mike was speaking, the proper foundation is probably lacking. But if David were able to testify that he had previously heard Mike's voice, there would be a proper foundation. Moreover, the fact that the conversation was overheard from Mike's office would support the identification of Mike. Again, it need not be conclusively proven that it was Mike's voice. It just needs to be enough to support a verdict.

Opinion Evidence

Pam could potentially argue that David offered improper opinion evidence when he said that Mike replied in "a measured tone." Lay opinion testimony is admissible if it is 1) based on the witness's perception, 2) helpful, and 3) did not require any specialized knowledge. Here, David has a strong argument that his statement that Mike responded in a measured tone is helpful to provide context to the jury and to show the affair (if David were mad, for example, it could be argued that his statements were false or made in the heat of passion). This testimony as to the tone of voice is probably admissible.

Hearsay

The crux of whether the statement is admitted is likely whether it is inadmissible hearsay. Here, there was an out-of-court statement made by Mike. And it is likely being offered for the truth of the matter asserted--that there was an affair (see below for an argument that it is not hearsay). Therefore, the question is whether it falls under the California exceptions.

California has a hearsay exception for dying declarations in all civil and criminal cases. But Mike's statement does not satisfy that exception. True, Mike is dead, as is required by the California exception. But Mike did not make the statement as his death was impending and it does not relate to the cause of his death.

This also is not an excited utterance--Mike replied in a measured tone. This is not a statement of past or present physical or mental condition (although Mike would satisfy the unavailability requirement). And this is not a statement where Mike is describing his current actions.

David may have a good argument that this is a statement against interest. Under the federal rules, a statement is against interest if it is against penal or pecuniary interest. California also applies the exception where the statement is against social interest. The witness must be unavailable. Here, Mike satisfies the unavailability requirement (he is dead). And this statement could be found to be against social interest. Mike's statement that he was having an affair could be seen as exposing him to adverse social judgments. This would be David's best exception for a hearsay exception to apply.

David could also attempt to argue that this was not hearsay at all because, while it is an out-of-court statement, it is not being offered to prove the truth of the matter asserted. Rather, David could attempt to show that it was being introduced to show its effect on him, the listener. This argument may not be successful because it would be questionable whether such evidence would be relevant. In a defamation case, truth is a defense. But it is not clear that David's state of mind is relevant. If Sue and/or Mike were public figures or if the matter were one of public interest, then David's state of mind would be relevant, since fault would need to be shown. But if fault need not be shown, then the statement may not be admissible for its effect on him. If the statement were admitted for such a purpose, a limiting instruction would likely be given.

David could also attempt to argue against inadmissibility by arguing that this statement is being used for impeachment purposes, since Pam testified. However, the out-of-court statement of another person is generally not admissible to impeach.

Overall, the best argument is that this was not hearsay or, even better, was a statement against interest. It seems that the testimony was very likely properly admitted.

Answer B

California Evidence Code & Truth in Evidence (Prop 8)

The California Evidence Code (CEC) governs the admission of evidence in California state courts. A constitutional amendment called the Truth in Evidence Amendment (Prop 8) was passed in the 1980s. Prop 8 applies only in criminal cases. It provides that all relevant evidence in California is admissible notwithstanding CEC rules to the contrary. Prop 8 has a number of exclusions, however: (1) hearsay rules; (2) the confrontation clause; (3) CEC 352 (balancing test); (4) privileges; (5) character evidence; (6) the secondary evidence rule.

Because this is a civil lawsuit and not a criminal lawsuit, Prop 8 does not apply.

1. The Email

- *Logical relevance*

In order for evidence to be admissible, it must be logically relevant. That means that it must have the tendency to make any fact of consequence to the dispute more or less probable than without the evidence. Under the CEC, the fact must also be in dispute. Here, the email is logically relevant because it constitutes the basis of the lawsuit and is actually in dispute.

- *Legal relevance*

In order for evidence to be admissible, it must also be legally relevant, as tested under CEC 352. In order to be legally relevant, the probative value of the evidence must not be substantially outweighed by undue prejudice, waste of time, or confusion. In addition, there must not be any policy exclusions that might apply to prevent introduction of the evidence (such as prior offers to settle, etc.). Here, the email is

legally relevant because its probative value--whether it supports a case for defamation--is not outweighed by undue prejudice, waste of time, or confusion.

- *Authentication*

In order for relevant tangible evidence to be admissible, it must also be authenticated. The standard for testing this is whether it is sufficient to sustain a finding of authenticity. A number of different kinds of authentication evidence are permissible:
(1) personal knowledge; (2) circumstantial evidence; (3) expert testimony; (4) admission, etc. Here, Ed introduced the email. He testified that he had received the email at work and printed it, and that he had received hundreds of other unrelated emails from David. While it would be preferable to have David authenticate the mail he wrote, this authentication is likely sufficient to sustain a finding of authenticity.

- *Secondary Evidence Rule*

When the contents of a writing are at the heart of the matter, the secondary evidence rule requires that either an original or duplicate of the document be introduced into evidence (or testimony where the original is unavailable). In California, a duplicate can be: (1) photocopy; (2) carbon copy; or (3) handwritten copy (not true in FRE). Here, the contents of the email are relevant to defamation cause of action. This printing of the email is essentially a photocopy and would satisfy the secondary evidence rule.

- *Independent Legal Significance*

Pam might argue that the email is not hearsay because it has independent legal significance. Indeed, because this is a defamation action and the email is the defamatory statement, this is likely to be successful.

- *Layered Hearsay*

Hearsay is an out-of-court statement offered for the truth of the matter asserted. It is generally inadmissible unless it falls within an exception. (The FRE has both exemptions and exceptions, but the CEC only has exceptions.) Here, if the email were not admitted as having independent legal significance, the email is layered hearsay so both the email itself and the statement contained therein must fall admissible under an exception.

- *Email: Business Record*

A business record is: (1) a recording of an event or condition; (2) made by someone with personal knowledge; (3) made at or near the time the event; (4) kept in the ordinary course of business. Here, the email would not qualify as a business record because David was under no business duty to send this email.

- *Statements in Email: Admission by Party Opponent*

A statement being offered against a party is an admission by a party opponent. The statement need not have been against the party's interest at the time it was made to qualify. Here, David's statement is being offered against him, and thus it would be admissible as an admission by a party opponent.

- *Conclusion*

The email will be admissible because it has independent legal significance and is thus not hearsay.

2. Sue's Testimony

- *Logical Relevance*

See rule above. This evidence is logically relevant because it has the tendency to make a fact of consequence that is in dispute (whether Pam is a thief) more or less probable.

- *Legal Relevance*

See rule above. This evidence is legally relevant because its probative value--whether Pam is a thief--is not outweighed by undue prejudice, waste of time, or confusion. Pam may argue that this is unduly prejudicial because it paints her as a thief, but she has asserted that the statement in the email is false, and thus the court will allow it.

- *Competence*

For a witness to be competent to testify, she must have personal knowledge, present recollection, the ability to communicate, and understand that she is under a legal duty to tell the truth. These factors appear to be met -- Sue has personal knowledge of her interaction with Pam and appears to have a present recollection of the interaction. Furthermore, there is nothing to indicate that she lacks the ability to communicate or that she doesn't understand her legal duty to tell the truth. Sue is competent to testify.

- *Character Evidence: Pam Stealing $300 of Petty Cash*

Character evidence is evidence that tends to convey a moral judgment about someone. The testimony about Pam stealing $300 from the petty cash drawer is character evidence. In California, character evidence in civil cases is inadmissible to prove circumstantial evidence of guilt (there are no exceptions like under the FRE). However, character evidence is admissible if it is in issue, as is the case

here. This is a defamation case where Pam has alleged that David's statement calling her a thief is false. Therefore, evidence of her being a thief is highly probative and directly in issue. Thus, the court will allow Sue's testimony that Pam stole $300 of petty cash.

[Note that this could also be considered impeachment evidence. Pam has testified that the contents of the email were false. Specific incidents can be used to impeach a witness, and this would also be appropriate impeachment evidence.]

- *Sue's statement accusing Pam of Taking the Money: Not Hearsay*

Sue's statement accusing Pam of taking the money is not hearsay because it is not being offered for the truth of the matter asserted. Instead, it is being offered to show its effect on the listener (Pam).

- *Sue's statement that Pam walked away: Hearsay*

Sue also seeks to testify about Pam walking away when accused of a crime. This statement is hearsay. Hearsay encompasses all assertive conduct, which is conduct that is intended to communicate something. Thus, unless it falls within a hearsay exception, this statement which is being offered for the truth of the matter asserted (that she would not have walked away if she weren't guilty) is hearsay.

- *Admission by Party Opponent: Adoptive Admission*

A statement being offered against a party is an admission by a party opponent. The statement need not have been against the party's interest at the time it was made to qualify. Adoptive admissions occur where a party is accused or confronted and we would expect them to deny a statement but instead they remain silent, implicitly adopting the statement. Here, we would expect an innocent party accused of stealing

to defend herself if it were not true. By simply walking away, Pam has adopted the statement.

- *Conclusion*

Sue's testimony about Pam stealing $300 of petty cash is admissible because it is character evidence that is in issue in a defamation case; her statement to Pam accusing her of taking the money is not hearsay because it is offered to show its effect on the listener; her statement about Pam's reaction is admissible as an adoptive admission by a party opponent.

3a. David's Testimony About What Pam Said to Mike

- *Logical Relevance*

See rule above. This evidence is logically relevant because it relates to whether Pam was having an affair with Mike, a key subject of the defamation action and one that is hotly contested.

- *Legal Relevance*

See rule above. This evidence is legally relevant because its probative value--whether Pam was having an affair with Mike--is not outweighed by undue prejudice, waste of time, or confusion.

- *Authentication*

In order for this testimony to be admissible, David must be able to authenticate that it was, indeed, Pam speaking. The standard for testing this is whether it is sufficient to sustain a finding of authenticity. Here, David is presumably familiar with Pam's voice

and has heard it many times before. This will be adequate to sustain a finding of authenticity.

- *Hearsay*

See rule above. This evidence is being offered to prove the truth of the matter asserted (i.e., that Pam was having an affair with Mike). Thus, unless an exception applies, it is inadmissible.

- *Hearsay Exception: Admission by Party Opponent*

A statement being offered against a party is an admission by a party opponent. This statement, made by Pam, is being offered against her. It is thus admissible as an admission by a party opponent.

- *Hearsay Exception: Excited Utterance*

An excited utterance is a statement made relating to a startling event or condition made while under the stress or excitement of that event or condition. A declarant's availability is irrelevant. Here, Pam cried in what appears to be an excited voice: "Please don't leave me!" This may qualify as an excited utterance, but the better fit is an admission by a party opponent.

- *No privileges*

Because Pam and David are not married, there are no privileges that might apply to this otherwise confidential communication.

- *Conclusion*

This testimony is admissible as an admission by a party opponent.

3b. David's Testimony About What Mike Said to Pam

- *Logical Relevance*

See rule above. This evidence is logically relevant because it relates to whether Pam was having an affair with Mike, a key subject of the defamation action and one that is hotly contested.

- *Legal Relevance*

See rule above. This evidence is logically relevant because it relates to whether Pam was having an affair with Mike, a key subject of the defamation action and one that is hotly contested.

- *Authentication*

See rule above. Here, David is presumably familiar with Mike's voice and has heard it many times before. This will be adequate to sustain a finding of authenticity.

- *Hearsay*

See rule above. This evidence is being offered to prove the truth of the matter asserted (i.e., that Pam was having an affair with Mike). Thus, unless an exception applies, it is inadmissible.

- *Declaration Against Interest*

A declaration against interest is a statement made by an unavailable declarant that was against his interest at the time it was made and that the declarant knew was against his interest at the time it was made. In California, it can be against a person's penal, financial, or social interest. A statement is against someone's social interest if it would

subject them to hatred, ridicule, or disgust. Declarations against interest are only admissible where a declarant is unavailable. A declarant can be unavailable due to death, inability to secure their presence through reasonable process, total memory failure, privileges, or their refusal to testify out of fear and despite a court order.

Here, Mike died and is thus unavailable. The statement by Mike ("Our affair is over") is against his social interest. He was acknowledging that he was having an affair with Pam in the first place. Thus the first part of his statement "Our affair is over" is admissible as a declaration against interest.

- *Dying Declaration*

A dying declaration is a statement made by a declarant while he thought he was imminently dying and describing the conditions or circumstances of his death. The declarant must be unavailable, and in California the declarant must have actually died and it can be used in either civil or criminal cases. This statement does not appear to be while David thought he was dying or about the conditions and circumstances surrounding his death. It is thus inadmissible as a dying declaration.

- *Excited Utterance*

See rule above. This exception does not apply because the facts state that David responded "in a measured tone." Therefore, he was not under the stress or excitement of an event.

- *Present State of Mind*

A statement describing a person's present state of mind (usually statements like "I intend" or "I plan") are admissible as hearsay exceptions regardless of the declarant's availability. Here, the first part of the statement may also qualify under the present state of mind exception because it is demonstrating that David intends to end the

affair. Nonetheless, the declaration against interest exception is the best fit for this statement.

- *No privileges*

Because Pam and David are not married, there are no privileges that might apply to this otherwise confidential communication.

- *Conclusion*

This testimony "Our affair is over" is admissible as a declaration against interest. The second half of the testimony "you need to get on with your life" may be admissible only if it is being offered to show the effect on the listener, Pam.

Q6 Contracts

On February 1, Bing Surfboards ("Bing") ordered 400 gallons of epoxy from Super Chemicals ("Super") using its standard purchase order. Bing's purchase order provided that delivery would be no later than February 20, but stated nothing about warranties, disclaimers, or remedies. Super responded with its standard acknowledgment, which purported to accept the order and confirmed that delivery would be no later than February 20. It also provided: (1) "Seller disclaims all warranties of merchantability and fitness." (2) "In no event shall Seller be liable for consequential damages." (3) "This acceptance is expressly made conditional on your assent to the terms of this acceptance."

On February 15, Bing received the epoxy.

On February 20, Bing tested the epoxy by manufacturing 50 surfboards. The epoxy did not harden properly, leaving the surfboards useless.

On February 23, Bing emailed Super stating that the epoxy had failed to harden properly and that it was returning the remaining epoxy.

On February 25, not having heard from Super, Bing bought 400 gallons of epoxy from one of Super's competitors, paying a substantially higher price for quick delivery, which was necessary to avoid a shutdown of Bing's production line.

On February 26, Super informed Bing that it was shipping replacement epoxy to arrive the following day. The original epoxy had failed to harden because of manufacturing defects of which Super was unaware. Although the replacement epoxy was not defective, Bing rejected delivery and refused to pay.

Bing has sued Super for the increased price of epoxy it had to pay to Super's competitor, and for loss due to 50 defective surfboards.

Super has sued Bing for rejecting its replacement shipment and for not paying under the contract.

1. Is Bing likely to prevail in its suit? Discuss.

2. Is Super likely to prevail in its suit? Discuss.

Answer A

Bing's suit against Super

Governing law

The contract in question concerns epoxy, a good. Thus, UCC Article 2 applies to the contract.

Both Bing and Super are merchants, since Bing deals usually in surfboards and Super deals usually in epoxy and other chemicals. Thus, the rules applicable are those where both parties to the contract are merchants.

Contract formation

An initial question is whether a contract was formed by Super's standard acknowledgment.

In order for a valid contract to be formed, there must be offer, acceptance and consideration. Under the UCC, conditional acceptance is not treated as an acceptance; rather it is treated as a rejection. Here, Super's response to Bing was clearly conditional. Thus, it functioned as a rejection of Bing's offer, and no contract was formed.

Although no contract was formed, a subsequent implied contract may nevertheless have been formed by the performance of the parties. Here, Super did indeed send epoxy to Bing, which accepted it and, at least initially, did not object. All of the subsequent conduct and communications of Bing and Super are also in line with the existence of a contract. Thus, it is possible that the court will find an implied contract between the parties. Such a contract, implied purely from conduct, would not contain

any of the disclaimers in Super's acknowledgment form. Thus, default warranties and damages rules would apply.

Terms of the contract

Even if the court instead finds that a contract was formed by Super's acknowledgment, it is likely Bing can show that the terms regarding disclaimer of warranties and consequential damages have not been integrated into the contract.

Under UCC, for a contract between two merchants, offer does not have to mirror acceptance. However, any terms in the acceptance that vary the offer will not become a part of the contract unless (1) both parties are merchants, (2) the terms are not material, and (3) no objection is raised to them within a reasonable time.

Here, both the disclaimer or warranties and the limitation of damages are material terms, since the warranties go to the heart of the quality of goods being delivered and the limitation of damages speak directly to the economic interests of the parties. Since one of the elements is not met, these terms are not part of the contract, and the default warranties and damages rules apply.

Perfect Tender

Bing is likely able to demonstrate that a perfect tender was not made by Super, entitling it to reject the goods and cease performance (also relevant to Super's suit, later) and seek alternative goods.

Under the UCC, failure to make a perfect tender of goods ordered is a breach of the contract that allows the non-breaching party to reject goods and cease performance. Also, a warranty of merchantability is implied if the seller is a merchant, stating that the goods are fit for their ordinary purpose, and a warranty of fitness is implied if the seller knows the buyer is buying the goods for a particular purpose and relying on seller to

provide conforming goods. (As noted above, these warranties have not been properly disclaimed.)

Here, it would appear likely that both warranties are breached. The warranty of merchantability is breached since the epoxy was defective due to a manufacturing problem - unless it can be shown that the defect affects surfboards but not the usual uses of epoxy, the warranty is breached. The warranty of fitness is breached since Super knew Bing needed the epoxy for surfboards (because Bing's name is Bing Surfboards) and was relying on Super to deliver the epoxy fit for the manufacturing of surfboards, and failed to deliver that kind of epoxy.

Since the epoxy delivered was nonconforming goods that did not satisfy the implied warranties, perfect tender was not made.

(Note: If the warranties were in fact properly disclaimed from the contract, then perfect tender was made, since Bing would have taken the epoxy "as is" and the defect would breach no contractual term. In that case, Bing would not have been entitled to reject the goods; it would not recover any of the damages noted below; and it would be liable to Super for rejecting the goods and will need to pay the full contract price.)

Cover / consequential damages

Bing is likely able to recover that part of the increased price of epoxy reflecting a higher market price (if any), but will have a harder time recovering the increased price of epoxy reflecting quick delivery.

In general, where a seller breaches by delivering non-conforming goods, a buyer is entitled to seek cover by procuring the same goods on the market, and recover the difference between the cover price and the contract price. Thus, to the extent Bing's cover price is higher because the same goods now cost more on the market, it is able to get that difference from Super.

However, consequential damages (damages particular to a particular non breaching party) are generally not recoverable unless the breaching party could reasonably foresee such damages at the time of contract. Here, to the extent Bing's cover price is higher because it needed the goods faster, such difference would instead be consequential damages. Bing would have to show that Super could foresee that Bing would have incurred these costs to avoid a shutdown of its production line. It would probably be difficult for Bing to show with sufficient certainty what level of damages would have been foreseeable to Super at the time the contract was made on February 2. Thus, Bing will have a harder time getting that portion of damages from Super.

Incidental damages

Loss due to the 50 defective surfboards is incidental damages which Bing may recover from Super.

When a contract is breached, the non-breaching party may always recover incidental damages, which are damages relating directly to the handling of the nonconforming goods. Since Super has breached and Bing has incurred incidental damages relating to the defective surfboards, it can get damages for that from Super.

Super's suit against Bing

The analyses regarding governing law, contract formation, terms of the contract and perfect tender are all the same as above.

Rejecting cure

Super likely will not prevail on the point of Bing rejecting the replacement shipment.

Under the UCC and the perfect tender rule, once the time for performance has passed, seller is not entitled to cure by shipping conforming goods unless it knows it is

reasonable for it to do so at that time. Here, the time for performance had passed by six days by the time Super told Bing it was shipping replacement epoxy, during which time Bing had already told Super about the issue and that Bing was returning the defective epoxy. As an industrial merchant, Super should probably be familiar with the manufacturing processes of its clients and should probably be aware that there is at least a good probability that a six day delay is too long for a manufacturing customer, which would probably have made cover arrangements during that period. Thus, Super probably can't show that it was reasonable to provide conforming goods six days late.

In short, Super will fail on this claim.

Not paying

Super likely will also fail on its claim to get Bing to pay under the contract.

Once perfect tender is not made, the buyer is entitled to reject the goods, cease performance and not pay. Here, Bing has properly rejected the goods, and it is therefore entitled to not pay.

If Bing had, instead, kept the defective epoxy, Super would probably be able to recover under a restitutionary theory for Bing's enrichment (in that case, though, Super's recovery would have been based on the value of the defective epoxy, not the contract price). But since Bing rejected, it was not enriched, and Super would not be able to recover under that theory either.

In short, Super will fail on this claim as well.

Answer B

Governing Law

All contracts except for contracts for the sale of goods are governed by the common law. Contracts for the sale of goods are governed by Article 2 of the UCC. Article 2 of the UCC provides special rules for contracts between merchants. Here, the contract was for the sale of a movable good, epoxy. A merchant is an entity that regularly deals in goods of the kind in question. Here, Bing regularly ordered epoxy as part of its manufacturing and Super regularly sold epoxy. Therefore, both parties were merchants and the special rules for merchants applied.

Formation of Contract

Offer and Acceptance

To be valid a contract must contain an offer and acceptance as well as mutual assent. An offer is an expression of intent to enter into a contract, communicated to the offeree, as by making a promise, undertaking, or commitment. The terms of the offer must be sufficiently definite to enable a court to enforce the resulting contract. For a contract for the sale of goods, an offer must indicate the subject matter of the contract and contain a quantity term. An offer is accepted by an expression of assent to the terms of the offer communicated to the offeror.

Here, Bing made a valid offer to Super, indicating the subject matter, epoxy, and the quantity, 400 gallons. Further, Bing indicated an intent to enter into a contract. Super's acknowledgment, however, did not constitute an acceptance. Under the UCC, the "battle of the forms" provision controls the terms of a contract when the terms of the acceptance vary from the offer. Here, Super's acceptance contained additional terms to the contract. Ordinarily, additional terms to the contract will become a part of the

contract, unless 1) the terms materially modify the contract, 2) the offer expressly limits acceptance to its terms, or 3) the offeror has objected or objects to the additional terms within a reasonable time. If an acceptance indicates that it is conditional on assent to additional terms, it is not construed as an acceptance, but as a rejection and a counteroffer. Therefore, Super's acknowledgment was not an acceptance of Bing's offer, but rather a rejection and counteroffer. Because Bing did not accept the counteroffer, a contract could only be formed by conduct.

Additionally, even if the acknowledgment had not been conditional on assent to additional terms, the additional terms would likely not have become part of the contract. This is because the terms were material alterations of the contract. A term is considered to be material where it alters or in some way limits the available remedies. Here, the additional terms disclaimed warranties of fitness and merchantability, and disclaimed liability for consequential damages. This would severely limit the remedies available to Bing in the event of breach. Because these were material alterations, they would not become part of the contract under the UCC.

Consideration

To be valid, a contract must have consideration, which is a bargained-for legal detriment by both parties or a consideration substitute. A legal detriment may consist of promises exchanged for each other. Here, if a contract was formed between the parties, there would be consideration. Super promised to provide 400 gallons of epoxy. If Bing accepted the contract by conduct, it would become obligated to pay the stated purchase price. Therefore there was an exchange of promises. Alternatively, if the offer and acknowledgment formed no contract, a consideration substitute might be found through promissory estoppel. Promissory estoppel results when a party makes a promise, intending to induce the reliance of the other party, and the other party foreseeably relies on that promise to its detriment.

Bing's Suit Against Super

Breach of Contract

The first issue is whether Super breached its contract with Bing. Because Super's acknowledgment form constituted a counteroffer, which was not accepted by Bing, a contract could only have been formed by conduct. A court would find an implied in fact contract from the shipment of the goods and payment for the goods. However, the terms of Super's acknowledgment would not become part of the contract unless accepted by Bing, which they were not. As a result, Super's disclaimer of warranty and consequential damages was ineffective. Because the disclaimers were ineffective, Super's goods would include an implied warranty of merchantability. The implied warranty of merchantability provides that when a seller of a particular type of goods sells that good, that the goods will be commercially reasonable and will be fit for the ordinary purpose for which such goods are used. Here, Super's epoxy failed to harden properly because of a manufacturing defect. As a result, Super breached the implied warranty of merchantability.

Under the UCC, shipments of goods are governed by the perfect tender rule. Under the perfect tender rule, goods must completely conform to the buyer's specifications or they may be rejected. Any deviation from the buyer's specifications or from commercial suitability is a material breach allowing the buyer to reject the goods. A breach of the implied warranty of merchantability would be a material breach of contract under the perfect tender rule entitling the buyer to reject the shipment. Because the epoxy did not harden properly and was defective, Bing was entitled to reject the shipment. Further, there would be no contract until Bing paid for the goods. Because Bing did not pay for the goods, there was no enforceable contract except to the extent one was created by conduct or promissory estoppel. Super's shipment of epoxy would then be construed as an offer which could be rejected at Bing's discretion.

Super may have also breached the implied warranty of fitness for a particular purpose. The implied warranty of fitness provides that when a seller of goods knows of the particular purpose for which the buyer is using the goods, and the buyer is relying on the seller's skill and judgment in selecting the goods, that the goods must be fit for the particular purpose for which they are used. If Bing had informed Super that it was using the epoxy to make surfboards, and was relying on Super's skill and judgment to furnish epoxy which would be suitable for the purpose, then Super would breach this contract when the epoxy was not suitable for use in making surfboards.

Rejection

The next issue is whether Bing properly rejected the shipment of epoxy. A buyer has a right to inspect the goods before acceptance. Therefore, it was appropriate for Bing to test the epoxy before determining whether to accept the shipment. A buyer of goods may reject a shipment of goods by notifying the seller within a reasonable time of the defect and of intention to reject the goods and returning them. The buyer may accept all the units, or accept some commercial units and reject the rest. Here, Bing tested the epoxy and notified Super a little over a week after the shipment. This would probably constitute a reasonable time after receiving the shipment. Bing returned the defective goods to Super. Therefore, Bing's rejection of the shipment was proper.

Implied in Law or Implied in Fact Contract

A court might find that there was no contract because Bing rejected the offer created by Super's shipment of the goods and never paid for them. A court might also find that a contract existed on the basis of promissory estoppel. Here, Bing notified Super of its requirements and requested shipment by February 20. Super confirmed that it would ship the goods by February 20. Super was aware and would be deemed to know that Bing was using the epoxy in its manufacturing process and might suffer lost profits if the epoxy was defective. Bing relied on this promise to its detriment by not procuring alternative goods in sufficient time to avoid paying a premium and to avoid shutting

down its production line. Therefore, a court could likely find that a contract was implied in law by Bing's justifiable reliance on Super's promise to ship the goods by February 20.

On the basis of an implied in law contract, Bing could likely prevail in its suit against Super because it justifiably relied to its detriment on Super's representation that it would ship the epoxy by February 20. If, however, a court found that there was no contract, Bing would not be able to recover any contractual damages.

Damages

Bing would be able to recover compensatory expectation damages from Super for the breach if there was indeed a contract. Expectation damages are designed to put the nonbreaching party in the position it would have been in had the other party properly performed. In a contract for the sale of goods, where the buyer is forced to cover, the buyer must make a good faith effort to obtain a reasonable replacement within a reasonable time. The buyer can recover the difference between the cover price and the contract price. Here, Bing could recover the difference between the price it agreed to with Super and the cover price.

Bing might also be able to recover consequential damages in the form of lost profits, as well as incidental damages. To be recoverable, consequential damages must be certain, foreseeable, and unavoidable. Consequential damages are damages over and above expectation damages resulting from special circumstances of which the seller knows at the time of the contract formation. Here, Super was aware that Bing was using the epoxy in its manufacturing process, and could foresee that Bing might suffer lost profits if the epoxy was defective. Super was aware of Bing's special circumstances. Therefore, it would have been foreseeable to Super that Bing might lose money if the epoxy shipment was defective. Moreover, a supplier is deemed to know of a manufacturer's requirements if it knows that the manufacturer is using the goods as part of the manufacturing process. Here, consequential damages would be

measured by the costs expended in manufacturing the 50 defective surfboards, and lost profits resulting from the inability to sell those surfboards, if Bing could sell as many surfboards as it could produce and was a lost volume seller. This would be a sufficiently certain measure of damages because it would be measured by the quantity and cost of defective surfboards produced, as well as any additional surfboards that might have been sold but for the breach. Moreover, Bing made every effort to mitigate its damages and avoid the loss to the extent possible by covering immediately at a reasonable price and reasonable time. Bing might also have incidental damages in locating an alternative supplier of epoxy. Therefore Bing could probably obtain lost profits and incidental damages.

Super's Lawsuit Against Bing

Rejection of Replacement Shipment

Ordinarily when a seller breaches a contract by providing nonconforming goods, the seller has within the time for performance of the contract to cure the breach. Here, Super can argue that because Bing was delayed in notifying Super of the breach, it was not notified within a reasonable time and therefore could not cure within the time for performance. However, likely a court would find that Super was notified within a reasonable time. Because the time for performance of the contract had lapsed, Super had no right to cure the defective shipment. Ordinarily if the seller had reason to believe that the goods would be acceptable with a reasonable allowance, a reasonable additional time might be allowed for the seller to cure. But this is not the case here. Additionally, the fact that Seller was unaware of the manufacturing defects would not grant it additional time to cure. Therefore, Seller had no right to cure.

Paying Under Contract

Because any contract between Bing and Super would be implied rather than actual, Bing would not be liable for payment for the goods if it rejected the goods. Even in a

contract formed by mutual assent the buyer would have a right to reject. Further, Super's disclaimers of warranty would not be effective because Super's counteroffer was not accepted. Super's disclaimer might be found to be unconscionable as a contract of adhesion even if it were deemed to have been accepted by Bing. A buyer is deemed to accept those units of the good that he or she actually uses. Further, in an implied in fact contract, there is a contract only to the extent of the goods actually accepted. Therefore, Bing would only be liable for those gallons of epoxy that it used in testing to manufacture the 50 surfboards. Bing would be deemed to accept that quantity of epoxy and would have to pay for it. Otherwise, Bing would not be liable under the contract.

Super is unlikely to prevail in its suit against Bing because there was no mutual assent to terms of a contract. The contract would be implied in law or implied in fact. Further, Super could not disclaim its implied warranty of merchantability in an implied contract. Therefore, Buyer had the right to reject nonconforming shipments, and Super did not cure within the time for performance. Therefore, Bing will not be liable to Super.

Jul 2015

California Bar Examination

Essay Questions and

Selected Answers

The State Bar Of California
Committee of Bar Examiners/Office of Admissions

180 Howard Street • San Francisco, CA 94105-1639 • (415) 538-2300
845 S. Figueroa Street • Los Angeles, CA 90017-2515 • (213) 765-1500

ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2015

CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2015 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	Subject
1.	Civil Procedure
2.	Real Property
3.	Criminal Law and Procedure
4.	Community Property
5.	Business Associations/ Professional Responsibility
6.	Constitutional Law/Real Property

ESSAY EXAMINATION INSTRUCTIONS

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

Q1 Civil Procedure

Doctor implanted a valve in Patient's heart in State A, where both Doctor and Patient lived. The valve was designed in State B by Valvco. Valvco was incorporated in State C, but had its headquarters in State D.

Patient was visiting State B when he collapsed due to his heart problems. Patient decided to remain in State B for the indefinite future for medical treatment.

Patient sued Doctor and Valvco in state court in State B for $100,000, alleging that Valvco defectively designed the valve and Doctor negligently implanted it. Another patient had recently sued Valvco alleging that it defectively designed the valve, and had obtained a final judgment in her favor after trial on that issue.

Doctor and Valvco each moved the state court to dismiss the case on the ground of lack of personal jurisdiction. The state court granted Doctor's motion and denied Valvco's.

Valvco then filed a notice in federal court in State B to remove the case. Patient immediately filed a motion in federal court to remand the case to state court. The federal court denied Patient's motion.

Relying solely on the judgment in the other patient's action, Patient then filed a motion in federal court for summary adjudication of the issue that Valvco defectively designed the valve. The federal court granted the motion.

1. Did the state court properly grant Doctor's motion to dismiss? Discuss.

2. Did the state court properly deny Valvco's motion to dismiss? Discuss.

3. Did the federal court properly deny Patient's motion for remand? Discuss.

4. Did the federal court properly grant Patient's motion for summary adjudication? Discuss.

Answer A

Did the State Court Properly Grant Doctor's Motion to Dismiss?

Doctor filed a motion to dismiss based on lack of personal jurisdiction. A motion to dismiss on jurisdictional issues is proper when, viewing the facts in the most favorable light to the defendant, the plaintiff has failed to satisfy the elements of personal jurisdiction. Failure to object to personal jurisdiction before answering or in a party's first 12(b)(6) motion waives the issue. There is no indication that waiver occurred here. Thus, the issue is whether the court in State B had personal jurisdiction over the Doctor.

Traditional Basis for Jurisdiction

Personal jurisdiction refers to the power of a court to adjudicate claims involving a particular party. Traditionally, personal jurisdiction is based on three concepts: ***consent, presence, and domicile.*** Here, there is nothing in the facts indicating that the doctor consented to personal jurisdiction. Moreover, there is nothing in the facts indicating that he was served while he was in State B or that he is a resident of state B. The facts indicate Doctor is a resident of state A. Thus, the traditional bases for jurisdiction are not met.

Long-Arm Jurisdiction/Constitutional Limits of Jurisdiction

Many states have adopted long-arm statutes to obtain personal jurisdiction over non-residents. While long-arm statutes can differ by state, jurisdiction under a long-arm statute must satisfy the constitutional requirements for the exercise of jurisdiction. Many states, like California, have adopted long-arm statutes which extend personal jurisdiction to the constitutional limits. In order to satisfy the constitutional requirements for personal jurisdiction, the defendant must have such ***minimum contacts*** with the forum state as to ***not offend traditional notions of fair play and substantial justice.*** In determining whether such minimum contacts are present, courts look to

three things: 1) the level of contacts with the forum state, 2) the relatedness of those contacts to the cause of action, and 3) whether the exercise of jurisdiction would be fair, taking into account private and public considerations.

Contacts

To determine whether a defendant has minimum contacts with the forum state to justify an exercise of personal jurisdiction, the court looks: 1) whether the defendant ***purposefully availed*** himself to the forum state and 2) whether the exercise of jurisdiction by the forum state would be ***foreseeable.*** Here, there is nothing in the facts to indicate that Doctor purposefully availed himself of the benefits and protections of State B. He did not travel to state B and he did not do business with state B or a company in state B. While the valve by Valvco was designed in state B, Doctor (or the hospital with whom he associates) likely dealt with Valvco through its headquarters in State D and purchased the valve through Valvco in State D. Thus, doctor has done nothing to purposefully avail himself of the benefits and protections of state B. It is not foreseeable that Doctor could be sued in State B because doctor did not conduct surgery in state B or take any action in state B. Moreover, Doctor did not interact with any State B residents. Patient was not a citizen of state B when doctor operated on him. While patient collapsed while in state B, such a fact, if considered foreseeable, would make doctor amenable to jurisdiction in any state, as it could be assumed that his patients could travel to any state and then fall ill. This is too tenuous of a connection to be considered foreseeable under the constitutional analysis. Thus, Doctor did not have sufficient contacts with the forum to satisfy the constitutional limits of jurisdiction.

Even though Doctor did not have sufficient contacts to warrant jurisdiction, the remaining elements are discussed for completeness.

Relatedness of Contacts

General Jurisdiction

The court looks to see whether defendant's contacts with the forum state are so extensive, as to find that the defendant is essentially at home in the forum state. If so, the court has general jurisdiction over the defendant and the defendant is amenable to a wider range of lawsuits in the state. Here, as stated above, Doctor did not have sufficient contacts with the state to show minimum contacts. Thus, he is not at home in state B.

Specific Jurisdiction

If general jurisdiction does not exist, the court looks to see whether the defendant's particular contacts with the state relate to or give rise to the particular cause of action. If so, the court has specific jurisdiction over the defendant. Here, the cause of action arises out of doctor's negligence in implanting the valve. This took place in State A. There is nothing to indicate that doctor's negligence extended to state B, except that B collapsed there. Thus, there is no specific jurisdiction over Doctor in State B.

Fairness

To determine whether jurisdiction is fair, courts look to a variety of public and private factors. Courts look to several factors, including the Plaintiff's interest in the chosen forum, a state's interest in providing redress for its citizens or for harms that occur in its state, and whether the exercise of jurisdiction would be so unfair as to offend traditional notions of fair play and substantial justice. Here, the forum state does have an interest in providing redress for its citizens. Patient is currently domiciled in state B. Domicile is determined by someone's physical location combined with an intent to stay. Here, the facts state that Patient is physical in state B and wishes to remain there or the indefinite future. Thus, Patient is a domicile of State B. However, he was a citizen of state A

when the negligence occurred. While some of the witnesses concerning the design of the valve may be in State B, the action against the doctor is for negligence. Thus, most of the evidence and witnesses, such as medical records, surgery staff, and nurses would be in State A. Thus, on the balance it is not fair to exercise jurisdiction in State B.

Conclusion

Based on the above analysis, since Doctor does not have any basis for traditional jurisdiction and since Doctor does not have such minimum contacts with the forum, as to make the exercise of jurisdiction not offend traditional notions of fair play and substantial justice, jurisdiction over D was not proper. Thus, the court properly granted his motion to dismiss.

Did the State Court Properly Deny Valvco's Motion to Dismiss?

Valvco filed a motion to dismiss based on lack of personal jurisdiction. A motion to dismiss on jurisdictional issues is proper when, viewing the facts in the most favorable light to the defendant, the plaintiff has failed to satisfy the elements of personal jurisdiction. Failure to object to personal jurisdiction before answering or in a party's first 12(b)(6) motion waives the issue. There is no indication that waiver occurred here. Thus, the issue is whether the court in State B had personal jurisdiction over Valvco.

Traditional Basis for Jurisdiction

As stated above, personal jurisdiction refers to the power of a court to adjudicate claims involving a particular party. Traditionally, personal jurisdiction is based on three concepts: ***consent, presence, and domicile.*** Here, there is nothing in the facts indicating that Valvco consented to personal jurisdiction. Moreover, there is nothing in the facts indicating that it was served while he was in State B. For jurisdiction purposes,

a corporation is domiciled in the state of incorporation and the state of its principal place of business. The corporation's principal place of business is where its headquarters are or where its officers are located. Here, Valvco is incorporated in State C and has its headquarters in state D. Thus, it is domiciled in State C and D. Since the lawsuit is brought in state B, there is no basis for personal jurisdiction based on Valvco's domicile. Thus, the traditional bases for jurisdiction are not met.

Long-Arm Jurisdiction/Constitutional Limits of Jurisdiction

The requirements for long-arm jurisdiction are described in detail above. In order to satisfy the constitutional requirements for personal jurisdiction, the defendant must have such ***minimum contacts*** with the forum state as to ***not offend traditional notions of fair play and substantial justice.*** In determining whether such minimum contacts are present, courts look to three things: 1) the level of contacts with the forum state, 2) the relatedness of those contacts to the cause of action, and 3) whether the exercise of jurisdiction would be fair, taking into account private and public considerations.

Contacts

To determine whether a defendant has minimum contacts with the forum state to justify an exercise of personal jurisdiction, the court looks to two things: 1) whether the defendant ***purposefully availed*** himself to the forum state and 2) whether the exercise of jurisdiction by the forum state would be ***foreseeable.*** Here, Valvco used state B to design its valve. Thus, it availed itself of the labor force in State B and the privileges and benefits of operating a business location in state B. Thus, Valvco purposefully availed himself of State B. Moreover, the exercise must be foreseeable. Since the valve was designed in State B, it is foreseeable that someone injured by design of the valve may bring a lawsuit in state B for negligent design. Thus, Valvco has sufficient contacts for constitutional jurisdiction purposes.

Relatedness of Contacts

General Jurisdiction

The court then looks to see whether defendant's contacts with the forum state are so extensive, as to find that the defendant is essentially at home in the forum state. If so, the court has general jurisdiction over the defendant and the defendant is amenable to a wider range of lawsuits in the state. Here, Valvco's only activity in state B from the facts was designing the valve. This is likely not continuous or systematic activity which rises to the level of Valvco being "at home" in the forum state. Thus, general jurisdiction does not exist.

Specific Jurisdiction

If general jurisdiction does not exist, the court looks to see whether the defendant's particular contacts with the state relate to or give rise to the particular cause of action. If so, the court has specific jurisdiction over the defendant. Here, the cause of action arises out of Valvco's negligent design of the valve. The design took place in State B. Thus, there is specific jurisdiction over Valvco.

Fairness

To determine whether jurisdiction is fair, courts look to a variety of public and private factors. Courts look to several factors including Plaintiff's interest in the chosen forum, a state's interest in providing redress for its citizens or for harms that occur in its state, whether the exercise of jurisdiction would be so unfair as to offend traditional notions of fair play and substantial justice. Here, the forum state does have an interest in providing redress for its citizens. As discussed above, Patient is currently domiciled in state B. Domicile is determined by someone's physical location combined with an intent to stay. Here, the facts state that Patient is physically in state B and wishes to remain there or the indefinite future. Thus, Patient is a domicile of State B. Moreover,

witnesses concerning the design of the valve are likely in State B. State B also has an interest in ensuring products developed in its state are not defective to protect its residents and other foreseeable plaintiffs. Thus, on the balance it is fair to exercise jurisdiction in State B.

Conclusion

Based on the above analysis, since Valvco has such minimum contacts with the forum, as to make the exercise of jurisdiction not offend traditional notions of fair play and substantial justice, jurisdiction over Valvco is proper. Thus, the court properly denied its motion to dismiss.

Did the Federal Court Properly Deny Patient's Motion for Remand

Removal refers to a defendant's ability to remove a case brought initially in state court to federal court for adjudication. In order to remove a case, the case must have been one that could have originally been brought in federal court. Removal is proper to the federal district encompassing the location where the original action was filed in state court. Moreover, removal has to be timely--it has to be within 30 days of the last pleading giving rise to a removal action and cannot in any cases be more than a year since the filing of the lawsuit. Removal is not proper when a defendant is a resident of the state in which the action is brought and all defendants must join in the removal for it to be proper. If removal is not proper, then the plaintiff can file a motion to remand the case back to state court. A motion to remand must be filed within 30 days of the notice of removal.

Was Timing of Removal Proper

First, as a preliminary matter, removal has to be timely--it has to be within 30 days of the last pleading giving rise to a removal action and cannot in any cases be more than a

year since the filing of the lawsuit. There is nothing in the facts to explicitly indicate that the timing issue here was violated. However, the motion for removal was filed after Doctor and Valvco moved the court to dismiss on an issue of personal jurisdiction and the decision on the motion was returned. This likely took more than 30 days. Thus, removal after the motions to dismiss for lack of personal jurisdiction may not be timely. On these grounds alone, the court could grant Patient's motion for remand.

Is Any Defendant a Citizen of the State in Which the Action was Filed?

Removal is not proper when a defendant is a resident of the state in which the action is brought. Here, as explained above with respect to personal jurisdiction, Doctor is a resident of State A and Valvco is a resident of States C and D. Thus, this is not a bar to removal.

Did all Defendants Join in Removal?

All defendants must join in the removal for it to be proper. Here, the facts indicate that V filed a notice of removal in federal court. The facts do not indicate that D joined in this motion. However, at the time, D had been dismissed from the case. Thus, Doctor was no longer a defendant and was not required to join in the motion for removal. This was not a bar to removal.

Could the Case Originally Be Brought in Federal Court?

For removal to be proper, the case must be one that could have initially been brought in federal court. Federal courts are courts of limited jurisdiction. A federal court must have subject matter jurisdiction over the claims, meaning the court must have the power to adjudicate the dispute. The two most common bases for federal jurisdiction are federal question jurisdiction and diversity jurisdiction.

Federal Question Jurisdiction

Federal question jurisdiction refers to claims that are brought to enforce or decide a federal right. Here, the case brought was a defective design case against Valvco and a negligence claim against Doctor. These are both state law tort claims and do not invoke federal question jurisdiction. Thus, the case could not have been brought in federal court on the basis of federal question jurisdiction.

Diversity Jurisdiction

For diversity jurisdiction to exist, there must be diversity between plaintiffs and defendants and the amount in controversy must exceed $75,000.

Diversity of Citizenship

Complete diversity between all parties is not required for diversity jurisdiction. However, there must be completed diversity between all Plaintiffs and all Defendants -- that is all Plaintiffs must be of diverse citizenship of all Defendants. Citizenship is determined at the time of filing of the action. For individuals, an individual can only have one citizenship--his or her domicile. Domicile is where a person is physically present with intent to permanently remain.

Here, the facts indicate that Doctor lives in State A. Thus, since no facts indicate he does not intend to remain there indefinitely, he is a citizen of State A.

Patient was a citizen of state A when the surgery occurred, but after he was injured he remained in state B with intent to stay there indefinitely. Thus, Patient became a citizen of state B. Plaintiff was a citizen of State B upon the filing of the lawsuit.

Corporations are considered domiciled where they have their principal place of business and where they are incorporated. The corporation's principal place of business is where

his headquarters are or where his officers are located. Here, Valvco is incorporated in State C and has its headquarters in state D. Thus, it is domiciled in State C and D.

Looking at the parties, the case is Patient (B) v. Doctor (A) and Valvco (C and D). Thus, diversity exists for federal jurisdictional purposes because the Plaintiff is of diverse citizenship from all defendants.

Amount in Controversy

The amount in controversy for diversity jurisdiction requirements looks at the amount from Plaintiff's well-pleaded complaint, irrespective of costs and fees. Here, the facts indicate that Patient sued Doctor and Valvco in state court for $100,000. Aggregation of amounts in controversy against more than one defendant is proper if each defendant is jointly and severally liable for the full amount. Thus, if Patient's case seeks joint and several liability from Doctor and Valvco, jurisdiction is proper. However, if Patient was seeking $50,000 from Doctor and $50,000 from Valvco individually, the amount in controversy would not be satisfied for jurisdiction. There are not enough facts to determine how the damages may be allocated.

Conclusion

Since there is diversity of citizenship and the amount in controversy requirement is met, assuming joint and several liability, this is a case that could initially be brought in federal court under diversity jurisdiction.

Ultimate Conclusion

Since this is a case that could have originally been brought in federal court, Defendant is not a resident of the state in which the action was filed, and all defendants at the time joined in the removal, removal is proper. Thus, the motion to remand was properly denied. However, based on the timing of the notice of removal, if it occurred after 30

days from the last pleading raising a removable issue, Patient's motion to remand may be granted.

Did the Federal Court Properly Grant Patient's Motion for Summary Judgment?

Summary judgment is granted when there is no issue of material fact and a party is entitled to judgment as a matter of law. Summary judgment often comes up along with issues of claim preclusion or issue preclusion.

Claim Preclusion

The first issue is whether summary judgment can be granted due to claim preclusion.

Claim preclusion occurs when an identical claim was already fully litigated on the merits to a final judgment, by a court with jurisdiction, between the same parties. This prevents subsequent actions deciding the same claim that was already decided.

Here, the facts indicate that another patient recently sued Valvco alleging defective design of the valve and obtained a final judgment on the merits after a trial. With respect to Valvco, assuming it is the same valve in question, this is the same issue that is at issue in the present case. Thus, the identity of issues was met. The facts indicate that there was a judgment in her favor after trial, so there is a final judgment on the merits. Federal courts do not require all appeals be exhausted before using claim preclusion. However, claim preclusion requires identity of parties. Here, the prior action involved another patient and Valvco, not this Patient and Valvco. Thus, the requirements for claim preclusion are not met.

Issue Preclusion

The second issue is whether summary judgment can be granted based on issue preclusion.

Issue preclusion prevents an issue that was already fully litigated on the merits from being re-litigated. The requirements for issue preclusion are 1) the same issue, 2) actually litigated and decided, 3) a final judgment on the merits, 4) the issue was essential to the judgment and 5) in the cases of non-mutual issue preclusion, fairness.

Same Issue

Here, the facts indicate that another patient recently sued Valvco alleging defective design of the valve and obtained a final judgment on the merits. With respect to Valvco, assuming it was the same valve, this is the same issue that is at issue in the present case. Thus, the identity of issues was met.

Actually Litigated and Decided

The facts indicate that there was a judgment in her favor after trial, so issue was actually litigated and decided.

Final Judgment on the Merits

The facts indicate that there was a judgment in her favor after trial, and it wasn't based on a lack of jurisdiction or other decisions not on the merits, so there is a final judgment on the merits. Federal courts do not require all appeals be exhausted before applying issue preclusion.

Essential to the Judgment

It appears the decision was essential to the judgment, as the other patient brought a defective design case and won. There are no other facts indicating there were separate or alternative grounds for the other patient's success in the suit. Thus, a finding of negligent design is essential to the judgment.

Fairness/Non-Mutual Issue Preclusion

Traditionally, issue preclusion required the same parties to the prior lawsuit assert issue preclusion or at least parties in privity with each other. If that was the case, then issue preclusion could not be used here for the reasons explained above with claim preclusion.

However, many courts now allow non-mutual issue preclusion to be used if it is fair. Here, Patient is trying to use non-mutual offensive issue preclusion--that is, a Plaintiff is using it as a sword against a Defendant in a later action. Courts typically allow this if Valvco had the same or similar motivations to defend the prior suit and if it would not be unfair or unjust. Here, both actions were for defective design. Thus, Valvco had a similar motive to defend this prior lawsuit. Therefore, it is not inequitable for Patient to use issue preclusion.

Since there is issue preclusion and Valvco is precluded from claiming it is not negligent, there is no issue of material fact with respect to Valvco's negligent design. Thus, summary judgment should be granted for Patient. The court was proper in granting the motion.

Answer B

1) State Court Properly grant Doctor's motion ("D") to dismiss?

The issue here is whether the State B court had personal jurisdiction ("PJ") over A. The plaintiff's place of residence or domicile is irrelevant to this issue.

Traditional Bases of PJ

Personal jurisdiction assesses whether the court has power over the defendant such that it may hear a case against him. There are three traditional bases that personal jurisdiction can be established over a defendant. If the defendant consents to the jurisdiction; is domiciled in the jurisdiction; or is served while present in the jurisdiction (although, not if served due to the fraud or deceit of the plaintiff, or, in federal court, if served while serving as a witness or party in a court case). For a person, domicile requires two elements be met: 1) presence in the forum state and 2) an intent to permanently remain in the forum state.

In this case, none of the traditional methods appear to be applicable. D was not served in State B nor did he consent to the jurisdiction of the court (if he did, he would not have brought the motion to dismiss). He also is not domiciled in State B. D lives in State A and is merely visiting State B for these court proceedings; he does not intend to stay permanently.

Long-arm Statute

If the traditional bases of PJ do not apply, we then must analyze the state's long-arm statute. A long-arm statute permits a state to have PJ over out-of-state defendants. There are two types of long-arm statutes--those that apply the minimum constitutional requirements of due process to establish personal jurisdiction and those that have

specific limitations beyond those prescribed by the Due Process clause. Here, we are not told of State B's long-arm statute; we are similarly not told of any restrictions the state has regarding PJ. Thus, it is likely (and will be assumed) that the state simply applies the constitutional analysis.

Constitutional Requirements

The Supreme Court has held that, for a state to have PJ over a defendant, the defendant must have sufficient minimum contacts with the state, such that traditional notions of fair play and justice are not offended by the use of jurisdiction over him. The Court has established a three-factor test to determine whether minimum contacts exist: 1) contact; 2) relatedness; 3) fairness.

Contact

Under the contact factor, courts ask whether the defendant purposely availed himself of the benefit and protections of the state's laws, and based on that availment, was a law suit foreseeable. Here, D has not purposely availed himself of the protections of State B's laws. He has not practiced medicine in State B, and there are no facts showing that he has even stepped foot in State B, other than for purposes of this lawsuit. As a result, a lawsuit against him in State B was not foreseeable. PJ would likely fail due to this factor.

Conclusion: Thus, the state court properly granted D's motion to dismiss for lack of personal jurisdiction.

2) State court Properly deny Valvco's ("V") motion to dismiss?

The issue here is whether the State B court had PJ over V.

Similarly to D, the traditional bases (domicile, consent, and personal service) of PJ will not work to acquire jurisdiction over V. A corporation's domicile includes both all of the states where it is incorporated as well as the location of its principal place of business--the place where the corporate's headquarters, officers, and main employees that operate the whole company are located. Here, V is incorporated in State C and its headquarters, which would likely comprise its principal place of business, is in State D. Thus, it is not domiciled in State B, it was not served in State B (based on the facts), and it clearly has not consented to PJ. None of the traditional bases works.

Additionally, the long-arm statute likely will apply the constitutional analysis. Thus, the three-factor test will be used here as well to determine if V had minimum contacts with State B to establish personal jurisdiction.

Contact

As mentioned above, under the contact factor, courts ask whether the defendant purposely availed himself of the benefit and protections of the state's laws, and based on that availment, was a lawsuit foreseeable in the state. Here, although the facts are somewhat unclear, it is likely that V has purposely availed itself of the benefits and protections of State B's laws. V designed the valve that purportedly injured Patient ("P") in State B. It likely has employees permanently located and working in the state. If so, it has purposely availed itself of the state's laws, and it was entirely likely that it could be sued in the state.

Relatedness

The relatedness factor identifies if one of two forms of jurisdiction exist--specific and general jurisdiction. Specific jurisdiction exists when the actions that the defendant took in the state are related/caused the cause of action to arise. Specific jurisdiction grants the court the PJ to hear only that case against the defendant. In contrast,

general jurisdiction asks whether the defendant has maintained a systematic and continuous presence in the forum state such that it is essentially at home. If so, a court can hear any case against the defendant.

Here, specific jurisdiction exists, and with additional facts, general jurisdiction could be shown to exist as well. V's conduct in the state, designing the valve, led directly to the cause of action at hand. As a result, the claim and its actions are related, and it establishes specific jurisdiction. General jurisdiction could also exist if the company has a factory or team of workers in the state that remain there consistently. However, specific jurisdiction is sufficient to establish PJ.

Fairness

The last factor simply asks whether exercising PJ in the forum state is fair. The court will look to both the defendant's and plaintiff's interests in having the proceedings in the state, as well as the state's interests in exercising jurisdiction. Here, it seems entirely fair that V will be subject to State B's jurisdiction. The employees that designed the valve are likely in State B, making it reasonable for the plaintiff to proceed in the state, and the plaintiff lives in the state. Thus, the plaintiff's interests are in favor of the proceeding. Additionally, State B has an interest in protecting its citizens from the potentially negligent acts of business in the state. Finally, the defendant's interests do not weigh so heavily in favor of the court not exercising PJ to justify dismissal. Only when the D's interest is gravely injured by the exercise of PJ should it be denied.

Conclusion: The state court properly denied V's motion to dismiss for lack of PJ.

3) Fed Court properly deny Patient's ("P") motion for remand

For the court's decision to be correct, it must have had subject matter jurisdiction, and V must have had the power to remove the case. If either of those elements were

not met, it should have remanded the case back to the state court. The first issue here is whether the federal court had subject matter jurisdiction ("SMJ") over P's claim, such that V could remove the case.

SMJ

Subject matter jurisdiction ("SMJ") determines whether a court has the ability to hear a case. SMJ can be established in one of three ways, although only two are relevant here--federal question jurisdiction and diversity jurisdiction. Federal question jurisdiction applies when the plaintiff, in its well-pleaded complaint, raises a federal right or claim of relief--the federal claim cannot arise in another pleading, but must be clear from the complaint. If federal question jurisdiction exists, removal to a federal court is always appropriate. Here, P's complaint does not raise a federal issue--it is a state law tort issue--and as a result, federal question jurisdiction does not exist.

Diversity jurisdiction requires that two elements be met. First, there must be complete diversity between the parties--the case must involve citizens of different states or a citizen of the US and a foreign citizen, and all plaintiffs must be from a different state than all defendants. Diversity is determined at the time the case is instituted. A person is a citizen of the state he or she is domiciled (present and intend to permanently remain), while a corporation is a citizen where it is domiciled (incorporation and principal place of business). Here, complete diversity does exist. P is likely a citizen of State B at this moment. He is present in State B and intends to remain there for the indefinite future (however, even if he is a citizen of State A, diversity will still exist). V, on the other hand, is a citizen of both State C (incorporated) and State D (principal place of business). Thus, complete diversity exists.

To have diversity jurisdiction, the second element required is that the suit be for greater than $75,000. Unless it is clear to a legal certainty that the plaintiff's amount is below $75,000, the plaintiff's claim for relief that is made in good faith and greater than the threshhold will establish the amount for diversity purposes. Typically, the amount

sued for applies only to one defendant; however, in the case of joint tortfeasors, the amount applies to all defendants. In this case, P sued D and V for $100,000. Although D is no longer a party to the case (as a result of the motion to dismiss), the $100,000 claim is applicable to V. As a result, the amount in controversy requirement is met.

Removal appropriate

The second issue is whether V met the requirements for removal and whether it was appropriate.

Removal must be made within 30 days of being served the complaint in a matter. The notice of removal must be sent to the federal court encapsulating the state court in question, and it must join all defendants currently in the matter. In this case, these initial requirements appear to be met. Although we are not given facts regarding the 30-day timeline, it seems to be met. Additionally, V filed the notice in the appropriate federal court--the State B federal court. Lastly, because D had been dismissed as a defendant, the notice included all required defendants. Thus, at first glance, the elements were met.

In a diversity case, however, removal may not be had in two situations. First, if the defendant is a citizen of the state where the state court sits, it is not appropriate, and removal should be denied. Second, removal may only be had within one year after service, and any removal actions sought after one year should be denied.

Here, as mentioned, V is not a citizen of State D; therefore, that limitation does not apply here. Second, although the facts are ambiguous, it would appear that the motion was timely brought within the one-year period. As a result, removal was properly granted, and P's motion for remand was properly denied.

Conclusion: P's motion for remand was properly denied by the Federal Court.

4) Fed Court properly grant P's motion for summary adjudication?

The issue here is whether issue preclusion should apply.

Summary judgment is appropriate when there are no genuine material issues of fact in dispute and the moving party is entitled to judgment as a matter of law. It is at the court's discretion, however, as to whether it will grant the motion. The motion may be made any time prior to 30 days after the end of discovery. Both claim and issue preclusion can be used to establish that no genuine material issues of fact exist, such that summary judgment is appropriate. Additionally, if issue preclusion does not justify the granting of a total summary judgment, a court may grant a partial summary judgment as to that particular issue or permit additional time to prove up the other necessary facts.

Claim Preclusion (res judicata)

Claim preclusion is not applicable here. For claim preclusion to apply, the same two parties from a prior final judgment on the merits must be in a second proceeding, in which one party is seeking to relitigate a claim litigated at the first proceeding or one that should have been made at that proceeding. Here, P was not a party to the first proceeding, and as a result, the doctrine will not apply.

Issue Preclusion (collateral estoppel)

A party can be estopped from relitigating an issue that was litigated at an earlier proceeding if issue preclusion applies. Issue preclusion requires the following elements to be met: 1) a final judgment on the merits in a prior proceeding; 2) the issue sought to be estopped was actually litigated; 3) that issue was essential to the judgment; and 4) mutuality of parties. Here, the prior case involved V and another plaintiff. That plaintiff won the case based on the allegation that V had defectively designed the valve used in P's case. Thus, there was a final judgment on the merits of the case. Additionally, the

issue that P seeks to estop V from relitigating--the defective design--was actually litigated and essential to the court's judgment in the final proceeding.

The final determination is whether mutuality of the parties exists in this case. Although mutuality of parties used to require the same parties in both the prior and current proceeding, American courts have relaxed this requirement. Instead, defensive claim preclusion (used by a defendant) has been upheld in nearly all jurisdictions, and offensive claim preclusion (where the plaintiff seeks to estop the defendant) is gaining traction, and it has been used by the Supreme Court. Offensive issue preclusion is allowed if the party that will be estopped had a fair and equitable opportunity to litigate the issue at the prior proceeding. If that party had such an opportunity to litigate, then issue preclusion can apply notwithstanding the fact that the plaintiff was not a party in the prior proceeding.

Here, offensive claim preclusion should be allowed. V had a full and fair opportunity to litigate the defective design issue. It was in its best interest to put forth all of its efforts in winning that case. If not, and as seen here, other users of their products would likely start to sue them using the judgment to their advantage. It had the opportunity to call witnesses and cross-examine the other plaintiff's witnesses. It is fair and equitable that V should be estopped from relitigating the issue here.

Partial or total summary judgment

Although P may have shown a defectively designed product manufactured by V, he has not yet shown the other requirements of either a negligent design action (duty, causation, and damages) or a strict product liability action (causation, damages). As a result, total summary judgment is likely not appropriate in this matter. However, at the court's discretion, it could grant partial summary judgment as to the defective design issue, or give P additional time to prove up the additional elements, such that she could receive a total summary judgment. Thus, it should not have granted the total summary judgment as it did based on the facts at hand.

Conclusion: The state court erred in granting a total summary judgment; at best it should have granted a partial.

Q2 Real Property

Oscar owned a fee simple absolute interest in Greenacre. He conveyed a fee simple defeasible interest in Greenacre to Martha and Lenny "as joint tenants with a right of survivorship for so long as neither Martha nor Lenny make any transfer of Greenacre. In the event of such a transfer, Greenacre shall automatically revert back to Oscar."

Subsequently, without Lenny's knowledge, Martha conveyed all of her interest in Greenacre to Paul. She died shortly afterwards. Unaware of Paul's existence, Lenny paid the property taxes.

Paul entered into a written lease of his interest in Greenacre with Sally for a two-year term at a rental of $500 per month. At the end of the lease, Sally stopped paying rent, but continued to occupy Greenacre without Paul's consent. After three months, Paul confronted Sally. Although they did not agree to a new lease, Sally paid Paul the three months' rent she had not paid and resumed paying him monthly rent.

Lenny then attempted to sell his interest in Greenacre. He soon learned that Sally was occupying Greenacre and that Paul had acquired Martha's interest.

Concerned about conflicting property interest claims regarding Greenacre, Lenny commenced a lawsuit seeking to quiet title against Oscar, Martha's estate, Paul, and Sally, and to obtain from Paul an accounting and contribution for a share of the rent paid by Sally and for a share of the property taxes paid by Lenny.

1. What property interest in Greenacre, if any, is the court likely to find possessed by Oscar, Lenny, Paul, Sally, and Martha's estate? Discuss.

2. Is Lenny likely to obtain an accounting and contribution from Paul? Discuss.

Answer A

1. Interests in Greenacre

To determine who has what interest in Greenacre (G), the validity and effect of each transfer/agreement must be determined. Generally, property may be transferred by sale, gift, will, or intestate succession. Leases may also create interests in possession of property.

Oscar

First, it must be determined what interest Oscar (O) had in the property. A fee simple is the largest property interest possible and O began with a fee simple interest in G.

Fee Simple Determinable

A fee simple defeasible is a fee simple interest that may be cut short by a subsequent event. When a fee simple defeasible contains terms of duration (e.g. as long as, for the time that, until, etc.), it is a fee simple determinable. A fee simple determinable will be a fee simple until a designated event occurs. Here, O's conveyance to Martha (M) and Lenny (L) was likely a fee simple determinable because it contained the phrase "for so long as." Thus, this conveyance conveyed a fee simple determinable interest to M and L.

Possibility of Reverter

The grantor of a fee simple determinable interest retains a possibility of reverter. Here, O's conveyance additionally contained explicit language that he retained a possibility of reverter. A possibility of reverter means that fee simple automatically reverts to the grantor at the time the designated event occurs. The grantor need not go to court to claim this interest; the interest automatically vests at the occurrence of the subsequent event. Here, O had a possibility of reverter. The event in question was if either M or L made any transfer of G. Thus, if his possibility of reverter was valid, O gained a fee simple interest in G at the time M transferred her interest in G to Paul (P).

Restraints on Alienation

However, the possibility of reverter here may not be valid because it may be an undue restraint on alienation. Generally, courts do not allow title instruments/conveyances that absolutely prohibit future transfer of the property. Restraints on alienation may be

allowed if the restraint is only conditional/for a moderate time period (e.g. does not transfer for the next 50 years). However, absolute restraints on alienation are invalid. Any language indicating such absolute restraint will be struck from the instrument, so the resulting interests will remain. Here, the proposed restraint was absolute--O conveyed to M and L so long as neither transferred G. There was no condition or limited time period on this restraint; it was absolute. So, this clause will be struck from the instrument and the remaining interests will exist. With this clause struck, there is no future event that gives O a possibility of reverter. Rather, it changes M's and L's interests to fee simple interests and strips O of his possibility of reverter. Thus, because of the striking of the invalid restraint on interest, O conveyed G in fee simple to L and M and retains no interest in the property. So, O has no interest in G.

Lenny

As discussed above, because the alienation language had to be struck, L received a fee simple interest with M in G from O.

Joint Tenancy

There are various forms of co-tenancies. Each form allows all co-tenants to possess the whole of the property, though each holds only a lesser, divided share of the property. A tenancy in common is the default form. A joint tenancy carries the additional right of survivorship between joint tenants. This right of survivorship means that when one joint tenant dies, the surviving joint tenant receives the deceased joint tenant's interest in the property automatically, and the deceased tenant's interest is no longer part of her estate and so cannot be passed through probate. A joint tenancy exists when property is conveyed by an instrument that indicates intent for the property to be held as a joint tenancy with a right of survivorship, and when the four unities of (1) possession, (2) interest, (3) time, and (4) title exist. Here, O conveyed G to M and L "as joint tenants with a right of survivorship." So, the explicit language indicating intent to convey as a joint tenancy and to convey a right of survivorship is present.

1. Possession

The unity of possession means that all joint tenants have equal right to possess the whole property. Here, although L and M (and P as M's successor) took various degrees of possession of G, there is no indication that any ousted the other at any time--i.e. no

tenant ever prevented the other from taking possession of the whole property. Thus, there was unity of possession.

2. Interest

Unity of interest means that each joint tenant must have an equal share interest in the property--i.e., for two joint tenants, each must have a 50 percent interest rather than, e.g., one having a 40 percent and one a 60 percent interest. Here, it is not indicated what interest each L and M had in G, so presumably each was conveyed a 50 percent interest in G. So, there was unity of interest.

3. Time

Unity of time means that each tenant must have acquired her interest in the property at the same time. Here, initially, both L and M acquired their interests in G at the same time--when O conveyed it to them. However, subsequently, M conveyed her interest to P. So, P acquired his interest in G at a different time than L (the remaining joint tenant), thus destroying the unity of time (discussed more below).

4. Title

Unity of title means that each tenant must have acquired her interest in the property by the same instrument. Here, as with the unity of time, L and M initially had unity of title because both originally acquired their interests in G by means of the grant from O. However, when M conveyed her interest in G to P, P then got title from M's conveyance while L still had title from O's conveyance. So the unity of title was also broken at that time.

Thus, while M and L originally were tenants in common because the four unities were present and the intentional joint tenancy and right of survivorship language was included in the relevant instrument, the joint tenancy ended when M conveyed her interest in G to P because this broke the unities of time and title.

Tenancy in Common

When any of the unities for a joint tenancy are broken, the tenancy reverts to a tenancy in common. A tenancy in common is the default form. Under a tenancy in common, each co-tenant has equal right to possess the whole of the property, but only a lesser divided interest in the property. Under a tenancy in common, each tenant may devise

her interest in the property or it will pass through intestate succession because a tenancy in common has no right of survivorship.

Here, because the unities of time and title were broken when M conveyed her interest in G to P, the tenancy reverted to a tenancy in common. So, at that point, L and P held G as tenants in common with no right to survivorship. However, each's interests in the property (i.e. 50 percent share) was not affected.

So, at the time of the action, L held a 50 percent interest in G as a tenant in common.

Paul

Next, it must be decided what interest P had.

Inter Vivos Transfer

P obtained his interest in G by an inter vivos transfer from M. It must be determined that this interest is valid. First, the provision in the conveyance from O that the property was conveyed to M and L so long as neither transferred it could prohibit the transfer. However, as discussed above, that provision of O's conveyance was an invalid absolute restraint on alienation, so must be struck from the instrument. Thus, M was not restrained from transferring by means of O's clause in his conveyance. Second, the nature of a joint tenancy may prevent M from transferring her interest. Generally a joint tenant may transfer her interest in the property without the consent of her joint tenants. The effect of the transfer is that it converts the joint tenancy to a tenancy in common, but permission is not required to make the transfer. By contrast, a tenancy by the entirety--which is a joint tenancy held by married spouses--requires that property interest cannot be transferred without consent of the other tenant-by-the-entirety. Here, there is no indication that M and L were married to each other, so no indication that this was a tenancy by the entirety rather than a joint tenancy. So, as a joint tenancy, M was not required to obtain L's permission to transfer to P. Third, as a transfer of interest in real property, the Statute of Frauds would ordinarily require that the conveyance be in writing. Here, it is not clear whether the conveyance was in writing, but the Statute of Frauds may nonetheless be satisfied by part performance if P did two of the three: took possession of the property, made payment for the property, or made improvements on the property. So, M's transfer to P was likely valid.

Tenancy in Common

As discussed above, thus, P holds a 50 percent interest in G as a tenant in common with L.

Lease to Sally

However, P has also entered a lease with Sally (S) that may affect his interests. There are three kinds of landlord-tenant leases--(1) tenancy for years, which is a lease for a definite period of time; (2) periodic tenancy, which is a lease for a definite period (e.g. one month) that automatically renews at the end of each period; or (3) tenancy at sufferance, which is a tenancy caused by the holdover of property by the tenant after a lease has ended. Generally, rental leases need not be in writing unless they are a lease for years for greater than a 1-year term (because the Statute of Frauds requires a writing for any contract that cannot be performed within one year). Here, the initial rental agreement was for 2 years, but was in writing. P initially rented G to S as a tenancy for years with a fixed two-year term. A tenancy for years automatically terminates at the end of the fixed period. So, here, this tenancy terminated at the end of two years.

A periodic tenancy is created by implication if a tenant pays rent and the landlord accepts it each period. Typically, a periodic tenancy is created at the end of a tenancy for years when the tenant pays rent and the landlord accepts. However, here, S stopped paying rent at the end of the two-year lease, but remained on G as a holdover. So, at that time, a Tenancy at Sufferance was created. However, when S subsequently paid P for those three months and resumed paying monthly rents, a periodic tenancy was created if P accepted those rents. There is no information to the contrary, so P presumably accepted those rents.

Thus, at the time of the action, P owned a 50 percent interest in G as a tenant in common, but leased possession of G to S as a periodic tenancy.

Sally

S's interest in G is only that granted her by her lease with P. Because P, as a tenant in common, has a right to possess the whole property, he may lease the whole property to a tenant. Further, as discussed above, at the time of the action, S and P had a periodic

tenancy by implication. Thus, S has an interest in possessing the whole of G (but no ownership interest) as a periodic tenancy.

Martha's Estate

Finally, as discussed above, M's inter vivos transfer to P was valid. Thus, that property was no longer in M's estate at the time she died. So, M's estate has no interest in G.

2. Likelihood Lenny Can Obtain an Accounting and Contribution from Paul

Next, it must be determined whether L can obtain an accounting and contribution from P, his tenant in common.

Rights to Third-Party Rents

Generally, tenants in common each have a right to possess the whole property. So, one tenant may not demand rent from her co-tenant because the co-tenant possesses the whole of the property exclusively. However, co-tenants may demand accounting for rents received from third parties. Here, P, a co-tenant, rented G to a S, a third party, and received rents from S. So, L may demand an accounting for the rents received from S in proportion to his interest in the property. Here, L had a 50 percent interest in G, so may demand 50 percent of the rents received from S.

Contribution for Operating Expenses

Generally, tenants in common are not entitled to contribution from other co-tenants for costs expended to repair or improve the property. However, they are entitled to contribution for basic operating expenses--which include property taxes. Here, L paid all property taxes on G after M died. Because property taxes are operating expenses, L is entitled to demand contribution from P for his share (proportionate to his interest in the property). Here, P had a 50 percent interest in G, so L may demand that P pay him contribution for 50 percent of the property taxes.

Answer B

1. What Property Interests in Greenacre is the Court Likely to Find Possessed by Oscar, Lenny, Paul, Sally, and Martha's Estate

Oscar

Fee Simple Determinable and the Possibility of Reverter

The issue is whether Oscar has the possibility of a reverter interest in Greenacre. Oscar owned a fee simple absolute interest in Greenacre. He conveyed a fee simple defeasible interest in Greenacre to Martha and Lenny as joint tenants with the right of survivorship, but included a fee simple determinable ("FSD"), so that if Martha or Lenny ever transferred Greenacre, the property shall automatically revert back to Oscar.

Thus, Oscar attempted to give Martha and Lenny an FSD, and leave for himself the possibility of a reverter. A possibility of reverter follows an FSD. A possibility of reverter means that the property automatically reverts back to the grantor upon the happening of an event, and thus, the grantor does not need to take any action in order to regain access to the property.

Improper Restraint on Alienation

The issue is whether Oscar's FSD to Martha and Lenny contained an improper restraint on alienation. If Oscar's FSD is found to be a complete restraint on alienation, then the condition will be removed and Martha and Lenny will own Greenacre in fee simple. Oscar will be left with no remaining interest in Greenacre.

An owner of property may grant interests in property subject to certain conditions. These are known as defeasible fees and include fee simples determinables ("FSD") and fee simples subject to conditions precedents ("FSCS"). A court will generally uphold such conditions, as long as they are reasonable restraints on use and not complete bars

on alienation. Public policy favors free alienability of property. Thus, a court will generally invalidate a FSD if the condition contains a complete restraint on alienation. A court will remove the condition, and leave the grantee with a fee simple absolute interest in the property.

Here, Oscar stated that neither Martha nor Lenny may make any transfers of Greenacre. Lenny and Martha's estate will thus argue that this condition is a complete bar on alienation, and thus invalid. The two will argue that in the event that they are to sell Greenacre, it will automatically revert back to Oscar. Thus, they will argue that this is a complete restraint on alienation because it does not require any action from Oscar to determine whether or not to take back Greenacre: it simply automatically reverts back to him upon any alienation of the property.

Oscar, however, will argue that this is not a complete restraint on alienation. He will argue that Martha and Lenny may do whatever they like with the property and may use it however they like; they may even rent it out to tenants, but their only restraint is that they may not entirely transfer the property. Thus, he will argue that when Martha transferred her interest in Greenacre to Paul, Greenacre automatically reverted back to him. However, this argument is a weak one, for it appears that the condition is one barring complete alienation.

Conclusion

If a court finds Oscar's argument persuasive, then Oscar has a fee simple absolute in Greenacre, for Greenacre reverted back to Oscar when Martha transferred Greenacre to Paul. If this is the case, then Paul, Lenny, Martha's Estate, and Sally have no interest in Greenacre. However, a court is more likely to find Oscar's restraint on alienation complete and unreasonable. Thus, a court is likely to find that Oscar transferred Greenacre to Lenny and Martha in fee simple absolute, and that Oscar retains no interest in Greenacre.

LENNY'S INTEREST IN GREENACRE

Joint Tenancy

The issue is whether Lenny owns Greenacre in fee simple, or as a tenancy in common with Paul. Oscar granted Greenacre to Lenny and Martha "as joint tenants with a right of survivorship." As discussed above, the condition that Oscar placed on Greenacre is likely an invalid restraint on alienation, and thus Oscar granted Lenny and Martha the land as joint tenants in fee simple. A joint tenancy gives the co-owners equal right and possession to the property. The right of survivorship, a unique aspect of a joint tenancy, allows one joint tenant's interest in the land to pass to the other joint tenant upon death. A joint tenancy is created with the four unities are present: the joint tenants must have equal interests, rights to possession, must have obtained title by the same interest, and must have obtained title at the same time. Thus, at the onset, Lenny and Martha owed Greenacre as joint tenants with a right of survivorship, in fee simple absolute.

Severance of a Joint Tenancy

A joint tenancy is severed when any one of the four unities discussed above is severed. A joint tenancy may be severed by one joint tenant conveying his interest to another. A severance can occur without the permission of the other joint tenant. When a severance occurs, the new owner of the land will take as tenants in common with the remaining joint tenant.

Here, Martha conveyed all of her interest in Greenacre to Paul. Thus, she severed the joint tenancy. When she severed the joint tenancy, Lenny and Paul became tenants in common.

Tenancy in Common

In a tenancy in common, the only unity that exists is the unity of possession. There is no right of survivorship. Thus, when Martha transferred her interest to Paul, Paul and Lenny became tenants in common, with equal rights of possession in Greenacre. Lenny lost his right of survivorship when Martha transferred her interest to Paul. Lenny

may argue that because he did not consent to Martha's transfer, when Martha passed away they were still joint tenants, and her interest passed to him through the right of survivorship. However, this argument will fail. As discussed above, consent of the joint tenants is not necessary for severance.

Conclusion

Thus, a court will likely find that Lenny has a fee simple absolute interest in Greenacre and that he is a tenant in common with Paul.

PAUL'S INTEREST IN GREENACRE

As discussed above, Martha conveyed her interest in Greenacre to Paul before her death. She therefore severed the joint tenancy. Paul thus takes the same as Lenny: he has a fee simple absolute interest in Greenacre, and is a tenant in common with Lenny.

MARTHA'S ESTATE'S INTEREST IN GREENACRE

A court is likely to find that Martha's estate has no remaining interest in Greenacre. Before Martha's death, Martha conveyed all of her interest in Greenacre to Paul. Thus, Martha has no remaining interest in Greenacre.

SALLY'S INTEREST IN GREENACRE

The issue is whether Sally created a new periodic tenancy when she resumed paying monthly rent to Paul. Paul, a co-owner of Greenacre, entered into a written lease of Greenacre with Sally for a two-year term at a rental of $500 per month. At the end of the lease, Sally stopped paying rent but continued to occupy Greenacre without Paul's consent. After Paul confronted Sally, while they did not enter into a new lease, Sally paid Paul the three months' rent she had not paid and resumed paying him monthly rent.

A lease is a possessory interest in property whereby the tenant maintains a present interest in the property, and the landlord retains a future interest. There are four types of leases or tenancies: tenancy at will, tenancy at sufference (a holdover tenancy),

periodic tenancy, and tenancy for years. Here, it seems as though initially, Sally and Paul entered into a tenancy for a term of two years. Thus, they had a tenancy for years, which was to terminate at the end of the two year period.

Holdover Tenant - Tenancy at Sufferance

When Sally stopped paying rent, but continued to occupy Greenacre without Paul's consent, Sally became a holdover tenant. When one stops paying rent but remains on the premises, one becomes a holdover tenant. A holdover tenant is one who was once properly on the landlord's premises, but has exceeded her permission to occupy the premises, and thus remains on the premises unlawfully. A landlord has the right to evict the holdover tenant and sue for past rent, or the landlord may create a new periodic tenancy, by operation of law, with the tenant.

Periodic Tenancy

Although they did not agree to a new lease, Sally and Paul entered into a new periodic tenancy by operation of law. It appears as though Paul accepted Sally's late payment of the three months' rent, and Sally resumed paying Paul monthly. Thus the pair created a new month-to-month periodic tenancy, where rent will be due every month. The periodic tenancy will require notice to terminate it. The amount of notice required will be one month, the time of one period under their lease. If Paul has indeed accepted Sally's three months' rent she has not paid and has accepted her next month's rent, then Sally is a tenant and Paul is her landlord.

Conclusion

Sally has a present possessory interest in Greenacre under a periodic tenancy. However, as long as proper notice is given, she or Paul may terminate the periodic tenancy at any point, and Sally will retain no interest in Greenacre.

2. Is Lenny Likely to Obtain an Accounting and Contribution from Paul?

The issue is whether Lenny may obtain a contribution from Paul for a share of the property taxes paid by Lenny and whether Lenny may obtain an accounting from Paul for a share of the rent money paid by Sally.

Contribution

A contribution is a payment from one co-tenant to another co-tenant to reimburse a co-tenant for necessary costs spent in maintaining the property. Co-tenants who do not presently occupy the property (live there or otherwise do business on the premises) are required to share the costs of necessary improvements, principle payments on the mortgage, and taxes paid on the property. If one co-tenant pays these costs up front, he is entitled to contribution from his co-tenants.

Here, Lenny paid taxes on Greenacre. Thus, he is entitled to contribution from Paul to reimburse him for half of the amount spent.

Accounting

An accounting is a sharing of the profits derived from the property that two tenants co-own. Co-tenants of a property are entitled to share in the profits gained from leasing the property to a third party.

Here, Paul leased the property to Sally. He obtained $500 per month for two years, plus as discussed above, started a new periodic tenancy with Sally at the end of the two year period. Lenny is thus entitled to a receipt of half of the profits earned from the leasing of Greenacre to Sally.

Conclusion

Lenny is likely to obtain both an accounting and contribution from Paul.

Q3 Criminal Law and Procedure

Owen, a police officer, had a hunch that Dora might be selling methamphetamine from her house in the country. To learn more, Owen drove to Dora's house with a drug-detection dog and waited until she left.

Owen first walked the drug-detection dog around Dora's house. At his direction, the dog jumped up on the porch, sniffed the front door, and indicated the presence of methamphetamine.

Owen then propped a ladder on the back of the house, climbed to the top, and peered into a second-story bedroom window. He saw a small box on a bedside table, but could not read the label. He used binoculars to read the label, and saw that it listed ingredients that could be used to make methamphetamine.

Owen went back to his car, saw Dora return home, and then walked back to the house and crouched under an open window. He soon overheard Dora telling a telephone caller, "I can sell you several ounces of methamphetamine."

Dora was arrested and charged with attempting to sell methamphetamine.

Dora has moved to suppress evidence of (1) the drug-detection dog's reaction, (2) the small box, and (3) the overheard conversation, under the Fourth Amendment to the United States Constitution.

How should the court rule on each point? Discuss.

Answer A

The Fourth Amendment of the US Constitution - incorporated to the states by the Due Process Clause of the 14th Amendment - protects citizens from unreasonable search and seizure. The touchstone of a search and seizure is reasonability. This means that to conduct a search, the police officer or agent of the state must have a valid search warrant. Where there is no warrant, the search will be unreasonable unless one of the valid warrant exceptions exists.

Exclusion Rule - Suppression Remedy

Evidence seized in violation of the fourth amendment will be suppressed at trial. Further, under the **fruit of the poisonous tree** doctrine, all evidence gathered as a result of an unlawful search will be suppressed as well unless the government can show that the taint of the unconstitutional activity has been sufficiently attenuated.

State Action

A "search" requires government action. Here, Owen is a police officer; thus, this requirement is met.

"Search"

A search only occurs where the government physically intrudes on the person's person, property or effects, or when the government intrudes on a person's "reasonable expectation of privacy" (REOP).

Because there is no indication that Officer Owen had a warrant for any of the activity discussed below, his actions are unreasonable if they constitute a "search" and if no valid warrant exception applies.

1. The Dog's Reaction

The issue here is whether the use of the drug-sniffing dog at the front porch was a search.

Government Action

As discussed above, the fourth amendment is only triggered by state action. Action by a police officer is sufficient. Here, Owen is a police officer. Thus, there is state action.

"Search"

A search exists where the government interferes with a reasonable expectation of privacy (REOP) or where there is a physical trespass into constitutionally protected space (persons, places or effects).

Trespass Theory

The Supreme Court recently held that bringing a drug-sniffing dog to the front porch of a home for the purpose of searching for drugs is a "search" under the fourth amendment. Although the front door is typically held open under implied consent doctrine, the use of a drug-sniffing dog exceeds this consent and is therefore a trespass. (Note: this is unlike the case of using a drug-sniffing dog at a traffic stop, which is reasonable under the fourth amendment.)

Here, Owen brought the drug-sniffing dog to the porch for the purpose of checking for drugs. He did not have a warrant to do so. Because Dora did not consent to this, this is a search under the trespass theory of the 4th amendment.

REOP

Dora could also argue this is a search under the REOP theory of the 4th amendment. A search occurs where state actors intrude on one's reasonable expectation of privacy. AN REOP exists where the person holds a subjective expectation of privacy and the expectation is objectively reasonable. There is always an REOP in one’s own home. Here, the home belonged to Dora. Thus, Dora could argue that a person has an REOP in her front door in regards to drug-sniffing dogs.

The government would point out that the front door is a place where we have no REOP. This was not a search of the home per se. However, even if this is true, Owen also took the dog into the curtilage, where Dora does have an REOP.

Curtilage vs. Open Fields

Curtilage is the area immediately around a home and is intimately tied with the activities of the home. The Court has found an REOP to exist there. Areas that are not curtilage are considered "open fields" and there is no REOP in open fields.

The government will argue that the front door is not part of curtilage. However, the dog also walked around the house immediately next to it. This is likely considered curtilage, where the court has found REOP.

Sensory Enhancing Technology

However, even in the open fields, the government action is a "search" if they use "sensory enhancing technology" not available to the general public. Here, a drug-sniffing dog may meet this test (a plurality of the Supreme Court feels it does). Thus, even if the dog were kept in open fields, the use of a drug dog would still constitute a search.

Conclusion

Because there was a trespass in a constitutionally protected area without a warrant, and alternatively, because the drug-sniffing dog at the front door violated Dora's REOP, the court will find that a "search" occurred without a warrant and the evidence of the dog's reaction should be suppressed.

2. The Small Box

The legality of this evidence will turn on whether a search occurred and whether there was a warrant exception.

Government Action

There was government action (see rule statement above).

"Search" - REOP

The government will argue that no search occurred because the officer was in the open fields and only used binoculars. Dora will argue that the officer's presence in her back yard was an intrusion in the curtilage.

Open Fields vs. Curtilage

See rule statements above. Dora will argue that the officer was in the curtilage of her home because the ladder was propped against her home and he peered into the window. Not only was he in the back yard, but he was also peering into the second story window. This is not open fields because we do not expect people to be propped on a ladder in our backyard. This is clearly curtilage instead of open fields.

Sensory Enhancing Technology

Dora will also argue that the use of the binoculars constituted a search even if the government was properly in the window. The government will argue this was not a search because this technology is available to the public.

The Court has found that a search occurs where the government, even standing in open fields, uses sensory enhancing technology not available to the general public. This covers using heat-detecting technology, for example. Here, the officer used binoculars, which are available to the public. Because binoculars are readily available, the court will likely find that this, alone, will not transform this action into a search.

However, the court will likely find that a search occurred because of Owen's presence in the curtilage. Because it was a search, the evidence should be suppressed unless a warrant exception applies.

Plain View

The government will argue that even if a search occurred, a warrant was not required under the plain view exception. Plain View means that a warrant is not required when officers find evidence in "plain view". We do not require the police to close their eyes to incriminating activity (when walking by an open window, for example). For a search to fall within plain view, two elements must be met: (1) the officer must be lawfully in the place where he made the observation, and (2) the incriminating nature of the evidence must be readily apparent.

Lawfully in the Place

Here, Dora will argue that the officer could not be in the curtilage of her home. The government may argue first that Owen was merely in the curtilage, and so his presence was lawful (see discussion above). Additionally, the government could argue that the dog's reaction at the door provided probable cause for the officer to take a closer look at the house. The court will likely find that without a warrant, this presence in the window on the second story was not proper. The officer needed a warrant to come this close to the house. Thus, he was not here lawfully.

Incriminating Nature of Evidence

If the officer is there lawfully, the criminal nature of the evidence must be readily apparent to qualify under plain view. Here, the box could not be read from the window where Owen saw it - he required binoculars to see that the box contained ingredients used for methamphetamine. However, because binoculars are generally available, the court may find that this meets the "apparent" requirement. On the other hand, the fact that it had ingredients alone may not make it incriminating, unless those ingredients themselves are illegal. The court could find there was nothing apparently incriminating about this evidence.

Thus, the plain view doctrine does not apply.

Fruit of the Poisonous Tree

The fruit of the poisonous tree doctrine suppresses evidence seized as a result of an unlawful search, unless the taint of the illegality has been attenuated. Here, even if the plain view exception applies, Dora could argue that it should be suppressed because it was the result of the illegal use of the drug-sniffing dog at the front door. The government will argue that the taint has been attenuated.

Attenuation

Fruit of the poisonous tree can be admitted if the government can show the taint of illegality has been attenuated. This is often shown where sufficient time has gone by between the illegality and the discovery of the evidence, or where there is an independent source for the evidence, or where it would have been inevitably discovered.

Here, very little time went by. Owen went straight from using the dog to going to the backyard. Further, there is no independent source or reason for inevitable discovery. Thus, the evidence cannot be saved by attenuation and should be suppressed as poisonous fruit.

Conclusion

The court will find that the officer's activity constituted a search when he went into the curtilage of the home and that the plain view exception to the warrant requirement does not apply because the officer was not lawfully in the place where he made the observation and because even if he was, the incriminating nature of the evidence was not immediately apparent. Thus, the evidence of the small box should be suppressed.

3. The Overheard Conversation

State Action

See rule statement above. There is state action here.

"Search"

See rule statement above. Whether or not there was a search will turn on whether Dora had a reasonable expectation of privacy in her conversation with the window open.

Eavesdropping

Generally, there is no REOP in a conversation held in public. There is also no REOP for conversations held in private with another person. The theory is that when one speaks to another person, you assume the risk that that person may be a police informant. Police may not use electronic methods to eavesdrop on phone calls, but that is because there IS an REOP that persons are not listening in on phone calls. Generally there is no REOP in people overhearing conversations. The court has held that there was not a search where officers stuck their ear to a wall to eavesdrop on conversations overheard in the next apartment over. There would be a search, however, if the officers used sensory enhancing technology, or wiretapping to overhear these conversations. Police may not use electronic methods to eavesdrop on phone calls, however, but that is because there IS an REOP that persons are not listening in on phone calls. Generally there is no REOP in people overhearing conversations.

Here, the government will argue there was no search because the officer merely overheard the defendant making incriminating statements. She had her window open and made them loud enough for passers-by to hear. Even though the statements were made over the phone, the conversations were not overheard via electronic wiretapping. Nor was there sensory enhancing technology used. Thus, the court will find that Dora had no REOP in her conversation that was overheard outside.

Curtilage

Dora will again argue that this was a search because Owen was in the curtilage. However, the court has held that merely being on another's property is not curtilage. The are under the window in the front yard is probably not sufficiently connected to the intimate activities of the home to constitute curtilage (compared to peeping in the back,

second-story window, for example). We routinely allow officers to walk around the home.

Here, Owen was merely in the front yard and under an open window. We allow officers to make reasonable inquiries around the home. This will likely not be found to be curtilage. Thus, the court will find that Owen was only in the open fields, not the curtilage.

Warrant Exception?

If the court were to find that a search had occurred, the government would have to argue that a warrant exception applied. No warrant exceptions apply.

Fruit of the Poisonous Tree / Attenuation

Dora will argue this should be suppressed anyway as fruit of the poisonous tree. See rule statement above. The government may argue that even if the earlier search were unconstitutional, this evidence should not be suppressed because it was independently discovered by Owen overhearing in the front lawn. His overhearing had nothing to do with the drug-sniffing dog.

However, if the court finds that the earlier search was unconstitutional, and that Owen would not have been in front of the window but for that illegal search, then the criminality has not been sufficiently attenuated and should be suppressed.

Conclusion

Because there is no reasonable expectation of privacy in one's conversations overheard in public, the court will find that there was no search here and therefore the 4th Amendment was not implicated. Evidence of the conversation should not be suppressed. However, the court may find that it should be suppressed as fruit of the earlier unconstitutional use of the drug-sniffing dog.

Answer B

Dora ("D") was arrested and charged with attempting to sell methamphetamine following several questionable search tactics implemented by police officer, Owen ("O"). D has moved to suppress the evidence under the Fourth Amendment to the United States Constitution. Despite Dora's involvement in rather exploratory drugs (meth), it appears she will prevail in the suppression of all evidence obtained against her by Owen.

FOURTH AMENDMENT RULES

The Fourth Amendment protects against unreasonable searches and seizures, and is incorporated against the states pursuant to the 14th Amendment due process clause. Here, the drug dog's reaction, the small box spotted with binoculars, and the conversation heard through the window all trigger issues with respect to unreasonable searches and the exclusionary rule.

Expectation of Privacy in the Home

A "search" occurs anytime that a police officer or state actor invades an area that a person has a reasonable expectation of privacy (e.g. home, automobile, or a bag in one's possession). The Supreme Court has long held that persons retain their expectation of privacy in their home; it is a sacred place. Conversely, the government's authority to conduct searches is at its zenith at the border. Here, the facts indicate that O conducted several searches at D's house in the country. Thus, Dora's expectation of privacy is very high in the areas search.

Unreasonable Searches and Seizures and the Exclusionary Rule

As a general rule, a search is unreasonable absent the existence of a warrant and probable cause. However, several exceptions to the warrant requirement exist (e.g. contraband items in plain view; persons committing a crime in plain view). If an exception applies, a search may be reasonable even absent a warrant. However, where no exception applies, any evidence discovered pursuant to an illegal and

unreasonable search should be excluded from evidence under the exclusionary rule. Finally, where an illegal search reveals subsequent incriminating evidence, that subsequent evidence discovered may also be excluded as evidence that is "fruit of the poisonous tree" - i.e., evidence that would not have been discovered but for the initial 4th Amendment violation. The only way such subsequent evidence may be admitted is if there is an independent source for that evidence (independent of the illegal search), or the evidence would have been inevitably discovered (despite the illegal search).

The aforementioned rules are applied below, but not restated.

(1) Suppressing Evidence of the Drug-Detection Dog's Reaction

No Warrant

Unless exigent circumstances arise (hot pursuit of a criminal; destruction of evidence), police need a warrant to conduct a home search. The warrant must clearly state facts on which the requesting officer has made a determination of probable cause, and approved by a neutral magistrate. Here, the facts do not indicate that O obtained a warrant before investigating D's house. Thus, the searches are presumptively unreasonable and violate the fourth amendment.

Probable Cause

The facts indicate that O drove to Dora's on a "hunch" that D might be selling methamphetamine, and further that O brought his drug-detection dog. The Supreme Court has held that probable cause, while need not be definitive, must be "more than a hunch." Instead, probable cause must be based on some "reasonable articulable suspicion" that criminal activity is likely afoot. Since no facts indicate what O's hunch was based on (and none are provided in a warrant application), the requirement for probable cause is not met.

Impermissible Dog Search

As stated above, a search occurs whenever police invade an area where a person has a constitutional expectation of privacy. The use of a drug-detection dog has been found to constitute a search by the Supreme Court, which has held that persons have an expectation of privacy both in their home and the surrounding curtilage. Thus, while dog searches are permissible in the automobile context (assuming no unreasonable delay), such searches are not permissible in the context of a home search without a warrant or probable cause.

Here, O walked the dog "around Dora's house." If O stayed off Dora's property, there is likely no 4th Amendment violation. For instance, O could have the dog sniff Dora's trash that was set out on the curb. Further, since D's house is "in the country," O might even have some leighway to search any open fields surrounding D's property, since such fields do not carry the same privacy interests as a residence. However, the facts indicate that O directed the dog to jump up on the porch, at which point the dog sniffed the front door, and indicated the presence of methamphetamine.

This clearly constitutes a search under the 4th Amendment. O brought the dog in proximity to Dora's actual place of dwelling, and ordered the dog to jump on the porch (technically, a trespass - which the court recently found to be one means of determining a search in the GPS car case). Thus, by violating Dora's privacy interests and property interests, and conducting a search without a warrant or any identifiable probable cause, the drug dog's reaction constituted an unconstitutional search.

Under the exclusionary rule, the drug dog's reaction thus cannot be admitted as evidence.

No Consent or Exceptions

It should be noted that warrant and a probable cause are not required where an officer obtains consent to search an area. Even then, any search is limited in scope by the degree of consent. Here, the facts clearly show that Owen "waited until [Dora] left"

before commencing the dog search. Thus, the absence of consent is apparent and does not apply. Similarly nothing in the facts indicates that O was in hot pursuit or that there was a risk of imminent destruction of evidence - to the contrary, it appears nobody was home when D left the house.

(2) Suppressing Evidence of the Small Box

Owen propped a ladder on the back of D's house, climbed to the top, and peered into a second-story bedroom window. After seeing a small box on a bedside table with a label he could not read, O used binoculars to determine that the listed ingredients could be used to make methamphetamine.

Unreasonable Warrantless Search

As discussed above, O had no probable cause or warrant and thus was not legally on the property. His action of using a ladder and placing it against the house is clearly a violation of Dora's property interest in her home (whether the ladder was his or Dora's) and by subsequently looking in her window, from the vantage point offered by the ladder, he effectively conducted a search. Similar to the facts discussed above, the fact that O did not physically enter D's house does not preclude the court finding an unreasonable search. Here, both Dora's property interest (to not have ladders placed against her home) and privacy interests (to not have cop's snooping in her second floor window from ladders they placed on her house) have been violated. Thus, the search was unconstitutional because, as discussed, no warrant or probable cause existed.

Dog's Search Did Not Create Probable Cause or Exigent Circumstances

The Prosecution may argue that following the dog's bark, the officer had probable cause with respect to the house containing methamphetamine. Even so, no exception to the warrant requirement applies and thus the search remains constitutionally impermissible. As noted, Dora was not at the house and the facts do not indicate that anyone else was present in the home. Further still, Dora apparently does not know about officer's presence on her property (otherwise she likely would not be gabbing so loud about a

drug deal through an open window). Thus, even if the dog-sniff were not illegal, the absence of a warrant would preclude O from searching D's home, where her expectation of privacy is at its highest.

Binocular Search

As a general rule, law enforcement's use of technology does not inherently transform police action into a search. However, police use of technology not widely available to the public may result in a search even where a person's physical interest in property was not violated (compare: thermal imaging vs. binoculars). Here, the officer used binoculars to look in D's window in order to read the ingredients of a small box on her bedside table. The use of binoculars in and of itself does not appear to be problematic - this is an item generally available to the public.

However, for the reasons stated above, O only got to a point where he could assess the need to look into the box in D's window by conducting an impermissible search (putting a ladder on the back of the house). Thus, O's "search" - vis-a-vis his use of binoculars to read the ingredients in the box - and the subsequent discovery of that information constituted either an illegal search, or the fruit of the initial illegal search. As such, this evidence should also be excluded.

NOTE: If Officer looked through Dora's window from a tree off of her property, police may have an argument that such a search was permissible and within "plain view." However, this is questionable given the reverence with which the Supreme Court has treated a person's expectation of privacy in his home.

(3) Suppressing Evidence of Overheard Conversation through Open Window

Reasonable Expectation of Privacy in Phone Call In House Made While Window Open

After D returned home, O "walked back to the house and crouched under an open window." He subsequently heard D make incriminating statements to a caller that she

could sell several ounces of methamphetamine. This is the closest call with respect to the three pieces of evidence offered.

On the one hand, while Dora made the comment in her home, and thus retained an expectation of privacy, the facts also indicate (1) that she made the comment to someone else on the other line and (2) that her window was open. While police may not generally use wiretapping as a means to conduct a search without a warrant, persons are said to assume the risk whenever they disclose information to a third party. Thus, if the overheard conversation is introduced by obtaining the person on the other end as a witness, no constitutional issue would arise (except that O only knew about the call via a potentially illegal search, which would not have been discovered but for that search). In any event, the fact the statement was made to a third party slightly reduces Dora's expectation of privacy.

The second important fact is that Dora's window was open. Officer will argue that the window was open, and Dora likely assumed the risk of her conversation being overheard. Thus, Officer will contend that no impermissible search occurred. However, Dora will argue that she lives "in the country," where houses are presumably far apart and foot traffic is minimal. Thus, she would say her expectation of privacy is not altered by an open window. Further, Dora will argue that the officer intentionally "crouched under an open window" and thus conducted an illegal search by being physically on her property and concealing his presence. Finally, Dora will argue that officer would not have even returned to her house but for the illegal searches discussed in items 2 and 3.

Given the clear violations of the first two illegal searches and subsequent chicanery by officer, it is likely that Dora will once again be able to prevail in the exclusion of this evidence, both as the product of an illegal search or as fruit of the poisonous tree (even if no search occurred - O would not have returned to the window but for the initial illegal searches).

Q4 Community Property

In 2008, Henry and Wendy married in California. Neither had saved any money before marriage. At the time of the marriage, Henry had a monthly child support obligation of $1,000, which was deducted from his salary, for a child from a prior relationship.

In 2010, Wendy accepted a job at Company. At that time, she was told that if she performed well, she would receive stock options in the near future.

In 2011, Henry inherited $100,000. He used $25,000 to buy a necklace that he gave to Wendy as a holiday present. He used the remaining $75,000 to buy a municipal bond that paid him $300 per month.

In 2012, Wendy was granted stock options by Company, which would become exercisable in 2014, in part because she had been a very effective employee. Later in 2012, Wendy was injured in a car accident and made a claim against the person responsible.

In 2013, Henry and Wendy permanently separated and Henry moved away.

In 2014, Wendy settled her accident claim for $30,000. Later in 2014, Wendy exercised her stock options and earned a profit of $80,000.

In 2015, Wendy filed for dissolution.

1. What are Wendy's and Henry's respective rights regarding:

    a. The necklace? Discuss.

    b. The car accident settlement proceeds? Discuss.

    c. The stock option profits? Discuss.

2. Should Henry be required to reimburse the community for his child support payments and, if so, in what amount? Discuss.

Answer according to California law.

Answer A

1. Wendy and Henry's Rights at Divorce

General Principles

Henry and Wendy were married in California. California is a community property state. Property acquired during marriage is presumed to community property (CP). Property acquired before marriage or after permanent physical separation is presumed to be separate property (SP). In addition, property acquired by gift, bequest, or devise, is that spouse's SP. The character of property is determined by tracing back to the source of funds used to acquire that property.

At divorce, each CP asset is divided 50/50 in kind, unless a special rule requires deviation from the equal division requirement or if the spouses agree in writing or by oral stipulation in court. Each spouse's SP remains that spouse's SP.

a. The Necklace

Characterization

Property acquired during marriage is presumed to be CP. A spouse can rebut this presumption by tracing back to the source of the property and showing that SP was used to purchase the property.

Here, the necklace was acquired in 2011, while Henry and Wendy were still married. Thus, the necklace is presumed to be CP. However, Henry will be able to rebut this presumption by tracing back to the source of the funds used to purchase the necklace. Henry used $25,000 of his $100,000 inheritance to purchase the necklace. Since an inheritance is SP regardless of when it was acquired, Henry will be able to

rebut the CP presumption by tracing his SP funds. The next issue is whether Henry and Wendy changed the character of the property when Henry gave the necklace to Wendy.

Transmutation

Spouses can change the character of any asset from CP to SP, SP to CP, or from one spouse's SP to another spouse's SP. This is called a transmutation. To be valid, there must be an express declaration in writing that is signed or assented to by the spouse whose property interest is adversely affected. The writing must expressly state that a change in the property ownership is being made.

Here, when Henry gave Wendy the necklace, no transmutation occurred because there was no express declaration in writing signed by Henry that stated that a change in the ownership interest in the necklace was being made. However, there is an exception to the transmutation rule for gifts of a personal nature.

Exception - Gift of Personal Nature

A transmutation is not necessary to change the character of an item when there is a gift from one spouse to another of an item of personal nature. For this exception to apply, the item must be of a personal nature, used primarily by the spouse who was gifted, and the item must not be substantial taking into account the circumstances of the marriage.

Here, the necklace is an item of a personal nature because it is jewelry that is worn by a person. Furthermore, Wendy, the spouse who was gifted with the necklace, is presumably the one who primarily uses the necklace. The issue here would be whether the necklace was substantial in value taking into account the circumstances of Henry and Wendy's marriage. The facts do not tell us about Henry's employment but we do know that he has a job. Furthermore, we know that Wendy has a corporate job. Nevertheless, the spouses came into the marriage with no savings and Henry had a

monthly child support payment. Considering that the necklace was $25,000, it was most likely substantial taking into account the circumstances of their marriage. Therefore, the necklace would most likely remain Henry's separate property and did not change into Wendy's separate property.

Distribution At Divorce

At divorce, a spouse's SP remains his or her SP.

If the necklace was substantial in value taking into account the circumstances of Henry and Wendy's marriage, then the necklace would remain Henry's SP. If it was not substantial taking into account the circumstances of marriage, then the necklace was changed into Wendy's SP.

b. The Car Accident Settlement

Personal Injury Award

The character of a personal injury award is determined when the cause of action arose, not when the spouse receives a settlement or judgment. If the cause of action arose during marriage, then the personal injury award is CP. If the cause of action arose before marriage or after permanent physical separation, then it is SP.

Here, the car accident settlement arose out of Wendy getting injured in a car accident in 2012. Thus, the cause of action arose in 2012. Although there may be an issue as to whether the economic community ended in 2013 or 2015 (discussed below), the community was certainly continuing in 2012, and thus the personal injury award would be CP.

Division At Divorce

The general rule is that each CP asset is divided 50/50 in kind at divorce. One special rule that requires deviation from the equal division requirement is for personal injury awards. At divorce, a personal injury award will be awarded entirely to the injured spouse unless the interests of justice require otherwise.

Here, the personal injury award will be awarded to Wendy at divorce since she was the injured spouse. We would need more facts to determine whether the interests of justice would require that the community receive part of the award, such as where part of the settlement was reimbursement for medical expenses that were paid from community funds. As it is, the personal injury award of $30,000 will be awarded entirely to Wendy at divorce.

c. The Stock Option Profits

The rents, issues and profits of community property are community property. Stock options get special treatment under the rules when the stock options are granted during the marriage but are not exercisable until after the marital community ends. It first must be determined when the marital community ended.

End of The Marital Community

The marital community ends when there is permanent physical separation and an intention not to resume the marriage. Intention not to resume the marriage by one spouse only is effective so long as it is communicated to the other spouse.

Here, Henry and Wendy permanently separated and Henry moved away in 2013. Thus, we have permanent physical separation. The issue is whether the spouses intended to resume the marriage. Henry moving away *permanently* is indication of an intention not to resume the marriage, but we would need more facts about intent to

make that determination. Wendy filing for dissolution in 2015 is certain evidence of an intention not to resume the marriage. Thus, it is certain that the economic community ended in 2015, but it most likely ended before that, in 2013 when Henry and Wendy permanently separated and Henry moved away.

Stock Options

The community interest in stock options depends on which formula is used. Which formula is used depends on what the intent of the employer was in granting the options. If the employer's intention was to reward the employee for past services, then the formula is: The numerator is the years that the employee was married until the economic community ended and the denominator is the years the employee was married until the options became exercisable. The community gets a larger percent under this formula because community labor is community property. If the employer's intention was to grant the options as an incentive to continue working for the company the formula is: The numerator is the date the option was granted until the economic community ends and the denominator is the date the option was granted until the date the options became exercisable. The fraction represents the community property interest.

Here, Henry would argue that the employer was granting the options as remuneration for past services because when Wendy was granted the options, it was in part because she has been a very effective employee. Wendy would argue that it was an incentive to keep working and doing a good job because she was told when she began working there that she would receive stock options in the near future if she performed well. Since it is a difficult determination on these facts, the stock options will be analyzed using both formulas.

Reward For Past Services

Here, when Wendy was hired in 2010, she was married to Henry. Henry and Wendy permanently separated in 2013, which is when the economic community ended. Thus the numerator is 3. The options became exercisable in 2014, so the denominator is 4 (2010-2014). Thus, the community interest in the stock option profits would be 3/4.

Incentive

Here, the options were granted in 2012 and the economic community ended in 2013. Thus, the numerator is 1. The options were granted in 2012 and became exercisable in 2014, making the denominator 2. Thus, the community interest in the stock option profits would be 1/2.

Division At Divorce

If the employer's primary intent in granting the options was to reward Wendy for past services, then the community interest in the $80,000 stock profits is 3/4, or $60,000. The $60,000 would be divided equally between Henry and Wendy; thus each would receive $30,000 of the profit. Wendy would end up with $50,000 ($30,000 (her half of the CP) and $20,000 (SP interest) and Henry would get $30,000.

If the employer's primary intent in granting the options was to incentivize Wendy to keep working, then the community interest in the $80,000 stock profits is 1/2, or $40,000. The $40,000 would be divided equally between Henry and Wendy; thus each would receive $20,000 of the profit. Wendy would end up with $60,000 ($20,000 (her half of the CP) plus $40,000 (SP interest)) and Henry would end up with $20,000.

2. Should Henry be required to reimburse the community for child support payments and if so, what amount?

Child Support Payments

Child support payments from a previous marriage are treated like a debt incurred before marriage. The CP is liable and the parent spouse's SP is liable. The other spouse's SP is not liable. The community is entitled to reimbursement for child support payments made with community funds to the extent that separate property was available and not used. A spouse's salary during marriage is community property.

Here, the child support payments were for Henry's child from a prior relationship so his SP is liable and the CP is liable. Henry paid $1000 a month for child support payments from his salary. Henry's salary is community property because it is from his labor during marriage. Since CP funds were used to pay the child support payments, the issue is whether there was Henry's separate property available that could have been used instead.

Reimbursement

Here, the spouses had no money saved coming into the marriage in 2008. Henry received an inheritance of $100,000 in 2011. Thus from 2008-2011, the community is not entitled to reimbursement because there was no separate property available. Henry tied up $75,000 of the $100,000 in a municipal bond and used the other $25,000 for Wendy's necklace. Since the bond had profits of $300 per month that went to Henry, that is SP that was available (as stated above, rents issues and profits of SP are SP, and this was SP because it was inherited). Thus, the community is entitled to reimbursement for at least $300 of the $1000 paid in child support until the economic community ended in 2013.

At Divorce

The community is entitled to $300 a month from 2011-2013 (when the economic community ended). So the calculation is 24 months multiplied by $300, which equals

$7200. At divorce, the $7,200 will be divided equally between Henry and Wendy. Wendy will get $3,600 and Henry will get $3,600.

Answer B

1. Wendy and Henry's Respective Rights

California is a community property state. Property acquired during a valid marriage is presumptively community property ("CP"). Property acquired before marriage the spouse's separate property ("SP"). Further, property acquired during marriage by gift, devise, or bequest is SP, along with the rents, profits, and increases in value of the SP during marriage. At dissolution of the marriage, the court will divide CP assets equally in kind, absent an agreement to the contrary. At dissolution of the marriage, each spouse's SP will remain SP. The court will trace the asset back to its source to determine its ownership. California has also expanded its community property system to domestic partnerships between same sex couples and elderly couples who are receiving Social Security Benefits. Since Henry and Wendy married in California, community property rules govern.

End of the Economic Community

The community ends upon dissolution of the marriage or at permanent physical separation, with an intent not to resume the marital relation. The intent may be unilateral, provided it is communicated to the other spouse. Here, the facts state that Henry and Wendy permanently separated in 2013, and Henry moved away. While the facts do not state whether there was an express agreement not to resume the relation, Henry's moving away along with the fact that they permanently separated likely means that they intended not to resume the marital relation. Thus, the economic community ended in 2013, not at filing of dissolution in 2015.

1a. The Necklace

The issue is whether the community has an interest in the necklace Henry gave to Wendy. Since the necklace was acquired during the marriage, it is presumptively CP. However, Henry can trace the funds used to purchase the necklace to his inheritance of $100,000 in 2011. Since property acquired by inheritance is SP, the funds used to purchase the necklace are SP.

Spouses may agree to change the character of ownership during the marriage by transmutation. Prior to 1985, oral agreements were sufficient to transmute an asset from SP to CP, or from CP to SP. However, after 1985 the court requires an express agreement in writing, stating that the nature of ownership is changing, and signed by the adversely affected spouse. There is an exception, however, for gifts made to a spouse during marriage that are not substantial taking into account the economic circumstances of the marriage.

Here, Henry gifted Wendy a necklace purchased with $25,000 of his SP. There is no evidence of an express agreement, in writing, signed by Henry to change the ownership of the asset. Wendy may argue that since the necklace was a gift of SP, she owns the necklace as her SP. However, the facts state that neither Henry or Wendy had saved any money prior to marriage, and Wendy had accepted a new job the year before. Therefore, it is likely that $25,000 was substantial in value considering the circumstances of the marriage. Given that the necklace is worth $25,000, Henry and Wendy appear to be just starting out their careers, and there is no express transmutation agreement, the court will likely award the necklace to Henry as his SP, and Wendy does not have an interest in the necklace.

1b. The Car Accident Settlement Proceeds

A judgment obtained by a spouse for a cause of action arising during the marriage is presumptively CP. While Wendy settled the claim for $30,000 in 2014, after the end of the economic community, the accident occurred in 2012, prior to the permanent physical separation. Thus, the community would have an interest in the recovery during marriage.

However, the court will award the judgment to the injured spouse at dissolution of the marriage, absent circumstances which would be inequitable to the other spouse, such as if medical expenses were paid from the community or the noninjured spouse quit her job to care for the injured spouse. Here, however, there is no indication that it would be inequitable to award the settlement to Wendy, though the community may be entitled to reimbursement for any medical expenses. Therefore, the court will award the

settlement proceeds to Wendy at dissolution, and Henry has no interest in the proceeds.

1c. The Stock Option Profits

In determining whether stock options are CP or SP, the court will determine whether the options were granted as deferment of wages, or as a future incentive to continue working for the company. As a spouse's labor during marriage, in the form of wages, is CP, the community will have a greater interest in options that are granted as deferred wages. The court will conduct a proration to determine the CP interest in the stock options, dividing the years of employment during marriage over the years for the option to become exercisable. In this case, the court will take the years of employment during the marriage (2010-2013) divided by the years of employment until exercise (2010-2014). The community will have a 3/4 interest in the stock options under this approach, so Henry and Wendy would each have a 1/2 interest in $60,000 of the profits, and Wendy would own $20,000 as her SP. Thus, Henry would take $30,000 at dissolution, and Wendy would take $50,000.

Alternatively, if the options are granted as a future incentive, the court will divide the years of employment during the marriage after the option is granted by the years the option is granted to becoming exercisable. Thus, the court would divide the years of marriage from the grant of the option (2012-2013) divided by the option's grant to its being exercisable (2012-2014). In this case the community would have a 1/2 interest, so Henry and Wendy would each own 1/2 of $40,000, and Wendy would have $40,000 as her SP. Thus, Henry would take $20,000, and Wendy would take $60,000.

Since Wendy was told that "if she performed well" at Company, she would receive stock options in the near future, it appears that the options were granted as deferred wages, earned by Wendy's labor during the marriage. Further, at the time they were granted, Company stated they were because she "had been" an effective employee, pointing to her labor during the marriage as providing the basis for the options. Thus, the court will likely use the first approach, and Henry will take $30,000, and Wendy will take $50,000.

2. Reimbursement for Henry's Child Support Payments

Debt incurred prior to marriage is the spouse's SP, but CP may be used during marriage to fulfill the debt obligations. The nondebtor spouse may choose to keep her earnings in a separate checking account, to which the other spouse does not have access, to avoid her wages from being reached. At dissolution, the debt will be assigned entirely to the debtor spouse. Since Wendy did not appear to isolate her earnings in a separate checking account, the child support obligations could be paid by the CP.

However, the community may be reimbursed at dissolution if the support obligation was paid by the community when separate property was available. Since Henry paid the child support obligation of $1000 per month from his earnings, which are CP, during the marriage, the community paid for the obligation during marriage. As Henry and Wendy did not have SP coming into the marriage, Wendy will be unable to show that SP was available prior to 2011. However, in 2011, Henry inherited 100K, investing 75K to buy a municipal bond paying $300 per month. While the bond was acquired during marriage, and is thus presumptively CP, the court will trace the funds to the 75K inheritance, which was SP. As profits from SP during marriage are also SP, the $300 per month was Henry's SP. Since there was $300 per month of SP available from 2011 to 2013, and Henry paid the obligations from his earnings, or CP, the community is entitled to reimbursement of $300 per month during 2011 and 2012, since the parties separated in 2013. Thus, Henry is to reimburse the community $7,200 for the SP that was available.

Q5 Business Associations / Professional Responsibility

Online, Inc. was duly incorporated as an Internet service provider. Its articles of incorporation authorized issuance of 1,000 shares of stock at $1,000 par value.

Online initially issued only 550 shares to its shareholders as follows: Dick and Sam each received 200 shares and Jane received 150 shares. Online's Board of Directors (composed of Jane, Sam, and Harry) named Jane as the Chief Executive Officer and named Harry as General Counsel.

Online's business grew substantially in the following months. Still, Online was short on cash; as a result, instead of paying Jane $10,000 of her salary in cash, it issued her 50 additional shares with the approval of its Board of Directors.

Looking to expand its operations, Online sought to enter a strategic partnership with LargeCo, Inc. Jane had learned about LargeCo through Harry's wife, who she knew was the majority shareholder of LargeCo. Jane directed Harry to negotiate the terms of the transaction with LargeCo. In the course of Harry's negotiations with LargeCo, LargeCo offered to acquire the assets of Online in exchange for a cash buy-out of $1,000,000. Harry telephoned Jane and Sam; Jane and Sam agreed with Harry that the offer was a good idea; and Harry accepted LargeCo's offer.

Two days after completion of the transaction, LargeCo announced a joint venture with TechCo, which was solely owned by Harry. The joint venture was valued at $10,000,000. In its press release, TechCo described the joint venture as a "remarkable synergy of LargeCo's new technology with TechCo's large consumer base."

The following week, Dick learned of LargeCo's acquisition of Online's assets. An expert in technology matters, he was furious about the price and terms of the acquisition, believing that the value of Online had been seriously underestimated.

1. What are Dick's rights and remedies, if any, against Jane, Sam and/or Harry? Discuss.

2. What ethical violations, if any, has Harry committed? Discuss. Answer according to California and ABA authorities.

Answer A

1)

Directors of corporations owe fiduciary duties to the corporation. Among these duties are the duties of care and the duties of loyalty. If a director breaches either of these duties, affected shareholders may bring either a direct action or a derivative action against the director, based upon the nature of the injury the shareholder suffered.

Duty of Loyalty.

Directors owe a fiduciary of duty of loyalty to the corporation, which requires the director to act in the best interest of the corporation, to refrain from self-dealing with the corporation, and to refrain from usurping business opportunities from the corporation.

Harry's Breach of the Duty of Loyalty as a Director:

One aspect of the duty of loyalty is that it requires the director to refrain from self-dealing with the corporation. Here, the facts indicate that Harry negotiated the terms of a transaction with LargeCo., of which Harry's wife is the majority shareholder. Self-dealing extends not only to the director or businesses in which the director has a financial interest, but also those of the director's family. Here, because LargeCo is mostly owned by Harry's wife, the acquisition of Online's assets by Online was a self-dealing transaction.

In order not to be liable for a breach of duty regarding a self-dealing transaction, the terms of the deal must be objectively fair to the company, or the decision must be ratified at a meeting by a majority of disinterested directors who are fully informed about the conflicting interest and the terms of the agreement. (Or, by unanimous written consent of disinterested directors, if no meeting). Here, Harry provided no notice for a special meeting of the board of directors. There was no vote by the disinterested investors (Jane and Sam). Harry's telephone call to Jane and Sam, and Jane and Sam's subsequent agreement was insufficient to ratify the transaction.

Furthermore, the facts indicate that the acquisition was not fair to the company. LargeCo. offered $1,000,000 for all of the assets of Online. However, two days after completion of the transaction, LargeCo announced a joint venture with TechCo, valued at $10,000,000. This suggests, but is not conclusive, that the $1,000,000 acquisition offer may have been lower than fair market value for the acquisition.

Harry also arguably breached the duty of loyalty by usurping a corporate opportunity. TechCo, owned solely by Harry, entered into a joint venture with LargeCo two days after the completion of the acquisition of Online by LargeCo. A director may not obtain business opportunities for his own benefit at the expense of the corporation. Whether a business opportunity is one that should first be offered to the corporation is usually determined by the corporation's business, and whether the corporation is in the same general business as the opportunity. It is unclear from the facts whether the joint venture with LargeCo was a business opportunity that TechCo usurped from Online, but, if TechCo and Online conduct similar business, Harry likely violated the duty of loyalty in this aspect as well.

Harry, Jane, and Sam's breaches of the duty of care.

Corporate directors also owe the fiduciary duty of care to the corporation, which requires directors to act as reasonably prudent directors and in good faith when making corporate decisions. Under the business judgment rule, a court will not disturb a director's business decisions, and will find compliance with the duty of care, if a director takes reasonable steps in becoming informed, bases decisions on a reasonably rational basis, acts in good faith, and refrains from self-dealing with a corporation.

Under this standard, Harry, Jane, and Sam have breached the duty of care, and will not be afforded the protection of the business judgment rule. The facts indicate that Jane knew that LargeCo was largely owned by Harry's wife, yet Jane directed Harry, a director she knew to be interested, to negotiate the terms of a transaction with LargeCo. This was likely unreasonable; a reasonable director would have had a disinterested

party negotiate the terms of a possible acquisition. Furthermore, Jane and Sam failed to take reasonable steps in becoming informed about the deal. The facts indicate that Harry, again an interested party, telephoned Jane and Sam, and that Jane and Sam agreed that the offer was a good idea. This is not sufficient; Jane and Sam undertook no independent investigation to determine if the terms of the proposed acquisition were fair to the corporation. Sufficient steps would have included, for example, obtaining an independent audit of Online's value as a business. Here, there are no facts Jane and Sam took **any** steps in becoming informed about the deal. Therefore, they have both breached the duty of care in this respect.

Finally, Harry's negotiations with LargeCo. were not in good faith. Harry's wife was the majority shareholder of LargeCo. Furthermore, mere days after the completion of the transaction, LargeCo entered into a $10,000,000 joint venture with Harry's solely owned company. Both of these facts indicate that Harry was acting not in the best interest of the corporation, but in his own best interests.

Issuance of the Stock For Less Than Par Value.

Dick may also bring a derivative suit on behalf of the corporation to recover for the issuance of the stock to Jane. Par value sets the minimum price for which stock may be issued. Here, Online Inc's stock has a par value of $1,000. This means shares cannot be issued for less than $1,000. The facts indicate that Online, short on cash, issued Jane 50 shares of Online stock, in lieu of $10,000 salary she was owed. This was improper. The board, Jane, Sam, and Harry, are liable to the corporation for the difference between the par value of the 50 shares ($50000) and the price paid ($10000). This is known as the "water." Jane is also personally liable as the party who received the stock, because, as a director with knowledge of the par value, she was aware that the stock was being issued to her below par value.

Failure to provide Notice and Obtain Shareholder Vote for Acquisition of Substantially All of Online's Assets.

Certain major events in a corporation must be put to a shareholder vote. These include a merger or an acquisition of substantially all of the corporation's assets. Before disposing of substantially all of a corporation's assets, there are procedures that must take place. First the board must pass a resolution, either during a meeting or by written consent, agreeing to the acquisition. Appropriate notice must then be given to shareholders, informing them of the terms of the transaction and the date of the shareholder's meeting for purpose of the vote. At the meeting, a quorum must be present, and a majority of shares voted must be in favor of the acquisition.

Here, none of these procedures took place. Dick, as a shareholder, was uninformed of the acquisition, which was agreed to solely by the directors, Harry, Jane and Sam, and accepted solely by Harry.

Derivative Action.

Here, Harry would be able to bring a derivative action on behalf of Online Co against Harry, Jane, and Sam, for the above violations. Normally, a shareholder must make a demand upon the board of directors, before bringing the action on its behalf. Here, however, demand will be excused, because the action would be against all members of the board of directors, who would be defendants in the action. Harry will likely be able to recover, for the corporation, the "water" from the stock issued to Jane, and damages for breaches of the duties of loyalty by Harry, Jane and Sam. Furthermore, Harry, again, on behalf of the corporation, may be able to rescind the acquisition, because the proper procedures for the acquisition of Online's assets were not followed. If he is successful in his derivative action, Harry will be entitled to attorney’s fees and costs of suit.

2) Harry's Ethical Violations

Duty of Loyalty:

Harry has also violated his ethical duty of loyalty. Under both the ABA and CA rules, an attorney must always act in good faith and in the best interest of the client.

An attorney may not represent a client where the attorney's representation creates either a possible or actual conflict of interest. Under the ABA, an attorney may represent a client if the attorney reasonably believes he will be able to represent the client without a conflict, and the client provides informed written consent. In California, there is no reasonableness standard, but the attorney must receive informed written consent in the case of a possible conflict and again if the conflict ripens into an actual conflict.

Here, Harry has a conflict of interest in representing Online Co. with respect to its transaction with LargeCo. LargeCo's majority shareholder is Harry's wife, so Harry has a financial interest that is directly in conflict with Online Co's interest. Harry failed to disclose the conflict to Jane and Sam (it is immaterial that Jane knew this on her own; Harry still has a duty to inform), and Harry failed to obtain written consent from the company. Having violated this duty, Harry is subject to discipline.

Business Deal with the Client:

When entering into a business deal with the client, the deal must meet four specified criteria. First, the deal must be on objectively fair terms to the client. Second, all terms of the deal must be clearly and thoroughly disclosed in writing to the client. Third, the client must be advised that outside counsel is recommended. Fourth, the client must provide written consent.

Here, Harry has failed to meet these requirements. By entering Online into a deal with LargeCo, of which his wife is majority shareholder, Harry is essentially entering into a business deal with Online. The facts suggest the deal is not fair, because 2 days later Harry enters into a joint venture with LargeCo for 10x the price paid to Online. The terms of the deal were not fully disclosed in writing, because the deal was discussed

over telephone. Harry did not advise Online that it should have independent counsel. Finally, Harry did not receive written consent by Online for the deal.

Accordingly, Harry has violated his duties regarding this deal, and is subject to discipline.

Duty of Competence

An attorney has a duty of competence in his representation of a client. An attorney must exercise reasonable skill while representing the client. Reasonable skill is determined by a number of factors, including how long the attorney has practiced, the attorney's expertise, the amount of time the attorney put into becoming informed, and the ability to associate with more knowledgeable counsel. Here, the facts indicate that Harry, as general counsel of Online, breached numerous fiduciary duties. Harry approved the issuance of stock for significantly below par value, resulting in liability to himself, the other directors, and Jane, in her role as purchaser. Furthermore, Harry represented Online in a transaction in which he knew he had a personal financial interest. Finally, Harry accepted LargeCo's offer, without proper board approval and approval by shareholders. These actions suggest that Harry did not exercise reasonable skill in his representation of Online Inc.

While each of these may subject Harry to discipline under the ABA, California requires a repeated, reckless, or intentional failure to exercise reasonable skill, in order to be subject to discipline. Even under the California standard, it is likely that Harry could be disciplined, due to both his intentional conduct in violating the duty of loyalty, and in his repeated failure to exercise reasonable skill in the issuance of stock and acceptance of LargeCo's acquisition offer.

Answer B

1. What are Dick's remedies?

Direct Remedies

Dick will likely be unsuccessful in bringing direct action in his own right as a shareholder, as he likely cannot succeed in suing for oppression. In a closely-held corporation, with a small number of shareholders, when one shareholder owns a majority of the shares, that shareholder may not take actions to oppress the minority shareholders and deprive them of their ability to exercise their rights as shareholders, such as voting, or unreasonably deprive them of dividends.

Here, Online Inc. is probably a close corporation, as it has only three shareholders: Dick, Sam, and Jane. However, Dick will probably be unable to argue for oppression because he owns 200 shares, which is equal to Sam's holdings, and after Jane received an additional 50 shares, she is also a holder of 200 shares. Therefore, because the shareholders own equal portions of Online, there is no majority shareholder oppression here, and Dick will need to take action in a shareholder's derivative suit on behalf of the corporation to obtain relief for the acts of Sam, Jane, and Harry.

Derivative Suit

Dick will be able to sue on behalf of Online Inc, in a shareholder's derivative suit. To bring a derivative suit, the shareholder must first petition the board of directors, and be rejected by the board. However, many states now do not require this step if the petition would be futile (i.e. where a majority of the board would be defendants in the derivative suit). Here, because the entire board would be defendants, it would be futile, and Dick would be able to bring his shareholders' derivative suit.

a. Jane

i. Watered Stock

When a corporation is incorporated, it can include a par value for its shares in the articles of incorporation. A par value is the minimum value that the share can be issued for. A share issued for below par is called "watered." A shareholder who takes knowing of the water may be liable for it, and the board of directors will be liable to the corporation for the "water": the difference between the par and the issued value.

The issue here is whether the board issued watered stock to Jane when it gave her 50 shares in the place of a $10,000 salary payment. A corporation may exchange shares for anything of value, including real property and wages, but that exchange must still meet the par value. Here, Online's par value for its shares was $1,000 per share. Thus, 50 shares would be worth $50,000 par. The board of directors voted to issue Jane $50,000 worth of stock for $10,000 worth of labor, creating $40,000 of water. Therefore Dick could sue on behalf of the corporation to recover the value of the water from either Jane, who took the shares with knowledge of the water, and also voted to issue them as a board member, or the other two directors for the water as well.

ii. Breach of Duty of Loyalty

All directors of a corporation owe fiduciary duties of loyalty and care to the corporation. A director must not deal with the corporation as an outsider, and must not engage in transactions where the director is interested in the transaction. Here, Jane breached the duty of loyalty by issuing herself the watered stock. Thus, she took advantage of her position as a board member, and obtained stock at below par in exchange for her services.

iii. Breach of Duty of Care

All directors owe a corporation a duty of care. A director must conduct business as a reasonably prudent director in the same or similar circumstances. A director may rely upon experts when voting on decisions, and may also rely upon other members of the board, but only if they are reasonably qualified to give that advice. A director will not be held liable for good faith business judgment decisions. Here, in voting on the decision to sell Online, Jane "agreed with Harry" that the offer was a good idea, and Harry accepted the offer. This deal was for the sale of the entire company,

and Jane did absolutely no due diligence whatsoever to ensure that the deal was in fact a good one. Importantly, she relied only upon Harry, an attorney, and not upon Dick, who was an expert in technology matters, and who would have been a better resource on the value of the company. Jane could argue for the business judgment rule, but because she did so little in the way of due diligence, she will not be able to argue good faith successfully. This is especially true because she knew of Harry's marital relationship with the majority shareholder of LargeCo.

Therefore, Jane will be liable for a breach of the duty of care.

b. Sam

i. Watered Stock

Sam will be liable as a board member for the "water" on the stock issued to Jane, for the same reasons Jane was liable as a board member.

ii. Breach of the duty of Care

Sam will be liable for a breach of the same duty of care as Jane, because he too relied solely upon Harry when agreeing to sell Online to LargeCo.

c. Harry

i. Interested Director/Breach of Loyalty

The same duty of loyalty applies to Harry as a director as applied to Jane. A director is part of an "interested director transaction" where the director is personally part of the opposite side of a deal with the corporation, or is in a close relationship with a majority owner or board member of the other corporation. In this situation, any transaction may be voidable and the director may be held liable for the damages.

Here, Harry was an interested director. He was engaged in negotiations with LargeCo, in which his wife was the majority shareholder. He had a duty to disclose that to the board. He did not, and thus breached his duty. Harry could argue that Jane knew of the relationship, and thus the board was aware of the interest he had. That argument will fail because he had a duty to inform the entire board, not just rely on one member.

Thus, Harry will be liable for the deal between LargeCo and Online.

ii. Duty of Care

Harry also breached his duty of care, by not doing any due diligence on the deal, and by accepting an offer that undervalued the company. The same reasonably prudent director standard applies here. Because Harry alone negotiated the deal, did not do any research into the value of the company, and took a low offer, Harry breached his duty of care.

d. Fundamental Corporate Change

Dick will also have a successful action against all three board members together for a failure to put a fundamental corporate change to a vote of the shareholders. A fundamental corporate change includes the sale of all, or substantially all of the corporation's assets. A fundamental corporate change must be approved by a resolution of the board, at a board meeting, and then submitted to the shareholders, who must approve it by a majority vote.

Here, the board agreed to a fundamental corporate change when it allowed the cash buy-out of all Online assets for $1 million. Thus, they were required to hold a board meeting to approve the change and submit it to the shareholders. They did not. A board meeting must be an in person meeting, and a special meeting requires written notice to all board members. Neither occurred here, only a phone call, without an actual vote. More importantly, the change was not submitted to the shareholders for a vote. In fact, the non-board shareholder Dick was not informed at all.

Therefore, the board will be liable to the shareholders for damages on the fundamental change.

2. Harry's Ethical Violations

Potential Conflicts

Under the California rules, an attorney may not represent a client where the representation would be directly adverse to another client in the same matter, or where there is a significant risk that the representation will be materially limited by the lawyer's representation of another client, or the lawyer's own personal interests. A lawyer may still take on a representation under the California rules if the lawyer believes that he can

still competently represent both clients, all affected clients give informed, written consent, and the representation is not prohibited by law or ethical rule. California extends the written notice requirement to potential conflicts, while the ABA does not. The ABA rules also include a "reasonable lawyer standard" where a lawyer must reasonably believe he can competently represent both parties.

Here, a potential conflict existed when Harry sat on the Board and was also General Counsel. He put himself into the position where he may have been interested in taking an action on the board for his own personal financial gain, that may not have been in the corporation's best interest. Thus, in California, he would have had to give Online written disclosure of this potential conflict, and under the ABA and CA rules, would have had to get informed, written consent if the conflict became actual. Harry did not do this, and therefore violated the rules.

Actual Conflicts

Harry also engaged in actual conflicts of interest when he negotiated the deal with LargeCo. Here, under the California rules, Harry's personal interest with his wife, the majority shareholder, was likely enough on its own to trigger a conflict. Because Harry's relationship with his wife would lead him to be more willing to make a deal unfavorable to his client, Online, an actual conflict existed when he began negotiating. Under the ABA, the conflict is a bit more remote, as Harry is not *personally* interested in the transaction, but it would probably still be enough that his wife is the majority shareholder. Therefore, Harry was in a representation where he had an interest that was probably directly adverse to his client, or at the least posed a significant risk that it would materially limit his ability [to] represent Online. Thus, Harry would have had to obtain informed written consent, and did not. Further, it is possible that this conflict could be non-consentable under the CA and ABA rules, as it seems unlikely that *any* lawyer would advise a client to allow an attorney to negotiate a deal with a company majority-owned by that attorney's wife. Therefore he violated both the ABA and CA rules.

Duty of Loyalty

An attorney owes the highest duty of loyalty to a client, and may not take any actions directly adverse to the client's interests. An attorney can enter into regular business transactions with client, so long as those transactions are fair and are in the client's usual course of business. Any other business transactions between a lawyer and client where the lawyer is adverse, the lawyer must give the client an opportunity to obtain independent counsel, and get informed consent to the deal in writing.

Here, Harry did not disclose his own company TechCo, which put his interests in the sale directly adverse to Online, as he could then negotiate a deal with LargeCo for a greater sum. TechCo, which was owned by Harry, eventually negotiated with Harry's wife's company for a deal 10x more valuable than the one he negotiated for his client, Online. Because Harry did not inform Online of the opportunity to seek independent counsel, or obtain informed consent, Harry violated both the CA and ABA rules.

Q6 Constitution / Real Property

City Council (City) amended its zoning ordinance to rezone a single block from "commercial" to "residential." City acted after some parents complained about traffic hazards to children walking along the block. The amended ordinance prohibits new commercial uses and requires that existing commercial uses cease within three months.

Several property owners on the block brought an action to challenge the amended ordinance.

In the action, the court ruled:

1. Property Owner A, who owned a large and popular restaurant, had no right to continue that use, and had time to move in an orderly fashion during the three-month grace period.

2. Property Owner B, who had spent $1 million on engineering and marketing studies on his undeveloped lot in good faith prior to the amendment, was not entitled to any relief.

3. Property Owner C, whose lot dropped in value by 65% as a result of the amended ordinance, did not suffer a regulatory taking.

Was each ruling correct? Discuss.

Answer A

Constitutional Protection

The Constitution prohibits wrongful government/state action, not private action. State action allows constitutional protections to arise.

State Action

The state action here is the City Council amending its zoning ordinance.

Takings Clause

The power of the government to take private property for public use is known as eminent domain. The takings clause of the 5th Amendment to the US Constitution provides "no property shall be taken for public use without just compensation." The government must provide just compensation for any property taken for a public use. Since the *Kelo* decision the US Supreme Court has interpreted a public use broadly and deemed a public use to even include "economic development" as well as the classic highway, military base, etc. The Takings Clause applies to states and local entities through the 14th Amendment. Regulations are not usually considered takings but can be in certain circumstances.

Here there was no physical taking of any land by the government for a 'public use'. The City Council amended the zoning ordinance to change a block from commercial to residential. The property of the block was not actually seized, but rather the activity on the property was regulated. The property owners will argue this regulation constitutes a regulatory taking.

Regulatory Taking

A regulatory taking is that which deprives the owner of the economic use of his property. A regulatory taking is often found when a regulation deprives the owner completely of any substantial economic use. A regulatory taking analysis can be applied to the states and local entities through the 14th Amendment. (See Florida Water District.)

To determine if a regulatory taking has occurred the Court will look at (1) the economic impact of the regulatory taking on the property, (2) the owner's reasonable expectation on the return on investment for the property, (3) and how the burdens of the regulation are distributed across interested community members.

2. Property Owner A

Property Owner A will argue the City Council's amended zoning ordinance constituted a regulatory taking violated the right to a Non-conforming use.

Regulatory Taking of the Restaurant

See Rule above

To determine if a regulatory taking occurred Property Owner A will demonstrate the economic impact of the regulatory taking on the property. Here the Owner operated a popular restaurant on the premises. The impact of the regulation on the land is severe as location is vital for [a] popular restaurant. The actual economic impact of the ordinance on the property value itself would need to be determined if there is value in land that has a restaurant on it and must be remodeled or rebuilt to conform with the residential requirement.

Property Owner's reasonable expectation on the return on investment for the property. If the owner has a popular restaurant and has been there for a long period of time then the economic return expected out of the property to be achieved can be argued to have occurred then the court decision is supported. However if the restaurant is newly open and popular for this reason, the owner has likely not achieved the expected return on investment for the restaurant. Restaurants are capital intensive and it takes time to recoup the capital costs.

Finally the court should have analyzed how the burden of the regulation was applied to owners across the community. Clearly the owners on the block were affected, but there is no indication the new ordinance affected any of the surrounding blocks.

In fact the purpose of the ordinance was to reduce traffic hazards to children, but this is not likely accomplished by re-zoning only one side of the street. The government will argue it only had to show a rational basis for the decision.

Non-Conforming Use

A non-conforming use occurs when a business or residence is in existence and within the proper use of a city ordinance, at which point the ordinance subsequently changes and the current use of the property becomes in violation of the current code. The non-conforming use must be permitted to continue unless substantial threat to public safety/health is at stake. The non-conforming use may continue as long as the business or use does not cease or a change in ownership of the property occurs.

In this case the restaurant business can only operate as a non-conforming use. Owner A should have been permitted to continue using the property as a popular restaurant. There was no significant threat to public safety or health. In fact the restaurant was likely feeding many residents due to its popularity. Traffic hazards are not necessarily related to the commercial uses on the property.

Conclusion: The Court was incorrect in ruling that the property owner had no right to continue that use. There was no emergency or threat to public safety to not permit a non-conforming use.

3. Property Owner B

Property Interest

A party that makes substantial investment and obtains the necessary permits for a development based on the current zoning ordinance is entitled to complete the project within a reasonable amount of time even if the zoning ordinance changed in the meantime. Once the government has granted the permission, and the party has then relied on that permission it may not be taken away arbitrary by new ordinances. If such action occurs the party may rely on the governing zoning and ordinances at the time the project was permitted and began.

In this case Property B substantially relied on commercial zoning ordinance based on his investment of $1 million on engineering and marketing studies. This investment was for the undeveloped land based on the commercial zoning ordinance. This is a significant sum, and the Owner may even claim he detrimentally relied on the previous ordinance, but such an argument would not be upheld.

The courts often require there be some permission granted or approval of a project by a review board before a developer can be found to substantially rely on the zoning ordinance. It is not enough to have a good faith belief that your use will be permitted in [the] future, some certainty must be acquired by permit or council approval. Unfortunately for Property Owner B the facts do not indicate he submitted his plan for the undeveloped property to local official for review. No applications submitted, and unfortunately the owner will be unable to mitigate losses if all the studies were based on commercial use.

Conclusion: The court's ruling was likely correct based on the Property Owner B's failure to obtain government permission for future investment. Owner B is not entitled to any protection as he would have been if permits were granted before the City Council amended the zoning ordinance.

4. Property Owner C

Regulatory Taking

See Rule Above

To determine if a regulatory taking has occurred the Court will look at (1) the economic impact of the regulatory taking on the property, (2) the owner's reasonable expectation on the return on investment for the property, (3) and how the burdens of the regulation are distributed across interested community members.

Economic Impact

The economic impact of the residential zoning ordinance on Owner C's property is significant. There was 65% drop in value because of the new ordinance. This is over

half of the value. However, even with a severe economic drop in value the property maintains some viable economic use if it retains 35% of its value. The courts when granting a regulatory taking prefer to see no economic benefit from the property because of the regulation. Based on these facts the economic impact to the ordinance favors the City Council.

Expectation on Investment Return

This analysis depends on Property Owner C's reasonable expectation on the return on investment for the property. This is a fact specific analysis. Given the fact that the property value decreased by 65%, this was not likely an expectation of the Owner. Even in a severe economic recession property losing over half of its value is substantial and not reasonably expected.

This factor supports the lot owner's claim.

Burdens Distributed

Finally the court should have analyzed how the burden of the regulation was applied to owners across the community. Clearly the owners on the block were affected, but there is no indication the new ordinance affected any of the surrounding blocks.

In fact the purpose of the ordinance was to reduce traffic hazards to children, but this is not likely accomplished by re-zoning only one side of the street.

Conclusion: The court should have ruled that the lot owner suffered a regulatory taking if the reduced expectation on investment and distributed burdens were severe enough.

Answer B

Zoning Powers

The Supreme Court has historically granted great deference to municipalities engaged in creating zoning ordinances. (*See Euclid v Ambler Realty*). Generally, local government has the police power to enact zoning ordinances so long as they are reasonably related to a legitimate government purpose, namely, that they relate to protecting the general welfare, safety, or health of the community.

Here, the city enacted the zoning amendment to change a commercial to residential area in response to traffic that may have endangered children. Clearly, the zoning ordinance is related to a legitimate government interest in protecting children pedestrians. On these grounds, it would most likely be upheld.

However, the facts indicate that the ordinance only applies to "a single block." This raises the specter of spot zoning, which may be impermissible if used to single out landowners or make a handful of landowners bear a disproportionate burden that the public at large should have to bear. In contesting zoning that appears to unlawfully inhibit a landowner's use of his property, a landowner may bring a takings claim challenging the constitutionality of the zoning ordinance on its face or as applied. As demonstrated in *Euclid,* a facial challenge is bound to fail--zoning has been upheld for decades. But an "as-applied" challenge can be viable, and is discussed below.

Takings

Under the 5th amendment and applied to the states via the 14th amendment, the government may not take private property without just compensation. Typically, a government taking is through eminent domain, where the government must show a valid public purpose for the taking and compensate the landowner for the land the government takes for the public purpose.

Here, the ordinance does not employ eminent domain, and as such is analyzed under takings jurisprudence.

Physical Takings

Any government statute that incurs a physical occupation of a landowner's land or real property (including airspace) must be compensated (*Lorretto Teleprompter*). Here, however, the ordinance does not install or require imposition of any government presence within any property owner's physical space, so this strict rule is unavailable to the plaintiffs.

Regulatory Takings

Courts have held that an ordinance that is so burdensome, or that unduly burdens a single landowner in order to benefit the public at large, may be a regulatory taking, and must be compensated. Under *Lucas,* a regulation that incurs a "total economic wipeout", meaning that it deprives a landowner of any economically beneficial use of his land, is a regulatory taking and must be compensated. The one exception to the total wipeout rule is if the ordinance is based on preexisting common law in the state (*Lucas*).

Here, the ordinance rezones the use of land from commercial to residential, and is thus most likely not based on common law principles. In *Lucas*, the court recognized an argument that an ordinance restricting beach development could be based on common law principles, if it sought to mitigate nuisance. But the facts here are not analogous. Nonetheless, the ordinance has also not incurred a total economic wipeout. Property owners A, B, and C all may still make use of their property in economically beneficial ways, even though those uses are not the ones they anticipated.

Because *Lucas* is unavailing, a takings analysis would go to the *Penn Central* multi-factor balancing test, in which the government determines if an ordinance incurs a taking based upon: the government interest to be advanced, the nature of the government regulation, and the degree of interference with the landowner's "investment back expectations."

Variances and Amortization

Lastly, landowners may also seek relief through variances and amortizations if they do not wish to bring a constitutional claim under Penn Central. A variance can be Area or Use. An area variance allows a nonconforming use to vary by the area used; a Use variance allows a nonconforming use in an area that is not zoned for that purpose. Use variances are typically harder to secure, and the landowner must show an undue burden if the use variance is not granted.

An amortization allows a nonconforming use to persist until ownership of the property changes, and prohibits the owner from expanding or changing his permitted non-conforming use. Amortization works to mitigate the impact of a sudden zoning change, which could deprive the landowner of economic use of their property and also reduce the likelihood of a takings lawsuit.

Application to Property Owners A, B, and C

Property Owner A

Here, the court has granted the property owner a mere 3 month period to move out of the premises or change it. Under *Lucas*, the property owner most likely does not have a claim. He has not experienced a total economic wipeout because he can still sell the land for residential development.

Under *Penn Central*, he has a stronger claim. The government interest in protecting children is strong, but it zones a single block, thus making property owner A largely bear this burden rather than the community as a whole. Further, the restaurant is popular, viable, and most likely has significant investment backed expectations--namely, its physical assets and cooking equipment. Although the government does not need to ensure that the new restaurant location is equally as profitable, the strict and narrow application of the zoning amendment gives the restaurant a factual advantage if it chooses to bring a takings claim.

To avoid a takings challenge under Penn Central, the court would have been wise to issue a use variance just for the property or an amortization, allowing the owners to continue operating until they finally closed by their own accord. As is, only allowing 3 months to move and in light of an ordinance that appears to single out the owners, the court risks a viable takings claim.

Conclusion: the court can uphold the ordinance and three-month grace period because the zoning appears to be a valid government action. But these are draconian measures and a three month grace period is very short. It might consider permitting an amortization or use variance to avoid a takings claim under Penn Central. An amortization would reduce the economic impact while allowing the area to gradually conform to the zoning the city enacted.

Property B

Here, the property owner has an undeveloped lot, so his loss is minimal. Under *Lucas*, he can probably sell the lot and earn a profit, and based on the jurisprudence in *Euclid*, a zoning ordinance is still viable even if it changes the permissible uses and devalues a property significantly.

But the owner has also invested $1 million in assessing his lot in "good faith" prior to the amendment. *Euclid* makes it clear that the zoning ordinance can still be upheld. However under *Penn Central*, this huge investment backed expectation gives serious weight to a takings claim. As mentioned above, the government objective is valid--public safety--but the nature of the government action is targeted and intrusive because it only applies to a single block. By contrast, in *Penn Central*, the court upheld a development restriction on a historical building because it found that the owner could build elsewhere, and moreover, everyone else in New York was equally burdened by the restriction. Here, only the block is burdened; a handful of landowners are bearing a burden for the whole city, but they are not being compensated. Because Penn Central is a fact-based inquiry, and the investment backed expectations here are so high, the landowner has a fairly strong case.

Nonetheless, the court's decision is valid--the owner is not entitled to relief, despite his investments because he can still sell his land. But in the interest of precluding a subsequent takings claim, the court might permit the owner to submit an area variance to the zoning board. Depending on what he had planned to use the lot for, the traffic impacts of that use, and how that lot would conform with surrounding uses and traffic, an area variance may still achieve the city's goals while avoiding a costly takings lawsuit and providing relief.

Property C

Here, the court properly ruled that the landowner did not suffer a regulatory taking. There has been no total wipeout, so the land is still valuable for residential uses. Further, the facts indicate that there are not investment-backed expectations. As such, the Penn Central analysis merely considers the impact--65% reduction in value--as well as the valid government interest in protecting children. Overall, there is no valid regulatory claim.

Lastly, *Euclid* is directly on point and confirms the court's holding. A city may enact zoning using its police powers and to further the general safety, welfare, or health of the community, even when the ordinances greatly reduce the value of property owner's land. In Euclid, the owner's land was greatly devalued because he could not use it for industrial purposes, but the supreme court nonetheless upheld the zoning ordinance.
Here, there was no regulatory taking. It is also unclear if a variance of any kind would provide relief, as the facts do not indicate the type of harm the property owner has experienced or his current use of the land.

Feb 2015

California Bar Examination

Essay Questions and

Selected Answers

The State Bar Of California
Committee of Bar Examiners/Office of Admissions

180 Howard Street • San Francisco, CA 94105-1639 • (415) 538-2300
845 S. Figueroa Street • Los Angeles, CA 90017-2515 • (213) 765-1500

ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2015

CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2015 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	Subject
1.	Contracts
2.	Real Property
3.	Civil Procedure
4.	Remedies
5.	Business Associations
6.	Wills/Trusts

ESSAY EXAMINATION INSTRUCTIONS

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

Q1 Contracts

Marta operated a successful fishing shop. She needed a new bait cooler, which had to be in place by May 1 for the first day of fishing season.

On February 1, Marta entered into a valid written contract with Don to purchase a Bait Mate cooler for $5,500 to be delivered no later than April 15.

On February 15, Don called Marta and told her that he was having trouble procuring a Bait Mate cooler. Marta reminded Don that meeting the April 15 deadline was imperative. “I’ll see what’s possible,” Don responded in a somewhat doubtful tone. Concerned that Don might be unable to perform under the contract, Marta immediately sent him the following fax: “I am worried that you will not deliver a Bait Mate cooler by April 15. Please provide your supplier’s guarantee that the unit will be available by our contract deadline. I want to have plenty of time to set it up.” Believing that Marta’s worries were overblown and not wanting to reveal his supplier’s identity, Don did not respond to her fax.

When Don attempted to deliver a Bait Mate cooler on April 16, Marta refused delivery. Marta had purchased a Bait Mate cooler from another seller on April 14, paying $7,500, which included a $2,000 premium for one-day delivery by April 15.

Have Marta and/or Don breached the contract? If so, what damages might be recovered, if any, by each of them? Discuss.

Answer A

I. Governing Law

The UCC governs contracts for goods. The common law governs all other contracts, including contracts for services and real estate. The UCC has additional rules that apply when both parties are merchants.

Marta and Don entered into a contract to purchase a bait cooler. Because the bait cooler is a good, the UCC rules will govern this contract. Further, Marta is the owner of a successful fishing shop, and Don sells bait coolers. They can both be considered merchants and the UCC's merchant rules should also apply.

II. Contract Formation

A valid contract requires an offer, acceptance, and bargained for consideration. Under the UCC, goods that cost over $500 require that the contract be in writing to satisfy the Statute of Frauds.

The facts state that Marta and Don entered into a “valid written contract" to purchase the Bait Mate cooler. Marta and Don mutually assented for Marta to purchase a Bait Mate cooler for $5,500 to be delivered no later than April 15. Because the contract was for over $500 for a purchase of a good, the contract needed to be in writing to satisfy the Statute of Frauds, which Marta and Don satisfied.

III. Breach of Contract

A. Anticipatory Repudiation

A person who unequivocally states that they will not perform the contract before the time performance is required will have been considered to anticipatorily repudiate the

contract. The other party who has not repudiated can treat this as a total breach and sue on the contract prior to the time of performance.

Two weeks after Marta and Don entered into their contract, Don called Marta and expressed his concerns in procuring a Bait Mate cooler. Marta told Don that meeting the April 15 deadline "was imperative" and Don merely responded that he would "see what's possible."

Marta may argue that Don anticipatorily repudiated the contract by telling Marta that he may not be able to perform on the contract before the contract was due. However, his statements were not unequivocal as to his inability to perform. Rather, Don only expressed doubt as to his ability to procure and deliver.

Because Don did not unequivocally state that he would not be able to deliver the Bait Mate cooler, he will not have been considered to have anticipatorily repudiated the contract.

B. Reasonable Assurances for Insecurity

Under the UCC, a buyer who has reasonable concerns or insecurity about the seller's ability to tender a good can request assurances that the seller will tender a good. The seller must offer the assurances within a reasonable period of time (generally no more than 30 days) or else the buyer who requested the assurances can treat the lack of assurances as a contract breach. The buyer has no duty to inform the seller that she is seeking to cover through the breach.

Here, Marta had reasonable concerns that Don would not be able to tender the Bait Mate cooler. Don himself raised his concerns about his possible inability to procure and deliver the good, and when Marta reminded him that she needed the cooler by April 15, Don did not assuage her concerns by stating that he would absolutely perform. Instead,

he merely responded that he would see what was possible. Thus, Marta had reasonable concerns and was within her right to ask Don for further assurances.
Don, however, might point out that Marta demanded that he provide the supplier's guarantee that the unit would be made available by the delivery deadline. He did not want to reveal the identity of his cooler supplier and he believed that Marta's demand was unjustified. However, as discussed above, it was reasonable for Marta to have the concerns about Don's inability to deliver the contracted good. Accordingly, Don should have provided assurances and communicated his ability to tender the goods as contracted within a reasonable period of time. Don not only failed to respond to Marta in a reasonable time, he wholly failed to respond to her.

Don may counter that Marta should have informed him that she was treating his failure to respond as a breach of contract. However, Marta is not under any obligation to do so after not receiving assurances for her reasonable insecurity.

Because Marta had reasonable grounds to be insecure about Don's delivery of the bait cooler, Don should have replied to Marta within a reasonable period of time. Don failed to provide Marta any sort of assurance. Accordingly, Marta was justified in treating Don's lack of assurances as a breach.

However, if Marta did not have reasonable grounds to be insecure, and should not have treated the lack of assurances as a breach, then she can point out that Don breached the contract when he failed to deliver on April 15 (discussed below).

C. Failure to Tender the Good on the Contracted Date

The UCC requires that goods be perfectly tendered. This requires that the products have no defects and that they are delivered by the date required.

Marta can argue that even if she couldn't treat Don's failure to provide assurances as a breach, that Don breached the contract because he failed to deliver the cooler on the

contracted date. Marta and Don's contract stated that Don would deliver *no later than April 15*. However, Don delivered on the 16th. By failing to tender delivery of the good by the contracted date, Marta can argue that Don breached and she isn't required to accept the good.

Don may argue that he substantially performed by delivering the day after, and in any case, the contract did not specify that time was of the essence. Further, he might argue that Marta was not harmed by the delay, because he still delivered the cooler before the first day of fishing season on May 1. However, Marta can correctly point out that those defenses such as substantial performance and delivery within a reasonable time frame after the contracted date where time is not of the essence is not applicable to UCC contracts. Perfect tender requires delivery on the contracted date. In any case, Marta may further counter that the contract was specific about the date the cooler needed to have been delivered. Additionally, she had made known through her fax communication in February that she needed the cooler on April 15 because she needed sufficient time to set up the cooler.

Because Don failed to perfectly tender the good, by not delivering the good on the contracted date, Don breached the contract.

D. Purchase of the Replacement Good Prior to Date of Delivery

Don might argue that it was Marta who breached the contract by purchasing a replacement cooler before the affected delivery date. However, as discussed above, if he failed to provide assurances for her reasonable insecurity, then Don was in breach and Marta was entitled to cover. If Don breached on April 15, Marta's cover purchase on the 14th should not be considered a breach of contract because Marta may still have been able to perform had Don delivered on April 15. However, Don did not deliver nor was Don aware of Marta's cover purchase.

IV. Damages for Contract Breach

A. Expectation

Where a contract has been breached, and the buyer is without the good and the seller has the good, the UCC provides that the buyer can receive expectation damages for the breach. This would place the non-breaching party in the position it would have been in had the contract been fulfilled. This can include the cost to cover and purchase the replacement good.

Here, Marta expended $7,500 to purchase a replacement Bait Mate cooler on April 14th. This included a $2,000 premium for the one-day delivery of the cooler by April 15. Marta paid $5,500 for the cooler itself, which is the same price she would have paid to Don for the same cooler. Marta then paid an additional $2,000 to have this cooler delivered within one day.

As to the cooler itself, Marta did not pay additional costs to actually cover for the replacement Bait Mate cooler. Thus, as to the cost of covering for the replacement cooler, Don would not be liable for any additional costs to cover the purchase of the replacement cooler.

Marta might argue that Don should be liable for the additional $2,000 it cost to deliver the Bait Mate cooler because this is the additional cost it required to have the cooler delivered by April 15, and place her in the position she would have been in had Don performed on the contract. Don will counter (as discussed below) that Marta did not mitigate her damages.

Consequential damages

A breaching party can also liable for the foreseeable indirect harm that results from the breach of contract. This might include, for example, economic harm that Marta's shop faced when she didn't have the Bait Mate cooler on the date contracted.

Here, it does not appear that Marta is alleging such losses that relate to Don's breach.

Incidental damages

A breaching party can also be liable for incidental damages, which cover the ordinary expenses the non-breaching party may have incurred in responding to the breach of contract. This includes the costs of inspection, the costs to return the non-conforming good, or the costs of negotiating with a new vendor to cover a good.

Marta does not appear to have additional incidental costs related to negotiating with the new supplier for the replacement cooler.

B. Duty to Mitigate Damages

The non-breaching party still has a duty to mitigate damages and minimize the costs that the breaching party will be liable for.

Here, Don might point out Marta breached her duty to mitigate the damages.

If Marta is correct in arguing that Don breached the contract by failing to provide assurances for her insecurity, Don will point out that the breach would have occurred when he failed to provide the assurances in a reasonable period of time. Marta demanded assurances in mid-February and Don never responded. Don will point out that if Marta is correct that he failed to provide necessary assurances, then he would have breached after that reasonable time period expired. We can assume that 30 days would be a reasonable response period. Accordingly, Don would have breached the

contract in mid-March. However, Don can point out that Marta did not seek to replace the Bait Mate cooler until April 14.

Marta may argue that she had been looking for a replacement cooler and it wasn't until April 14 that she was able to enter into the contract. However, the facts do not indicate that Marta took those steps to replace the cooler. If Marta breached her duty to mitigate because she failed to try and cover earlier, then Don has a strong argument as to why he should not be liable for the $2000 premium Marta paid.

Further, Don might argue that if it wasn't reasonable that Marta demanded assurances, then his breach of contract did not occur until April 15, but Marta purchased the cooler on April 14. He might argue that he shouldn't be liable for Marta's premium purchase prior to the breaching date, but he could be liable had she purchased after the breach and paid a premium for the speedy delivery.

Don has a strong argument that Marta breached her duty to mitigate. Accordingly, Don may not be liable for the $2,000 premium Marta paid on her replacement cooler.

Answer B

Governing Law

The UCC governs contracts for the sale of goods. Goods are tangible and moveable items. The common law governs all other contracts. If the UCC governs, certain rules will apply if the parties are merchants. Merchants are those who deal in the type of goods or have specialized knowledge or skill regarding the goods. Implied in every UCC contract is a covenant of good faith and fair dealing.

Here, there is a contract for a bait cooler. A bait cooler is a tangible good, and therefore, the UCC will govern this contract. Marta owns a fishing shop, which means she has specialized knowledge and skill and deals in the type of goods here (fish and fishing supplies), so she is a merchant. It is unclear is Don is a merchant. Marta has contracted with Don to purchase a bait cooler, but nothing in the facts indicate if Don is a commercial seller of bait coolers, or anything else to indicate his status as a merchant. However, because this is a very expensive cooler ($5,500), it is very likely that Don is a merchant seller of bait coolers. Also, because Don is procuring it for Marta, as opposed to having one personally and selling it online or by advertisement, that tends to show he is a merchant seller. Certain rules may apply relating to the parties as merchants. Also, because this is a UCC contract, there is an implied covenant of good faith and fair dealing.

Contract Formation

To have a valid contract, there must be mutual assent and consideration. Mutual assent is an offer and acceptance. An offer is a manifestation to presently have the intent to contract, with the terms clearly specified, communicated to the offeree. An acceptance is a manifestation to assent to the terms of the offer. Consideration is a bargained-for exchange, consisting of a legal value to one party and a legal detriment to the other. Consideration usually comes in the form of performance, forbearance, or a promise to perform or forbear.

Here, the facts indicate that a valid written contract was formed on February 1st; therefore, it can be inferred that there was a valid offer and acceptance. The consideration for the contract was the promise by Marta to pay the $5,500, and for Don to procure and sell to Marta a bait cooler.

Statute Of Frauds

Certain contracts must be in writing to be enforceable, signed by the party against who enforcement is sought. One such type of contract is a contract for the sale of goods over $500.

Here, the contract is for a good (cooler) for $5,500, which is over $500. The facts indicate that a valid written contract was entered into. Therefore, it is assumed that the statute of frauds is satisfied.

Anticipatory Repudiation

When one party gives a clear and unequivocal indication that he will not perform his end of the contract, the other party can treat that as an anticipatory repudiation, which is an instant breach of the contract. When this occurs, the non-breaching party may elect to not perform and immediately sue for damages, or to wait until performance is due and then sue for damages.

Here, On Feb 15, Don called Marta and told her that he was having trouble procuring the cooler. Marta reminded Don that there was a strict deadline of April 15, and Tom told her he would "see what is possible", using a doubtful tone. Because these words are not a clear and unequivocal indication that Don would not perform, there is not an anticipatory repudiation. To have an anticipatory repudiation, Don would have had to say something more along the lines of "I will not be able to procure the cooler by April 15". Because Don's words did not amount to an anticipatory repudiation, Marta cannot treat the contract as breached as of Feb 15. However, she can demand assurances.

Reasonable Grounds For Insecurity and Demand for Assurances

When a party has reason to believe the other party may not be able to perform, typically actions by the other party that fall short of an anticipatory repudiation, the party may, in writing, demand assurances of performance by the other party. If commercially reasonable, the demanding party may suspend performance. Additionally, if the party who has given reasonable grounds for insecurity does not provide assurances within 30 days, the other party may treat that as an anticipatory repudiation and immediately treat the contract as breached, even if the time for performance has not come.

Here, Don's words to Marta on the phone did not amount to an anticipatory repudiation (above), but, they certainly gave Marta reasonable grounds for insecurity. At the time the contract was formed, Marta and Don agreed that the cooler would be delivered no later than April 15. On the Feb 15 phone call, Marta again reminded Tom of the strict deadline. When Tom, using a doubtful tone, said he will see what is possible, this gave Marta reasonable grounds for insecurity. Marta was worried that he would miss the deadline and she would not have time to set the cooler up and ready for the first day of the fishing season. Marta faxed Don, which meets the writing requirement, asking him to provide assurances of performance by providing his supplier's guarantee that the unit will be available. Don believed that this was overblown and did not respond. Marta will argue that Don needed to provide assurances within 30 days. Because Don did not respond, Marta can treat the contract as repudiated as of 30 days after the fax, which would be March 15. Don did not want to give up his supplier's identity, and may argue that although Marta's grounds for insecurity are reasonable, that her demanding his suppliers guarantee was unreasonable. Don is assumingly in the business of procuring items for fishing shops, and he will argue that if he gave up his suppliers identity, Martha may go straight to the supplier in the future for her needs and circumvent Don. A court could go either way on deciding this issue. A court will surely find that Marta had reasonable grounds for insecurity, but may find that her demand for assurances (providing the supplier) was not reasonable. However, the court would likely find that Don doing nothing, and not responding at all, was also reasonable and not in good faith.

If Don did not want to give up his supplier, he still could have replied and given Marta assurance that he would perform by the deadline.
It is most likely that a court would find that Don failing to respond to Marta's insecurity within 30 days amounted to an anticipatory repudiation. In that case, Marta could treat the contract as breached immediately and find other options for her cooler, and sue Don for damages. However, even if the court finds that it did not amount to a repudiation, Don will still be in breach of the contract for delivering late.

UCC Perfect Tender

In UCC contracts, there must be a perfect tender of goods; otherwise there is a breach. A perfect tender means every item is delivered as promised, and at the correct time. When there is not a perfect tender, the non-breaching party may take the non-conforming goods and sue for damages, reject some goods and keep some, or reject all the goods and sue for damages. The non-breaching party must notify the seller of the breach and if they are going to accept or reject the goods, and if they reject, must timely return the goods, arrange for the goods to be shipped back, hold the goods for pickup, or re-sell on the breaching party's account.

Here, Don attempted to deliver the cooler on April 16th, one day late of the strict deadline. Because Don did not deliver on the agreed deadline (April 15), he did not make a perfect tender. Therefore, Don has breached, and Marta is under no obligation to accept the cooler. The facts indicate that Marta promptly notified Don that she was refusing delivery, as required by the rules.

Damages

Marta's Damages Claims

When a UCC contract has been breached, the non-breaching party may sue for and receive compensatory damages. The most common compensatory damages are expectation damages, incidental damages, and consequential damages.

Expectation Damages

Expectation Damages put the non-breaching party in the position they would be had the contract not been breached. Expectation damages must be foreseeable, certain, and mitigated. When the seller has breached, the expectation damages would normally be the fair market value of the good minus the contract price, or the cost to cover minus the contract price.

Here, Don and Marta contracted for the sale of the cooler for $5,500. Because Don did not perform by the deadline of April 15, and because he likely repudiated when he did not respond to Marta's request for assurances, Marta was entitled to either sue for the difference in the fair market value of the cooler and the contract price, or to cover and sue for the difference between the cost of cover and the contract price. Here, Marta covered and purchased a different cooler for $7,500. Marta will argue that Don is liable to her for the difference of $2,000. Don may argue that he should not be liable for this difference, because the fair market value (and the price it appears Marta paid) of the cooler was actually only $5,500; the $2000 extra was a one day rush delivery fee. Marta will argue, however, that she had no choice but to pay the $2,000 delivery fee, since she needed it by April 15th. Don may also argue that if the court does find he repudiated as of March 15th, that Marta did not mitigate, because she could have found another cooler between March 15 and April 15th, but instead, she waited until April 14th to purchase the cooler with 1 day rush. Marta may respond that when there is a repudiation, she has the option to wait until performance is due to treat the contract as breached. However, Don will then argue that because she bought the new cooler on April 14, not April 15th, that she was not waiting for performance. Also, Don will likely successfully argue that Marta MUST have been relying on the anticipatory repudiation, and not on the perfect tender breach, since she did not wait until his performance was due on the 15th to purchase the new cooler.

A court could go either way. Don may have to pay Marta the $2000 difference for what she paid and the contract price, but, the court also might find that Marta did not mitigate, and therefore the $2000 rush fee was avoidable. However, if Marta did in fact look

around for coolers between March 15 and April 15 and just could not find one until April 14, then she will have met her duty to mitigate and could recover the $2,000.

Incidental Damages

Incidental damages are those damages that are incidental to the breach, and are always expected, such as costs to return or store the goods.

If Marta incurred any incidental costs, such as advertising that she was looking for a cooler, or long distance calls to other suppliers, etc., then she will be able to recover these costs also.

Consequential Damages

Consequential damages are special damages that are unique to the non-breaching party, such as lost profits, and they must be foreseeable at the time of contracting to the breaching party to be recoverable.

It does not appear that Marta suffered any consequential damages as a result of the breach, but if she did, and they were foreseeable, then she could recover these too.

Punitive Damages

Punitive damages in contract cases are not recoverable. Marta will not be able to recover any punitive damages, because they are not available in breach of contract actions.

Don's Damages Claims - Restitution

Restitution is an equitable remedy meant to prevent unjust enrichment. Typically, this type of remedy is used when a contract is unenforceable, and one party received a benefit but did not have to pay for it. In such a circumstance, the other party can usually receive the reasonable value of their services. At common law, the breaching party could not receive restitution. But, modernly, many courts will provide reasonable value of services even to the breaching party to prevent unjust enrichment by the non-breaching party.

Here, Don may argue that he is entitled to something from Marta, since he procured the cooler, and likely had to pay for the cooler from his supplier to get it for Marta. However, Marta will successfully argue that she was not unjustly enriched in any way, because she did not get anything from Don. She did not keep the cooler. Don may then try to argue that the services he provided in spending the last few months procuring the cooler were valuable services, and that he should be compensated for the procurement services. However, a court will likely find this a very weak argument, as Don breached the contract, and Marta received absolutely no benefit from Don.

Q2 Real Property

Amy and Bob owned Blackacre in fee simple as joint tenants with a right of survivorship. Blackacre is located in a jurisdiction with a race-notice recording statute.

Without Bob's knowledge, Amy gifted her interest in Blackacre to Cathy by deed. Amy and Bob then sold all of their interest in Blackacre by a quitclaim deed to David, who recorded the deed. Shortly thereafter, Cathy recorded her deed.

David entered into a valid 15-year lease of Blackacre with Ellen. The lease included a promise by Ellen, on behalf of herself, her assigns, and successors in interest, to (1) obtain hazard insurance that would cover any damage to the property and (2) use any payments for damage to the property only to repair such damage. Ellen recorded the lease.

Five years later, Ellen transferred all of her remaining interest in Blackacre to Fred. Neither Ellen nor Fred ever obtained hazard insurance covering Blackacre. While Fred was in possession of Blackacre, a building on the property was destroyed by fire due to a lightning strike.

David has sued Ellen and Fred for damages for breach of the covenant regarding hazard insurance for Blackacre.

1. What right, title, or interest in Blackacre, if any, is held by Cathy, David, Ellen and/or Fred? Discuss.

2. Is David likely to prevail in his suit against Ellen and Fred? Discuss.

Answer A

1. What right, title, or interest in Blackacre, if any, is held by Cathy, David, Ellen and/or Fred?

At common law, there were no recording statutes and the rule was that the first in time prevailed. Under this jurisdiction, there is a race-notice statute that will govern the facts of this case. If the statute does not apply, then the common law does. A race-notice statute provides that any subsequent purchaser of property will take if they are a bona fide purchaser (BFP) and recorded first. To be a BFP, a party must pay value and take without notice of any prior recordings that may affect their title to the property. Notice can be by: (1) actual notice; (2) constructive notice; or (3) inquiry notice. Actual notice is that the party knew there was another party with a claim on the property. Constructive notice is when a recording in the grantor-grantee index gives notice to a party that there are other parties claiming interest to the land. Lastly, inquiry notice is when the party is given facts that there may be other possessors to the property and that party has a duty to inquire further (i.e., if they see a house built on the land with occupants, that party has a duty to inquire why they are on the land).

A. Cathy

A joint tenancy is created with a right of survivorship when the four unities are met: time, title, instrument and possession. In other words, the parties must acquire their joint tenancy at the same time, with the same amount of title, in the same instrument and each have the right to possess the entire land. The right of survivorship allows that when one of the joint tenants die, the entire estate goes to the surviving joint party. However, if the joint tenancy is severed, the parties become tenants in common and the right of survivorship no longer exists. The joint tenancy can be severed by a unilateral conveyance of one of the joint tenants to another party.

Here, Amy and Bob owned the land in fee simple as joint tenants with the right of survivorship. The facts do not give details as to if the four unities of time, title, instrument and possession were met. However, the facts assume that these elements

were met. As such, Amy and Bob owned Blackacre as joint tenants with the right of survivorship to begin with. Amy thereafter gifted her interest to Cathy. This bequest severed the joint tenancy between Amy and Bob. At this point in time, Bob and Cathy were then owners to Blackacre as tenants in common. However, as will be discussed in the following section, because Cathy failed to record her deed, David will take Blackacre under the recording statute and Cathy has no interest in Blackacre.

B. David

As mentioned, under the recording statute in this jurisdiction, a subsequent purchaser will take if they are a BFP and record their interest first. Amy and Bob sold all of Blackacre to David. Although Amy no longer had any interest in Blackacre because she had conveyed her interest to Cathy, David was unaware of that fact. David was a BFP as required under the statute. First, he paid value for the property. And secondly, based on the facts, he did not have knowledge about Cathy's conveyance. There are no facts to indicate that he had actual knowledge of the conveyance to Cathy. Additionally, David did not have constructive notice of the conveyance to Cathy. A BFP only has a duty to check the grantor-grantee index when the conveyance is made to him. He does not have to subsequently check the index for good title. Therefore, when he checked the index before accepting the property, there was no notice of Cathy's deed. Lastly, David did not have inquiry notice. It doesn't appear that Cathy lived on the land or made any assertions of title over the land. As such, David qualified as BFP because he took without notice and paid value for the land. Also, to prevail under a race-notice statute, the subsequent purchaser must record. Here, David recorded his deed promptly. As a result, David's interest in the land is superior to Cathy's.

C. Ellen

David had good title to the property as discussed above and therefore, was free to do what he wanted with the land. He subsequently leased the property to Ellen. Ellen is a BFP under the recording statutes as well. She is paying value for the lease through rent payments and took without notice of Cathy's interest. Similar to David, there is no actual or inquiry notice for the same reasons as stated above. Additionally, she just not

have constructive notice. Although Cathy has now recorded the deed, it is not within the chain of title that Ellen would have to search. Even if Ellen did have notice of Cathy's interest, she would be protected by the Shelter Doctrine, which allows subsequent parties to assume BFP status from the prior conveyance, even if that purchaser did not have BFP status. Here, David was a BFP and recorded his deed; thus, Ellen is a BFP under David anyway.

However, David's conveyance to Ellen was not a fee simple, but rather, a lease for a term of 15 years. Thus, by the terms of the lease, Ellen has a possessory interest in the property for the next 15 years. At the time of the lease, she was in privity of contract with David (through the lease) and privity of estate with David (by occupying the land).

D. Fred

Parties are generally free to assign their interests under a contract or lease to another party. An assignment is where a party gives the remaining interest under the lease to a subsequent party. Alternatively, a sublease is where a party gives less than the full interest left on the lease. Thus, the courts are to look at the actual interest conveyed and not what the parties might have labeled it.

The lease between David and Ellen did not contain an anti-assignment clause. Rather, the lease applied to Ellen, her assigns, and successors in land. Thus, an assignment of Ellen's interest was valid under the lease. (Even if it wasn't, David would have likely waived the anti-assignment provision because he continued to accept rent from Fred). Additionally, the facts state that Ellen transferred "all her remaining interest in Blackacre to Fred." Therefore, it was an assignment, since all her interest, the remaining 10 years on the lease, was transferred to Fred. As such, Fred assumed Ellen's interest in the land. As such, Fred is lawful tenant with possessory interest in Blackacre for the next ten years.

E. Conclusion

Because this is a race-notice jurisdiction and the statute applies under the facts of this case, David has superior title to the land. Cathy does not have any interest in the land because she failed to record her interest. David conveyed his possessory interest

to Ellen, who assigned her interest to Fred. As such, David holds title in fee simple to Blackacre and Fred has possessory interest in Blackacre for the next ten years under the terms of the lease between David and Ellen.

2. David v. Ellen & Fred

As mentioned above, there was a valid assignment of Ellen's interest to Fred under the lease. Ellen, as the assignor, remains in privity of contract with David. Fred, as the assignee, remains in privity of estate with David. The terms of the lease between David and Ellen contained two covenants: Ellen, on behalf of herself, assigns, and successors was to: (1) obtain hazard insurance that would cover any damage to the property and (2) use any payments for damage to the property only to repair such damage. Neither Ellen nor Fred ever obtained hazard insurance covering Blackacre. Unfortunately, lightning struck the property and destroyed a building on the property. Thus, the issue is whether David can prevail on a damages claim based on these covenants against Ellen and Fred?

A. Ellen

As mentioned, Ellen remains in privity of contract with David under the terms of the lease. A novation occurs when two parties agree that one party will no longer be held liable under the terms of the contract.

Under the facts, Ellen and David entered into a 15-year lease agreement. Five years into the lease, Ellen assigned her interest to Fred. There does not appear to be any agreement between David and Fred relieving Ellen of her liability under the lease. As such, no novation has occurred. Because David and Ellen are still in privity of contract, David can bring claims against Ellen for damages for breach of the covenant regarding hazard insurance for Blackacre.

B. Fred

For a covenant to run with the land and bind successors in interests, certain requirements must be met depending on whether the interest in the burdened (servient) or benefited (dominant) estate is being transferred. The servient estate is the estate that incurs the burden of the covenant, while the dominant estate is the one that

benefits from the covenant. If the covenant is on the servient estate, the covenant will run with the land if: (1) the parties intended the covenant to run with the land; (2) the covenant touches and concerns the land; (3) the servient estate has notice of the covenant; (4) there exists horizontal privity; and (5) vertical privity.

Here, the covenant burdens the lessee estate, since Ellen and her successors/assigns are required to maintain hazard insurance and use that insurance to repair the damages. Thus, David will have to show the above five elements in order to be able to collect damages from Fred.

i. Intent

The parties to the original agreement must have intended that the covenant be perpetual and continue to bind successors in interest of the land. Here, the parties specifically included in the written lease agreement that "Ellen, on behalf of herself, assigns, and successors in interest" will maintain hazard insurance and use the proceeds of such insurance to fix any damage caused by any hazards. Therefore, the express language of the parties in the lease provide that they intended the covenant to bind all successors in interest.

ii. Touch and Concern the Land

To bind successors in interest, the covenants must also touch and concern the land. Courts have held that a covenant touches and concerns the land if it conveys a benefit onto the land. For example, the payment of rent is a sufficient covenant that touches and concerns the land. Here, the covenant is to provide insurance to protect the land in case of damage and to repair the land in the event that such hazardous damage does occur. This is for the benefit of the land to maintain the premises and therefore, it touches and concerns the land.

iii. Notice

The successor in interest must have notice of the covenant in order to be bound by the terms of it. As mentioned above, there are three types of notice. Here, Fred had constructive notice because Ellen recorded the deed in the grantor-grantee index.

Therefore, Fred would be able to know the terms of the lease because it was within the chain of title and will be deemed to have constructive notice of the covenants.

iv. Horizontal Privity

Horizontal privity must exist between the original parties to the covenant, such as grantor-grantee or lessor-lessee. A covenant agreement alone is insufficient to establish horizontal privity. Here, David and Ellen have horizontal privity as their relationship was that of lessor-lessee. Thus, horizontal privity exists.

v. Vertical Privity

Lastly, vertical privity must exist between the successor in interest and the previous owner of the servient estate. Here, Ellen conveyed the remainder of her interest on the lease to Fred. Therefore, there is a vertical privity between Ellen and Fred.

Thus, all five elements are met for a covenant to run with the land and David may hold Fred liable for damages for the breach of the covenants.

C. Conclusion

David may hold Ellen liable for damages for breach of the two covenants because she is in privity of estate with David. Additionally, David will be able to hold Fred liable for damages because the two covenants run with the land and Fred had notice of such covenants.

Answer B

1. **What right, title, or interest in Blackacre, if any, is held by Cathy, David, Ellen and Fred.**

Classify the Interest: Joint Tenants with a Right of Survivorship

A joint tenancy is a concurrent interest in land in which case at least two individuals own an undivided interest in the whole of the property. A joint tenancy is created with express language that the tenancy carry with it the right of survivorship. The right of survivorship means that when one joint tenant dies the other co-tenants take the deceased tenant's interest in the property. A joint tenancy is created when four unities are present at the time of creation. These unities are the unities of time, title, interest, and possession.

Here, facts indicate that Amy and Bob owned Blackacre in fee simple as joint tenants with a right of survivorship. Thus, the original property relationship was that of a joint tenancy because the right of survivorship was expressly provided for.

Severance of the Joint Tenancy

A joint tenancy is severed whenever any one of the four unities of time, title, interest, and possession is disturbed. When one of the four unities of a joint tenancy is disturbed a tenancy in common results and the right of survivorship is extinguished. In this event the tenants in common own a undivided interest in the whole of the property which is then freely alienable.

Here, the facts indicate that Amy gifted her interest in Blackacre to Cathy by deed. By gifting her interest in the joint tenancy, Amy disturbed the four unities, particularly the unity of title. As indicated above, when a joint tenancy is severed a tenancy in common is created. Thus, since the joint tenancy was severed, at this particular point in the facts

Amy held no interest, and Cathy and Bob held the property as tenants in common. The right of survivorship was extinguished and both Cathy and Bob had an undivided interest in the whole of the property.

Amy's Conveyance to David / Recording the Interest / Recording Statute

The facts indicate that after Amy gifted her interest in Blackacre to Cathy by deed she and Bob sold all of their interest in Blackacre to David. These facts implicate the rules for the relevant recording statue.

In a race-notice jurisdiction, a subsequent bona fide purchaser (BFP) is protected by the recording statute provided that he takes without notice and is the first to record his interest in the deed. There are three different kinds of notice. There is actual notice, record notice, and inquiry notice. Actual notice refers to the extent to which a BFP actually knows that someone else claims an interest in the land. Record notice refers to the extent to which the BFP is notified by researching the record of title. And inquiry notice refers to the extent to which a BFP inspects the property and discovers someone else asserting a claim to the property. Additionally, it should be noted that the recording statutes are designed to protect subsequent BFP's and not gratuitous grantees of real property.

Here, the facts indicate that Amy and Bob sold all of their interest in Blackacre to David after Amy gifted her interest to Cathy by deed. The facts also indicate that David recorded his deed before Cathy recorded her deed. Thus, for the recording statute to apply and for David to take title to the property he must be a subsequent BFP who took without notice and who recorded first. The facts indicate that David did in fact record before Cathy recorded. Thus, the "recorded first" element is satisfied. The next question that must be determined is whether David had notice of Amy's interest. There is nothing in the facts which says that David had actual notice of Cathy's interest. Additionally, although the facts do not indicate that David inspected the property, the facts also do not indicate that Cathy occupied the property so as to put David on notice

had he inspected the property. The real question is whether David had record notice. Determining record notice is a two-step process. First, the BFP must go to county recorder's office, locate the particular property and construct the chain of title. The chain of title can be constructed by looking first at the grantee index and then building the chain of title back in time. Next, the BFP must adverse each link of the chain. This is done by looking at the Grantor index and following the chain of title until the BFP reaches his interest. Here, David will not discover Cathy's interest in Blackacre. Cathy recorded her deed too late. By recording her deed after David recorded his deed David would not be put on notice as to Cathy's interest in Blackacre. Also, although not directly relevant, it should be noted that Cathy, as a gratuitous grantee, is not likely to receive any protection under the recording statute.

On balance, David obtained lawful title to Blackacre as a subsequent BFP who took without notice and was the first to record his interest.

2. Is David Likely to Prevail in his Suit Against Ellen and Fred

The Lease with Ellen

A tenancy for years is a specific type of tenancy that has a specific start date and a specific end date. A tenancy for years need not be for a terms of actual years but rather only needs a specific starting and ending date. A tenancy for years is terminated upon the end of the specified date.

Here, the facts indicate that David entered into a valid 15-year lease of Blackacre with Ellen. Since the lease has a specific start date, and a specific end date, it is likely considered a tenancy for years.

Ellen's Transfer to Fred

A sublease is a legal relationship in a leased property that arises when the tenant conveys out less than his entire interest under the lease. In this circumstance, sublessor has privity of estate with the lessor. An assignment occurs when the lessor conveys out all of his durational interest under the lease. In the case of an assignment the original lessee is no longer in privity of estate with the lessor but depending on the circumstances may still remain in privity of contract with the lessor. Privity of estate means that two individuals share an interest through their relationship to a leased property and privity of contract is a contract obligation between two contracting parties.

Here, the facts indicate that five years into the lease, Ellen transferred all of her remaining interest in Blackacre to Fred. Thus, because all of the remaining interest was transferred as opposed to only some or part of the interest Ellen executed a valid assignment. The results of this assignment is Fred is not in privity of estate with David. However, because Ellen was the original contracting party with David, she remains in privity of contract with David.

Breach of the Covenant: Ellen

A restrictive covenant is a written promise with respect to land either to take an affirmative action or to refrain from taking action. Liability for the restrictive covenant may attach to parties that are either in privity of contract with the lessor or privity of estate. In the event of privity of contract, the contracting party remains liable under a contract theory of recovery. If an express contract between the lessor and the lessee is breached by failing to satisfy the written covenant then the landlord may sue to evict the tenant and/ or assert a claim of money damages.

Here, as noted above, Ellen is in privity of contract with David. She is the original party under the lease, who signed the lease and who had knowledge of the covenants in the lease. The fact that she assigned her interest to Fred means only that she is not under privity of estate with David, but she is still liable under privity of contract. The lease included a promise by Ellen to obtain hazard insurance and to use any payments for

damage to the property to repair such damage. Ellen breached the lease covenant because she never obtained hazard insurance covering Blackacre and because a building on the property was destroyed by fire.
Thus, because Ellen is in privity of contract with David, David can elect to sue Ellen for breach of the express contractual covenant.

Breach of the Covenant: Fred

Restrictive Covenant

A restrictive covenant is a written promise with respect to a particular piece of property to do or to refrain from doing something on that particular property. Restrictive covenants run with the land to successive assignees if the covenant makes the land more beneficial or useful. In order for the burden of a restrictive covenant to apply there must be intent and notice, the covenant must touch and concern the land, there must be vertical privity and horizontal privity. In order for the benefit of a restrictive covenant to apply there need only be the elements of intent, touch and concern and vertical privity. Vertical privity is present when the successor in interest has the entire interest in the property. Horizontal privity refers to the fact that the original parties to the agreement had a mutual interest in the property outside of the covenant agreement.

Here, the facts indicate that the lease expressly stated that the covenant to obtain hazard insurance and to use its proceeds would apply to "Ellen, on behalf of herself, her assigns, and successors' interest." Thus, because there was intent that the covenant apply to subsequent parties, the intent element is met. The facts also indicate that Ellen recorded the lease and that the covenants were expressly written in the lease. Thus, it appears that Fred had notice of the lease provisions. The next element that must be satisfied is the touch and concern element. As discussed above, in order for the covenant to touch and concern the property it must make it more beneficial or more useful. Here, the covenant was that Ellen and her assigns obtain hazard insurance which would cover any damage to the property. If a particular piece of property is

covered by insurance, then it is more likely than not to be benefitted and thus, as a result will be more valuable. As noted above, vertical privity must also be satisfied. Here, Ellen conveyed out all of her remaining interest on Blackacre. Additionally, there is nothing in the facts to suggest that anyone else other than Fred not presently occupies the property. Thus, vertical privity is satisfied. Finally, there must be horizontal privity. David owns the property outright. Additionally, David and Ellen had no interest in the property outside of the lease. Thus, horizontal privity is satisfied.

Based on the foregoing analysis, it appears that the burden of the restrictive covenant to obtain hazard insurance does run to Fred, a party in privity of estate with David. Thus, because Fred failed to obtain insurance and because the property was destroyed implicating the need for the insurance, David is likely to prevail in his suit against Fred.

Q3 Civil Procedure

In March, while driving her car, Diana struck and injured Phil.

In April, Phil filed a complaint against Diana in federal district court properly alleging diversity jurisdiction and seeking damages for negligence for physical injury.

In May, Diana filed an answer denying negligence.

In June, during discovery, Diana filed a motion asking the court to order (1) a physical examination and (2) a mental examination of Phil. Over Phil's objection, the court ordered him to submit to both examinations.

In July, Diana served Phil with a notice to depose Laura, a physician who treated him after the accident. Phil objected on the grounds that (1) Laura could not be deposed because she was not a party, and that (2) deposing her would violate the physician-patient privilege. The court overruled Phil's objections.

In September, a few weeks before trial, Phil decided to file a demand for a jury trial. Diana immediately filed a motion to strike the demand. The court granted Diana's motion.

1. Did the court err in granting Diana's motion to order (a) the physical examination and (b) the mental examination of Phil? Discuss.

2. Did the court err in permitting Diana to depose Laura? Discuss.

3. Did the court err in granting Diana's motion to strike Phil's demand for a jury trial? Discuss.

Answer A

Applicable law

Under the Erie doctrine, a federal court sitting in diversity jurisdiction must apply the substantive laws of the state where it sits and the procedural laws of the federal system, generally the Federal Rules of Civil Procedure and in most cases the Federal Rules of Evidence. Whether or not a rule is substantive or procedural is a balancing test that depends on whether 1) the rule is outcome determinative, 2) the federal court's interest in applying their own rules, and 3) whether or not application of the federal rule will result in forum shopping.

Whether or not a party may obtain an order for a physical or mental examination is a rule of discovery that is procedural and governed by the Federal Rules of Civil Procedure which will apply in this case.

a) Diana's motion for a physical examination of Phil

Under the Federal Rules of Civil Procedure, a party may obtain a mental or physical examination of the other party if 1) that party's physical or mental condition is in controversy, and 2) good cause exists for ordering the examination. Good cause will generally be found to exist if the examination in question is not overly intrusive and it is relevant, measured in terms of its logical and legal relevance as well as how relevance is defined under the Federal Rules of Civil Procedure with regard to its discoverability. Evidence is logically relevant if it tends to make the existence of a fact of consequence more or less likely. Evidence is legally relevant if its probative value is not substantially outweighed by its prejudicial effect. And evidence is relevant and discoverable if it is reasonably likely to lead to the discovery of admissible evidence.

Phil's suit against Diana is one for personal injury stemming from her alleged negligence. In a negligence suit, the plaintiff must prove duty, breach, cause, and

damages. Because damages are a required element, the injury and the extent of the injury suffered by a party will always be in controversy in a personal injury suit. Additionally, good cause exists for ordering the physical examination here. It is not overly intrusive as Phil has already likely sought out and received medical treatment for his injuries of a similar nature in this case. Additionally, it is logically and legally relevant and relevant under the Rules' definition for discovery because it is reasonably likely to lead to the discovery of admissible evidence. The examining physician may have a different opinion as to the nature and extent of injuries suffered by Phil.

For these reasons, the court did not err in granting Diana's request for a physical examination of Phil.

b) Diana's motion for a mental examination of Phil

With regard to Diana's motion for a mental examination of Phil, the rules are the same as for a physical examination. Under the Federal Rules of Civil Procedure, a party may obtain a mental or physical examination of the other party if 1) that party's physical or mental condition is in controversy, and 2) good cause exists for ordering the examination. However, the calculus here for a mental examination is much different.

Phil's suit against Diana is for personal injury. His physical condition is relevant because it is a fact in controversy as damages are an element of negligence. Phil's mental condition, however, does not appear to be in controversy. Phil's suit is not for infliction of emotional distress or any other cause of action where his mental condition would be a fact in controversy. If Phil suffered from some sort of mental disease or defect that made him comparatively or contributorily negligent or that affected his abilities to perceive or recall, such that Diana could impeach his credibility, then Phil's mental condition could theoretically be in issue. However, that does not appear to be the case here. There is nothing to indicate that Phil's mental condition is in controversy. Additionally, a mental examination is an intrusive procedure that should not be granted unless necessary to establish a claim or defense, neither which requirement is met in

this case. Good cause for granting Diana's request for a mental examination thus cannot be said to exist.
For these reasons, the court erred in granting Diana's request for a mental examination of Phil.

2)

Whether the physician-patient privilege applies

Under the Federal Rules of Evidence, there is no physician-patient privilege. There are only privileges for spousal communications, spousal immunity in criminal cases, penitent-clergy, and patient-social worker.

However, as discussed above, under the Erie doctrine, a federal court sitting in diversity jurisdiction must apply the substantive laws of the state where it sits and the procedural laws of the federal system. Generally the Federal Rules of Civil Procedure and in most cases the Federal Rules of Evidence are procedural. However, whether or not a testimonial privilege applies is a rule of substantive law and a federal court sitting in diversity must apply the law of the state in which it sits regarding testimonial privileges.

The federal court sitting in this case must apply the state law regarding the doctor-patient privilege. Generally the doctor-patient privilege covers confidential communications between a doctor and a patient for the purposes of obtaining medical treatment. If the state in which this federal court sits acknowledged the doctor-patient privilege then Phil's communications to his doctor would generally be privileged.

However, there is generally an exception to the privilege when the patient-plaintiff's physical condition is in controversy. As stated above, this is a personal injury suit and damages are a necessary element of the negligence claim so Phil's physical condition is in actual controversy.

For that reason, even if the doctor-patient privilege applies, Phil's communications to Laura would likely be outside the privilege and would not prevent Diana from deposing Laura.

Whether Laura cannot be deposed because she is not a party

As with the standard for granting a physical or mental examination of a party, whether a party can be deposed is a discovery rule and is thus procedural and governed by the Federal Rules of Civil Procedure.

The Federal Rules of Civil Procedure allow a party up to 10 depositions in a case. Each deposition must be no longer than 1 day of 7 hours. A party may depose another party at any time simply by providing reasonable notice. A party may depose a non-party, but it must be done on subpoena to the non-party and must provide reasonable notice and accommodations.

Under the Federal Rules of Evidence, Laura may be deposed even though she is not a party to the litigation. So Phil's objection is not correct.

However, there is no indication in the fact pattern that Diana obtained a subpoena or served it on Laura prior to deposing her. Diana cannot simply serve Phil with a notice of subpoena in order to depose a non-party.

Nonetheless, a party's objection to discovery must be stated accurately and with particularity. Phil may have waived his valid procedural objection to Diana's deposition of Laura by not correctly stating the grounds for his objection.

In sum, Diana may depose Laura under the Federal Rules of Civil Procedure, even though she is a non-party. However, Diana must do so on subpoena and notice to Laura, which Diana failed to do in this case. However, Phil incorrectly stated the basis for his objection to Diana deposing Laura and in so doing likely waived his otherwise valid procedural objection to the deposition.

Thus, the court did not err in permitting Diana to depose Laura.

3)

Under the 7th Amendment to the Constitution, a party is entitled to a jury trial in all suits for damages at law. Phil's suit against Diana is a personal injury suit for damages at law and not for some form of equitable relief like an injunction so Phil is entitled to a jury trial in his suit against Diana (as is Diana). However, under the Federal Rules of Civil Procedure, a party must file a demand for a jury trial within 14 days of the filing of the answer to the complaint. A party may file a motion to strike all or a portion of the other party's pleading within 30 days of receiving that party's pleading.

In this case, Diana filed an answer to Phil's complaint denying negligence back in May. Phil did not file his demand for a jury trial until September and only a few weeks before trial. For this reason, Phil's demand is untimely and absent good cause for the delay in this case, which does not seem likely, Phil has waived his right to demand a jury trial. Since Diana immediately filed her motion to strike in response to Phil's demand, it was timely and should be considered and granted by the court.

For this reason, the court did not err in granting Diana's motion to strike Phil's demand for a jury trial.

Answer B

Preliminary matters

Applicable Law

After having been injured by Diana (D), Phil (P), filed a complaint in April against D in federal district court properly alleging diversity jurisdiction and seeking damages for negligence for physical injury. As such, because the complaint was filed in federal court, the Federal Rule of Civil Procedure (FRCP) govern the rules applicable to the proceedings and the actions of the courts and the parties in the suit.

(1) The Court Properly Granted Diana's Motion to Order (a) the physical Examination if she properly established good cause, but erred in granting (b) the mental examination

(b) The Physical Examination

Scope of Discovery

Discovery is the process by which parties obtain information from the other party. The FRCP provides for a broad scope of discovery, and the information needs only to be relevant to the cause of action. In fact, any information that would reasonably lead to the discovery of admissible evidence is discoverable. In other words, the information does not have to be admissible evidence to be produced, but only to reasonably lead t such information. Here, the dispute between P and D involves a car accident where D struck and injured P. As a result, P filed an action against D for negligence for physical injuries. Therefore, any information that would relate to the accident, the physical condition of P, which is at issue here, will be admissible. Here, D has filed a motion, seeking a court order directing the court to order a physical examination of P. Such examination is relevant because here, the physical condition of P is at issue since the lawsuit involves damages for personal injury. As such, this information is discoverable and within the scope of discovery.

Physical Examination Requirements

Physical Condition at Issue

In order for a party to obtain an order for a physical examination, the FRCP requires, first, that the physical condition be at issue. Here, P's condition is at issue because, as explained above, the lawsuit between P and D is about a car accident where D stuck and injured P. P is seeking damages. A physical examination will be useful to determine the extent of the injury cause by the accident to P, and will therefore be useful to determine the extent of damages, if any. Also, such physical examination will also determine if the physical injuries suffered by P were the result of the accident.

Court order and Showing of Good Cause

The FRCP requires that a court grant a motion to order a physical examination only when the moving party establish good cause to do so. Here, the facts are not clear on whether D established such good cause. A showing of good cause will require D to show that there is no other means to obtain the information that the physical examination would provide and establish the reasons to do so. Here, as explained above, a physical examination will be useful to determine the extent of the injury caused by the accident to P, and will therefore be useful to determine the extent of damages, if any, especially if there is no other information available. Also, such physical examination will also determine if the physical injuries suffered by P were the result of the accident. However, if the deposition of D is ordered (see below), then the showing of good cause for a physical examination will harder to establish because there would already be available information related to the physical condition of P after the accident. If ordering the deposition fails, however, this might constitute a good cause to order the examination because no information related to P's physical condition would therefore be available.

(c) The Mental Examination

Scope of Discovery

Discovery is the process by which parties obtain information from the other party. The FRCP provides for a broad scope of discovery, and the information needs only to be relevant to the cause of action. In fact, any information that would reasonably lead to the discovery of admissible evidence is discoverable. In other words, the information does not have to be admissible evidence to be produced, but only to reasonably lead t such information. Here, the dispute between P and D involves a car accident where D struck and injured P. As a result, P filed an action against D for negligence for physical injuries. Therefore, any information that would relate to the accident, the physical condition of P, which is at issue here, will be admissible. Here, a request for a mental examination is not likely to lead to any relevant admissible information. In fact, here, the mental condition of P is not at issue, only his physical condition because he is seeking damages for personal injury as a result of the accident. As such, this demand does not fall within the scope of discovery.

Mental Examination Requirements

Again, a court will issue an order for mental examination, only when this condition is at issue and when the moving party has established good cause to do so. Here, as explained above, the mental condition of P is not at issue and there is no reason why the court would order such examination. Not only does it fails to show good cause but would also be highly prejudicial to P.

(2) <u>The Court Erred in Permitting to Depose Diana only if a Subpoena was not Issued, and P's argument that the Deposition would lead to the discovery of Privileged information fails</u>

Scope of Discovery

Discovery is the process by which parties obtain information from the other party. The FRCP provides for a broad scope of discovery, and the information needs only to be relevant to the cause of action. In fact, any information that would reasonably lead to the discovery of admissible evidence is discoverable. In other words, the information does not have to be admissible evidence to be produced, but only to reasonably lead t

such information. Here, the dispute between P and D involves a car accident where D struck and injured P. As a result, P filed an action against D for negligence for physical injuries. Therefore, any information that would relate to the accident, the physical condition of P, which is at issue here, will be admissible. Here Diana (D) is a physician who treated P right after the accident. Her deposition will be useful because it will lead and explain what was the physical condition of P right after the accident and will help in determining the extent of the injury as well as damages, if any.

Deposition of Third Party - Subpoena To The Third Party

The FRCP allows deposition of non-party to the case and provides for a maximum of 10 depositions, no longer than 7 hours each. There can also be only one deposition per person. When the deposition involves a non-party, i.e. someone not named in the lawsuit, then the requesting party must request the court to issue a subpoena in order to depose the third party. Here, D served P with a notice to depose Laura (L), the physician who treated him after the accident. The FRCP allows "notice" only when the discovery tools are used by party against another party. When a third party is involved, a subpoena is required, which D shall have done to properly depose her. In fact, not only did she fail to notice Laura personally, but she also failed by the means she used. As such, P is wrong when he says that a third party cannot be deposed. A third party can be deposed but here the court erred in granting the discovery request because the third party, Laura, was not properly notified.

Limit of The Scope of Discovery = Privileged Communication

The broad scope of discovery is limited by privileged information. In fact the FRCP provides that discovery means: discovery of any "non privileged" information. As such, whenever a privileged communication is involved, the scope of discovery may be limited. Here, P is asserting the Physician-Patient Privilege. As explained in the preliminary considerations, the FRCP apply here. The FRCP, and the Federal Rules of Evidence, do not recognize a Physican-Patient Privilege. As such, whether this argument will fail or prevail depends on which law the Federal District Court will apply.

Diversity Cases - Erie Doctrine - Application of State Law Privilege

The lawsuit filed by P against D was filed in federal district court, and properly alleged diversity jurisdiction. Under the Erie Doctrine, Courts sitting in diversity jurisdiction will apply the federal procedural law, and the substantive law of the state. Whether a law is substantive or procedural depends on whether it is outcome determinative or not. State Law regarding privileges have been held to be outcome determinative and therefore, substantive law for purposes of Erie Doctrine. Here, assuming that the state law of the seat of the federal action recognizes the physician-patient privilege, the federal court will have to apply it and such privilege might limit the scope of discovery.

Physician-Patient Privilege

Privilege

The physician-patient privilege is a privilege usually applied by states specifically recognizing such privilege. Under the physician-patient privilege any communication between a physician and his patient, made for the purpose of diagnosis or treatment, is privileged. The patient is the holder of the privilege and can oppose to the revelation of such information. Here, deposing L will likely lead to revealing privileged information: P saw L for purposes of diagnosis and treatment after the car accident and therefore, such communications are likely privileged.

Exceptions

The Physician-Patient privilege does not apply in several circumstances, and especially when the physical condition of the patient is at issue. Here, as explained, P's physical condition of D is at issue: the lawsuit involves a car accident where D struck and injured P and P is seeking damages for physical injury. As such, the privilege does not apply and P will fail in his argument that the deposition of L will lead to violate the physician-patient privilege because here, the privilege does not apply.

(3) The Court Properly granted Diana's Motion to Strike Phil's demand for a jury trial

In September, a few weeks before trial, P decided to file a demand for jury trial. D immediately filed a motion to strike the demand. The court was absolutely right in granting the motion.

7th Amendment Right to a Jury Trial

The 7th Amendment of the U.S. Constitution provides a right for a jury trial in federal civil case (does not apply to the states through the 14th Amendment) when the damages at law involved exceed $20. Here, P is seeking damages for personal injury under a negligence action. Negligence is an action recognized in common law and the damages required are legal damages and likely to involve more than $20, since they stem from the personal injury suffered after the car accident. Therefore P was entitled to a jury trial, but only as long as the demand was timely filed.

Notice to Opposing Party and Timely Demand

P made his demand for a jury trial about 3 weeks before trial. A demand for jury trial must be noticed to other party and promptly filed. The FRCP requires that a demand for a jury trial be filed by the Plaintiff 14 days after the complaint is filed, at the very latest and be properly notified to the opposing party. Here, P made his demand only 3 weeks before trial, after all the pleadings were closed. As such, this was not a timely demand and the Court was absolutely right to grant D's motion to strike P's demand for a jury trial.

Q4 Remedies

Steve owned two adjoining improved tracts of land, Parcels 1 and 2, near a lake. Parcel 1 bordered the lake; Parcel 2 bordered Parcel 1, and was adjacent to an access road. Steve decided to sell Parcel 1 to Belle. Belle admired five 100-year-old oak trees on Parcel 1 as well as its lakefront location.

On February 1, Steve and Belle executed a contract for the sale of Parcel 1 at a price of $400,000. The contract specified that the conveyance included the five 100-year-old oak trees. In addition, the contract stated that Belle was to have an easement across Parcel 2 so that she could come and go on the access road. Although the access road was named Lake Drive, Steve and Belle mistakenly believed that it was named Top Road, which happened to be the name of another road nearby. The contract referred to the access easement as extending across Parcel 2 to Top Road, which would not have been of any use to Belle. The contract specified a conveyance date of April 1.

Later in February, Steve was approached by Tim, who offered Steve $550,000 for Parcel 1. Steve decided to breach his contract with Belle and agreed to convey Parcel 1 to Tim. Despite Belle's insistence that Steve honor his contract, he told her that he was going ahead with the conveyance to Tim in mid-April, and added, "Besides, our contract is no good because the wrong road was named."

In March, Belle learned that, in April, Steve was going to cut down the five 100-year-old oak trees on Parcel 1 to better the view of the lake from Parcel 2.

1. What equitable remedies can Belle reasonably seek to obtain Parcel 1? Discuss.

2. What legal remedies can Belle reasonably seek if she cannot obtain Parcel 1? Discuss.

Answer A

1. What equitable remedies can Belle reasonably seek to obtain Parcel 1? Discuss.

Equitable Remedies

Remedies are ordinarily split into two categories, equitable remedies and remedies at law. Equitable remedies are only available where a remedy at law is inadequate to repair the harm. Equitable remedies are decided by the judge whereas legal remedies are usually decided by a jury. Unlike legal remedies that usually only declare damages owed from the defendant to the plaintiff, equitable remedies are backed by the contempt power of the court. If a defendant fails to comply with an equitable order, she can be held personally in contempt of court. There are several equitable remedies that Belle may seek to protect her rights with respect to the land sale contract for Parcel 1 with Steve.

Temporary Restraining Order (TRO)

A temporary restraining order is a stop gap measure wherein a court can order a defendant not to act, or occasionally to act affirmatively, in order to preserve the status quo until a hearing on a preliminary restraining order can be heard. A temporary restraining order will only be granted where the plaintiff can demonstrate that (1) she will suffer irreparable harm without the order, (2) the balance of the equities between the plaintiff and defendant favors the order, (3) the plaintiff is likely to prevail on the merits of her claim. A temporary restraining order can be heard ex parte if the plaintiff demonstrates a good faith attempt to give notice or demonstrates good cause for not giving notice. A temporary restraining order is a time-limited measure, typically limited to ten days. In this case, Belle might seek a TRO to stop Steve from cutting down the trees on Parcel 1 and not to sell Parcel 1 to Tim or any other buyer.

Irreparable Harm

First, Belle must demonstrate irreparable harm. In other words, she must show that a remedy at law would be inadequate and, without this order, any further remedy would be inadequate. Belle can demonstrate irreparable harm with respect to the cutting down of trees because her contract specifically protects her right to the 100-year-old oak trees and the trees were important to her decision to purchase the property. If Steve cuts down the trees, they cannot be replaced by damages. It would take another 100 years to grow similar oak trees. Belle likely also can show irreparable harm regarding Steve's selling of the property. Belle seeks to enforce her contract to purchase the property. If Steve sells the property to another bona fide purchaser in the meantime, she will not be able to seek specific performance. Steve may argue that he is not planning to sell to Tim until mid-April; therefore a TRO is not necessary. However, Belle can reasonably argue that Steve is not acting in good faith and there is a possibility that he will expedite the sale in order to deprive Belle of her right to specific performance. Therefore, Belle can demonstrate irreparable harm.

Balance of the Equities

Next, Belle must demonstrate that the balance of equities tips in her favor. In other words, Belle must prove that the hardship on her of not receiving the TRO is greater than the hardship to Steve of the TRO. Belle will argue that if the trees are cut down or the property is sold, she will forever lose the benefit of her contractual bargain. Therefore, there is a strong equitable argument in favor of granting Belle the TRO. Steve will argue that a TRO is inequitable because he will lose the right to an improved view of the lake on his property and might lose his interested buyer. However, a TRO will only interrupt Steve's view for a short time if he is able to prevail later and Steve is unlikely to lose his buyer based on this short time-limited order and if he does, there are likely other buyers available. The court may also disfavor Steve's arguments because he is breaching his contract with Belle and therefore his equitable arguments are not as strong. As such, the balance of the equities tips in favor of Belle.

Likelihood of Success on the Merits

Belle must demonstrate that she is likely to succeed on the merits. Belle will be able to prove a likelihood of success on the merits. A valid contract requires offer, acceptance, and consideration and must not be subject to any valid defenses. The land sale contract signed by both parties demonstrates offer and acceptance and satisfies the Statute of Frauds. The contract provides for the exchange of $400,000 for a parcel of land, which satisfies the bargained-for exchange requirement. The contract requires Steve to transfer the land to Belle and specifically protects Belle's rights to the five oak trees. Nonetheless, Steve has unequivocally plans to cut down the trees and sell to another buyer. As such, he has anticipatorily breached. If Steve receives notice, he may argue that the contract is not valid because of the mistake in the contract with respect to the name of the road. Such a mutual mistake, however, does not invalidate the contract. Therefore, Belle can establish a likelihood of success on the merits.

Preliminary Injunction

A preliminary injunction is a longer lasting pre-judgement equitable remedy. A preliminary injunction is a court order restraining the defendant from action (or more rarely, requiring the defendant to affirmatively act) to preserve the status quo. It lasts until there is a final judgment on the merits. The requirements for a preliminary injunction are identical to those for a temporary restraining order: (1) irreparable harm, (2) balance of the equities and (3) likelihood of success on the merits. However, a preliminary injunction requires notice to the defendant and a hearing.

As discussed above, Belle can demonstrate irreparable harm, balance of the equities, and likelihood of success on the merits. To receive a preliminary injunction, Belle will have to give Steve notice and the court must hold a hearing. Steve will argue that the contract is invalid because of the mistake regarding the name of the road for the easement and therefore, Belle is unlikely to succeed on the merits. But Belle can seek

reformation of the contract to correct that error. Even if she could not prevail on reformation, the mistake is only harmful to Belle; therefore Steve cannot void the contract on the basis of this mistake, only Belle can. Therefore, Steve's argument will not be successful. Belle will likely be successful in receiving a preliminary injunction pending the court's determination of Belle and Steve's right to Parcel 1.

Contract Reformation

Contract reformation is an equitable remedy wherein the court will correct an error in a written contract in order to conform the contract with the actual agreement of the parties. Reformation is most often available where there is an error in the contract on the basis of a mutual mistake or scrivener's error. A mutual mistake occurs where both parties intend the contract to reflect an agreement between them but, due to a mistake by both parties, the contract does not properly reflect this agreement.

Belle can argue that the land sale contract should be reformed to include an easement over Parcel 2 to reach Lake Drive rather than Top Road. She can demonstrate to the court that both she and Steve intended the contract to include an easement over Parcel 2 to reach the access road adjacent to Parcel 2, which is Lake Drive. Both Steve and Belle mistakenly thought that the adjacent access road was called Top Road. Therefore, she can demonstrate the proper elements of mutual mistake to justify the reformation.

Steve will argue that the parol evidence rule bars extrinsic evidence related to the contract where there is a written contract. This argument will not be successful because the parol evidence rule does not apply in cases related to contract reformation. Belle can successfully seek reformation of the contract.

Specific Performance

Next, Belle will seek specific performance of the contract. Specific performance requires the defendant to actually perform under the contract rather than pay legal damages for the breach. Specific performance is available where there is (1) a valid contract, (2) that is sufficiently definite in its terms, (3) all conditions have been met for defendant's performance, (4) that there is no adequate remedy at law, (5) enforcement is feasible and (6) it is not subject to any equitable defenses.

As discussed above, Belle has a valid contract for the sale of the land for $400,000. There are no valid defenses as Steve's theory on the basis of mutual mistake fails because Belle can reform the contract and he cannot invalidate the contract on the basis of a mutual mistake that only injures Belle. The contract is sufficiently definite. The contract clearly describes the parcel of land to be sold (with the oak trees intact), the parties, and the price and payment information. Finally, Belle must be prepared to pay the purchase price to satisfy the condition of Steve's performance.

Belle has no adequate remedy at law. Every piece of land is unique. Therefore, land sale contracts are per se unique and damages are per se inadequate for a buyer (and seller under the theory of mutuality of remedies). As such, Belle can easily establish inadequate remedy at law. The enforcement of specific performance here is certainly feasible because it only requires a single transaction. Courts are hesitant to grant specific performance for repeated transactions and will never allow specific performance for personal services. But these concerns are not present; enforcement is feasible.

Finally, there must be no equitable defenses, specifically the defenses of laches and unclean hands. The defense of laches bars specific performance or other equitable remedies where the plaintiff has unjustifiably delayed in bringing the action and the delay prejudices the defendant. There is no indication that Belle has delayed since she will bring this action before the closing of the contract was even due. There is no prejudice to Steve. The defense of unclean hands bars specific performance where the plaintiff is guilty of some wrongdoing, even if not technically a breach or illegal act, in

relation to the transaction. In this case, there is no suggestion of any wrongdoing by Belle. The only mistake she made with respect to the contract was entirely unintentional and innocent. This defense does not apply. Belle can seek specific performance of the contract.

If Steve cuts down the trees, Steve may argue that he is excused from specific performance of the contract because it would be impossible for him to perform the contract. However, where complete performance is not possible, a plaintiff seeking specific performance can still seek specific performance of the contract to the extent possible and seek abatement of the purchase price based on the damages from incomplete performance. Therefore, even if Steve cuts down the trees, if Belle still wants the property, she can seek specific performance and request that the court value the trees and abate the price accordingly. Of course, Belle will have to establish the value of the trees with reasonable certainty, which may be difficult given the intangible aesthetic benefit of the trees.

2. What legal remedies can Belle reasonably seek if she cannot obtain Parcel 1?

Expectation Damages

If Belle does not obtain Parcel 1, she can seek legal remedies instead. A land buyer's legal remedy for the seller's breach of contract is ordinarily expectation damages. Expectation damages seek to put a non-breaching party in the same position they would be in but for the breach. In land sale contracts they are calculated by the difference in the fair market value of the land and the contract price for the land. In this case, Belle needs to establish the fair market value of the land. A reasonable estimate for that might be the recent offer from Tim for $550,000. Therefore the difference would be $150,000 ($550,000-$400,000). Belle is entitled to the return of any deposit and $150,000 in damages, that will put her in the same legal position as if the contract was performed.

Belle may also seek consequential damages that arise from the breach if they were reasonably foreseeable. Since it is unclear what Belle bought the property for, it is unclear whether or not she could prove any consequential damages. If she was purchasing for a business purposes, she may seek to prove lost profits from the delay in finding a new property. Any lost profits claim would be limited by a defense of foreseeability and reasonable certainty.

Reliance or Restitution Damages

Where a buyer is unable to prove expectation damages, perhaps because the market price is below the contract price, a buyer can seek reliance damages for the breach. Reliance damages seek to put the buyer in the same place she was before the contract was made. Most often in land sale contracts, the reliance damages are the out-of-pocket expenses including any down payment or earnest money paid to the seller. Where a seller breaches in good faith, for example because he is unable to deliver marketable title due to no fault of his own, a buyer may also be limited to her reliance damages. In this case, expectation damages are appropriate because Belle can prove that the fair market value is greater than the contract price and Steve's breach was not in good faith.

Finally, restitution damages are available where other remedies are inappropriate and inadequate and the defendant has been unjustly enriched by this action. In this case, restitution damages would include the return of her down payment. If Steve actually sells to Tim, they may also include the additional $150,000 in profits that Steve gained from breaching his contract with Belle and selling to Tim.

The most typical defenses available to damages in contract cases are failure to mitigate damages or uncertainty. In this case, neither will apply. There is no evidence that Belle failed to act in any way that ran up her damages and by seeking the difference in fair market value and the contract price, the damages are reasonably foreseeable.

Answer B

1. Equitable Remedies

The issue here is what equitable remedies Belle may seek to obtain Parcel 1.

Temporary Restraining Order

A temporary restraining order ("TRO") is an order from the court requiring, or forbidding, the nonmoving party to take an action, while the nonmoving party seeks a preliminary injunction. The purpose is to preserve the status quo pending a decision on the motion for a preliminary injunction. To obtain a TRO, a plaintiff must show (1) that, without the TRO, she will suffer imminent irreparable harm, as balanced against the hardship that the defendant will suffer from the issuance of the TRO, and (2) a likelihood of success on the merits. A plaintiff may seek a TRO *ex parte* - that is, without notice to the nonmoving party - if, in addition to showing a likelihood of irreparable harm, the plaintiff shows a strong showing for why notice could not be practically provided, or why it should not have to be provided (for example, if issuing notice would cause the defendant to take the action causing irreparable harm). A TRO is only available for up to 10 days (or 14 days, under the Federal Rules of Civil Procedure).

Irreparable Harm

Here, Belle purchased the property from Steve in part because they contained the five 100-year-old oak trees. If Steve cut them down, it would prevent Belle from enjoying their presence on the property. Because they are so old, they could not be readily replaced; instead, should she have to plant new ones, she would need to wait 100 years to have comparable trees on the property. Thus, she would suffer irreparable harm should Steve cut them down.

Moreover, Belle would suffer irreparable harm if Steve sold the property to Tim. If Tim did not know about the prior contract (that is, if he was a bona fide purchaser for value), and Steve sold him the property, the sale would be valid, and Belle would not be able to recover the property. Even though the conveyance to Tim will not occur until mid-April - and thus, is not scheduled to occur until after the 10-day TRO would dissolve - Belle would successfully argue that the TRO is still necessary to prohibit Steve from accelerating the sale in light of the pending litigation.

In contrast, there is no similar risk of harm to Steve. Regardless of the outcome of the litigation, Steve is either going to sell the property to Belle or to Tim in April. Preventing him from cutting down the trees will only obstruct his view of the lake for a period of less than two months, which is a minor inconvenience at most. Moreover, he will not suffer irreparable harm if he cannot convey the property immediately to Steve.

Thus, Belle would show the irreparable harm required for a TRO.

Likelihood of Success on the Merits

Belle would also be able to show a likelihood of success on the merits. Steve and Belle appear to have a valid contract, and Steve has breached the contract. Moreover, Steve's defenses here are limited.

First, under the Statute of Frauds, contracts for the conveyance of land must be in writing and signed by the party against whom enforcement is sought. The facts suggest that the contract was in writing, but they do not say so expressly. To the extent that the contract was not in writing or signed, Steve might raise the Statute of Frauds as a defense. But, because the facts suggest a writing, this is unlikely to be successful.

Second, Steve might argue that the contract is void because of the parties' mutual mistake. A contract is void for mutual mistake if both parties were mistaken to a material fact and the party seeking to invalidate the contract did not bear the risk of

mistake. Here, even though the parties made a mistake in the writing, they both subjectively understood which road was meant to be included in the contract; and, in any event, as the property owner with superior knowledge, Steve likely bore the risk of mistake. Thus, Steve's defense would likely fail. Belle would likely succeed on the merits.

Conclusion

Belle can seek a TRO to stop Tim from cutting down the trees and conveying the property to Tim.

Preliminary Injunction

A Preliminary Injunction ("PI") is an order from the court requiring, or forbidding, the nonmoving party to take an action, in order to preserve the status quo pending trial on the merits. The test for a PI is similar to that for a TRO. A plaintiff must show (1) that, without the PI, she will suffer imminent irreparable harm, as balanced against the hardship that the defendant will suffer from the issuance of the PI, and (2) a likelihood of success on the merits. Unlike a TRO, however, a PI may not be issued ex parte.

For the same reasons described above, the court would grant Belle a PI pending trial.

Specific Performance

Specific performance is an equitable remedy that requires the breaching party to perform his or her obligations under the contract. To obtain specific performance, a plaintiff must show (1) that there was a valid contract with sufficiently certain terms, (2) that the plaintiff performed or was able to perform her obligations under the contract, (3) no adequate remedy at law, and (4) feasibility of enforcement. Also, specific performance is not available if the defendant has any equitable defenses.

Valid Contract

To be sufficiently definite, a land sale contract must identify the parcel to be conveyed, the purchase price, and the parties. Here, the contract specified all three. Moreover, as described above, the contract appears to be valid and Steve does not appear to have any defenses to formation. Thus, the first prong is met.

Performance

Even though Belle has not yet paid the purchase price, there is nothing in the facts to suggest that she is not able or willing to fulfill her obligations and pay the contract price. Thus, the second prong is met.

Inadequate Remedy at Law

Under the law, all land is considered unique. Moreover, here, the parcel had unique features - it was near a lake and had 100-year-old oak trees. It would be impossible for Belle to obtain another identical parcel. Thus, simply awarding her monetary damages would not be an adequate remedy. She has no adequate remedy at law.

Feasibility of Enforcement

Requiring specific performance here would be feasible. It is not clear whether the parcel is in the same state as the court but, in any event, the court has personal jurisdiction over Steve and can require him to convey the property to Belle. Thus, enforcement is feasible.

Defenses

In some cases, a court will not award specific performance if it will result in undue hardship to the defendant, resulting from the plaintiff's sharp practices. Here, Steve

might argue that he would suffer undue hardship if he cannot obtain the value of his separate bargain. But he has not shown any sharp practices by Belle, and simply forgoing another opportunity is not a sufficient hardship to constitute a defense to specific performance. Thus, Steve does not have any defenses to specific performance.

Conclusion

Belle can obtain specific performance and require Steve to sell her the property.

Reformation

Reformation is an equitable remedy where the court will reform the terms of the agreement to reflect the true understanding of the parties. It requires (1) a showing of the mutually-understood contractual terms and (2) valid grounds, such as a mistake in rendering the contract to writing. Parol evidence may be used to show the existence of such a mistake.

Here, even though the contract identified the easement as giving Belle access to "Top Road," this was plainly not the true understanding of the parties. The parties both believed that the contract was giving Belle an easement to access the road known as "Lake Drive." Thus, there was a true meeting of the minds here and a court would be able to use parol evidence to determine that this was the true intent of the parties. Thus, the court would reform the contract to substitute "Lake Drive" for "Top Road."

2. Legal Remedies

The issue here is what is the appropriate measure of damages, should Belle not be able to obtain equitable relief.

The standard measure of contract damages is the expectancy measure. The purpose of contract damages is to put the non-breaching party into the same position she would have been in had the contract been fully performed. In a land sale contract, the expectation measure is the difference between the contract price and the fair market value of the property at the time of sale.

Here, Tim offered to purchase the property for $550,000. The fact that a buyer was willing to pay this price is strong evidence that it is the fair market value. Accordingly, should Belle not be able to obtain specific performance, she would be able to obtain monetary damages from Tim totaling $150,000 - the difference between the contract price and the fair market value. She would also be able to obtain any incidental damages resulting from the breach (for example, the transaction costs of cancelling the sale).

Q5 Business Associations

Andy, Ruth, and Molly decided to launch a business called The Batting Average (TBA), which would publish a monthly newsletter with stories about major league baseball players. Andy, a freelance journalist, was responsible for writing the stories. Andy conducted all of his business activities via a close corporation called Baseball Stories, Inc., of which he was the only employee. Ruth was responsible for maintaining TBA's computerized subscriber lists, mailing the newsletter every month, and billing TBA subscribers. Molly provided all equipment necessary for TBA. Andy, Ruth, and Molly expressly agreed to the following: Molly would have exclusive authority to buy all equipment necessary for TBA; and TBA's net profits, if any, would be equally divided among Andy, Ruth, and Molly.

Andy subsequently wrote a story in the newsletter stating that Sam, a major league baseball player, had been taking illegal performance-enhancing drugs. Andy knew that the story was not true, but wrote it because he disliked Sam. As a result of the story, Sam's major league contract was terminated. While writing the story, Andy's computer failed. He bought a new one for TBA for $300 from The Computer Store. The Computer Store sent a bill to Molly, but she refused to pay it.

Sam has sued Andy, Ruth, Molly, TBA, and Baseball Stories, Inc. for libel.

The Computer Store has sued Andy, Ruth, Molly, and TBA for breach of contract.

1. How is Sam's suit likely to fare? Discuss.

2. How is The Computer Store's suit likely to fare? Discuss.

Answer A

1. Sam's Suit

1-1. Does Sam have a valid claim for libel against Andy?

The issue is whether Sam has a valid claim for libel for the story Andy wrote. In order to claim a libel, a plaintiff must show that (i) there was a defamatory statement, (ii) of or concerning the plaintiff, (iii) which was published, and (iv) resulted in a harm to the plaintiff's reputation. When the plaintiff is a public official or a public figure, the plaintiff must also show (i) the defendant acted with malice, and (ii) the defendant's statement was false.

Defamatory Statement of or concerning the Plaintiff. For a claim for a libel, the defamatory statement cannot be a mere name calling but in general must allege a specific fact that is harmful to the reputation of the plaintiff. Also, it must identify the plaintiff. Here Andy wrote a story in the newsletter stating that Sam, a major league baseball player, had been taking illegal performance-enhancing drugs. The article specifically identified Sam and it specifically alleged that Sam took illegal performance-enhancing drugs. Therefore, there were allegations of specific acts of wrongdoing that were allegedly committed by Sam. Therefore, Andy's article constitutes a defamatory statement of or concerning the plaintiff.

Publication. Publication requires that the defendant share a defamatory statement at least with one person other than the plaintiff. Here Andy published his article in the newsletter with subscribers. Therefore, there was clearly a publication.

Damages. In a libel case, damages to the reputation can be presumed if the plaintiff meets all the requirements for defamation and also show malice and falsity. A libel is a publication of a defamatory statement in a written form. Here, as will be discussed below, Sam should be able to meet all the requirements so the damages can be

assumed. Also, the article constitutes a libel as it is a publication in a written form with subscribers. Even if the damages were not presumed, Sam's major league contract was terminated as a result of Andy's story. Thus, Sam would be able to show he suffered harm to his reputation as shown by his losing the contract. Therefore, Sam can show damages.

Malice. Given the constitutional protection of free speech, a public official or a public figure must meet a higher burden of proof in order to win in a defamation suit. A public official is a government official and a public figure is a figure well known in the society, such as celebrities or professional sportsmen. A public official or a public figure must show, in addition to the 4 requirements of defamation that the defendant acted with malice. In this context, in order to show malice, a plaintiff must show that (i) a defendant had actual knowledge that his statement was false, or (ii) a defendant acted with reckless disregard to the truth of his statement. Here Sam is not a public official but he is a public figure. He is a major league baseball player, not just a local player who plays for a hobby. Thus, Sam must be well known in the society and is a public figure. Thus, he must show that Andy acted with malice when he published his story. Andy published his story knowing that it is false because he disliked Sam. While the fact that he acted out of personal grudge or dislike of Sam does not show that Andy acted with malice, the fact that Andy published a defamatory article about Sam knowing that it was false shows that he acted with malice for purposes of defamation. Thus, if Sam can prove that Andy knew that the story was not true, Sam would be able to show Andy acted with malice.

Falsity. A public official or a public figure must also show that the defendant's story is not true. Here the facts indicate that Andy's story was not true so Sam should be able to meet this burden.

In conclusion, Sam is likely to succeed on his claim on defamation against Andy.

1-2. Is Baseball Stories, Inc. liable to Sam?

The next issue is whether Baseball Stories, Inc. ("BSI") can be held liable for Andy's libel. Andy, a freelance journalist, conducts all of his business activities via a close corporation BSI, of which he was the only employee. Under the theory of respondeat superior, an employer is liable for the employee's tort if the employee committed the tort within the scope of his employment. While an employer is not generally liable for an employee's intentional tort, the employer could still be liable if (i) the employee was motivated by a desire to further the employer's interest, (ii) the tort was authorized or ratified by the employer, or (iii) the tort was part of the nature of the employee's job.

Here Andy and BSI's businesses consist of writing articles for journals. Thus, Andy's publication of the article in the newsletter was within the scope of his employment. Here Andy is likely to be liable for intentional tort because he was not merely negligent in publishing the story but he intentionally published the story knowing that it was false. Sam can argue that Andy was motivated by his desire to increase subscription and popularity of the newsletter and BSI's business of publishing articles. Thus, Sam can argue that BSI should be held liable for the defamation committed by Andy.

1-3. Can Andy be held liable to Sam, notwithstanding Baseball Stories, Inc.?

A person is always liable for his or her own tort. Thus, Andy should be directly liable for the libel against Sam. Also, a court may pierce the veil and hold a shareholder liable for the tort committed by the corporation if, for example, (i) the shareholder did not treat the corporation as a separate entity and did not observe corporate formalities, or (ii) the corporation was inadequately capitalized. This is most likely in a closely held corporation and even more so when a plaintiff is a tort victim who did not rely on the limited liability of the corporation. Here BSI is a close corporation and Andy is the only employee. Thus, it indicates that Andy had a controlling influence over BSI. While a corporation can have a sole shareholder and only one employee, the corporate formalities must be observed in order to maintain the limited liability status of the

shareholder. Thus, if Andy commingled his personal funds with BSI's, used BSI's funds as if they were his own, used BSI's other assets as his own, or he inadequately capitalized BSI, Sam may be able to show that Andy and BSI are alter egos and Sam may be able to pierce the veil to reach Andy's personal assets for tort liabilities. Having said that, Andy should be directly liable to Sam in any case because it was tort committed by him personally.

1-4. Did Andy, Ruth and Molly form a partnership when they launched TBA?

Given that Andy and BSI can be held liable for Andy's libel, the next issue is whether Ruth, Molly and TBA can be held liable for Andy's libel. A partnership is formed when two or more people agree to carry on a business as co-owners for profit. No specific formalities are required to form a general partnership and whether the parties intended to form a partnership does not matter as long as there was an agreement to carry on a business enterprise for profit. Here Andy, Ruth and Molly decided to launch a business called The Batting Average (TBA). It is not clear from the name what type of entity they intended to form. However, it was formed to publish a monthly newsletter with stories about major league baseball players. Also, there is no indication it was intended to be a non-profit organization. In fact, Ruth was responsible for maintaining the subscriber lists and billing the subscribers. Also, they expressly agreed that TBA's net profits, if any, would be equally divided among Andy, Ruth and Molly. Thus, they agreed to form a business venture of publishing articles about major league baseball players for profit. Also, an agreement to share net profits shows that they formed a partnership. It does not matter that they never used the word "partnership" or they never intended to form a partnership.

The next question is what type of partnership Andy, Ruth and Molly formed as a result to determine their and TBA's liability. A default partnership is a general partnership where all partners are liable for their liabilities of the partnership. A creditor of the partnership must first look to the assets of the partnership and if they are insufficient, they can pursue the partners' personal assets. Therefore, in a general partnership, the

partners act as guarantors for the partnership liabilities. There are other forms of partnership or business enterprise that provide some form of limited liability for some or all owners, such as a limited partnership, limited liability company, a limited liability partnership or a corporation. However, they all require filing a form of certification with the Secretary of State and they each require that their names indicate a limited liability by including the words such as "limited partnership," "LP", "limited liability company", "LLC" or "Inc." or "Incorporated." There is no indication here that Andy, Ruth and Molly or TBA filed any certificate of limited partnership to form a limited partnership or a certificate of qualification to form a limited liability company, nor did they file articles of incorporation to form a corporation. Also, the name, "The Batting Average" does not have any of the words indicating that they formed a business entity with limited liability. Since no formalities were observed, they would also not be able to argue that they formed a de jure corporation. Therefore, Andy Ruth and Molly formed a generally partnership when they decided to launch their business TBA.

1-5. Can TBA be held liable to Sam for Andy's tort?

Given that TBA is a general partnership, the next issue is whether it or Ruth and Molly can be held liable for Andy's tort. A partnership is liable for tort committed by a partner in the scope of his partnership. Here Andy committed a tort while he was publishing the article for the newsletter published by TBA. Thus, TBA would be liable for the tort and Sam would be able to look to the assets of TBA. In a general partnership, all the partners are liable for the partnership liabilities if the partnership assets are insufficient to meet those liabilities. Thus, if TBA's assets are not sufficient to meet Sam's claim, Ruth and Molly could also be held liable and may be required to pay out of their own personal assets. However, Ruth and Molly may be entitled to indemnification from Andy since Andy was the tortfeasor.

In conclusion, Sam is likely to be successful on his libel claim against Andy. In such event, (i) TBA and BSI would likely be vicariously liable and (ii) if the assets of TBA are insufficient, Ruth and Molly would also likely be liable out of their personal assets.

2. The Computer Store's Suit

The issue is whether (i) Andy, Ruth and Molly formed a partnership, (ii) Andy had an express, implied or apparent authority when he bought a computer for TBA, (iii) TBA can be held liable for Andy's contract liabilities, and (iv) Ruth and Molly can be held liable.

2-1. Did Andy, Ruth and Molly form a partnership?

As discussed above, Andy, Ruth and Molly agreed to carry on a business venture of publishing monthly newsletters for profit and to share any net profits derived therefrom. They did not make any necessary filings with the secretary of state and TBA does not have a name indicating limited liability. Therefore, TBA is a general partnership.

2-2. Did Andy have an Express, Implied or Apparent Authority when he bought a computer for TBA?

The next issue is whether Andy had an express, implied or apparent authority when he bought a new computer for TBA for $300 from The Computer Store. All the partners of a partnership are considered agents of the partnership and they are generally authorized to act on behalf of the partnership relating to the partnership's business, although each partner's authority may be limited by agreement. Under the agency theory, a principal can be held liable under the contract entered into by the agent if the agent had an authority to enter into such contract. An authority can be actual or apparent. An actual authority arises when the principal either expressly grants the authority to the agent either by words or conduct or it is implied from (i) the past course of dealing between the principal and the agent, (ii) the principal's past acquiescence, or (iii) such authority is incidental to other express authority granted to the agent.

Here Andy is a partner of TBA and thus he generally had the ability to act on behalf of TBA. However, Andy, Ruth and Molly expressly agreed that Molly would have exclusive

authority to buy all equipment necessary for TBA. Therefore, Molly had the exclusive and express authority to buy all the equipment, including a computer used in the business. Since her authority was exclusive, Andy did not have an express authority to buy computers on behalf of TBA. There is no indication that TBA or Molly acquiesced in the past in Andy buying a computer. The Computer Store may argue that Andy was responsible for writing articles for TBA and thus using and buying a computer was incidental to his authority to write articles for TBA. However, given that buying equipment was Molly's exclusive authority, it is unlikely that Andy had any authority to buy equipment or computers on behalf of TBA.

The next question is whether Andy had an apparent authority to buy computers. An apparent authority arises when the principal holds the agent out to a third party as having certain authorities or powers. Given that TBA is an enterprise with only three owners and Andy was one of them and given that Andy was writing articles on behalf of TBA, The Computer Store is likely to argue that Andy had an apparent authority to buy a computer. On the other hand, TBA can argue that the fact that The Computer Store sent a bill to Molly indicates that they were aware that Molly was responsible for purchasing equipment. Also, the fact that Andy wrote articles for TBA can also only mean that he is an employee of TBA or a freelance writer. Thus, TBA may have a viable argument that Andy had neither actual nor apparent authority when he bought the computer and thus it should not be liable under the contract. However, even when the agent did not act with actual or apparent authority, the principal can be held liable if the principal later ratified the contract, which can be either express or implied if the principal kept the benefits of the bargain. Here, if TBA kept the computer and used it, there is likely to be ratification and thus TBA would be liable for $300 to The Computer Store.

2-3. Can Andy, Ruth and Molly be held liable for breach of contract?

Assuming that Andy acted within the scope of authority on behalf of TBA when he bought the computer or TBA later ratified the contract by keeping the benefits, the next issue is whether TBA's partners, Andy, Ruth and Molly can be held personally liable. As

discussed above, they formed a general partnership. In a general partnership, partners are liable for the partnership liabilities. Thus, if TBA's assets are not sufficient to meet the liabilities to The Computer Store, they can each be held liable and required to pay out of their personal assets.

Answer B

General partnership

A general partnership is an association between two or more people to carry on as co-owners a business for profit. There are no formalities required to form a partnership. There is no writing requirement or filing requirement with the Secretary of State. The subjective intent of the parties is immaterial. All that is required is that they intend to carry on as co-owners a business for profit. In other words, a partnership is formed, simply by meeting the definition of a partnership. Here, Andy, Ruth and Molly decided to launch The Batting Average (TBA), a business to publish monthly newsletters with stories about major league baseball players, and agreed to assign responsibilities among themselves for the management of the business. Furthermore, the sharing of gross profits gives rise to a presumption of partnership formation. Here, Andy, Ruth, and Molly expressly agreed to share TBA's net profits equally among themselves.

Andy, Ruth, and Molly formed a general partnership.

Sam v. Andy

General partners are always liable for their own torts. Thus, if Andy is found liable for libel, he will be personally liable for the tort regardless of the liability of TBA.

Libel

A prima face case for libel requires a defamatory statement, of or concerning the plaintiff, publication, and damages. In addition, when the defamatory statement concerns a public figure, such as a major league baseball player, the plaintiff must prove falsity and fault. For the fault requirement, a public figure must prove actual malice. Actual malice exists when the defendant knew that statement was false or recklessly disregarded the truth or falsity of the statement. Here, Andy wrote a newsletter stating that Sam, a major league baseball player, had taken illegal performance-enhancing drugs.

Defamatory statement of or concerning the plaintiff

A statement is defamatory if it adversely reflects on the plaintiff's reputation. Here, the statement that Sam was taking illegal performance-enhancing drugs clearly lowers his reputation in the community and in his profession. In fact, his major league contract was terminated due to Andy's newsletter. Furthermore, while the facts do not present the newsletter, it is safe to assume that Andy at least mentioned Sam by name. As a result of the newsletter, Sam was terminated.

Publication

For publication, the defamatory statement must be made to a third person who understands it. This requirement is clearly satisfied as Andy published the story in a newspaper.

Damages

Sam suffered general and special damages. For libel, damage to reputation may be presumed and as his contract was terminated, Sam has also suffered pecuniary loss.

Falsity and Fault

The facts state that Andy "knew that the story was not true". This would satisfy both additional requirements for constitutional damages as the statement is in fact false and Andy acted with actual malice when he published the newsletter knowing it was not true. The fact that he wrote the story because he disliked Sam would not establish actual malice, but his intentional disregard for the truthfulness of his statement satisfies.

Thus, Sam will be successful in a suit against Andy for libel.

Liability of Baseball Stories

In terms on Baseball Stories' and TBA's liability for Andy's tort, the issue is whether Andy was acting as an agent and whether he was acting within the scope of his employment and/partnership. An employer/partnership will be vicariously liable for torts committed by agents/employees/partners that are within the scope of scope of

employment/partnership. Sam would argue that because Andy conducts all of his business via Baseball Stories and is its only employee he was acting within the scope of his employment and Baseball Stories is vicariously liable.

Liability of TBA

A partnership is vicariously liable for torts committed by agents of the partnership that are within the scope of the partnership. General partners are agents of the partnership. Thus, Andy is an agent of TBA and TBA will be liable for Andy's tort if he was acting within the scope of TBA.

Sam could also argue that Andy was working on a computer purchased for TBA, and Andy was responsible for writing stories for TBA; thus he was acting as an agent of TBA and within the scope of his partnership.

Liability of Molly and Ruth

General partnerships are jointly and severally liable for all partnership obligations. Thus, a tort judgment creditor may sue any general partner for his entire loss. However, the creditor must first exhaust partnership resources before seeking payment for partners individually. Thus, Sam could hold Molly and Ruth personally liable for Andy's tort, but Sam must first exhaust TBA's resources. If he fails to do so, Molly and Ruth could look to the partnership for indemnification and/or contribution from the partners.

2. Computer Store's suit

A partnership will be liable for contracts entered into on its behalf by agents who have actual or apparent authority or contracts that have been ratified by the partnership. Partners are agents of the partnership. Thus, Andy, Ruth, and Molly are agents of TBA.

To determine whether the principal (TBA) will be bound if must first be determined whether the agent (Andy) had actual or apparent authority or the TBA ratified Andy's purchase.

Actual express authority

There is actual express authority when such authority is granted in the four corners of the partnership agreement or expressly granted by a requisite vote. Here, Andy, Ruth, and Molly agreed that Molly would have exclusive authority to buy all equipment necessary for TBA. There were no changes made to this agreement by the partners and Andy did not receive permission from Ruth and Molly to purchase a new computer for TBA. Thus, Andy did not have actual express authority.

Actual implied authority

There is actual implied authority, when the agent reasonably believes he has authority based on the manifestations of the principal. As stated above there have been no such manifestations by TBA. Furthermore, it is unreasonable for Andy to believe he has such authority because the partnership agreement between him and Ruth and Molly expressly grants such authority to Molly.

Apparent authority

Apparent authority is based on the reasonable expectations of a third party. Where a principal holds out an agent as possessing authority and a third party reasonably relies on such holding out, there is apparent authority. While TBA has not made direct representations to The Computer Store on behalf of Andy's authority, generally partners have authority to enter into contracts in the ordinary course of partnership business. Furthermore, apparent authority may be created by an agent's title. For example, if Andy told The Computer Store he was a partner of TBA, such an expression would reasonably induce The Computer Store to rely on Andy's authority as a partner. Thus, even though Andy did not have actual authority to purchase the computer for TBA he likely had apparent authority, which would bind TBA for the contract.

Ratification

Ratification occurs where an "agent" purports to act on behalf of the principal when in fact he does not have actual or apparent authority, and the principal subsequently

ratifies the action (with full knowledge of its terms). There are no facts to suggest that TBA ratified Andy's purchase and thus ratification is not available to bind TBA.

Liability

As mentioned above, general partners are personally liable for partnership obligations. Thus, if apparent authority is found, The Computer Store will have a claim against TBA, Andy, Ruth, and Molly.

Even though Molly will be personally liable to Computer Store, she may seek indemnification from TBA and may also seek contribution from Andy and Ruth as partners. In addition, Ruth and Molly and likely to have a claim against Andy for violation of the partnership agreement.

Q6 Wills / Trusts

In 2011, Tess, age 85, executed a valid will, leaving all her property in trust for her grandchildren, Greg and Susie. Income from the trust was to be distributed to the grandchild or grandchildren then living each year. At the death of the last grandchild, any remaining assets were to go to Zoo for the care of its elephants.

In 2012, the court appointed Greg as conservator for Tess, because of Tess's failing mental abilities.

In 2013, the court authorized Greg to make a new will for Tess. Greg made a new will for Tess leaving Tess's entire estate to Susie and himself outright. Greg, without consulting Tess, then signed the will, in the presence of two disinterested witnesses, who also signed the will.

In 2014, Tess found a copy of the will drafted by Greg, and became furious. She immediately called her lawyer, described her assets in detail, and instructed him to draft a new will leaving her estate in trust to Susie alone and excluding Greg. Income from the trust was to be distributed to Susie each year. At Susie's death, any remaining assets were to go to Zoo for the care of its elephants. The new will was properly executed and witnessed.

In 2015, Tess died. That same year, Zoo's only remaining elephant died.

Zoo has petitioned the court to modify the trust to provide for the care of its animals generally.

1. Is Zoo's petition likely to be granted? Discuss.

2. What rights, if any, do Greg, Susie, and Zoo have in Tess's estate? Discuss. Answer according to California law.

Answer A

1. Zoo's Petition to Modify the Trust

Trust Creation

The issue is whether Tess's will created a valid charitable trust. A trust may be created either inter vivos or by testamentary trust in a will. A trust is created when there is a present intent to create a trust, a trust beneficiary, a trustee, a trust res, and a valid trust purpose. Here, it appears that Tess intended to create a trust via her will and that her property was the trust res. Although Tess did not name a trustee, a court will ordinarily appoint an appropriate trustee rather than allow a trust to fail for lack of trustee. The trust has appropriate beneficiaries because the portion of the trust intended for the benefit of Tess' grandchildren has identifiable and ascertainable beneficiaries, and the valid trust purpose of supporting the grandchildren from the income.

A charitable trust is a trust for a public charitable purpose, such as health care, education, or religion. A charitable trust may be of perpetual duration and need not identify ascertainable beneficiaries. In addition, the doctrine of cy pres applies to charitable trusts. When a charitable purpose becomes impossible or impracticable, under the doctrine of cy pres the court will determine whether there is an alternative charitable purpose that comes as near as possible to the settlor's charitable intent or whether the settlor would prefer the trust to fail. Here, the remainder of the trust after the death of the grandchildren is a charitable trust because the assets are to go the Zoo for the care of the elephants. Because the elephants died after Tess's death, her express charitable purpose of caring for the elephants is no longer possible. However, it is likely that the court will apply cy pres to direct the trust to the Zoo for the care of other animals or to another zoo with elephants for their care. It is not clear that Tess had a specific connection to this Zoo or to elephants in particular during her lifetime, such that she intended the trust to remain valid only if Zoo took care of elephants with the money. Rather, it appears that she had a general charitable intent, and the court will direct the trust funds to the charitable purpose as near as possible to her intent. Accordingly, Zoo is likely to be able to modify the trust under the cy pres doctrine.

(The gift to the Zoo does not fail under the Rule Against Perpetuities because it vests in the Zoo within 21 years after a life in being at the time of the creation of the trust. Under the Rule Against Perpetuities a gift will fail if it need not vest within the time of a life in being plus 21 years. The grandchildren were lives in being and the trust passes to the Zoo immediately upon the death of the last grandchild. Therefore, the gift over to the Zoo does not violate RAP. The charity-to-charity exception does not apply because the grandchildren are not a charity.)

Conclusion

The court will likely grant Zoo's petition to modify the trust to provide for the care of its animals generally under the doctrine of cy pres.

2. Rights to Tess's Estate

Validity of 2013 Will

The issue is whether the 2013 will validly revoked Tess's 2011 will. Generally, a validly executed will may be revoked by an act of physical revocation or by the execution of a subsequent valid will that either expressly revokes the earlier will or is inconsistent with the terms of the earlier will. If it is inconsistent in terms, the earlier will is revoked only to the extent of the inconsistency. The later will must be validly executed with all of the required formalities. A will is validly executed when there is testamentary capacity, present testamentary intent, the will is in writing, the will is signed by the testator (or signed at her direction and in her presence), there are two witnesses who jointly witness the signature or affirmation of the signature, and the two witnesses sign the will before the death of the testator with knowledge that it is the will they are signing. If the witnessing formalities are not observed, it may nonetheless be considered a valid will if the will proponent provides clear and convincing evidence that the testator intended the document to be her will. Holographic wills are permitted in California if all material terms are in the testator's handwriting.

Here, Tess executed a valid will in 2011 pouring her property into a trust that was created by the terms of the will. In 2013, Greg attempted to revoke the earlier will by

making a new will that was inconsistent with the earlier will by making an outright gift of all of the property. Thus, the 2011 will was properly revoked if the formalities were observed by the 2013 will. Because the court appointed Greg as conservator and authorized him to create a new will for Tess, Greg's capacity and present intent to create the will are at issue. No facts indicate that Greg did not have capacity or that he did not presently intend to create the will in 2013. The will was in writing and Greg signed it on behalf of Tess. Although Tess did not direct that he sign the will (and indeed she was not even aware of it), Greg had been appointed conservator and so he was authorized to sign on her behalf. The will was signed in the joint presence of two disinterested witnesses, and they also signed the will before Tess's death. Thus, all of the formalities were observed and the 2013 will became Tess' valid will, revoking the 2011 will by implication.

Undue Influence or Abuse of Relationship

The issue is whether the will or some portion of it was invalid because Greg exerted undue influence or abused his conservatorship in some way. Undue influence occurs when a person exerts influence over a testator to the extent that the testator's free will is overcome. If that happens, the portion of the will that was made because of the undue influence is invalidated. If that portion was made to a person who would take by intestacy, the gift is invalidated only to the extent of the intestate share. Undue influence is presumed where a person is in a confidential relationship with the testator, had a role in procuring the will, and an unnatural gift results. Here, Greg has not exerted undue influence over Tess because he did not need to prevail on her to change her will. Instead, he was appointed conservator and given authority to change the will himself. Thus, the gift will not be invalidated because of undue influence.

However, the court might decide that Greg abused his position as conservator by changing the will in a way that was contrary to Tess's intent, without ever consulting her as to her wishes. A conservator generally has fiduciary-like duties to the individual he is representing, and thus he must act loyally and in her best interests. Greg's change of the will benefitted him directly, in a way directly contrary to Tess's express wishes at a

time when she had mental capacity. Thus, the court might find that Greg's conduct violated his duty to loyally represent Tess's interests. In that case, his gift would likely be reduced to his intestate share. However, if Tess's property passed by intestacy, it would go equally to Susie and Greg as Tess's only living heirs. This is exactly the will that Greg made. Therefore, Greg would receive the gift he gave himself when he was abusing his authority. In that case, the court might impose a constructive trust on Greg's property for the benefit of Zoo.

(In practical effect, Greg's wrongdoing does not matter because Tess was able to execute a valid will revoking his 2013 will, see below.)

2014 Will

The issue is whether Tess's 2014 will properly revoked the 2013 will created by Greg. As stated above, a will is created when there is present testamentary intent, testamentary capacity, a will in writing, signed by the testator, witnessed by two joint witnesses, and signed by the witnesses before the testator's death.

Testamentary capacity exists when the testator understands the nature and extent of her property and knows the natural objects of her bounty. Here, when Tess called her lawyer in 2014 she was able to describe her assets in detail and provide a reasonable explanation for leaving her assets entirely to Susie. Although Greg will argue that she lacked capacity because he had been appointed conservator in light of Tess's failing mental abilities, testamentary capacity may exist even when the testator lacks capacity to manage his finances and other personal affairs. Under the circumstances, it appears that Tess had capacity to understand her assets and who she wanted to leave them to, and the court will likely find that she had capacity.

Tess also appeared to have present testamentary intent because she instructed her attorney to draft a new will. The facts also state that the will was properly executed and witnessed. Therefore, the 2014 will validly revoked the 2013 will because it was completely inconsistent with that will.

Accordingly, at Tess's death in 2015, the 2014 will leaving her entire estate in trust with income distributed to Susie during her lifetime and remaining assets to the Zoo at the time of Susie's death was Tess's valid will.

Omitted Child

Greg might attempt to argue that he is entitled to an intestate share of Tess's estate as an omitted child. If a child born after the creation of a will (or the testator mistakenly believed the child was dead or did not know he had been born) is unintentionally omitted from the will, the child may take his intestate share and all other gifts are abated. However, Greg is a grandchild not a child, and he was alive at the time the will was made and intentionally omitted because Tess was angry that he had attempted to change her will. Thus, Greg will not be entitled to an intestate share as an omitted child.

Remainder to Zoo

As noted above, the gift to Zoo after Susie's death does not violate the Rule

Against Perpetuities. It is a valid charitable trust, and the court will likely apply cy pres to prevent the trust from failing.

Conclusion

Greg has no rights in Tess's estate. Susie has a right to income from the trust during her lifetime and Zoo has a right to distribution of the trust assets upon Susie's death.

Answer B

2. Zoo's Petition.

The Issue here is whether Tess created a valid will and trust that left Zoo any interest in T's property.

2011 - Will

A valid will must be in writing. It must be signed by the testator in the presence of two disinterested witnesses at the same time who also sign the will.

The facts state that T created a valid will, so we can assume she met all elements of the will. Therefore, a valid will was created.

Trust

T left all of her property in trust for her grandchildren. In order for a trust to be valid, there must be a testator, a beneficiary, trustee, trust purpose, and trust property.

Testator

Here, T is the testator.

Beneficiaries

T's grandchildren Greg and Susie are the income beneficiaries b/c they get the income from the trust. The Zoo is also a beneficiary and they hold a future interest in the property. The Zoo will get the remainder of the trust after the last grandchild dies.

Trustee

Although there isn't a named trustee, it doesn't defeat the trust. The court will appoint a trustee if there is no trustee to manage the trust.

Trust Purpose

The purpose of the trust is to provide income to the grandchildren for their lives, then the remainder goes to the zoo.

Trust property

T has left all of her property into the trust.

Therefore, a valid trust was created. Under the 2011 will, Zoo had an interest in T's trust.

2013 - New Will

The issue is whether the new will is valid b/c it was created by a court appointed conservator.

Will Formalities

See rules above.

Here, Greg as the conservator for T and under the court's authorization created a new will for Tess. The will was signed by two disinterested witnesses. However, T did not sign the will. But Greg will argue that as the conservator, he was permitted to sign on her behalf. So, technically, a will was properly created. However, I will discuss below why the will should be void.

Greg as Conservator

A court can appoint a guardian or conservator to act on behalf of a person who lacks the mental capacity to act on their behalf. They have the authority to make legal decisions, such as drafting a new will. However, a conservator still owes the testator a fiduciary duty of care and loyalty. The conservator must act in the best interest of the testator and not make any decisions that are self-serving and are directly adverse to T's interest.

Here, Greg was appointed as a conservator for T b/c of her "failing mental abilities." Although he is authorized to create a new will for T, he must uphold his fiduciary duties. Greg violated his fiduciary duties when he created T's new will without first talking to her about the will and determining whether she was okay with changing the will so that it left the entire estate to Greg and Susie. Instead, Greg disregarded her previous will and left the entire estate himself and his sister Susie, cutting the Zoo completely out of the will. The act of leaving everything to himself and his sister shows self-dealing and he has violated his duty of loyalty. Even though he was legally permitted to create a new will for Tess, he violated his fiduciary duty to T. Any attempt Greg makes to argue that he was within his right to draft the new will will fail b/c he violated his fiduciary duties. T's estate could sue Greg for violating this duties and seek a request to void the 2013 will.

Undue Influence

Additionally, the Zoo and T's estate will argue undue influence per se b/c there was a fiduciary relationship with the person who wrote the will and there was an unnatural devise.

Here, Greg is the conservator and in a fiduciary relationship with T. The devise was also unnatural b/c the original will never intended to leave the entire estate to Susie and Greg. Therefore, the Zoo and T's estate should be successful in voiding the will under undue influence per se.

DRR

Alternatively, the Zoo and T's estate could attempt to revive the original will under DRR.

Under DRR, a previous will can be revived if a most recent will was created under fraud or misrepresentation. Meaning that the testator created the new will because they were misinformed about something (i.e., a beneficiary had died when they were really alive). If that is the case, then the new will can be voided and the old will can be revived.

Here, T's estate and the Zoo will argue that T would have never created the new will that Greg created. Greg fraudulently misrepresented T's wishes for her will and created an unnatural devise. As discussed above, T never intended to leave her entire estate to Greg and Susie. There is nothing in the facts that suggests she had changed her mind since 2011. Therefore, the 2013 will should be voided and the 2011 will should be revived.

2014 Will Drafted by Lawyer

After T discovered that Greg created the 2013 will, T created a new will. The issue here is whether a valid will was created for lack of capacity.

Will Formalities

See rule above. Here, the facts state that the new will was properly executed and witnessed. So, let's assume that will formalities have been met.

Lack of Capacity

Generally, a person lacks capacity if they are unable to understand the nature of their estate, the nature of their relationship with family and friends, and the nature of their act of creating the will.

Here, the biggest problem is that the court appointed a conservator for T b/c of her failing mental abilities. Other than that, we don't know much about her capacity to create a will. We don't know if "failing mental abilities" equates to lack of capacity. Let's look at the elements for capacity.

Nature of the act

This element means that the T must understand the nature of her acts and conduct of creating the will.

Here, T appears to understand the nature of her act of creating the will because she saw the will that Greg drafted and became furious and contacted her lawyer to draft a new will. It appears that T understood the nature of her act b/c she knew that Greg's 2013 will was not what she intended and she knew that she needed to call her lawyer to draft a new will. Therefore, this element is met.

Nature of the estate
This elements means that the testator must understand the extent of and identify his property.

Here, T understand the nature of her estate and property b/c she revised her will describing her assets in detail and left her entire estate to Susie. Thus, this element is likely met.

Nature of relationships with family and friends
This element means that the testator must understand their relationship with family and friends - the people they are leaving their assets to.

Here, T seems to understand the nature of her relationships b/c she was so angry at Greg for what he did that she specifically excluded him from her new will. She left all of estate in trust to Susie with the remainder to the Zoo. Thus, this element is likely met.

Therefore, since T appears to have met all the elements for capacity at the time that she created the will, the 2014 will is probably the valid enforceable will. The 2014 will revokes all prior wills automatically. If the court agrees that T had capacity at the time that she created her will, then T's 2014 will is probably valid and Zoo has an interest in T's estate.

Cy Pres

The next issue is Zoo's ability to use the assets b/c the trust assets were left for the care of its elephants but they have no elephants. Under the Cy Pres doctrine, the court can modify a charitable trust purpose if the trust purpose has been frustrated.

Here, T's trust left anything remaining in the trust to Zoo for the care of its elephants. The facts don't indicate that Susie has died yet, so the Zoo's interest is still a future one. Because the Zoo doesn't have any present interest in the trust, the Zoo will most likely fail in petitioning the court to modify the trust purpose. Although the Zoo doesn't have any elephants at this time, they might have elephants when Susie dies. If at the time that Susie dies, the Zoo doesn't have elephants, then the Zoo might have a better chance at succeeding in modifying the trust purpose. If they are successful in modifying the trust purpose, the new purpose must also be charitable and the court will probably want them to keep the charitable purpose as close as possible to what the original trustor intended the purpose to be. Therefore, Zoo's petition is premature. The court should dismiss it at this time b/c they do not have any present interest and the purpose of the trust is not currently frustrated.

3. Rights of Greg, Susie, and Zoo.

See discussion above regarding the beneficiaries' rights.

Disposition

Greg

Based on the 2014 will, Greg has no interest in T's assets. Of course, if the court determines that T lacked capacity to create the 2014 will, then Greg might be able to income from the trust from the 2011 will. The 2011 will will only be valid, if the 2013 will that Greg fraudulently created is void and the 2011 will is revived.

Susie

Susie has interest in the trust income for her life under the 2014 will. As discussed above, the 2013 will is likely invalid, so Susie won't get share T's entire estate with Greg. If the court determines that the 2014 will is invalid, then Susie gets trust income for life under the 2011 will.

Zoo

Zoo has a future interest in the remainder of the trust for the care of its elephants under the 2014 will.

Jul 2014

California Bar Examination

Essay Questions and

Selected Answers

The State Bar Of California
Committee of Bar Examiners/Office of Admissions

180 Howard Street • San Francisco, CA 94105-1639 • (415) 538-2300
845 S. Figueroa Street • Los Angeles, CA 90017-2515 • (213) 765-1500

ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2014

CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2014 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	Subject
1.	Contracts/Remedies
2.	Evidence
3.	Business Associations / Professional Responsibility
4.	Criminal Law and Procedure
5.	Trusts / Community Property
6.	Torts

ESSAY EXAMINATION INSTRUCTIONS

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

Q1 Contracts / Remedies

Percy and Daria entered into a valid written contract for Percy to design and install landscaping for an exclusive housing development that Daria owned. Percy agreed to perform the work for $15,000, payable upon completion. Percy estimated that he would work approximately 100 hours a month on the project and would complete the project in three months. His usual hourly fee was $100, but he agreed to reduce his fee because Daria agreed to let him photograph the entire landscaping project for an article he planned to propose to *Beautiful Yards and Gardens* magazine. He anticipated that publicity from the article would more than compensate him for his reduced fee.

Percy completed two months' work on the project when Daria unjustifiably repudiated the contract. He secured a different project with Stuart in the third month, which paid him $1,500 and took 15 hours to complete. He could have completed Daria's project at the same time.

At the time Daria unjustifiably repudiated the contract, Percy was negotiating with Tammy to landscape her property for $30,000. Once Tammy learned what had happened, she stopped negotiation.

Percy has sued Daria. Ideally, he would like to finish the project with her.

What remedy or remedies may Percy reasonably seek and what is the likely outcome? Discuss.

Answer A

Contract Law - Common Law

In contract law, the common law governs service contracts or land sale contracts, and the UCC governs the sale of goods. This is relevant because there are certain differences in remedies between the two areas of law, and certain remedies that are specific to the UCC.

This was a service contract, because Percy was to perform the service of landscaping the yard. Therefore, the common law and its remedies apply, which will be discussed below.

Breach Of Contract and a Valid Contract

A breach of contract claim requires there be 1) a valid contract, 2) a breach, and 3) damages. The problem says they entered a valid written contract, so there is no issue there.

Breach - Anticipatory Repudiation

Anticipatory repudiation occurs when a party clearly and unequivocally communicates or manifests that it will not perform its duties on the contract. When there is an anticipatory repudiation, the other party may treat the repudiation as a breach or ignore it and demand performance until the original performance was due. When one party has entirely performed before the agreed upon date, and the other party repudiates by refusing to pay - i.e. the only duty remaining is for one party to pay - the non-breaching party may not sue for damages until the original agreed upon date.

Here, Daria clearly manifested that she would not pay, and the problem says it was unjustifiable. Percy can take this as a breach of the contract. Also, Percy had not completed performance and so there are more duties due than simply one party paying.

Therefore, Percy may bring a breach of contract claim for any resulting damages, discussed below.

Monetary Damages

The general and presumed damages in contract law are monetary damages, with seek to compensate the non-breaching party with money. In certain situations, which will be discussed below, equitable remedies such as specific performance will be granted. But the default is damages, so these will be discussed first.

Expectation Damages

The default contract remedy is expectations damages. Expectation damages seek to place the non-breaching party in the same position he or she would have been in had the breaching party performed. Said another way, expectation damages seek to give the non-breaching party the benefit of its initial bargain. The general formula for expectation damages is the difference amount of price or the amount to be paid for a service or good under the contract and the amount of replacing (the market price) it, plus any incidental damages, plus any foreseeable consequential damages, less any amount saved by the non-breaching party.

Here, the general damages to which Percy would be entitled include the amount of money he stood to earn under the contract ($15,000) less the amount he could get paid for replacement work. There is a tricky issue regarding the magazine spread in Beautiful Yards and Gardens, because Percy can possibly argue that the value of that was at least $15,000, and so his total expectation was $30,000, and therefore if the court does not grant specific performance (see below), it should award him expectation damages of $30,000 minus any replacement services he provides and any amount he saves. This is because Percy would have completed 300 total hours of work (100 hours a month X 3 months) and he would normally charge $100 for each hour (300 X 100 = $30,000). Daria might argue that he only expected to make $15,000 and so that should be the amount from which to measure Percy's expectation damages.

Because the initial contract amount was only for $15,000, Daria has a strong argument that that amount was the only amount Percy could reasonably have expected to make. In the event the specific performance is not granted, and therefore Percy does not get the added publicity, it will be difficult for him to claim he expected to earn more than $15,000 and so arguing for his traditional hourly rate will probably fail. If he wants to collect more in the absence of specific performance, he could possibly argue under a restitution theory.

Consequential Damages: Lost Contract with Tammy

Consequential damages are damages that are unique to an individual party (i.e. they are not those that are clearly within the contract, such as the contract price) but that are the natural and foreseeable consequences of a contract breach or are contemplated by the parties when contracting. Importantly, to collect consequential damages, the damages must be proven with reasonable certainty and they must be foreseeable.

Here, Percy will argue that his lost contract with Tammy was a consequence of Daria repudiating their contract, and therefore the consequential damages of that $30,000 contract should be included in his damages with Daria. He will point to the timing, and that he and Tammy were negotiating a deal but Tammy stopped upon learning that Percy's contract with Daria ended. Percy might argue that Tammy stopped negotiating because the broken contract with Daria gave Tammy reservations about contracting with Percy.

Percy's consequential damages argument is subject to many counter-arguments by Daria, which will probably win out.

Causation of Breach

First, there is a causation issue. Daria can convincingly argue there is no proof that her repudiation even caused Tammy to stop negotiating. Therefore, it might not even be a "consequence" of her repudiation and should not be included in Percy's damages claim.

Certainty

Tammy can argue that there is no certain amount of the consequential damages with Tammy. They were negotiating over a price of $30,000, but that was not the final, agreed upon price, which could have been less. Further, there might not have been a contract at all. Therefore, there is no reasonable certainty that but for Daria's repudiation, Percy would have earned $30,000 from Tammy.

Foreseeability

Lastly, even if Daria's repudiation caused Tammy to cease negotiating, Daria can argue it was not a natural and foreseeable consequence of her repudiation, nor did Daria contemplate such a consequence when entering the contract. Daria repudiated the contract unilaterally. She never alleged that Percy was doing a bad job, and she has done nothing further to impugn his business reputation. While it is arguably foreseeable that someone canceling a contract might make the other party look bad, it is likely not a natural consequence of one individual's repudiation to cause another party to back out of a contract.

Disposition

Percy should not be able to collect consequential damages from the lost deal with Tammy in his claims against Daria.

<u>Incidental Damages</u>

Incidental damages are naturally arising damages that a party occurs when trying to fix the situation after another party breaches. Incidental damages include costs such as trying to renegotiate other deals. Here, it is unclear any specific incidental damages Percy may collect, but he will be able to collect any that do exist.

Mitigation and contract with Stuart

A non-breaching party has a duty to mitigate damages by seeking reasonable replacements or substitutes for goods or services. Thus, in his third month on the job, Percy had a duty to mitigate by finding replacement work. Any damages Percy collects

from Daria must be reduced by what Percy earns from these mitigating contracts, and if he does not mitigate, the law will treat Percy as if he did and not allow him to collect if there were reasonable replacements for his contract with Daria.

Here, Percy entered into a contract with Stuart to complete 15 hours of work for $1500 in the third month. Daria will argue that this was mitigation and therefore that any damages he collects from her should be reduced by this amount as adequate cover.

Lost-Volume Seller

A party does not need to reduce expectation damages by the cost of cover or replacement performance if the party is a lost-volume seller. Generally, this applies to sellers of goods who have enough supplies to meet the demands of their customers, such that the other party breaching does not just allow the seller to sell to a new party, but the breaching party merely constitutes a lost sale the seller could have met anyways. If a party is a lost volume seller, cover or replacement service will not reduce its damages.

Here, Percy was not a seller of goods, but he could have performed the contract for Daria and the contract for Stuart. Thus, the contract for Stuart makes Percy look like a lost volume seller because he could've performed both and thus could've made the $15,000 from Daria and the $1500 from Stuart. Therefore, the $1500 from Stuart should not count as mitigation and should not reduce any damages he collects from Daria.

Other Mitigation

There are no specific facts about seeking cover, but the fact he negotiated a deal with Stuart and was attempting to enter a deal with Tammy suggests he was looking for adequate replacements. Thus, Percy has met his duty to mitigate and his damages from Daria should not be reduced.

Disposition of Expectation Damages

He is entitled to the $15,000 regardless of specific performance (see below) because he expected to make that, but not the lost contract with Tammy and not reduced by the contract with Stuart. This should be increased by incidental damages and decreased by any amount he saves by not having to further perform. If he does not get specific performance, he might recover extra in restitutionary damages for the benefit conferred on Daria (See below).

Reliance

Reliance damages seek to place the non-breaching party in the position he or she would have been in if the party had never entered into a contract. Thus, reliance damages generally consist of reasonable expenses the non-breaching party has incurred in preparing and partially performing the contract.

Here, there are no clear reliance damages amounts, but Percy could collect any amounts he's spent on tools specifically for Daria or other related expenses.

However, these are likely to be less than the $15,000 expectation damages, and a party may not collect both expectation and reliance damages, so Percy will likely not try and collect these damages.

Restitution

Restitutionary damages seek to compensate the non-breaching party for benefits he has conferred on the breaching party in order to prevent unjust enrichment by the breaching party. In some circumstances a breaching party may even be able to collect restitutionary damages if he has substantially performed and thus conferred a substantial benefit on the other party. Restitutionary damages may take the form of either the amount of improvement the breaching party has enjoyed, or the value of the services provided by the non-breaching party. Courts have equitable power to choose one or the other, and will consider factors such as the blameworthiness of the parties.

Here, Percy has performed 2 months of work at 200 hours total and thus the market value of his benefit conferred upon Daria was $20,000. Percy will argue he should at least get paid this if he cannot finish the contract. This is more than the $15,000 in expectation damages, but it is arguably fairer if he doesn't get specific performance because this is the value he conferred on her. Daria might argue that he did not substantially perform because he only completed 2/3 of the work, but Percy was not a breaching party, and so he is not blameworthy and therefore he needn't substantially perform to seek restitution.

If the amount of increased value of her land is even higher, Percy might argue for that, but such a number is unclear from these facts. Because he's conferred $20,000 worth of services and thus benefited Daria to that amount, Percy can argue for this amount as well instead of expectation damages if he wants. If he gets specific performance and finishes and the original contract is enforced, he would not get restitution damages because the other remedies would suffice.

No Punitive Damages

Even though Daria's breach was intentional and without justification, punitive damages are not award for breach of contract claims, and therefore Percy may not collect any.

Specific Performance

It is within a court's equitable powers to grant specific performance as a remedy in certain circumstances. Specific performance requires that both parties actually complete the contract, rather than compensate each other in money for any breach. Specific performance requires 1) a valid contract, 2) with clear provisions that can be enforced, 3) an inadequate legal remedy (i.e. money damages are insufficient for some reason, such as the good or service is unique), 4) balancing the hardships, performance is equitable, and 5) enforcing the performance is feasible.

Valid contract with clear terms

The contract was valid and the terms were clear as the payment and services were unambiguous.

Inadequate legal remedies

Percy will claim that mere expectation or restitutionary damages are insufficient because he entered the contract thinking he would be able to photograph it and get more publicity to further his business. Specifically, he will claim that it is difficult to value the worth of this increased publicity and therefore it cannot be remedied with mere dollars and can only be remedied by allowing him to finish performance.

Daria can argue that he can be compensated for his time adequately by paying him his normal hourly rate, and that he can always just photograph another project of his. This is a close issue. If Daria's yard would've been particularly nice or a particularly good display of Percy's work, then maybe this performance was unique. If it was any ordinary yard, then absent a showing that Percy needed to place the advertisement now, legal remedies should suffice and Percy could just photograph another project.

Equitable

In terms of balancing the hardships, it is unclear why Daria repudiated the contract or if she has any sort of reason for not wanting performance complete. The question says it was unjustified and so there likely is not. On the other side, Percy has done nothing wrong and appears to have performed adequately. Daria arguably could have to pay more under a restitutionary theory if there is no specific performance (the $20,000 in received benefit as opposed to the initial $15,000 under the contract), so it would not be harder to enforce. However, it may be difficult because of their soured relationship, but that should not be a strong equitable argument considering Daria caused this potential issue.

Feasibility

Lastly, specific performance must be feasible to enforce. Courts consider how long the contract will last, the amount of supervision required, and other related factors. Here, the contract would only take one more month and 100 more hours. This is relatively short for a contract, and the parties could just come back in a month or so to a court to show it was enforced. Daria might argue the court would not want to spend this time, but that could apply to almost any specific performance remedy, and if a 1-month service contract with clear plans/designs already made by Percy is not feasible, then almost any specific performance would not be.

Disposition

While feasibility is not a clear issue, performance would likely be feasible. The biggest issue is whether a court thinks a legal remedy is inadequate. If there is something special about Percy completing this project, then a court will likely order specific performance. If it is just any other landscaping project, it will likely hold that damages (discussed above) will suffice.

Answer B

Applicable Law

It must first be determined what applicable law applies to the contract involved in this dispute between Percy (P) and Daria (D).

Rule: The Uniform Commercial Code applies to contracts for the sale of goods. All other contracts are governed by the common law, such as services contracts and contracts for the sale of land.

The contract between P and D involved the design and installation of landscaping for an exclusive housing development that D owned. As such, this is a contract for services, which makes the common law applicable and governing.

Conclusion: The common law applies.

Contract Formation

A contract is an agreement that is legally enforceable. A valid contract requires an offer, acceptance, and consideration.

The facts state P and D entered into a valid written contract, thus there was a valid contract between them.

Conclusion: There was a valid contract formed between P and D for the design and installation of landscaping.

Anticipatory Repudiation

Did Daria breach the contract by anticipatorily repudiating?

Rule: When one party unequivocally and unambiguously indicates to the other contracting party before the time for performance arrives that they are not going to perform on the contract, this is considered an anticipatory repudiation and a total breach of the contract. The non-breaching party is entitled to all remedies at this time so long as the non-breaching party has not already fully performed their part. If the non-breaching party has in fact fully performed their duties under the contract when the anticipatory repudiation is made, they must then wait until the time for performance to seek remedies.

Two months into the project, Daria "unjustifiably repudiated the contract." This will be regarded as a material and total breach, and at that time P was entitled to all remedies available.

Conclusion: D breached the contract by anticipatorily repudiating, and P is entitled to all remedies at this time.

Remedies

What remedies may P seek from D?

A party may seek legal, restitutionary, and equitable remedies depending on the facts and circumstances of the case.

Legal Remedies

What legal remedies is P entitled to?

Rule: Legal remedies take the form of monetary damages.

Compensatory Damages

Compensatory damages are a common legal remedy in contracts disputes. They can be in the form of expectation damages, consequential damages, and incidental damages, as well as reliance damages.

Expectation damages seek to place the non-breaching party in the position he would have been in had there been no breach. They seek to provide the non-breaching party with his expectations under the contract.

Consequential damages are a form of compensatory damages that are more special in nature and result from the non-breaching party's particular circumstances. These must be known to both parties at the time of contract formation in order for the non-breaching party to be able to recover them.

Reliance damages are used when expectation damages and consequential damages are too speculative and uncertain. They provide the non-breaching party with damages in the amount of how much that party spent in performance and reliance on the contract.

All contract damages must be causal (but for causation), foreseeable at the time of contracting, certain, and unavoidable (non-breaching party's duty to mitigate).

Expectation Damages for the Contract Price

The contract payment price was $15,000. Expectation damages for P would be $15,000 because this is what he expected to receive had the contract been fully performed by both parties.

Consequential Damages for the Photographs

P will also argue that he is owed consequential damages for the loss he incurred due to not being able to photograph the completed gardens and landscaping which he planned to include in his project for an article he planned to propose to Beautiful Yards

and Gardens. Since this loss is not a direct expectation damage, P will have to show that the damages are causal, foreseeable, certain, and unavoidable. He will argue that they are causal because D breached the contract only two months into the deal when the work was not yet completely done; he is no longer able to photograph the entire landscaping project and use it in his article which he plans to propose to the magazine. But for the breach, P would be able to have taken the pictures and included them in his article to propose to the magazine. However P will have a hard time arguing that the damages were foreseeable and certain. He may try and argue that these damages were foreseeable to both him and D because he agreed to a reduced fee only because D agreed to let him take the pictures of the completed landscaping project. If P can show that D was aware of the fact that he wanted to use the pictures in a proposal to magazine, he may have an argument this loss was foreseeable to both him and D. Also the fact that he accepted a significantly lower fee might suggest that D was in fact aware that that the photographs were an important "payment" for P. P normally charged $100 per hour for his work and planned to work 100 hours on this project a month for three months. Thus, his normal fee for such a project would have been $30,000, but instead he charged D only $15,000 because she agreed to allow him to photograph the landscaping. He anticipated "that publicity from the article would more than compensate him for his reduced fee." P will argue further that his damages are certain because they amount to $15,000 (the difference between his usual fee of $30,000 for this type of project and what he agreed to with D, $15,000). D will counter that these damages are not certain because they are too speculative. It would be hard to determine and set a monetary amount for how much P would have received in publicity from the article. D can also argue that P only planned to use the pictures in a proposal to propose to the magazine, and that P was not even definitely given an article spot in the magazine.

Regarding the factor of unavoidable, a party is under a duty to mitigate damages. P did in fact mitigate damages by securing a different project with Stuart in the third month that paid him $1, 5000 and took 15 hours to complete. However P will argue that he could have completed this project at the same time as D's, thus is this is

in fact the case, then P's damages would not be offset by the $1,500 he earned from the other job because he could have done both projects at the same time, thus he still lost out on the profits from D's breach.

Conclusion: P may have a claim that he is entitled to $15,000 for the loss in being able to photograph the completed project, but there are issues as to the foreseeability and certainty of these damages.

Consequential Damages for the $30,000 Tammy deal

P will also argue that he is owed consequential damages for the $30,000 deal with Tammy. P was negotiating with tammy to landscape her property for $30,000 but once Tammy learned of the unjustifiable repudiation by D she stopped negotiating. P will have to argue that but for D's breach, he would have secured the landscaping job with Tammy for $30,000. The facts do state that "once Tammy learned what happened" she immediately stopped negotiation which suggests that this news caused her to stop negotiating with P. However, P may have some trouble arguing that these damages are foreseeable because D may not have known at all that P was also negotiating with other individuals at the time for similar projects. P will try and make the argument that he is entitled to these damages because D should have known or even did in fact know that by breaching a major landscaping deal for an exclusive housing development news of this would spread and could affect P's reputation in the industry and lead others to refrain from doing business with him under the assumption that he was not an ideal business man since a previous client backed out of a contract with him. This could appear to others to be that P is not skilled and qualified to do landscaping jobs. These damages are likely certain because they were negotiating for an amount of $30,000 for the project and P can also rely on his past business deals to show this amount was accurate. There is no issue as to unavoidability here because there was no way P could have mitigate the loss from the Tammy deal.

Conclusion: P may have a claim for the $30,000 in lost profits from the deal with Tammy, but again these damages likely may be considered too speculative since the parties were only in the negotiations stage.

Incidental Damages

In addition to compensatory and consequential damages a party is always entitled to incidental damages which cover costs directly associated and incidental to the breach. In a contracts case this is usually expenses in negotiating with other parties for completion of the contracted for work.

If P incurred any costs or expenses in finding new work such as with Stuart as well as if he spent any more or time looking for other work to mitigate his losses from D's breach he would be entitled to such damages as well.

Conclusion: If P incurred any damages incidental to D's breach he can recover these in addition to receiving compensatory, expectation, and consequential damages.

Reliance Damages

P has a strong case for expectation damages amounting to $15,000, but he may have some trouble proving lost profits from the photographs and also the deal with Tammy. Instead of recovering such damages, P could elect to recover reliance damages, which would amount to all the costs P incurred thus far in reliance on the contract. Such expenses would include money spent on landscaping tools and items such as bushes and plants and flowers. It seems likely that this amount would be less than the $15,000 and potentially the consequential damages, so P likely would elect to recover those since they would be more money for him.

Conclusion: P could receive reliance damages and incidental damages in lieu of expectation and consequential damages.

Restitutionary Remedies

Restitutionary Remedies can be legal and equitable. Legal restitutionary remedies are applicable here. If a contract is breached or in fact no contract was formed or if a contract later fails for some reason and is no longer enforceable a party can still recover for the value of their services so that the other party will not be unjustly enriched. The value of this is based on the value of the party's services even if this amount is more than they were entitled to under the contract. Restitutionary remedies would be in lieu of legal remedies.

P could also elect to recover restitutionary damages instead of the above legal damages. These would be based on the fact that he completed two months' worth of work on the project at the time of breach. P estimated spending 100 hours of work on the project each month, thus he likely spent 200 hours on the project at the time of breach. P can argue that the value of his services was $100 an hours since this is what he normally charged for his work. As such P would be entitled to $20,000 in restitutionary remedies since D has received the benefits of P's work over the past two months. This would prevent D from being unjustly enriched. The fact that P's hourly rate under the contract was only $50 per hour would not stop P from being able to recover for $100 per hour of work so long as P can demonstrate that the value of his services was $100 an hour, which as discussed above, he likely can do.

Conclusion: P could seek the restitutionary remedy of restitutionary legal damages for $20,000 for the value of his work conferred upon D to prevent unjust enrichment.

Equitable Remedies

Specific Performance

Since P ideally would like to finish the project with D he would most likely argue for the equitable remedy of specific performance. Specific performance is a court order which mandates that a party perform their duties and obligations under the contract. A plaintiff is entitled to specific performance if they can show the following elements:

1. There is a valid and enforceable contract between the parties with terms certain and definite;

2. The non-breaching party has fully performed on the contract, is ready, willing, and able to perform, or their performance has been excused.

3. The legal remedy is in adequate;

4. The remedy is feasible; and

4. There are no defenses to the contract.

Valid, Enforceable Contract with Terms Certain and Definite

P can easily show there was a valid enforceable contract between P and D with terms certain and definite because the parties entered into a "valid written contract." The terms are certain and definite because P was to design and install landscaping for an exclusive housing development for an amount of $15,000 which was to be payable upon completion. He estimated work would take approximately 100 hours a month over the course of three months. All the essential elements such as payment, performance, duration of the contract, and the parties are specified.

Conclusion: P will be able to show there was a valid, enforceable contract with terms certain and definite between the parties.

Fully Performed

P can show he has performed two months' worth of work under the contract, and that he is ready willing and able to finish the project and continue performance if allowed by D. He has also taken other jobs which further indicate his abilities to perform landscaping work and his willingness to do so. Also P has said he ideally would like to finish the project.

Conclusion: P has fully performed.

Inadequate Legal Remedy

An inadequate legal remedy is involved when the sale is for a piece of land since all land is unique or for goods that are unique because they are rare or one of a kind. Also goods may be unique when the circumstances make them so. When the item of the contract is unique then legal damages remedies are inadequate.

P likely will have a hard time arguing that he cannot be compensated by legal damages. Money would be able to make P whole again and compensate him for his losses that resulted from the breach. P may try and argue that he has lost out on a $30,000 contract with Tammy and also much publicity from a proposal and article in magazine and that these damages may be considered too speculative and uncertain as consequential damages for him to prove in court, and thus he cannot be legally compensated by monetary damages for these losses. However, it seems likely this argument would fail.

Conclusion: Legal remedy is likely adequate.

Feasible Remedy

Negative injunctions where a party is prohibited from doing something are easy for a court to enforce. Affirmative mandates are harder to monitor and supervise, thus they pose a problem for the feasibility of ordering specific performance. Also parties are not usually entitled to specific performance when the contract is for personal services.

Here, the contract is for personal services but P seeks to be able to do these services. Usually when the plaintiff seeks for the breaching party to perform services under the contract by specific performance the court will deny this remedy. Because P only has one month left to finish work on the landscaping there is the possibility that the court may make D allow P to finish his project since D only has to pay D.

Conclusion: There may be a feasibility issue.

No Defenses

If there is a defense to the enforcement of a contract, the court will not award specific performance. Such defenses include statute of frauds, statute of limitations as well as equitable defense including unclean hands and laches.

The facts do not implicate any defenses to this contract. The contract was in writing thus there is no statute of frauds issue. Additionally the contract need not be in writing and signed by the party charged since it is not required to be under the Statute of Frauds.

Conclusion: There are likely no defenses to the contract.

Overall Conclusion on Specific Performance: P may be entitled to specific performance, but a court likely would find legal damages to be adequate and also for the remedy to be not feasible, and thus deny this remedy.

Overall Conclusion: As discussed above, P is entitled to the legal remedies of compensatory damages in the form of expectation damages and possibly consequential damages in addition to incidental damages. P could instead elect to recover reliance damages or restitutionary damages.

Q2 Evidence

Pete was a passenger on ABC Airlines (ABC), and was severely injured when the plane in which he was flying crashed because of a fuel line blockage.

Pete sued ABC in federal court, claiming that its negligent maintenance of the plane was the cause of the crash.

At trial, Pete's counsel called Wayne, a delivery person, who testified that he was in the hangar when the plane was being prepared for flight, and heard Mac, an ABC mechanic, say to Sal, an ABC supervisor: "Hey, the fuel feed reads low, Boss, and I just cleared some gunk from the line. Shouldn't we do a complete systems check of the fuel line and fuel valves?" Wayne further testified that Sal replied: "Don't worry, a little stuff is normal for this fuel and doesn't cause any problems."

On cross-examination, ABC's counsel asked Wayne: "Isn't it true that when you applied for a job you claimed that you had graduated from college when, in fact, you never went to college?" Wayne answered, "Yes."

ABC then called Chuck, its custodian of records, who identified a portion of the plane's maintenance record detailing the relevant preflight inspection. Chuck testified that all of ABC's maintenance records are stored in his office. After asking Chuck about the function of the maintenance records and their method of preparation, ABC offered into evidence the following excerpt: "Preflight completed; all okay. Fuel line strained and all valves cleaned and verified by Mac." Chuck properly authenticated Sal's signature next to the entry.

Assuming all appropriate objections and motions were timely made, did the court properly:

1. Admit Wayne's testimony about Mac's question to Sal? Discuss.

2. Admit Wayne's testimony about Sal's answer? Discuss.

3. Permit ABC to ask Wayne about college? Discuss.

4. Admit the excerpt from the maintenance record? Discuss.

Answer according to the Federal Rules of Evidence.

Answer A

1) Wayne's Testimony about Mac's question to Sal

Logical Relevance; in order to be logically relevant, the evidence must make a fact that is of consequence in determination of the action more or less probable than without the evidence.

Here the evidence with regard to Wayne's testimony is highly relevant in that it tends to establish that Mac's (M) supervisor Sal (S) had notice of a potential problem with the aircraft prior to flight. Moreover, the second part of the statement shows, the ABC had the opportunity to do a systems check that was part of the routine operation, but ultimately failed to do so. It thus makes it more probable that ABC's employees were negligent in maintaining the aircraft, because S had notice of a problem and took no corrective action.

Legal Relevance - relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, waste of time, or confusion of the issues. Here ABC will argue that the evidence is highly prejudicial to ABC since it demonstrates that one of its employees noted a problem and stated, that corrective action should be taken. This is unlikely to be well received by the court, since, it is prejudicial, but not unfairly so, since it does not tend to arise the emotions or passions of the jury. Further, the evidence is highly probative in that one of its employees noticed a potential problem and recommended corrective action. As such, the statements about Mac's statements are legally relevant with the probative value not being substantially outweighed by unfair prejudice.

Hearsay: hearsay is defined as an out of court statement offered for the truth of the matter asserted. Here the statement by M was made out of the current proceeding in court, thus it was made out of court. The first part of Mac's statement is an assertion

and thus definition be considered a statement. However the second part of the statement with regard to the systems check is actually a question (further explained below), and as such is not an assertion. Accordingly it would fall outside the definition of hearsay as discussed below. Finally, both parts of the statement may be being offered for their truth. That M noticed a problem and cleared out the fuel lines, and that M asked whether they should conduct a full systems check. This would be offered to show that there was actually a problem detected in the aircraft.

Alternatively however, Pete (P) could argue that he is offering this evidence not for its truth, but only for the purpose of showing the effect on the hearer (S). As such, P is only showing that S had notice of a potential problem and failed to take corrective action. If the evidence were offered only for this purpose, it is admissible and not hearsay.

Assuming that P wants to offer the evidence for its truth (that there actually was a problem detected:

a) First part of statement regarding fuel reading and clearing the gunk from the line

Because the first part of the statement is hearsay, it will be inadmissible unless a hearsay exception applies, or the federal rules deem the statement Non-hearsay under an exemption.

Hearsay within Hearsay - when there are multiple levels of hearsay - each independent level of hearsay must be satisfied either by an exception or exemption.

1st Layer - The reading on the fuel gauge. ABC might try to argue that this is an independent level of hearsay, and is an out of court statement being offered for the truth of the matter asserted. This argument would be unavailing however, since gauges which simply provide readout of data (which is not entered by a human) are not considered statements under the traditional hearsay definition. As such the first layer

with regard to the fuel indicator would be deemed non-hearsay and would be admissible.

2nd layer - The statement itself

A statement that is made by a party opponent is admissible against that party when introduced by an opposing party. Further, within this exception, an employee's statement related to a matter of employment, while within the scope of employment are exempt from the hearsay definition under this exemption. Similarly, the statements by spokespersons or agents for an individual can be admitted under this exemption. In sum, under the FRE, statements under this exemption are deemed non-hearsay and can be offered for the truth of the matter asserted.

Here the statement made by Mac is was made while he was employed with ABC and related directly to matter of his employment - the mechanical evaluation of the plane before flight. As such it would be deemed non-hearsay and admissible.

Present sense impression - a statement made while contemporaneously perceiving and event and describing that event may be admissible under the present sense impression exception. Here, the statement involves M relaying what he just read and the actions he took on the line. If it was made right after the observations, which it appears to be, it would also be admissible under the present sense impression hearsay exception.

b) Second part of statement with the question regarding the systems check

Here as indicated above, M is actually asking a question, as to whether they should perform a systems check As such it would fall outside the hearsay definition regarding. A statement under the hearsay definition requires an assertion. As such a question cannot be considered hearsay, and would be properly admissible.

In sum, the evidence of Mac's question is properly admissible both for its truth and for the effect on the hearer to show negligence.

2) Wayne's Testimony about Sal's answer

Logical Relevance; in order to be logically relevant, the evidence must make a fact that is of consequence in determination of the action more or less probable than without the evidence.
Here the evidence is clearly logically relevant, it shows that S believed that the gunk wouldn't cause any problems, and more importantly did not take any corrective action upon hearing the findings of Mac.

Legal Relevance - relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, waste of time, or confusion of the issues. Here, there does not seem to be any danger of unfair prejudice, and thus is legally relevant.

Hearsay - an out of court statement offered for the truth of the matter asserted.
Here the statement is made out of court and is likely being offered for the truth of the matter asserted, namely that as the supervisor, S took no corrective action with regard to the plane.

Because it is hearsay it will be inadmissible unless an exception applies.

Non-hearsay, as statement by part opponent (an employee). As defined above, the statement by S will be deemed a statement of party opponent (ABC) since it related to a matter of employment (inspecting the aircraft) and was made while S was employed with ABC. As such, it will be deemed non-hearsay and is properly admitted.

3) ABC inquiry to Wayne about college

Logical Relevance; in order to be logically relevant, the evidence must make a fact that is of consequence in determination of the action more or less probable than without the evidence. Here the evidence is relevant because it tends to impeach the credibility of

Mac a testifying witness. As such it logically relevant because it may make the jury not believe his testimony, and impact the outcome of the proceeding.

Legal Relevance - relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, waste of time, or confusion of the issues. Here, the jury may give unfair weight to the evidence, and discredit Wayne's (W)'s testimony. However, it is unlikely a court would find this unfair prejudice, and it probative value is high, since it tends to demonstrate W has been untruthful in the past. As such it would be legally relevant.

Impeachment - prior instances of uncharged conduct - probative of truthfulness - on cross-examination a party is permitted to inquire in specific instances of uncharged prior bad acts if they are probative of truthfulness. It bears noting however, that counsel is bound by the witnesses answer and may not provide extrinsic evidence to prove up the prior bad act.

Here, ABC's counsel is asking W about a specific instance of uncharged conduct - the lying in the course of a job application. Because the lying on a job application with regard to whether W went to college links directly on W's truthfulness as a witness, it is properly admitted. Additionally, since ABC's counsel did not try to introduce extrinsic evidence of the bad act, its form of introduction into evidence was also proper.

4) Excerpt from the maintenance record

Logical Relevance; in order to be logically relevant, the evidence must make a fact that is of consequence in determination of the action more or less probable than without the evidence. Here the evidence is relevant in that it demonstrates that the fuel lines were cleaned and the preflight checks were completed. As such it is relevant, to show that proper care was taken before flight, and less likely ABC was negligent in performing maintenance.

Legal Relevance - relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, waste of time, or confusion of the issues. Here there are no issues with danger of unfair prejudice; the evidence is also legally relevant.

Hearsay - an out of court statement offered for the truth of the matter asserted. Here the maintenance records are made out of court; they are a statement and are being introduced for the truth of the matter asserted. Specifically, that the maintenance was in fact performed. As such they will be inadmissible unless a hearsay exception or exemption applies.

- Hearsay within hearsay: here there are two levels of hearsay. The first is Mac's entries and the second is the business record itself, each must independently satisfy the hearsay exception.

Statement by Party Opponent

Here the entries by Mac would fall not fall under the statement of party opponent exception because they are being offered by ABC and not P. As such an alternate exception must be used.

Business Record Exception - a report that is created within the regular course of business, is recorded contemporaneously or near after the action of the business, and has indications of reliability can be offered under the business record exception. The business records will be inadmissible if they contain entries by a person who is not under a business duty to report, or are completed with anticipation of litigation.

Here, the custodian of records is proffering the business records. The custodian testified how the records were prepared and their method of preparation. Assuming there were no indicators of untrustworthiness the records are properly admitted. It bears mentioning that the custodian can properly authenticate the signature if he was familiar with the handwriting of Sal. Additionally, the hearsay within hearsay problem is

alleviated because the business record exception covers all employees who are creating and contributing to the record who fall under the business duty. As such, M's statements would be properly admitted within the business record.

Answer B

1. Ok to Admit Wayne's testimony about Mac's question to Sal

Relevance = The testimony is logically and legally relevant.

For an evidence to be admissible, it must be relevant. To be relevant, the evidence has to have any tendency to make any fact that is of consequence to the determination of the action more or less probable than without the evidence. Here, Wayne's testimony is most likely logically relevant because Mac's question ("Shouldn't we do a complete systems check of the fuel line and fuel valves?") shows that Mac and Sal, both ABC employees, was on notice that Mac thought they should do a complete systems check of the fuel line and fuel valves. Because Mac has stated that he just cleared some gunk from the line, he probably though more gunk would exist in other parts of the fuel line and valves. If ABC employees thought this way, then this could be relevant to prove that ABC knew that plane had some fuel line blockage problem before operating.

Even if the evidence is relevant, court may not admit the evidence if its probative value is substantially outweighed by unfair prejudice, waste of time, or confusion. Here, ABC would argue that this was only a question by Mac, and it does not indicate whether Mac actually thought there would be Gunk in other parts in the fuel line and valves. ABC would further argue that this question would confuse the jury (if this is a jury trial) to think that the employees actually thought there would be gunk in other places in the fuel lines and valves. However, Wayne's testimony is relevant, and is not substantially outweighed by any unfair prejudice. Although it would prejudice ABC, it is not unfair since opposing party's evidence would most likely be prejudicial to the other party due to nature of the adversarial setting of the trial.

Hearsay = The testimony is either not hearsay or falls under an exception

Hearsay is an out of court statement offered to prove the truth of the matter asserted. Statement can be a conduct or question as long as it is intended by the declarant to communicate something. Here, Mac's question was made outside of the court. Pete

would argue that Mac's question is not hearsay because it is a question. However, this question appears to be communicating. Mac stated that he just cleared some gunk from the line, and asked Sal if they should do a complete systems check of the fuel line and valves. Because of his previous statement before the question, Mac's question seems to communicate to Sal that they should be doing some systems check to see if other gunk exists elsewhere. Thus, Pete's argument that this is not hearsay because it is a question will not be too good.

It is not hearsay if the purpose of introducing the statement is not to prove the truth of the matter asserted but to show effect on the listener. Here, this is double-edged sword for Pete. Pete can probably get this in if he argues that this question should be admitted to show the effect on Sal. However, he also wants this question admitted for the truth of the matter asserted to show that Mac most likely thought that gunk existed elsewhere in fuel lines and valves. Thus, Pete can use this argument, but probably is not a good one to make.

The most successful argument would be that this statement falls under a hearsay exemption of statement of party opponent. Statement of party opponent can be admissible even if it is an opinion statement. An employee's statement can be admitted against an employer if the statement was made during the employment and statement describes a matter within the scope of their employment. Here, Mac was employed as an ABC mechanic when he made his question. Also, his statement directly related to his scope of employment as a mechanic because he was talking about doing some system check on the plane. Thus, his question would be admissible as a hearsay exemption of statement against party opponent.

Pete can also use a hearsay exception of present sense impression. A statement describing a condition or event while the declarant is perceiving the condition or event or immediately thereafter is admissible under hearsay exception. Here, Mac stated that he just cleared some gunk from the line, and asking a follow up question to his work. Thus, Pete can argue that Pete was asking that question pursuant to his observation of

his clearing of some gunk. ABC would argue that the question pertains to some future work that Mac is thinking about doing, so it does not relate to Mac's present sense impression of his past work completed. Even if ABC has a better argument here, this statement will pass the hearsay hurdle as a statement against party opponent.

Ok to Wayne's testimony about Sal's answer

Relevance = Sal's statement is logically and legally relevant
Here, Sal's statement is logically relevant because it can show negligence of ABC. Sal was notified by Mac that the plane had some gunks, but decided not to do system check because "a little stuff" (i.e., gunks) is normal for this fuel. Pete would argue that ABC knew about the gunks and decided not to clean or do any further systems check. Thus, it bolsters Pete's claim of negligent maintenance of the plane by Mac when he was on notice that the gunk was present in the fuel line. Thus, this is logically relevant.

Additionally, this statement is not substantially outweighed by any unfair prejudice. ABC may argue that little gunks in plane is normal, and this evidence may mislead the jury to think that having little gunk would cause problems.

Although this evidence is prejudicial, this is not unfair because jury can weigh the evidence after it is admitted.

Hearsay = this is not a hearsay statement and falls under a hearsay exception
Here, Sal's statement is a hearsay. His statement was made outside of the court; it was intended to communicate to Mac that little gunk is ok and that it would not cause problems; Pete is introducing this statement for the truth that Sal knew about there being some gunk and little gunk would not cause problems. Pete can argue that he is not offering this statement for the truth of the matter asserted but that Sal knew of some gunks and affirmatively decided not to conduct a system check even after being put on notice. In such a case, this statement would be admitted as non-hearsay.

Like Mac's question, Sal's statement would fall under statement against party opponent. Sal made this statement when he was employed by ABC and it was within the scope of his employment as an ABC supervisor. As a supervisor, he would ordinarily make decisions on whether to do a systems check of the fuel line and valves, and his statements regarding decision not to do such check and reasoning behind such decision would be constituted as statement within his scope of employment. Thus, Sal's statement would be not a hearsay statement.

Pete can also argue that Sal's statement is then-existing state of mind hearsay exception. A statement of past mental or physical condition or then existing statement of mind is admissible even if it is a hearsay statement. Here, Sal is telling Mac to not worry because little gunk will not cause any problems. This shows Sal's lack of worry at the time the statement was made with respect to little gunk in the fuel line system. Thus, Sal's statement would also fall under this hearsay exception.

3. Ok to permit ABC to ask Wayne about college

Relevance

This evidence of Wayne's lying on his job application is relevant because it goes to the credibility of the witness testifying in the court. Here, if Wayne is shown as a liar, it is relevant because then his other testimony cannot be fully trusted. Also, it is not outweighed by unfair prejudice. Jury can determine how much weight to give to a witness who has been impeached.

Leading Question ok here

Leading question is permitted on direct examination in certain circumstances, but is generally allowed in cross-examination. Here, Wayne is being cross-examined, so it is ok for ABC's counsel to use leading questions.

Character Evidence vs. **Impeachment** = Impeachment with prior misconduct related to lying

Character evidence is almost never allowed in civil cases except for few exceptions. Character evidence is given to prove that the person has acted in conformity with his character. However, under right circumstances this is ok if the purpose is to impeach the witness. A witness can be impeached with his prior misconduct related to lying. This impeachment can only be done on cross-examination and cannot be done with an extrinsic evidence. Here, Wayne is on cross-examination, so it was ok for ABC to ask Wayne about his lying on his job application about graduating from college.

4. Ok to admit the excerpt from the maintenance record

Relevance

The maintenance record is relevant because it shows that preflight check was completed with all okays. The record also shows that fuel line strained and all valves were cleaned and verified by Mac. This shows proper maintenance on the part of ABC to counter Pete's negligent maintenance claim. Also, it is not substantially outweighed by any unfair prejudice.

Authentication proper

When non-testimonial evidence is being introduced, it must be authenticated (i.e., prove the evidence is what it purports to be). This can be done several ways. One way is for a custodian of the record to testify to the creation or how the record gets maintained. Here, the maintenance record has been properly authenticated by Chuck, ABC's custodian of records. He testified that all ABCs maintenance records are stored in his office and discussed about the function of the maintenance records and their method of preparation. Also, facts indicate Chuck properly authenticated Sal's signature next to the entry.

Best Evidence Rule

When a written document is introduced as an evidence, courts usually allow the original document or its duplicate (photocopy or another method to re-create the original) to be admissible to prove the content of the written document. However, handwritten copy is

not admissible in lieu or an original or a duplicate. Although it is not clear whether the original maintenance record is being introduced, but it would be reasonable to assume that either an original or a duplicate is being introduced.

Hearsay

This maintenance record is hearsay. It is made outside of the court. It was a statement intended to communicate that preflight check was completed, fuel line was strained and all valves were cleaned. ABC is offering this written statement for the truth of matter asserted so that proper maintenance has been conducted. To be admitted, it must fall under a hearsay exception.

ABC would argue that it falls under a hearsay exception of business records. To be a business record exception, it must be (1) a statement of diagnosis, opinion, condition, event, (2) kept at a regularly conducted business activity, (3) made at or near the time matter observed, (4) by personnel who had personal knowledge or gotten the information from someone who had duty to report, and (5) it is regular practice for business to make such record. Here, the maintenance records had statement of plane's condition because the maintenance was completed and the fuel line was strained and all valves were cleaned and verified. Also, it was kept at a regularly conducted business activity because it would be safe to assume that such preflight maintenance records are kept. Although it doesn't say when the record was created, it is reasonable to assume that these records are maintained as Sal and Mac do maintenance checks. Also, Sal as a manager probably has duty to report the maintenance record. Chuck also testified that all ABC's maintenance records are kept in his office, so it would be safe to assume that it is regular practice for ABC to make and keep these types of records. In conclusion, the maintenance records probably fall under business records hearsay exception.

Q3 Business Associations / Professional Responsibility

Alice's and Bob's law firm, AB Law, is a limited liability partnership. The firm represents Sid, a computer manufacturer. Sid sued Renco, his chip supplier, for illegal price-fixing.

Renco's lawyer asked Alice for a brief extension of time to respond to Sid's interrogatories because he was going on a long-planned vacation. Sid told Alice not to grant the extension because Renco had gouged him on chip prices. She denied the request for an extension. Sid also told Alice that he'd had enough of Renco setting the case's pace, so he wasn't going to appear at his deposition scheduled by Renco for the next week, and that he'd pay his physician to write a note excusing him from appearing. Alice did nothing in response.

In the course of representing Sid, Alice learned that Sid planned a tender offer for the publicly-traded shares of chipmaker, Chipco. Alice bought 10,000 Chipco shares. By buying the 10,000 Chipco shares, she drove up the price that Sid had to pay by $1 million. When Alice sold the 10,000 Chipco shares, she realized a $200,000 profit.

1. What ethical violations, if any, has Alice committed regarding:

    a. The discovery extension? Discuss.

    b. The physician's note? Discuss.

    c. The Chipco tender offer? Discuss.

    Answer according to California and ABA authorities.

2. What claims, if any, does Sid have against Alice, AB Law, and Bob? Discuss.

Answer A

Governing Law: California is governed by the California Rules of Professional Responsibility as well as certain sections of the business code. The ABA has promulgated its Model Code of Professional Responsibility as well.

(1) What ethical violations, if any, has Alice committed regarding (1) the discovery extension, (2) the physicians' note, or (3) the Chipco tender offer?

Discovery Extension:

Duty of Fairness: An attorney has a duty of fairness to the opposing party to act in good faith. While an attorney has no duty to accept all requests made by opposing counsel if not required, and while an attorney has a competing duty to her client to act in the client's best interests and should advocate for her client's interests zealously, denial of a good faith request for a short extension may be considered a breach of A's duty of fairness to opposing counsel.

Here, Alice ("A") represents Sid ("S") in suing Renco ("R"). R's attorney has requested a brief extension to respond to interrogatories. The reason for R's request is to go on a long-planned vacation. Without a showing that R's counsel has continuously attempted to delay the litigation by asking for continuances and extensions, A's duty of fairness likely requires her to accept such brief extension. Her denial is based on her client's order that it not be granted for no other reason than "because R had gouged him on chip prices". Because if R's counsel requested an extension from the court based on good reason it might well be granted, it is improper for A to require such unnecessary resort to the court. A has likely violated her ethical duties of fairness.

Duty of Loyalty: An attorney has a duty of loyalty to always act in her clients' best interests and not to engage in conflicts of interest or compete with the client.

Here, A will likely argue that her duty of loyalty to S requires that A not fail to acquiesce to her client's requests. However, the duty of loyalty does not extend this far. An attorney must not advocate for her client to the point that it causes her to make other ethical violations.

Scope of Decision-Making: While the client has the right to state which claims he or she wishes to pursue and make major decisions regarding settlement or whether to plea, etc., it is within the attorney's scope of authority to determine the proper strategy for effectuating these goals.

A should not allow S to "order" her to deny the extension based on no substantive reason. This is within A's scope of authority to decide, and A should not acquiesce to a bad-faith denial of a good-faith request. If A and her client cannot agree on the scope of representation, withdrawal from the case may be appropriate to avoid A being pulled into improper conduct.

Physician's Note:

Duty of Candor/Honesty: An attorney must not make any false representations to the court or opposing counsel, and must not allow her client to make any false representations to the court.

Here, A has stated that he is going to bribe his doctor to get a note to excuse him from appearing at his deposition. This will constitute a fraud upon the court because it is not true that D is unavailable. Further, there is no valid reason for S to fail to appear at his deposition. An attorney can breach his or her ethical duties by failing to speak when she has a duty to counsel her client against illegal or fraudulent activity and advise him that he or she cannot be a part of such conduct. Here, when A failed to respond to S's statement, she impliedly acquiesced in his proposal. This is an ethical violation because it will cause A to participate in a fraud upon the court and will violate her duty of candor.

Withdrawal: An attorney must withdraw from a case when she learns of conduct that will constitute a crime or fraud that will necessarily involve the lawyer's services. If it will not involve the lawyer's services, the attorney may but does not need to withdraw.

Here, paying one's doctor to write a false note excusing him from appearing may constitute such improper behavior that reflects poorly upon the profession. Such conduct is clearly in bad faith and relates directly to the representation, directly involving A. Thus, A should have withdrawn from the representation had she not been able to dissuade S from failing to appear at his deposition for a fraudulent reason because she will necessarily be involved.

Duty of Confidentiality: An attorney has a duty of confidentiality not to disclose any information related to the representation of the client. However, there is an exception to this rule which allows disclosure if the attorney learns that the client plans to commit a crime or fraud. Further, California imposes a duty on an attorney who has learned that his client plans to commit a crime or fraud to attempt to dissuade the client from his proposed actions and further, if that fails, to tell the attorney that the attorney plans to disclose the information to the appropriate authorities.

Here, it is unclear the length S plans to go to in order to get him a "note". However, this likely does not constitute an actual crime or fraud, so A likely has no right to breach her duty of confidentiality to her client. Since she has not, she has not violated this rule.

Duty to Diligently Pursue Completion of the Case: An attorney has a duty to diligently pursue a case to completion without allowing it to languish in the court system.

Here, by impliedly acquiescing in S's statement that he plans to fail to appear at his deposition, this will require a further scheduling out of a deposition at a time convenient

for the parties and court reporter. This is a bad faith delay of the case that constitutes breach of A's ethical duties.

Chipco Tender Offer:

Duty of Loyalty: As stated above, an attorney has a duty of loyalty to her client to always act in the best interests of the client. This includes not acquiring an interest adverse to the interest of the client. California allows an attorney to obtain an interest adverse to that of her client in certain circumstances.

Here, when A learned of S's plan to make a tender offer for the publicly traded shares of Chipco, she immediately purchased Chipco shares and then sold them for a $200,000 profit. A's acquisition of these funds constitutes a breach of A's duty not to obtain an interest adverse to her client's, because the price S had to pay on the shares was raised by one million dollars. A has caused serious financial injury to S by acquiring an adverse interest and essentially taken a profit that should have gone to S. In doing so, A has breached her ethical duties.

Conflict of Interest: An attorney has a concurrent conflict of interest when there is a substantial likelihood that her ability to represent her client will be materially limited by her own personal interests, her duties to another client, a former client, or a third party. An attorney may take on the representation despite the concurrent conflict of interest if the attorney can believes that she can competently and adequately represent the interests of the parties, and if she obtains written consent from all involved parties. California has no "reasonable lawyer" standard and does not require written consent, only written notice, when the interest is personal to the lawyer.

Here, in gaining a personal interest in Chipco, A may have created a conflict that will materially limit her representation of S. However, A may argue that this is a deal on the side and is unrelated to the subject of the litigation in which she represents S; and further, A may argue that ownership of the shares has no bearing on her representation of S. If the court determines that she has acquired a conflict of interest, A has breached

her duty by failing to get written consent. In California, she has further breached her duty by failing to give written notice to S.

Duty of Confidentiality: See above. In using confidential information S provided to her in telling her about the tender offer for her own benefit, A may have breached her duty.

(2) What claims, if any, does S have against A, AB Law, and B?

Limited Liability Partnership: A limited liability partnership is a special type of partnership that affords limited liability to all its partners, created by filing a Statement of Qualification with the Secretary of State. In a limited liability partnership, the individual partners are not personally liable for any damages sustained by the partnership itself.

A: See above.

A will be personally liable for her own torts.

B: See above.

Because B is a partner in an LLP, he has limited liability. Thus, S will have no claim against Bob ("B") A's partner.

AB Law:

Authority: A partnership is liable for its partner's actions if the partners have authority to act for the partnership. Authority may be actual (express or implied), apparent, or ratified. Actual authority exists where a reasonable person in the agent's position would believe he had the right to act on behalf of the business. This may be express, through an agreement, or implied, through actions or conduct. Apparent authority exists where a reasonable person in the shoes of the third party believed that the person had authority to act. Ratification occurs where no authority exists but the business has

adopted the contract through action such as accepting its benefits. A partner in a partnership has both apparent and implied authority to act on behalf of the partnership.

Here, as a partner of AB law, A has actual authority to act on behalf of the partnership. Her acts taken in the scope of her law practice will thus subject the partnership to liability. Thus, A will both be personally liable for her own torts, and S will further be able to collect against AB Law for her actions.

Unjust Enrichment:

Here, S will sue A personally and AB Law for likely malpractice for losses caused by her breaches of her duties. Her misconduct has led to a loss by S of 1 million dollars, and has resulted in a gain to A of $200,000. In equity, a court may under unjust enrichment theory disgorge profits made by someone and impose a constructive trust. A constructive trust is not truly a trust but is an equitable remedy imposed by the court which forces the wrongdoer to hold unjustly realized profits in trust for the benefit of the rightful owner. Because she has been unjustly enriched by action taken in breach if her duties to S, the court will likely impose a constructive trust on the profit realized by A and will thus force A as trustee of these funds to distribute them to their proper owner, S.

Intentional Interference with a Business Expectancy: Intentional interference with business expectancy occurs where a person knows of a business expectancy of another party and knowingly interferes with that expectancy, resulting in damages. Here, S had planned a tender offer with C. Her actions in purchasing Chipco shares may constitute an interference with this expectancy with S, although A will argue that this expectancy is not yet an enforceable contract and that she has a valid defense of fair competition. This will be balanced by the court.

Answer B

Discovery Extension

Scope of Representation

A client usually determines the ends (goals) of a representation, whereas the lawyer generally determines the means (legal strategies). If a client is insisting upon actions that the lawyer does not wish to take, the lawyer may limit the scope of employment through informed written consent by the client. Here, it appears that Alice let Sid influence her legal decision-making by telling her to deny the request for an extension to respond to Sid's interrogatories. This type of decision should normally be decided by the lawyer because it falls into legal strategy. Although it is permissible for the lawyer to seek the client's input, the final decision should ultimately be left up to the lawyer. Alice let Sid control the litigation means.

Fairness to Opposing Counsel/Adverse Parties

A lawyer should treat opposing counsel and adverse parties fairly during the representation. A lawyer should not engage in certain actions if it is known to be for the purpose of harassing or making a task unduly burdensome for opposing counsel/adverse party. Here, Sid told Alice to reject the request to extend the time for answering the interrogatories. Renco's lawyer asked for a reasonable "brief extension" to respond since he was going on a long-planned vacation. This seems to be a reasonable request and is not an attempt by Renco's attorney to delay for an improper purpose. Sid's reasons for wanting to deny the extension, however, would be considered improper. He denied the request because Renco had "gouged hi on chip prices," so he was acting out of spite. He told this directly to Alice, so she knew his improper motives. She should have counseled him to allow the extension since it was a reasonable request and made clear that Sid's motives were improper. Because she did not do this, Alice violated her duty of fairness to Renco and its lawyer by furthering her client's improper purpose.

That being said, a lawyer does owe a duty to her client to diligently dispose of the case (work productively and not delay unnecessarily). If for some reason the extension requested was unreasonable, or it had been one of many requests for extensions, then perhaps Alice would be justified in denying the request. She has a duty to her client to make sure that his case is handled efficiently and effectively. The facts do not suggest this was the case, but if it was, then again it is possible she may not be in violation of an ethical duty.

Physician's Note

Duty of Candor

A lawyer owes a duty of candor to opposing counsel, adverse parties, and the court. A lawyer must not submit evidence that she knows to be false or make a false statement of fact or law that she knows to be untrue. If she makes such a statement without knowing it is false and later learns of its true nature, the lawyer has a duty to correct the evidence or testimony.

Sid told Alice he was not going to appear at his deposition for Renco the next week because he'd had enough of Renco setting the case's pace. He also told Alice that he was going to pay his physician to write a note excusing him from appearing at the deposition. Alice did nothing in response. Alice knows that Sid is not sick and that he just does not want to attend the deposition. He is going to get a fake doctor's note written to excuse him, so this would be false "evidence" or a false statement of fact being presented to the opposing side. Alice has a duty not to allow such false information to be presented to the other side. That being said, there is a conflict with her duty of confidentiality to Sid not to disclose his statements to her since they were made during and related to the representation.

A lawyer owes a duty of confidentiality to her client for anything related to the representation, even if not made by the client. Under the ABA, a lawyer may reveal confidences if the client persists in engaging in criminal or fraudulent conduct that will

result in death or serious bodily harm, or if the lawyer's services are being used to perpetuate a crime or fraud by client that will result in serious financial harm. California does not have an exception for financial losses. Neither of these exceptions appears to be present. Sid's actions will not cause harm to anyone to the extent of death or serious bodily harm. It may pose a financial burden on Renco because they have to pay the lawyer for time that was spent preparing and now it will be postponed, but the amount spent is not likely to satisfy the requirement of financial harm under the ABA. Therefore, since no exception applies, Alice cannot reveal Sid's confidences.

So Alice cannot reveal the confidences but she must not present false evidence. What she should have done is counseled Sid by trying to get him to show up for the deposition and not pay a doctor to make a false note. If that did not work, then she should have withdrawn from the representation since he was persisting in engaging in fraudulent conduct. If the withdrawal would be harmful to Sid, a court might not let her withdraw and it may request why she is choosing to withdraw. If that is the case, then Alice may reveal Sid's confidences regarding the letter. Because Alice did not take these steps and said nothing when Sid mentioned a fake doctor's note, she breached her duty of candor to Renco and its lawyer.

Duty of Fairness

Again, as mentioned earlier, Sid has improper motives for wanting to submit the doctor's note and not attend the deposition. He wants to regain control of the pace of the litigation and is acting out of spite toward Renco for the price he was charged for the chips. Alice should know based on the comments Sid has made to her that he only wants to delay the case for improper purposes. Because she is aware of this, Alice is violating her duty of fairness to opposing counsel and adverse party.

Chipco Tender Offer

Duty of Loyalty

A lawyer owes a duty of loyalty to her client. If the interests of another client, the lawyer, or a third party materially limit the lawyer's ability to effectively represent the client, then she has a conflict of interest. The lawyer must act in the best interest of the client. Tied with the duty of confidentiality mentioned below, a lawyer also cannot use information learned during the course of the representation to the disadvantage of her client.

Alice used the information she learned from Sid during the representation that Sid was going to make a tender offer to her advantage by purchasing shares of the stock and driving up the price. Alice benefitted by realizing a $200,000 profit while Sid had to pay $1 million more than he would have before she purchased the shares. Alice was looking out for her interests first and negatively impacted her client's interests in the process. Because she subordinated her client's interests to her own, Alice violated the duty of loyalty she owed to Sid.

Duty of Confidentiality

A lawyer owes a duty of confidentiality to her client. She must not reveal any information related to the representation that she learns, and she must not use that information to the disadvantage of her client.

Here, Alice learned while representing Sid that Sid planned to tender offer for the publicly-traded shares of Chipco. She used this information to Sid's disadvantage by purchasing 10,000 Chipco shares, which drove up the price that Sid had to pay. Although this purchase is unrelated to the representation, it involved information learned during the representation. The duty of confidentiality is broad and covers any information related to the representation. Alice may try to argue that this information is unrelated to Sid's illegal price-fixing claim against Renco, but it would likely be found to be covered by the duty of confidentiality. Price-fixing involves the market of that particular industry, and if Sid intends to make a tender offer for a competitor chipmaking company, it would affect the same market involved in the litigation that she is representing Sid for against Renco. Therefore, a court would find that the information is attenuated but still within the realm of the confidences covered by the duty of

confidentiality. Since Alice used the information against Sid to his disadvantage, she violated her duty of confidentiality.

Sid v. Alice, AB Law, and Bob

AB Law is a limited liability partnership (LLP). A limited liability partnership operates almost exactly the same as a general partnership except the partners in an LLP are not personally liable for the debts of the partnership like they are in a general partnership. Therefore, the partnership is liable for the negligent acts (but not intentional torts) of its partners but the other partners are not personally liable for different partner's negligent acts or debts of the partnership. A partner always remains liable for her own actions.

Alice

Alice obviously violated several of her ethical duties. The breach of the duty of loyalty that she committed against Sid by purchasing Chipco stock caused actual pecuniary harm to her client. This was an intentional act on Alice's part. Under her breach of the duty of loyalty, since she financially benefitted from her actions, realizing a $200,000 profit from buying and selling her shares of stock, she would be liable to Sid for profits realized as a result of her breach of the duty of loyalty. Therefore, Alice is personally liable for $200,000. She may also be liable for the harm caused to Sid by the breach. Sid had to pay $1 million more than he otherwise would have if Alice had not purchased the shares. But for Alice's purchase of the stock, Sid would not have had to pay $1 million more for the tender offer. It was also foreseeable to Alice that if she purchased the shares, it would drive the price of the stock up for Sid's tender offer. Therefore, she is also liable as the actual and proximate cause of Sid's loss due to her breach. Alice is personally liable for $1,200,000 to Sid.

As for a specific claim, Sid may be able to claim misappropriate. Alice was in a relationship of trust and confidence with him as a fiduciary. Sid had nonpublic information that most people would find material, meaning it was affect whether someone would purchase a stock or not. Sid did not tell this information to Alice for an

improper purpose and surely did not anticipate she would use the information to purchase stock. Therefore, Sid would not be a tipper and Alice cannot be a tippee. But she can be a misappropriator since she was in this fiduciary relationship with the source of the non-public material information and she purchased stock in reliance on that information. Therefore, she is liable to Sid for the same amount of damages mentioned above because they were profits that would need to be disgorged and harm caused from her misappropriation.

Bob

Because these actions were taken by Alice, even if the partnership is liable, Bob cannot be personally liable for the harm caused by Alice. It is a limited liability partnership, so partners are not personally liable for the debts of the partnership or torts of other partners. Therefore, Sid does not have any claims against Bob.

AB Law

A partner is an agent of the partnership and thus can bind the partnership to certain obligations. The partnership is also liable for the negligence or non-intentional torts committed by partners while in the scope of employment for the partnership.

Here, Alice was working as Sid's lawyer when she learned the information that she misappropriated from him. Her actions, however, would likely be considered beyond the scope of her employment as a partner. She took the information and used it for personal reasons. If she had, for example, not filed an important document on time resulting in a dismissal with prejudice, then Sid could sue for malpractice and the LLP would be liable because the claim arose from her duties as a lawyer. This harm caused to Sid was not because of Alice's actions as an attorney for Sid. Therefore, a court would likely find that the LLP is not liable for Alice's actions and Sid has no claim against AB Law. If the court did find her actions were within the scope of her duties as a partner, then AB Law would also be liable for the losses Sid incurred.

Q4 Criminal Law and Procedure

One summer afternoon, Officer Prowl saw Dan, wearing a fully buttoned-up heavy winter coat, running down the street. Officer Prowl ordered Dan to stop. Dan complied. As Officer Prowl began to pat down Dan's outer clothing, a car radio fell out from underneath. Officer Prowl arrested Dan and took him to the police station.

At the police station, Officer Query met with Dan and began asking him questions about the radio. Dan stated that he did not want to talk. Officer Query responded that, if Dan chose to remain silent, he could not tell the District Attorney that Dan was cooperative. Dan immediately confessed that he stole the radio.

Dan was charged with larceny. He retained Calvin as his attorney. He told Calvin that he was going to testify falsely at trial that the radio had been given to him as a gift. Calvin informed Dan that he would make sure he never testified.

Calvin filed motions for the following orders: (1) suppressing the radio as evidence; (2) suppressing Dan's confession to Officer Query under *Miranda* for any use at trial; and **(3)** prohibiting Dan from testifying at trial.

At a hearing on the motions a week before trial, Dan, in response to Calvin's motion for an order prohibiting him from testifying, stated: "I want to represent myself."

1. How should the court rule on each of Calvin's motions? Discuss.

2. How should the court rule on Dan's request to represent himself? Discuss.

Answer A

1. Ruling on Calvin's Motions

Motion to Suppress the Radio as Evidence

Fourth Amendment Protections

The Fourth Amendment, incorporated to the states through the Fourteenth Amendment, protects individuals against unreasonable searches and seizures of their person, home, and personal effects. A seizure occurs when an individual's freedom of movement is limited by an officer such that the person would not feel free to leave the officer's presence. A search occurs when an officer gathers information in which the individual has a reasonable expectation of privacy, such as a physical search of the person's body, a search of the person's home, or eavesdropping on private conversations through wiretapping. However, if the officer is in a location in which he is entitled to be, he may observe the person's conduct or identify contraband that is within plain view, since people do not have a reasonable expectation of privacy for things they disclose to the public, such as speaking on a public street. The general standard for reasonableness to affect a search or seizure is probable cause, although lesser standards apply in certain circumstances, as discussed below. The Fourth Amendment generally requires that police officers obtain a search warrant before searching a person and an arrest warrant before an arrest to ensure that the probable cause standard is met.

Terry Stop

Under the Supreme Court decision in Terry, an officer may stop and search an individual based on less than probable cause. A "Terry stop" is a reasonable search under the Fourth Amendment when two conditions are satisfied. First, the officer must have reasonable suspicion, based on specific and articulable facts, that the individual is engaged in criminal activity in order to stop the person. The officer may then question the individual. In order to search the person, the officer must have reasonable

suspicion, based on specific and articulable facts, that the person is armed. This is reasonable because if the person is armed, the officer is in possible danger.

Seizure

A seizure occurs when an officer restricts the freedom of movement of a suspect such that the individual would not be free to leave the officer's presence. The court will take into account all of the circumstances, including the officer's language and tone and the setting in which the confrontation took place. However, merely being in a physically confined area (such as a bus) will not make the officer's interaction with a person into a seizure. If the officer orders the individual to stop, the seizure does not occur until the person complies with the officer's instructions and his movement is actually restrained.

Here, Officer Prowl ordered Dan to stop while he was running down the street. He did not approach Dan and ask him to voluntarily speak with him. Rather, ordering "stop" would be interpreted by a reasonable person to be a use of police authority to restrain Dan's movement such that Dan could be subject to penalty if he refused. Dan complied with Prowl's order and actually stopped. Thus, a seizure occurred.

Reasonable Suspicion to Stop

The seizure of Dan will be reasonable under the Fourth Amendment, per Terry, if Prowl had reasonable suspicion to stop Dan. In order to satisfy the Fourth Amendment, Officer Prowl must have reasonable suspicion that Dan is engaged in criminal activity. This must be more than a mere hunch or an anonymous tip that the officer has no reason to trust. The officer must be able to identify specific facts that demonstrate objectively the reasonable suspicion to stop the person.

Here, Dan was running down the street wearing a fully buttoned-up heavy winter coat on a summer afternoon. It is objectively unusual to see someone wearing such a coat during the summer, and Prowl's experience would likely indicate to him that people use such coats to conceal contraband, such as stolen property or drugs. Further, Dan was running. Because of the coat, it would seem unlikely that Dan was running for exercise, since he would be overly hot during the summer.

Because these facts, taken together, indicate that Dan was acting objectively suspiciously, Prowl had reasonable suspicion to stop Dan.

Search

A search occurs when an officer infringes upon an individual's reasonable expectation of privacy. The individual's person is always an area in which the person has a reasonable expectation of privacy unless that expectation has been reduced for some reason, such as in prisoners and parolees. We do not have any indication that Dan was a parolee or on probation. Thus, when Officer Prowl patted Dan down, a search occurred.

Reasonable Suspicion to Perform Pat-Down

Under Terry, Prowl's search of Dan will be reasonable if he had reasonable articulable suspicion that Dan was armed. Although Dan's activity was objectively suspicious, he did not do anything and we have no indication that Prowl had prior knowledge that would make it objectively likely that Dan was actually armed. Prowl did not even speak with Dan after ordering him to stop, but immediately began a pat-down. Prowl would argue that Dan's bulky coat could easily have concealed a weapon, and Prowl's search was thus for self-protection. However, a physical search based on no independent facts suggesting that the person is armed is only reasonable following an arrest. Here, Dan was not arrested when Prowl performed the search.

Prowl's search of Dan was not based on reasonable articulable suspicion and was therefore a violation of Dan's Fourth Amendment rights.

Exclusion of Evidence

Evidence seized in violation of an individual's Fourth Amendment rights will generally be excluded in any subsequent criminal prosecution of that individual. The exclusionary rule operates as a deterrence mechanism to discourage police officers from committing constitutional violations. Although there are some circumstances in which the Supreme Court has concluded that the deterrent effect of the exclusionary rule is too inadequate to justify exclusion (such as knock-and-announce violations), the

exclusionary rule operates in the Terry stop circumstances. Any contraband that was discovered as a result of an illegal search subject to the exclusionary rule will be excluded from evidence.

Here, Prowl violated Dan's Fourth Amendment rights when he unreasonably searched Dan. Therefore, the court should order that the radio be suppressed.

Motion to Suppress Dan's Confession

Fourth Amendment

First, Dan would argue that the Fourth Amendment violation directly led to his confession, and thus the confession should be excluded under the "fruit of the poisonous tree" doctrine discussed above. However, the Fourth Amendment exclusionary rule operates to exclude physical evidence rather than statements. Thus, Dan's confession would not be excluded by the Fourth Amendment.

Fifth Amendment Protections

The Fifth Amendment right against self-incrimination protects suspects from being compelled to make statements against their own penal interests. The Supreme Court in Miranda interpreted this protection to require the police to effect certain warnings to individuals who are subject to custodial interrogation at the hands of police to offset the inherently compelling pressures of police interrogation.

Miranda Warnings

Police officers must give each suspect warnings about his rights once he is subject to custodial interrogation. The warnings must inform the suspect of his right to remain silent, his right to an attorney, and that the attorney will be provided for him if he cannot afford to pay.

Custodial

The "custodial" element is satisfied if the person is subject to police custody at the time of questioning. Once the individual is arrested, he is generally understood to be

in police custody. Even before an arrest, the suspect may be subject to custody if he is being restrained in a formal setting, such as a police station, and is not told that he is free to leave at any time. The suspect need not have been indicted or charged for the custody element to be satisfied.

Here, Dan had been arrested and taken to the police station, where Query began questioning him. Because Dan was in a formal setting and had actually been arrested, the custodial element is satisfied.

Interrogation

The "interrogation" element requires that the police actually be asking the defendant questions that would be reasonably likely to lead to an incriminating response. A question such as whether the suspect would like a drink of water or whether he was comfortable would not constitute interrogation.

Here, once Dan was in custody, Query began asking him questions specifically about the radio. Thus, Dan was being interrogated.

Because both elements of Miranda are satisfied here, Query violated Dan's Fifth Amendment right against self-incrimination by failing to read him Miranda warnings.

Dan's Statement That He Did Not Want to Talk

Once an officer has read the suspect his Miranda rights, any express invocation of those rights must be strictly honored by the officers, who must then stop interrogating the suspect.

Here, Query should have read Dan his rights. Dan's explicit statement that he "did not want to talk" likely qualifies as an invocation of his right to remain silent. Because Query continued to interrogate Dan following Dan's express invocation of his right to remain silent, Query violated Dan's Fifth Amendment rights.

Exclusion of Statement under Fifth Amendment

The remedy for a Fifth Amendment violation is an exclusion of the improperly obtained confession. However, generally speaking, any physical fruits of the confession,

such as evidence seized in reliance on statements made in the confession (such as the location of contraband) are not excluded. Further, the statement may still be used to impeach the suspect if he were to testify in the criminal case.

Here, Dan confessed that he stole the radio. Because Dan's Fifth Amendment rights were violated, the statement should be excluded from the prosecution's case-in-chief, although it may still be used to impeach Dan.

Voluntariness

The Fifth and Fourteenth Amendments of the Constitution also protect individuals against compulsory statements. A statement is compulsory if it was made involuntarily. An involuntary statement could be made as a result of legal compulsion (such as a subpoena to testify before a grand jury) or by improper police tactics, such as physical violence, threats, or promises that the suspect will not be prosecuted if he confesses. Although Calvin did not move to suppress the statement on voluntariness grounds, Dan would be wise to do so, since exclusion on voluntariness grounds would prevent the statement from being used against Dan on cross-examination.

Here, Query told Dan that he "could not tell the District Attorney that Dan was cooperative" if he refused to speak. Although this statement does not explicitly promise Dan that he would not be prosecuted based on the statement, Dan would argue that Query suggested that he could guarantee different penal consequences based on whether Dan confessed. Query would say that he merely suggested a statement he could make to the prosecution, not that the prosecution would react in any specific way.

Because Query did not make any actual promise that Dan's penal outcome would be different, the statement was likely voluntarily made.

Exclusion of Statement for Voluntariness

If Dan's statement were involuntarily made, the statement itself would be excluded for all purposes, including impeachment. Further, any physical fruits of the statement would be excluded as well. Thus, because Dan wants to testify at trial, he should still argue that the statement was involuntary, even if this argument is likely to fail.

Motion to Prohibit Dan from Testifying

Defendant's Right to Testify

Each defendant has a constitutional right to testify in his own trial. Although an attorney has a professional ethical obligation to counsel his client not to lie on the stand, the lawyer cannot prevent the client from doing so. Under the ABA authorities, the attorney must seek to withdraw from the representation if he knows that the client intends to perjure himself. The court could then grant leave to withdraw, but may also decide that efficiency and justice require continued representation.

Thus, the court should rule against Calvin's motion to prevent Dan from testifying. However, it would be proper under the ABA rules for Calvin to seek to withdraw from representing Dan.

2. Dan's Request to Represent Himself

Sixth Amendment Protections

The Sixth Amendment right to counsel protects a criminal defendant's right to be represented by an attorney in all critical stages of prosecutory action by the state. The Sixth Amendment right includes the right to counsel of choice or to decline the right of representation if the defendant is competent to refuse.

Right of Self-Representation

The Sixth Amendment includes a right of self-representation. The court must grant the right if the defendant is competent.

Competence to Stand Trial

The general rule is that if the defendant is competent to stand trial, he will be found competent to represent himself. To be competent to stand trial, the defendant must understand the nature of the proceedings against him and be aware of the consequences of the proceedings.

Here, we have no facts suggesting that Dan has a mental defect that would affect his competence. Thus, the competency to stand trial is satisfied.

Competence for Self-Representation

The Supreme Court has stated that competence for the purpose of self-representation does not require the defendant to be legally sophisticated or be able to do an objectively good job representing himself. Although the Court has recognized that most defendants would be better served by counsel than by self-representation, the Sixth Amendment guarantee requires the court to allow the defendant to represent himself, regardless of whether the court finds that his action is in his own best interest.

Thus, although Dan does not appear to have any particular legal knowledge or skills, such knowledge is not required to trigger the constitutional right to self-representation. Therefore, the court must allow Dan to represent himself.

Advisory Counsel

The court may require that the individual be assigned advisory counsel to assist him. The role of advisory counsel is to provide the defendant with legal advice and information, but advisory counsel is not allowed to make the strategic decisions that appointed or retained counsel may, such as choosing to call only certain witnesses (other than the defendant) or present certain evidence. The advisory counsel role serves as a layer of protection for a self-representing defendant in order to protect the integrity and efficiency of the judicial process.

Thus, although the court must allow Dan to represent himself, it could choose to appoint Calvin or another attorney as Dan's advisory counsel.

Answer B

1. HOW SHOULD THE COURT RULE ON EACH OF CALVIN'S MOTIONS

(1) Suppressing the Radio as Evidence

Exclusionary Rule

Where evidence is obtained unlawfully under the Fourth, Fifth, or Sixth Amendments, that evidence is generally inadmissible against the accused. In Mapp v. Ohio, the Supreme Court held that the exclusionary rule is incorporated against the states. Moreover, under the fruit of the poisonous tree doctrine, all evidence obtained as a result of an invalid search or confession is also suppressed unless the government can prove (i) an independent basis; (ii) inevitable discovery; or (iii) an intervening act of free will.

Fourth Amendment Search and Seizure

The Fourth Amendment provides that a person be free from unreasonable searches and seizure of their persons, homes, papers, or effects. To that end, Dan (D) should be able to successfully argue that he was unlawfully seized and that the radio must be excluded as the fruit of an invalid seizure.

(1) State Action

The Fourth Amendment is only triggered by state action. Thus, a state or federal police officer or a private officer that has been deputized by the city or state must be the actor in order to render the Amendment applicable. Here, Officer Prowl (OP) appears to be a state police officer and hence the state action requirement is satisfied.

(2) Search / Seizure

A "seizure" occurs under the Fourth Amendment where the circumstances of the encounter are such that a reasonable person would not feel free to decline the encounter. A "search" under the Fourth Amendment only occurs where the D has a

reasonable expectation of privacy in the area and thing searched, or where there is a government intrusion into a constitutionally protected area.

Seizure. Here, D was ordered to stop by OP. A police officer may ask a person if they are willing to talk, at which point the person is free to decline and is not seized. However, where an officer commands a person to stop, their authority as a police officer is such that a reasonable person does not feel free to decline the encounter. Thus, D was seized by OP when he was commanded to stop and he did, in fact, stop.

Search. Here, D does not have a reasonable expectation of privacy in his movement on the streets. OP is free to follow him as much as he wants. However, D does have a reasonable expectation of privacy in the things he keeps out of public view, hidden under his coat. Merely stepping out onto the street does not render everything in D's possession "public." In this case, OP also intruded upon a constitutionally protected area, i.e., D's person. By patting down the outer clothing that D was wearing, OP intruded on his person and searched him under the Fourth Amendment.

Thus, if there is not a valid basis under the Constitution for this search and seizure, the evidence was obtained in violation of the Fourth Amendment and must be suppressed.

(3) Warrant Requirement

A search or seizure is generally unreasonable unless the police have a warrant, or an exception to the warrant requirement applies. A warrant must be founded on (i) probable cause; (ii) state with particularity the persons and places to be searched; and (i) be executed in a valid manner. Where a warrant that is otherwise invalid is relied upon in good faith by the arresting officers, the search or seizure will be upheld as long as the warrant was not: (i) so lacking in probable cause or particularity as to render reliance unreasonable; (ii) obtained by fraud on the magistrate; or (iii) the magistrate was impartial.

Here, there was no warrant to arrest or search D. Thus, the search and seizure are unconstitutional unless an exception to the warrant requirement applies.

(4) Warrant Exceptions

Terry Stop. An officer may engage in what is known as a temporary "investigative detention" under the Supreme Court's Terry framework, provided the officer has reasonable suspicion of criminality on the part of the D which is based on "articulable facts."

Here, the only facts that are given is that D was running down the street one summer afternoon wearing a fully buttoned, heavy winter coat. The fact that it was summer and D was wearing a fully buttoned up winter coat is certainly suspicious. Indeed, a reasonable person would almost have to assume that the purpose of wearing such a coat would be to hide evidence of contraband. If it is warm outside, as it usually is in the summer, a coat would be unnecessary. On the other hand, D may live somewhere like San Francisco where summers can be quite cold; D may have had a cold or some condition that makes him cold; or D may have been training for a sporting event such as wrestling where people force themselves to sweat more. The Court has held that headlong flight from an officer after seeing the officer is evidence sufficient to help support reasonable suspicion, but merely running has never been held to be reasonable suspicion absent additional facts.

Nevertheless, given that D was running down the street and wearing a coat that was fully buttoned during the winter, a court would likely find that the officer had reasonable suspicion--but certainty not probable cause--to detain D for a short period of time to investigate the potential criminality.

Terry Search. An officer that has reasonable suspicion of criminality based on articulable facts may also conduct a Terry search of the D, provided he has reasonable grounds for believing that the D is armed and dangerous. A Terry search must be

limited to a pat-down of the outer clothing of the D, and must be limited to a search for weapons. In order to remove evidence that is not a weapon, the officer must have probable cause to believe the other evidence, e.g., drugs or a car stereo, is illegal.

Here, there is no real evidence that D is armed and dangerous. He was running wearing a coat, which--as discussed above--is sufficient to find reasonable suspicion that D just committed some type of theft offense and is trying to conceal the contraband in his coat. However, D will argue there is really no reason to believe that he was armed at this point. OP cannot simply claim he thinks D is armed because he seemed sketchy. On the other hand, OP might be able to convince a court that many theft offenses are committed with a weapon and hence that D could reasonably have been carrying a weapon. The fact that D was not actually carrying a weapon will not undermine this argument. While this is a close call, a court would likely permit OP to conduct a Terry search here.

The scope of the search seems permissible in this case, as OP merely patted down D's outer clothing. As he did so, a car radio fell out. The car radio is not a weapon, but may be admissible under the plain view doctrine, discussed below. In any event, the search and seizure itself was not unconstitutional.

Plain View. The Plain View doctrine applies where (i) the police have a right to be where they are viewing; and (ii) they see evidence and it is immediately apparent the evidence is contraband. Here, as discussed above, OP had the right to stop D under Terry, and hence he had a right to be where he was viewing the radio as it fell from D's coat. Moreover, it was immediately apparent to OP that the car radio was contraband. Indeed, D was running down the street, in a coat, in the summer, with a car radio hidden inside his coat. The radio was quite apparently stolen and hence admissible under the plain view doctrine.

Consent. While D has a constitutional right not to be searched or seized, the right is subject to waiver, i.e., the search or seizure is not unreasonable if D consents to the

search or seizure. Consent must be knowing and voluntary. However, it is not required that one know they have the right to decline the encounter.

Here, D is not likely to be deemed to have consented to either the seizure or the search by OP. Indeed, as discussed above, he was seized. A defendant is not deemed to consent when seized. Moreover, with respect to consent to search, OP just started patting down D's outer clothing. Consenting to questioning is not within the scope of consenting to search. Thus, even if D were deemed to consent to questioning he would not be deemed to consent to the search. In any event, the search and seizure are valid under Terry.

Conclusion
The evidence of the radio is admissible given that the search and seizure were valid under a Terry stop and frisk and the radio fell out of D's coat and was in plain view.

(2) Suppressing Dan's Confession to Officer Query

The Fifth Amendment protects a person from being compelled to be a witness against his or her self. Due to the inherent risks of coercion in police custodial interrogations, the Supreme Court has held that a defendant must be given Miranda warnings before any confessions by the defendant are admissible against the defendant, unless used to impeach.

Miranda Warnings
Miranda is triggered where the D is: (i) in custody; and (ii) interrogated.

Custody. For purposes of Miranda, custody is defined as a place where a reasonable person would not feel free to leave. Moreover, custody is assessed by looking to whether the situation involves the same inherently coercive pressures as stationhouse questioning.

Here, D was arrested and taken to a police station where he was then met by Officer Query (OQ). D had no ability to leave, and no reasonable person would feel free to leave in this situation. Moreover, this is stationhouse questioning, so the inherent pressures that Miranda is meant to protect against are at their pinnacle here. Thus, D is in custody.

Interrogation. Interrogation is defined as any line of questioning that a reasonable officer would find likely to illicit an incriminating response. Here, OQ was asking D questions about the radio. This is clearly questioning that is likely to generate an incriminating response. Thus, D was interrogated.

As both elements of Miranda are met, D was required to receive Miranda warnings. OQ ought to have told him he had the right to remain silent; that anything he said could be used against him in court; that he had the right to an attorney; and that he had the right to have an attorney appointed if he could not afford one. Since D was not warned, his confession is inadmissible against him (unless it is used to impeach him).

Invoking Miranda

D was not warned, but in this case it even seems that he attempted to invoke his Miranda rights. To invoke the right to remain silent, the D must clearly and unequivocally indicate his intent to invoke. Here, D stated to OQ that he "did not want to talk." That may not use the word "remain silent" but no reasonable officer could think that "not want[ing] to talk" means anything other than remain silent. After having said that, OQ tried to coerce him into talking. This is not permitted. OQ must honor D's request and stop talking. By badgering him after he invoked, any later confession is in violation of Miranda. In this case, since D was not even Mirandized, his is irrelevant. However, even if D were Mirandized, the fact that OQ failed to honor his request to remain silent is a separate basis for excluding this statement.

Conclusion

The confession must be suppressed (except for purposes of impeachment). Thus, the court should grant the motion in part, subject to use for impeachment.

(3) Prohibiting Dan From Testifying At Trial

Constitutional Right to Testify in Defense

All defendants have a constitutional right to testify in their defense at a criminal trial. This right trumps any ethical obligation that Calvin (C) has to the court or the profession. Indeed, neither C nor the court can prohibit D from testifying in this situation.

[NOTE: The proper response by C would have been to inform D that he cannot testify falsely and persuade him to testify truthfully. If that failed, C should have tried to withdraw from the representation. If the court failed to allow him to do so, under the ABA C should have then informed the tribunal and allowed the tribunal to take the necessary steps. Under the California rules, no disclosure is permitted. Instead, C should have let D testify and questioned him up until the point he knew he was going to testify falsely, then, at that point, allow D to testify in the narrative and in no way rely upon D's narrative in closing. Under any ethical rule and the Constitution, the prohibition on D testifying is not permitted.]

Conclusion

The court should rule that D be permitted to testify, as a criminal defendant has a constitutional right to testify. The tribunal may take necessary steps to remedy the false testimony, such as requiring narrative testimony.

2. HOW SHOULD THE COURT RULE ON DAN'S MOTION TO REPRESENT HIMSELF

Faretta Motion

The right of a criminal defendant to be represented by counsel was held to require the right of self-representation in Faretta. Where a Faretta motion is timely made, and the court is satisfied that the defendant is competent enough to represent himself, the court is required to respect the dignity of the defendant and allow him to have the right to choose for himself and represent himself. A court may also appoint back-up counsel to assist (but not actually control) the representation, but that is not constitutionally required.

Competence. The Supreme Court recently held that a defendant may be competent to stand trial but nevertheless incompetent to represent himself.

In this case, we have very little information on whether D is capable of representing himself. It appears he was found competent to stand trial, or at least that no such hearing has been conducted to this point. Thus, given no facts indicating that D cannot represent himself, he would likely be deemed competent to stand trial. The judge would have to verify that D was able to understand the charges and the legal issues, but--again--there is nothing in the facts indicating D cannot handle this. The court would also look to the issues between D and C and use this as a further justification for allowing D to represent himself.

Timeliness. A court need not allow a defendant to represent himself if doing so would cause an undue delay in the case. The request must be timely.

Here, D made the request to represent himself after an attorney was appointed and various pretrial motions were made. Indeed, the motion came just a week before trial. To allow D to testify would likely require giving D extra time to prepare the case himself, which would mean that the trial would have to be pushed back. That would interfere with availability of witnesses and with the efficiency of the court and the ability for the prosecution to put on its case. D might also win sympathy from the fact C is not permitting him to put on his case. However, that is more of a reason to substitute

counsel than to let D represent himself. In this situation, D would need to show he was immediately prepared to go to trial. Delay of any sort would be sufficient to permit the court to deny his Faretta motion.

Conclusion

Although D is likely competent to represent himself, but the court is likely to deny the motion as untimely, given that the trial date is set for only one week from the date of the motion and given that D would likely need a good amount of time to fully prepare himself for trial.

Q5 Trusts / Community Property

Henry and Wynn married in 2000. During the first ten years of their marriage, Henry and Wynn lived in a non-community property state. Henry worked on writing a novel. Wynn worked as a history professor. Wynn kept all her earnings in a separate account.

Eventually, Henry gave up on the novel, and he and Wynn moved to California. Wynn then set up an irrevocable trust with the $100,000 she had saved from her earnings during the marriage. She named Sis as trustee and Henry as co-trustee. She directed that one-half the trust income was to be paid to her for life, and that the other one-half was to be paid to Charity, to be spent only for disaster relief, and that, at her death, all remaining assets were to go to Charity.

Wynn invested all assets in XYZ stock, which paid substantial dividends, but decreased in value by 10%. Charity spent all the income it received from the trust for administrative expenses, not disaster relief.

Later, Sis sold all the XYZ stock and invested the proceeds in a new house, in which she lived rent-free. The house increased in value by 20%.

Henry has sued Sis for breach of trust, and has sued Charity for return of the income it spent on administrative costs.

1. What is the likely result of Henry's suit against Sis? Discuss.

2. What is the likely result of Henry's suit against Charity? Discuss.

3. What rights, if any, does Henry have in the trust assets? Discuss. Answer according to California law.

Answer A

1. Henry v. Sis

As discussed in #3, Henry does not currently have a personal interest in the trust assets. However, he is the co-trustee of the trust, and this may be sufficient to give him standing as trustee to bring an action against Sis for breach of her fiduciary duty as trustee.

Trust creation

To be valid, an express private trust must have a settlor, an ascertainable beneficiary, res, a valid purpose, and a trustee. However, the court will appoint a trustee if one is not provided for, or the elected trustee declines to serve. Here, Wynn is the settlor, and she has designated herself and Charity as lifetime beneficiaries, and Charity as the remainder beneficiary. Any natural person, entity or government can be a beneficiary of an express private trust. Both are ascertainable beneficiaries because they are either persons or entities expressly named in the trust instrument. The res can be any property or present interest. Here it is the $100,000 from Wynn's separate account. The trust appears to have two purposes: to provide lifetime income to Wynn; and to contribute to disaster relief via Charity. To be valid, a trust purpose must be able to be determined from the trust document, and must not be illegal. Neither of the purposes are illegal and are clear from the trust document. Wynn has designated Sis as trustee and Henry as co-trustee, and from the facts it does not appear that either declined to serve. They must be competent but there is no indication of incompetency in the facts.

Charitable trusts differ in that they must have a charitable purpose: something that contributes to societal good, such as abating hunger, education generally, religion, or the like. The beneficiaries of the trust must be indefinite, not a specific person. Here, because Wynn is a specific person, this could not be a charitable trust.

A valid express private trust was created.

Trustee powers

A trustee has the powers expressly granted in the trust document itself, and those implied in order to effect the purpose of the trust. Here, the trust instrument directed Sis to pay one-half of the income to Wynn, and the other half to Charity. This expressly gave her the power to make these distributions.

Trustee duties

A trustee has the duty of loyalty, to act for the benefit of the beneficiaries solely, and not in her own self-interest or that of third parties. This duty requires the trustee to be impartial as to multiple beneficiaries. Here, Sis has a duty to treat Wynn and Charity impartially. If this were a revocable trust, she would have a primary duty during Wynn's lifetime to Wynn as the settlor, but the trust is irrevocable.

As part of the duty of loyalty, a trustee has a duty not to self deal. Sis is living in the house owned by the trust, rent-free. Thus she is reaping personal benefit from her position as trustee. She has violated her duty of loyalty.

The trustee has a duty of care as well, which requires her to act as a prudent person would in handling their own affairs. This includes the duty to account regularly to the beneficiaries, and not commingle trust assets with her own.

As part of the duty of care, a trustee has a duty to invest the trust res as a reasonably prudent investor would. Under the traditional view, this limited the holdings of the trust to things such as blue chip stock, 1st trust deeds on real estate, government bonds and other conservative and safe investments. Each separate investment was considered separately in determining this. Modernly, the investments are looked at as a whole, and factors such as the need for income, tax consequences, and particular trust purposes are considered. Thus, the court will need to look at how Sis invested the trust res in light of whether the trust was intended more for lifetime income sources, or as a gift to

Charity at Wynn's death, at how the income would affect taxes, at what was reasonable as an investment in light of what was available to invest, at what reasonable investors were doing at the time.

Wynn originally invested the trust assets in XYZ stock, which provided substantial dividend income but lost value overall. This would seem to indicate a preference for lifetime income over growth of the principal.

Henry will need to be able to show that a reasonably prudent investor would not have sold the XYZ stock and invested it in a house. The sale of the stock itself may have been prudent given the loss in value. However, a trustee also has a duty to diversify in order to reduce the risk of loss and enhance income/growth opportunity, as would a reasonable investor. While the duty to diversify may have called for Sis to sell some or all of the XYZ stock, that same duty would generally preclude sinking all of the proceeds into one property. The trust res is then subject to any decline in real estate in the market, and will not benefit from any gains in other potential investments. Sis has probably violated her duty of prudent investment, and has certainly violated her duty to diversify.

The duty to make the res productive requires that Sis put the assets to work for the benefit of the beneficiaries. When she lived in the house rent-free, she violated this duty. The rental income from the house is to be distributed to Wynn and Charity, not retained for her benefit.

Sis has a duty to effect the purpose of the trust, by ensuring that income is maximized, based on the express and apparent intent of the settlor. She has not done so by selling the income stock and buying a house that currently provides no income to the trust.

Because Henry is currently subject to these same duties as co-trustee, he is obligated to prevent the wrongdoing of the other trustee. Thus he has standing to bring an action against Sis for her violations of duty, as a trustee of the trust.

Remedies available

The remedies available against a trustee who has violated their duties includes removal, surcharge for lost income/profits, disgorgement of any benefit wrongfully taken by the trustee. This benefit does not run to Henry, who is acting solely for the trust beneficiaries' benefit.

Henry will seek an accounting for the rent that should have been paid by Sis while living in the house owned by the trust. These funds must be paid personally by Sis. Additionally, he will seek surcharge for the lost income from the XYZ stock or similar investment that would have maximized lifetime income. Sis will have to make up the shortfall in income from her own funds.

Finally, Henry will seek removal of Sis as trustee. The court may then allow Henry to act as sole trustee or may appoint someone else.

Given Sis's breach of duty, the apparent purpose of the trust, the court will allow all of these remedies.

2. Charitable trusts are enforced by the attorney general, rather than by private action. If Charity is a charitable trust, Henry will not have standing to bring an action.

Assuming Henry has standing as the co-trustee of Wynn's trust, he can seek a constructive trust by tracing the funds from the trust to Charity as used for admin purposes. This will mean that Charity's sole duty as trustee of the constructive trust is to use the funds as directed.

3. California is a community property (CP) state. All property acquired during marriage while domiciled in CA or another CP state is presumed to be CP. All property acquired prior to marriage, or after separation, is presumed to be separate property. Additionally, all property acquired at any time by gift, descent, devise or bequest is presumed to be CP.

All property acquired during marriage while domiciled in a non-CP state that would be CP if domiciled in CA, is presumed to be quasi-CP (QCP). At termination of the marriage, to determine the character of property, a court will look at the source of the funds used to acquire property, any applicable presumptions, and any actions by the spouses that may change the character of the assets. A mere change in form does not alter the character of the asset.

Source:
Here, the source of the funds for the house, which is the sole trust asset, can be traced back to the XYZ stock and further, back to Wynn's earnings as a history professor. Because all earnings by community labor are CP, these earnings would be CP if the spouses had been domiciled in CA at the time they were earned. Thus, by definition, they are QCP (defined supra). During marriage, QCP remains the SP of the owning spouse. At divorce or death of a spouse, the character as QCP affects the property determination.

Presumptions:
All assets acquired during marriage are presumed to be CP. However, as noted, the source of the house is earnings that are Wynn's SP until termination of the marriage. Spouses can also take title in ways that raise a presumption, such as a gift to the community, which arises on death of a spouse under Lucas. However, Wynn kept the funds in a separate account, and then created an irrevocable trust with the funds, so no alteration in the title is shown in the facts.

Actions of the spouses
Spouses can by transmutation or other actions alter the character of their own SP. Henry may argue that the change from Wynn's separate account to a trust is such a transmutation. However, a transmutation, to be valid, must be in writing, signed by the adversely affected spouse and clearly express the intent to transmute. This is not evident here, so no transmutation has taken place.

Distribution of assets

At divorce, QCP is treated as CP, and this would entitle Henry to half of the QCP. Death also impacts the character, depending on which spouse dies. If the SP owner (Wynn) predeceases the non-owning spouse, the non-owning spouse may choose their forced share (take against the will) in order to get to QCP assets. However if the non-owning spouse dies first, they have no right to devise the QCP that belongs to the other spouse.

As a result, Henry has no immediate right in the trust assets. In the event of divorce or death of Wynn, he would acquire such rights as are discussed above.

Answer B

1. What is the likely result of Henry's suit against Sis

A trustee owes fiduciary duties of loyalty and care to the beneficiaries of a trust. A trustee may bring suit against a co-trustee for breaching the fiduciary duties, and move to have the violating trustee removed from their position.

A. Duty of Care

Generally, a trustee owes a duty of care to the beneficiaries to act as a reasonably prudent person under similar circumstances. This includes the duty to prudently invest trust property in a manner that will create the greatest return for the benefit of the trust.

i. Prudent investment

A trustee has a duty to prudently invest trust funds so as to increase the benefits from investments for the trust beneficiaries. Here, Sis sold all of the XYZ stock in the trust and used the proceeds to pay for a house. Sis will argue that this is a prudent investment because XYZ stock had decreased in value by 10%, whereas the value of the house has appreciated 20%. This increased the value of the trust property. However, Henry will likely argue that to tie up all of the trust assets in one piece of property which potentially can fluctuate wildly in the real estate market is not a prudent investment. Instead he will argue that Sis should have diversified to different stock from other companies other than XYZ in order to keep a more stable and broad base for the trust property.

Based on these arguments, it is likely that Henry will prevail against Sis in arguing that exchanging all of the stock into one parcel of real property is not a prudent investment.

ii. Duty to diversify

A trustee also has a duty to diversify the stock held by the trust. Here, as discussed above, the trust initially only held XYZ stock. Henry will argue that Sis had a duty to diversify the stock to include stocks from other corporations, and that consolidating the trust assets into one piece of property which is less liquid and potentially subject to market fluctuations in price and value violated the duty to diversify.

A. Duty of loyalty

A trustee is a fiduciary and owes a duty of loyalty to the beneficiaries and the trustor of the trust. Therefore, Sis has a fiduciary duty of loyalty to act solely in the best interest for the trust.

i. Duty to avoid self-dealing

A trustee has a duty to avoid self-dealing with respect to trust assets. The trustee must obtain court approval before the sale of any property which benefits the trustee personally. Here, Sis sold all of the trust assets and used the proceeds from the sale to purchase a house in which she lives in rent-free. She is therefore using trust assets for her own personal benefit, which is impermissible absent court authorization. She has a duty to pay fair market rent to the trust for use of the property in order to avoid a claim of self-dealing.

Therefore Sis has arguably violated her duty to avoid self-dealing

ii. Fairness to all beneficiaries

A trustee also has a duty to act impartially and fairly towards both the income and the principal beneficiaries. The trustee cannot favor one beneficiary over another in terms of their investments or distributions. Here, whereas Wynn and Charity are both

income beneficiaries of the trust currently, Charity is the only principal beneficiary after Wynn's death.

(a) "Income"

Income beneficiaries are entitled to cash dividends from stocks, and rents from property held by the trust. Initially XYZ stock issued substantial dividends which are considered income to the trust and distributed to the income beneficiaries. Therefore Wynn and Charity were sharing the substantial income beneficiary. However, as noted above, the stock declined in value and therefore was worth 10% less, therefore reducing the future value for the principal beneficiary.

However, upon changing the stocks for the house, the principal beneficiary would obtain a 20% increase in value of the property. However, Sis is not paying any rent for the property, and therefore Wynn is no longer getting an income from the trust as a result of this change. This change, coupled with the lack of rental payments by Sis, means that Henry will likely be successful in arguing that Sis has violated her duty to act fairly and impartially towards both income and principal beneficiaries.

D. Conclusion

Because of the aforementioned breaches in duty, it is likely that Henry will prevail against Sis in claiming a breach of trust. The trust would likely be entitled to a constructive trust for the unpaid rent that was due on the propety, and Henry may have Sis removed as trustee for breaching her duties of care and loyalty.

2. What is the likely result of Henry's suit against Charity for return of the income

A. Purpose of a charitable gift

A trust must have a valid purpose in order to be properly formed. Here, part of the trust's express purpose at the time of formation was for income from the trust to be delivered to Charity but only go towards disaster relief. Charitiable contributions and trusts are considered valid purposes and therefore the trust is permissible.

B. Violation of a condition by a beneficiary

However, a violation by a beneficiary of an express condition of the trust violates the trust purpose. The court will look at the totality of the circumstances to determine whether the language was intended to merely express a wish on the party of the trustor, or rather if it is an express condition for receipt and use of funds. Here, the trust had an express condition that the share of income given from the trust to Charity was only to be used for disaster relief. However, the beneficiary here instead used the funds for administrative expenses, not disaster relief. The Charity will likely argue that it was only a general wish because they would receive the full benefit of the property upon Wynn's death and therefore should be able to use and dispose of trust income in any manner that benefits the charity. However, Henry will likley argue that the express terms of the trust are explicit in requiring that the funds only be spent on disaster relief. Therefore the beneficiary has violated an express term of the trust.

C. Remedy for violation by a beneficiary

If a beneficiary violates an express term of a trust, the trustee can sue for return of the income used in violation of the trust terms. Therefore Henry would likely prevail in a suit against Charity for return of the income.

3. What rights does Henry have in the trust assets?

All property acquired during marriage in CA is presumed community property (CP). However, property acquired by (1) gift or inheritance; (2) expenditure of separate property funds, (3) the rents, profits, or income derived from separate property; or (4)

acquired before the marriage are presumed to be separate property (SP) of the acquiring spouse.

B. Quasi-Community Property

If a married couple acquires property in a non-community property state that would have been community property had the couple been residents of a community property state, such items are considered "quasi-community property" (QCP) and are potentially subject to community property laws if the couple later moves to a community property state. During the marriage, the QCP is treated as SP of the acquiring spouse. However, upon divorce or death of the acquiring spouse, the QCP will be treated as CP and divided equally between the spouses. Upon the death of the non-acquiring spouse, the property will remain the SP of the acquiring spouse.

C. Wages earned during marriage

Wages, earnings, and pensions earned during marriage are considered CP, absent an agreement between the spouses agreeing otherwise. Here, Wynn earned a salary working as a history professor while living out of CA. Regardless of whether she kept the earnings in a separate account, in CA the earnings would be considered CP. The facts do not show that Wynn and Henry had any agreements changing the character of the property. Therefore upon moving to CA, Wynn's earnings are presumed to be QCP. However, as noted above, they retain their SP characterization until death or divorce.

D. The trust assets

Wynn and Henry are still married at the time that Wynn sets up the trust fund with $100,000 of her earnings. Even though these funds are earmarked as potential QCP, during the marriage they are still considered the SP of the spouse who earned them. Therefore at this time, Henry does not have any interest in the trust assets because of

the ongoing marriage. Henry will not have any possible rights to the trust assets until death or divorce.

Q6 Torts

Owner owned and operated a small diner where Cook and Waiter worked. After closing one day, Cook called in sick for the following day. Owner knew that an acquaintance, Caterer, owned and operated a catering business. Owner asked Caterer to fill in for Cook. Owner told Caterer: “I want you to run the kitchen for one day. I will pay you your standard catering fee. I just need somebody who knows what he’s doing.” Caterer agreed, telling Owner, “I’ll bring my own knife set, but I assume the kitchen is fully equipped.”

Owner did not check Caterer’s references. If he had, he would have learned that Caterer’s business had once been shut down by the health department.

Caterer went to Owner’s diner and started to cook. Patron, a customer, ordered chicken wings from Waiter. Waiter gave the order to Caterer.

A notice posted on the kitchen wall, entitled “Health and Safety Code Section 300 Notification,” stated: “To avoid food poisoning, all poultry products must be cooked at a minimum temperature of 350 degrees.” Upon observing that the oven was set at 250 degrees, Waiter informed Caterer that the oven should be set at 350 degrees. Caterer responded: “Just worry about waiting tables, and leave the cooking to me.” Caterer did not raise the temperature of the oven, and removed the chicken wings shortly thereafter.

Waiter served Patron the chicken wings. Patron ate the chicken wings and suffered food poisoning as a result.

Under what theory or theories, if any, might Patron bring an action for negligence against Caterer, Waiter, and/or Owner, and what is the likely outcome? Discuss.

Answer A

In a negligence case, the plaintiff must show duty, breach, causation, and harm. When the defendant's conduct creates an unreasonable risk of harm to others, a duty of due care is owed to all foreseeable plaintiffs; the defendant must act as a reasonable person to protect foreseeable plaintiffs. Under the majority Cardozo view this duty is owed to all foreseeable plaintiffs, while under the minority view it is owed to all plaintiffs. When the defendant's conduct falls below the relevant standard of care, the defendant has breached his duty. To show cause, the plaintiff must show actual cause (that the plaintiff's injury would not have happened but for the defendant's conduct) and proximate or legal cause (that the plaintiff's injury was foreseeable in that it was a result of the increased risk created by the defendant's conduct/within the normal incidents of the defendant's conduct). Finally the plaintiff must prove that they suffered damages. Here, Patron will be able to satisfy this final requirement of harm/damages with respect to all possible defendants because Patron suffered food poisoning as a result of eating the chicken wings.

Patron v. Caterer

Patron can bring a negligence claim against Caterer for negligently serving Patron undercooked chicken wings. First, Patron could establish the first element of a negligence claim by arguing because Caterer was cooking food to serve to customers at a diner, he owed a duty to all customers who would be eating at the diner to exercise due care/act as a reasonably prudent person in the preparation of their food. Because Patron was a customer at the diner, Caterer thus owed a duty of care to Patron. Caterer breached this duty in multiple ways. First, Caterer failed to exercise due care by not reading and heeding the notice on the kitchen wall that to avoid food poisoning, all poultry products must be cooked at a minimum of 350 degrees. This notice was easy to understand and seems to have been conspicuously posted, and thus a reasonable cook in the kitchen would have read and followed the warning. Second, Caterer was unreasonable in ignoring Waiter's warning that the oven was only set at 250 degrees.

As a cook by profession, Caterer should have known the necessary temperature to cook food at to avoid food poisoning, and even if he didn't there was a notice in the kitchen stating what temperature poultry must be cooked at. Furthermore, as a cook Caterer should exercise due care in making sure that the oven is set at the proper temperature, and even if he were for some reason excused for not noticing that the oven was at the wrong temperature, the fact that Waiter explicitly warned Caterer that the oven was at 250 degrees would negate any possible excuse. Thus, Caterer breached the duty of due care he owed to Patron by cooking the chicken wings in an oven which he knew was only set at 250 and when he knew that the Health and Safety Code required poultry to be cooked at a minimum of 350 degrees.

Moreover, the fact that a Health and Safety Code mandated a minimum temperature of 350 degrees gives Patron another theory on which to show duty and breach. In this case of a violation of a regulation such as this Health and Safety Code, a plaintiff can take advantage of the statutory presumption of negligence. If a plaintiff can prove a defendant violated a statute, that the plaintiff was within the class meant to be protected by the statute, and that the harm caused to plaintiff was of the harm meant to be prevented by the statute, then the duty and breach elements of a negligence case will be presumed. In this case, Caterer clearly violated the statute by cooking the chicken at 250 degrees. The statute explicitly states that it is meant to avoid food poisoning, so the harm caused to plaintiff was indeed the harm meant to be prevented by the statute. Finally, the statute is a Health and Safety Code that is posted in restaurant kitchens, indicating that restaurant patrons are the class of people meant to be protected by the statute. Thus, all the elements are satisfied and Patron can use Caterer's breach of this statute to show duty and breach.

Actual causation is easily established because if Patron had not eaten the chicken wings, she would not have gotten sick ("but for" consuming the chicken wings, she would not have suffered harm). Proximate cause is also straightforward in this case; it is very foreseeable that serving someone chicken wings that have been undercooked will cause that person food poisoning, especially if the person cooking the chicken wings is

a professional caterer. Finally, as stated in the introductory paragraph, Patron can easily establish damages because she got food poisoning. Thus, Patron is likely to prevail on a negligence claim against Caterer.

Patron v. Waiter

Patron can also bring a negligence claim against Waiter under the theory that he negligently served her undercooked chicken wings or negligently failed to warn her of the possibility that the wings were undercooked.

Patron would argue that as a waiter, Waiter has a duty to his customers to not serve them food that he knows has a substantial likelihood of causing food poisoning, whether or not he himself is responsible for cooking the food. Alternatively, Patron could argue that Waiter had a duty to warn his customers if he was serving them food which he had reason to believe could cause food poisoning. Waiter would counter that because he was not responsible for cooking the food, he did not have a duty to Patron. However, while it is true that Waiter probably didn't have a duty to make sure that the food was cooked property because it was not his job to cook the food, as a professional waiter he did at least have a duty to either not serve food he had reason to believe would cause food poisoning, or to warn Patron that the food might cause food poisoning. This is because a restaurant patron reasonably relies on their waiter to serve them food that the waiter believes to be safe for consumption. If Waiter had no reason to believe that the chicken would cause food poisoning, he would not have breached his duty to act as a reasonable person with respect to his customers. However, here Waiter knew that the oven was only set at 250 and that the cook had ignored his warning to adjust the temperature. Under these circumstances, a reasonable person exercising due care would not have served the chicken wings, at least not without warning their customer. Thus, Waiter breached his duty to Patron by serving her chicken wings when he knew that they were not cooked at the required temperature.

Patron would argue that actual cause is established because if waiter hadn't served her the chicken wings, she would not have eaten them and gotten sick. Waiter would try to argue that if he hadn't served the chicken wings, a different waiter working that day would have brought them to the table, and he is therefore not a "but-for" cause of Patron's injury. However, the most likely interpretation of this situation is that because Waiter knew that the chicken was undercooked, his duty was not simply to refrain from bringing the chicken to the table but rather to make sure that Patron was not served the chicken or was warned about the chicken; because he was employed as a waiter at the restaurant where Patron was eating and knew of the danger, he cannot avoid liability on that argument. Patron would thus be able to establish actual cause: but-for Waiter's failure to prevent Patron from being served or failure to warn her, Patron would not have eaten the wings and gotten sick. Patron would also be able to establish proximate cause: Waiter knew the oven was only set to 250 degrees and that Caterer had ignored Waiter's warning. It was thus foreseeable that the chicken would be undercooked, foreseeable that if Waiter served the chicken to Patron, Patron would eat the chicken, and foreseeable that if Patron ate the chicken she would get sick. Thus, Patron could establish proximate cause. Damages could be established as above.

Therefore, Plaintiff would also likely win in a negligence action against Waiter for negligently serving her chicken wings that he knew were likely to cause food poisoning.

Patron v. Owner

Patron could bring a suit against Owner either for vicarious liability for Caterer's negligence, vicarious liability for Waiter's negligence, or direct negligence for negligently hiring caterer.

An employer is vicariously liable for the negligence of its employees in the course of their duties. An employer will not be liable for negligence of their employees outside of the duties, nor will someone generally be liable for the negligence of an independent contractor (rather than of an employee). However, someone will still be liable for the

negligence of a contractor if the negligence involves a non-delegable duty or an ultrahazardous activity.

Thus, the first question is whether Caterer is an employee or an independent contractor. A court will address this issue by analyzing the degree of care and control Owner exercised over Caterer, taking into account factors such as the length of employment, the nature of the duties, the amount of responsibility retained by and amount of discretion exercised by the employee/contractor, and the nature of payment. In this case, the fact that Caterer was only filling in for Owner for one day while Cook called in sick, was asked only to "run the kitchen for one day," brought his own knives, was paid a one time payment of his standard catering fee, independently owns and operates his own catering business, and does not appear to have been supervised in his duties all support a finding that Caterer was an independent contractor. The fact that aside from the knives Caterer relied on Owner's "fully stocked" kitchen supports an argument that Caterer was an employee; so does the nature of the job, as generally a cook in a restaurant is an employee of the restaurant; however, these facts are not sufficient to support a finding that Caterer was an employee. Thus, Caterer would be found to be an independent contractor.

Therefore, if Patron were to pursue a claim that Owner was vicariously liable for Caterer's negligence, Patron would have to argue that Caterer was performing a non-delegable or inherently dangerous/ultrahazardous function. The latter exception does not apply because while cooking food at a restaurant does have some inherent risks regarding kitchen safety and food poisoning issues, these are not sufficient for a finding that it is ultrahazardous. However, Patron has a chance of prevailing on the argument that the duty of ensuring that food cooked and served to restaurant patrons is cooked to health and safety code specifications is a non-delegable duty. Common carriers and store/restaurant owners are held to have a particularly high duty of care to their customers, and as such some duties are non-delegable. One example of a non-delegable duty is the maintenance of taxicabs: even though taxi drivers and mechanics are independent contractors, the taxi company may not escape liability for negligence in

the maintenance of their fleet of cars by claiming that they are not liable for negligence of independent contractors on public policy grounds. Another example of a non-delegable duty, and one that is more relevant to this case, is the maintenance of a store to keep it safe for customers. In that case, if for example a store owner hires an independent contractor to repair a dangerous condition in the store that creates a hazard to customers, the store owner can still be found vicariously liable for the independent contractor's negligence under the theory that maintaining the safety of the premises is non-delegable for public policy reasons. By analogy, the owner of a restaurant could still be found liable for the negligence of an independent contractor regarding ensuring that food is cooked according to health and safety code requirements, because restaurant owners owe a particularly high duty of care to their customers and therefore such duty is non-delegable on public policy grounds.

Therefore, Patron has a good chance of prevailing on the argument that Owner is vicariously liable for Caterer's negligence on the grounds that the duty of ensuring that food served at Owner's restaurant is cooked according to health code specifications is non-delegable. Of course, for Owner to be vicariously liable, it must also be established that Caterer himself was negligent. As discussed above, Patron has a strong case that Caterer was indeed negligent; therefore, this will not be a bar to arguing that Owner was vicariously liable.

Next Patron could argue Owner is vicariously liable for Waiter's negligence. Here there are no facts indicating that Waiter is an independent contractor. Owner might try to argue that the fact that waiters generally earn most of their wages in tips supports a finding that Waiter is an independent contractor and not an employee. However, this is not very persuasive and court would probably find Waiter to be an employee. Thus, if Patron did prevail on her claim against Waiter for negligence, she could also prevail on a claim against Owner for vicarious liability; however, if Waiter were found not to be negligent, Patron would have no such claim against Owner.

Finally, Patron could argue that Owner was directly negligent in hiring Caterer because he did not check Caterer's references. First Patron would have to establish duty. Patron could successfully argue that Owner had a duty to his customers to exercise due care in selecting his employees and independent contractors. Patron could also successfully argue that Owner breached that duty by not checking Caterer's references. A reasonable restaurant owner would check the references of a Caterer before hiring him. Owner would argue that here he was only hiring Caterer for one day, that Caterer owned and operated his own catering business which was evidence that he was a competent caterer, and that Caterer was an acquaintance of Owner so perhaps he had independent, circumstantial knowledge of his competence. However, these arguments are not persuasive; it would not have taken long to check Caterer's references, and given the nature of the work he was being hired to do, it was still reasonably prudent to check his references even though he was only being hired for one day.

Patron would argue that Owner's breach of duty in failing to check Caterer's references was the actual cause of her harm because the facts state that if Owner had checked Caterer's references, he would have learned that Caterer's business had once been shut down by the health department. To prove actual cause, however, Patron would still have to argue that had Owner found this out he would have then chosen not to hire Caterer or would have chosen to supervise Caterer more carefully. The court will likely permit this inference in Patron's favor, and she will thus be able to establish actual cause.

Patron would argue that Owner's breach was also the proximate cause of her harm because it was foreseeable that by hiring Caterer without checking his references, Owner was taking the risk that Caterer was incompetent and could cause harm as a result of his incompetence. Patron would probably succeed on this element. It is established practice in the service industry to check references before hiring. Thus, it is foreseeable that a failure to check someone's references could lead to the type of situation at issue. Finally, damages would be established as above. Thus, Patron is likely to prevail on a direct negligence claim against Owner.

Answer B

In all negligence actions, the plaintiff must establish a prima facie case for negligence, which generally is composed of four elements:

(ii)defendant owes a duty to plaintiff,
(iii)that duty is breached,
(iv) the breach is the actual and proximate cause of the injury, and
(v) damages to the person or property.

All four elements must be established to succeed on a negligence claim.

The duty owed to the plaintiff is a general duty to all foreseeable plaintiffs. Further, the majority (Cardozo) is that the duty extends only to plaintiffs within the foreseeable zone of the danger. Conversely, the minority (Andrews) is that the duty extends to all plaintiffs. Also important to the first element is what the duty actually is: the standard of care. There are many different standards of care that will be discussed below.

Whether a duty and standard of care is breached is fact specific, but can look to industry custom, regulations or health codes, and any other relevant information.

For causation, plaintiff must establish both actual and proximate cause. Actual cause is causation in fact; but for the defendant's actions, the plaintiff's injury would not have occurred. Proximate cause is a limitation on liability, and says that the injury must be foreseeable; the defendant is generally liable for all harm that is the normal incident of and within the increased risk of his conduct.

Lastly is damages, which must be to the person or property.

The analysis for these elements in part differs depending on who the action is against; thus, they will be discussed accordingly.

(1) Action for Negligence against the Caterer: The action can be based on negligence or arguably negligence per se; both will be analyzed below.

(i) Duty to Patron: Here, Caterer is working in a restaurant and cooking food that is to be served to customers. Thus, he owes a duty to all customers because they are foreseeable plaintiffs and within the zone of danger of his negligent conduct, meaning they will eat his food and get sick. The standard of care here could be a variety of things, but regardless of which the court chooses, the Caterer will have breached it.

The first possible standard of care is the common law one: a person must act as an ordinary, reasonable, and prudent person would act in the same circumstances as the defendant. Such a standard does not take into account the mental capacity of the defendant, but may take into account any physical incapacities. The court may also take into account any expertise or knowledge that he has, such as being a caterer or chef. This is the most likely standard of care.

The second possible standard of care is that of a professional: which requires that a person act with the knowledge and skill of a professional in good standing in his community. It is arguable that a caterer is a professional, but less likely.

The last standard of care is Negligence Per Se which will be discussed with breach.

(ii) Breach of the Duty:

Looking to the first possible standard of care, Caterer clearly breached it by not checking the temperature on the oven despite the warning from both the clearly present Notification which he observed and from the waiter's comment to him. A reasonable and prudent person would have done so in light of these circumstances, and even without such obvious notifications, it would also be required because it is generally common knowledge that undercooked chicken is dangerous.

The second possible standard of care will have a similar outcome. This is an even higher standard of care, which the Caterer cannot meet. If a caterer or chef is considered a professional, then a reasonable and prudent caterer or chef would surely

check the temperature and have the right temperature for cooking meats, especially chicken.

Lastly is negligence per se. Negligence per se is that the generally common law standard of care may be replaced when there is a government regulation, statute, or as is here a health notification, that imposes a criminal penalty, which includes a fine. If negligence per se is established, then it is conclusively presumed that the negligence elements of duty and breach are satisfied. To establish negligence per se, the regulation must be violated without excuse, the plaintiff must have been within the protected class meaning the type of person the regulation sought to protect, and lastly that the plaintiff suffered the type of injury that the regulation sought to avoid. The first issue with negligence per se is whether the Notice constitutes a regulation or statute imposing a criminal penalty. It may not and if it doesn't, then negligence per se does not apply. It is possible it will not because nothing in the facts shows there is a penalty for such a violation. Conversely, usually there are large fines for violating these health code notifications and so it may be ok. Thus, if it does satisfy the first element of negligence per se, it has obviously been violated because caterer cooked the chicken at 250 instead of 350 degrees. Further, there was no evidence of an excuse the 250 degree-cooking. Next plaintiff was clearly in the protected class the notice sought to protect; the notice sought to protect patrons from getting sick. Lastly, plaintiff suffered the type of injury the notification sought to avoid; food poisoning. Thus, it is very possible that the court will determine negligence per se applies. But regardless of the outcome with negligence per se, it will likely be held that Caterer breached his duty under the common law negligence standard of care.

(iii) Causation: actual cause and proximate cause. Looking first to actual cause, defendant's negligent act of undercooking the meat was the cause in fact for plaintiff's injury. But for the undercooking of the meat, plaintiff would not have gotten food poisoning. Secondly, is proximate cause. Defendant's act directly proximately caused plaintiff's injury because it was foreseeable that serving undercooked meat to a patron would make the patron sick. Thus, the causation element is satisfied.

(iv) Damages: damages will be clearly established because plaintiff suffered food poisoning as a result of his negligence.

Thus, it is likely that the Patron would succeed in his action for negligence against the Caterer.

(2) Action for Negligence against the Waiter: The patron may have a claim for negligence against the waiter as well, essentially because the waiter observed the caterer's undercooking and ended up serving the food without confirming with the caterer that his mistake had been remedied. Again, for the waiter to be liable, the patron will have to establish the four elements of negligence.

The first element of duty: The waiter likely owes a duty to the patron because the patron is a foreseeable plaintiff within the zone of danger for his act of possibly negligently serving undercooked meat. Further, the standard of care would likely be the common law standard of care because none of the other standards of care apply to a waiter, which is a non-professional. Thus, the standard of care is that of an ordinary, reasonable, and prudent person in the same circumstances as the waiter.

The second element of breach: It is arguable that the waiter breached his duty to the patron. One the one hand, a reasonable and prudent person, after observing that the oven was set too low and the hearing caterer's defensive response to his inquiry, would likely make sure after the order was completed that the owner had remedied his mistake and changed the temperature of the oven because a reasonable person would be aware of the dangers of serving undercooked chicken to a patron. A reasonable person might also notify the owner of the carelessness to which the caterer is cooking, especially since he will only be working there one day. Conversely, a reasonable and prudent person might assume that after warning the caterer of the oven-temperature error, that he would simply correct his error and that the caterer's snappy response merely derived from his embarrassment at undercooking a chicken. Thus, the court

could really go either way in determining whether the duty was breached, but it seems more likely that the court would determine that it was breached.

The third element is causation: The actual cause will be satisfied because but-for the waiter serving the undercooked chicken, the patron would not have gotten sick. However, the proximate cause is more difficult to establish, but still likely will be. Although the waiter did not undercook the meat, his negligence (if it is found) contributed to the patron's injury. The waiter's act is likely said to be an intervening force or negligent act. The waiter's failure to ensure that the chicken was cooked properly contributed to the patron's injury and was within the normal incidents of and the increased risk of his conduct. Thus, while more difficult because it is a more tenuous cause, it is likely the court will determine this element to be satisfied.

The fourth element is damages: this will be satisfied because the patron suffered food poisoning.

Thus, it is likely the patron will succeed against the waiter for a negligence claim.

(3) Action for Negligence against Owner: The patron may have a view actions for negligence against the owner of the restaurant. The first being an ordinary negligence claim under vicarious liability. The second being direct negligence for the negligent hiring and or supervision of the employee. All will be discussed.

The owner can be liable for the negligence of his employees, and even possibly the acts of independent contractors, under vicarious liability. Vicarious liability says that the master may be liable if the acts of his servant were within the course of employment. Generally, an owner or master will not be liable for the intentional torts of his servants or employees, unless the intentional tort was natural in the nature of the job, performed at the request of the master, or for the master's benefit. Here, there is nothing to suggest an intentional tort, but rather negligence.

Above, it has been established that the caterer was negligent, and thus, his negligence may be attributed to the owner. The first important determination is whether or not the caterer is an employee or an independent contractor. This is important because the vicarious liability of the owner differs depending on this. Generally, to determine whether someone is an employee or independent contractor, the courts look to several factors: degree of skill required in the job, who provided the tools and facilities, duration of the relationship, did principal control the means of performing the task, was there a distinct business, etc. Applying those facts to this case, it would appear that the Caterer was more likely an independent contractor. The reason being that the employment was only for one day, it was because the owner's normal cook was out for the day, the owner did not operate that much control over the caterer, the caterer had his own distinct business, and the caterer brought his own knives. Thus, if the caterer is determined to be an independent contractor of the owner, the owner generally is not liable unless one of the two exceptions apply.

An owner is liable for the acts of his independent contractor in two situations: (i) when the independent contractor is performing an inherently dangerous task and (ii) when because of public policy, the principal's duties are non-delegable. The latter of the two exceptions likely applies here. Public policy requires that an owner of an establishment that invites and charges members of the public for certain services must reasonably maintain their premises and ensure they are safe. Thus, just because the caterer was an independent contractor, does not mean that the owner could delegate the duty to maintain his restaurant and make it safe. Thus, the owner will likely be vicariously liable for the negligence of the caterer.

It should be noted, that if for some reason the court finds that the caterer was actually an employee of the owner because he was using the owner's kitchen and cooking the owner's menu items, then the owner would also be liable because the negligence occurred within the scope of his employment: it occurred while cooking on the job for a patron of the restaurant.

The owner may also be vicariously liable for the negligence of the waiter (if the waiter is found to have been negligent), because the waiter is an employee and the negligence occurred while acting within the scope of his employment.

The patron could also sue the owner for his Direct Negligence. Even if the owner is not vicariously liable, he can be directly liable for his own negligence. All persons are generally personally liable for their own negligence. Here, the direct negligence would arise from the owner's negligent hiring and arguably negligent supervision of the caterer. The owner owes a duty to his patrons to employ persons that are qualified and will perform the job responsibly. The patron will argue that the owner negligently hired the caterer because he gave him the job when the caterer was only an acquaintance. Further, the owner did not check the Caterer's references or ask around, which a reasonable person would have done; and if such acts had been done, he would have learned that the Caterer's business had once been shut down by the health department for violations. It was the owner's negligent hiring that was the actual, and very likely, the proximate cause of the plaintiff's injuries. Thus, the patron will likely succeed in this direct negligence claim against the owner.

The patron could also sue the owner for his Direct Negligence for negligent supervision of his employees. This is less probable because although the facts do not state that the owner inspected the caterer's work and watched him perform, it is not unreasonable for an owner to not check the every move of a caterer or chef. That being especially true when the caterer is performing such a standard task as cooking chicken. Thus, while the owner owed a duty to supervise, it was likely not breached. The duty here takes on the standard of care required for invitees: which is that the owner must make reasonable inspections to discover all non-obvious and dangerous artificial and natural conditions. That standard of care does not cleanly apply here, and even if it does, it is not apparent that it has been breached. Further, his failure to supervise may not be the proximate cause, because of the caterer's intervening act that was likely not the normal incidents of a failure to adequately supervise. Thus, it is likely the patron will lose on this claim.

Feb 2014

California Bar Examination

Essay Questions and

Selected Answers

The State Bar Of California
Committee of Bar Examiners/Office of Admissions

180 Howard Street • San Francisco, CA 94105-1639 • (415) 538-2300
845 S. Figueroa Street • Los Angeles, CA 90017-2515 • (213) 765-1500

ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2014

CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2014 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	Subject
1.	Professional Responsibility
2.	Community Property
3.	Civil Procedure
4.	Real Property
5.	Constitutional Law
6.	Remedies

ESSAY EXAMINATION INSTRUCTIONS

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

Q1 Professional Responsibility

Three months ago, Dave was arrested for the burglary of a shoe store after a forensic investigation by the police department identified him as the burglar. Patty, a prosecutor, brought burglary charges against him.

A week ago, Patty saw a press release that the police chief was planning to issue to the media. It stated that Dave was a "transient" and had been "arrested for burglary by Inspector Ing, who is known for his ability to apprehend guilty criminals."

Four days ago, Patty received a report from a federal agency stating that the police department's forensic investigation identifying Dave as the burglar was unreliable.

Three days ago, Patty announced "ready for trial" at a pretrial conference.

Yesterday, Patty learned that two eyewitnesses had identified Dave as the burglar. Because she did not intend to use evidence from the forensic investigation, she did not disclose the federal agency report to Dave's attorney. Dave's attorney has never asked her to provide discovery.

This morning, Patty called the judge who will be presiding over Dave's trial to reassure him that there is ample non-forensic evidence to convict Dave.

What ethical violations, if any, has Patty committed? Discuss.

Answer according to California and ABA authorities.

Answer A

Prosecutors have numerous unique ethical duties as a consequence of their role as public representatives and their power to interfere in the liberty of private persons. In general, a prosecutor has a duty to seek justice, not to secure a conviction at any cost.

Press Release Suggesting That the Accused Is Guilty

A lawyer has a duty not to make any statements that she should reasonably expect to be publicly disseminated and that are substantially likely to prejudice a judicial proceeding. A prosecutor in particular must not broadcast or allow to be broadcast a statement that expresses an opinion regarding the guilt or innocence of a criminal defendant. If a prosecutor knows that an attorney or law enforcement agent under her oversight plans to make such a statement, the prosecutor must make reasonable efforts to prevent the statement from being issued.

Here, the chief of police planned to issue a statement declaring that Dave had been apprehended by a detective "who is known for his ability to apprehend guilty criminals." Patty saw this press release before it was issued and knew that the chief planned to issue it. She therefore should reasonably have expected that it would be publicly disseminated. Patty will likely argue that the statement does not pose any problems, because in it the police chief does not directly express an opinion that Dave is guilty (or innocent). This argument will likely fail. The police chief's statement announces that Detective Ing has a reputation for apprehending guilty parties, which suggests strongly that the chief believes that Dave in particular is guilty. Patty may also argue that she has no duty to prevent the statement because it is attributable to the chief, not to her. This argument will likely also fail. As a prosecutor, Patty has a duty to make reasonable efforts to prevent law enforcement from making public statements that will prejudice a proceeding in which she is counsel. The chief's planned statement suggests strongly that the chief believes that Dave is guilty. This statement would likely prejudice the public against Dave, perhaps making it more difficult to select an unbiased jury. Patty

therefore had a duty to make reasonable efforts to prevent the statement from being made.

Patty may argue that the other portions of the press release are not objectionable. For instance, a prosecutor generally may announce the name of a criminal defendant, the fact of an arrest, and the nature of the charges. That the police chief planned to announce that a person named Dave was arrested for burglary is therefore consistent with Patty's duties with regard to trial publicity, as is the chief's statement that Dave is a "transient." However, the statement that Dave was arrested by a detective who is known for apprehending "guilty criminals" suggests an opinion as to Dave's guilt, and amounts to a violation.

Patty's failure to prevent the chief's statement that Dave was arrested by a detective known for apprehending "guilty criminals" after learning that he planned to make it was a violation of her duty to avoid public statements that may prejudice a proceeding.

Prosecution Despite Lack of Probable Cause

A prosecutor's duty to seek justice requires that she never pursue a charge that she knows is unsupported by probable cause. Probable cause exists when the facts known to the prosecutor are sufficient to allow a person of reasonable prudence and caution in the prosecutor's position to seriously entertain the possibility that the defendant is guilty of the crime charged.

Here, Patty will argue that she has probable cause to pursue Dave's burglary charge to trial. She will note that two eyewitnesses have identified Dave as the burglar, and eyewitness testimony is usually sufficient to make out a prima facie case against an accused. The State Bar would likely point out that Patty did not learn of the eyewitness testimony until yesterday. Before that time, the sole evidence on which the charge was based was the police department's investigation. Four days ago, however, before Patty learned of the eyewitnesses, a federal report revealed that the forensic investigation

was unreliable. The State Bar will argue that, as of this time, Patty lacked probable cause because the sole evidence on which the charge was based had been revealed to be suspect. The State Bar would be correct. In the two days between receiving the federal report and learning of the eyewitnesses, Patty lacked sufficient facts as would justify a reasonable person in believing that Dave was guilty. Instead of continuing to pursue the charge, she should have conducted further investigation to learn whether Dave was likely to be responsible for the burglary charged. Patty may argue that the mere existence of a report calling into question the police department's investigation does not alone establish that the investigation was faulty. This is true, but it does not excuse her conduct. At minimum, the report called the investigation into question. Patty should have pursued that question rather than continuing to rely blindly on the forensic evidence.

Patty's continued pursuit of the burglary charge after receiving the federal report was likely a breach of her duty not to pursue a charge in the absence of probable cause.

Lack of Candor Before the Tribunal

A lawyer's duties to uphold the integrity of the profession and to avoid prejudicing the administration of justice require that she make no false statements to a court in the course of a proceeding. This duty applies to prosecutors as well as to all other lawyers.

Here, Patty announced ready for trial three days ago at a pretrial conference. The day before the conference, she had learned that the sole evidence on which the burglary charge was then based, the police department's forensic report, was unreliable. Rather than announce this fact to the court, however, she told the court that she was ready for trial. Patty may argue that this statement was not a misrepresentation. She may assert that she intended to proceed to trial on the forensic evidence despite the federal report, perhaps in the belief that the report was mistaken. Other facts in this case belie that assertion. After the pretrial conference, as soon as Patty learned that there were eyewitnesses to the charged crime, she abandoned the forensic evidence. This

indicates that she understood that the forensic evidence had limited value, and suggests that Patty did not truly believe that she was "ready for trial" when this evidence was all that was available. On the other hand, if Patty did believe that the forensic evidence was sufficient to proceed to trial, this fact reinforces the conclusion above that Patty breached her duty not to pursue a charge in the absence of probable cause.

Patty likely did not believe that she was ready for trial when she announced as much to the court, a breach of her duty of candor. If she did believe that she was ready when the only evidence available was the unreliable forensic evidence, her announcement of readiness for trial is a breach of her duty not to pursue a charge in the absence of probable cause.

Failure To Disclose Exculpatory Evidence to the Defense

The Due Process Clause of the United States Constitution imposes a duty on every prosecutor to disclose to the defense material evidence favorable on the issues of guilt or punishment. Evidence is "material" if the prosecutor's timely disclosure raises a reasonable possibility that the outcome of the trial would be different than if the evidence had been withheld. The duty to disclose exists even if the defense makes no discovery requests. A prosecutor is responsible for violating this duty even if she did not act in bad faith.

Here, Patty received a report from a federal agency suggesting that the police department's forensic investigation was unreliable. This evidence is favorable to Dave because he can use it to show that the forensic evidence deserves little weight. Patty will argue that the report is not material because she intends to rely on eyewitnesses, and does not plan to introduce the forensic evidence at all. She will assert accordingly that the defense will not be able to use the report to affect the outcome because it does not address the reliability of the eyewitnesses' testimony. This argument will fail. The report allows the defense to attack the reliability of the police department's entire investigation. By demonstrating that the forensic investigation was inept, the defense

will be able to suggest that the police handled the eyewitnesses ineptly as well. Because the defense can use the report to undermine the police department's investigation, a reasonable possibility exists that it could influence at least one juror to vote not guilty, calling for a mistrial. This is sufficient to give rise to a reasonable possibility that disclosure of the report could lead to a different outcome. Patty may also argue that she has no duty to disclose the report because the defense never asked for it. This argument will also fail. A prosecutor has a duty to disclose exculpatory evidence in her possession whether the defense asks for it or not.

Patty's failure to disclose the federal report is a breach of her duty to disclose exculpatory evidence to the defense.

Improper Ex Parte Contact with the Presiding Judge

A lawyer's duty of fair play to her opposing counsel requires that she not engage in any ex parte contact with a judge in order to influence the outcome of a proceeding.

Here, Patty called the presiding judge in Dave's trial to assure him that she has sufficient non-forensic evidence to prove the burglary charge. There is no indication that she announced to Dave's counsel that she intended to make this contact or that she invited Dave to speak with the judge at the same time. This was an improper ex parte contact. Moreover, it was likely intended to influence the judge in the proceedings. That Patty felt the need to reassure the judge that she need not rely on the forensic evidence suggests that she knew or suspected that the judge had misgivings about the forensic evidence. Her reassurance was likely intended to assuage those misgivings. Making this communication in the absence of opposing counsel was a violation of Patty's duty of fair play.

By contacting the presiding judge ex parte in an attempt to influence him regarding the strength of her case, Patty violated her duty of fair play to opposing counsel.

Answer B

Patty's Ethical Violations

Attorneys have a duty to represent their clients with diligence, competence and zealous representation. The attorney must conform their conduct with their client, courts, opposing counsel and other parties within the rules under the Business and Professions code and Ethical codes of conduct. Generally, the ABA and California are the same but I will note when they are different.

Here, Patty as prosecuting attorney has a duty to zealously represent the state and conform her conduct with the professional rules and uphold the integrity of our legal system. Patty has potentially violated some of these rules which will each be discussed in turn below.

Statements to the Public/Media

Patty likely committed an ethical violation when she knew the police chief was planning to issue a press release to the media containing prejudicial statements about Dave that would adversely affect his right to a fair trial and impartial jury.

An attorney may not make extrajudicial statements that would inhibit a defendant's right to a fair trial. An attorney cannot make statements about a trial that would prevent the selection of an impartial jury or prejudice the defendant. It is important public policy that the community not be tainted by these statements to the media; otherwise a defendant will be unable to obtain a fair trial with an impartial jury. However, there are a few matters where an attorney may make a statement to the public such as any defenses to the crime charged and an attorney may respond to accusations by another attorney. In other words, the attorney can make statements in rebuttal of any prejudicial statements made by opposing counsel. Without allowing statements of rebuttal the jury selection would be tainted and prevent a fair trial for the defendant. Statements may also be

made when the police are still conducting an investigation and are seeking help from the public. For instance, looking for witnesses or information regarding persons of interest or whereabouts.

Here, Patty is a prosecutor bringing burglary charges against Dave. Patty is arguably responsible for statements by the police chief as he is the head of the department leading the investigation of the crime for which she is prosecuting. Patty knew of extrajudicial statements before they were made by the police chief because she saw the press release a week ago. As such, Patty has a duty to prevent any extrajudicial statements to the press by the police chief that would adversely affect Dave's right to a fair trial. Furthermore, Patty had knowledge of these statements and she knew of their potential prejudicial effect on Dave the defendant. Dave's attorney may argue Patty knew the police chief's statement contained prejudicial statements about his client because she knew the police chief was going to call Dave a "transient". Dave's Attorney will argue by telling the public Dave is a transient will have a prejudicial effect on the public. The public may infer guilt upon Dave because traditionally in our society being a transient indicates a lack of money and provides motive to rob a shoe store. Patty will counter argue statements as to the potential motive of the criminal act is a permissible statement. Patty cannot argue as a defense these statements were not made in an ongoing effort to solve a crime or gain information from the public and are thus permissible. It is possible the disciplinary boards or the court may not find the "transient" statement to have been so prejudicial as to be an ethical violation by Patty.

The second statement made by the police chief was that Dave was "arrested for burglary by Inspector Ing, who is known for his ability to apprehend guilty criminals." While the first part of the statement announcing Dave was arrested for burglary by Inspector Ing does not appear prejudicial, the police chief crossed the line with the statement "known for his ability to apprehend guilty criminals." This statement would have an extremely prejudicial effect on the public at large because he is stating Detective Ing only arrests those who are guilty criminals. Dave's right to a fair trial and impartial jury are tainted by such statements because it is telling the public by inference

of his arrest he is guilty. Again, as prosecuting attorney Patty had a duty to prevent the police chief from making prejudicial statements about Dave to the public because she had knowledge of his press release he was planning to issue.

In conclusion, it is likely Patty will be found in violation of the ethical code of conduct because she knew of the police chief's press release stating Dave was arrested by Detective known for apprehending guilty criminals.

Malicious Prosecution: Bringing Charges Without Probable Cause

Patty committed an ethical violation by bringing charges against a defendant without sufficient probable cause.

A prosecuting attorney has a duty to not bring malicious actions and may only bring charges supported by probable cause. If a prosecutor initially has probable cause to bring charges but later finds out there is no probable cause (lack of evidence, etc.) then the charges against the Defendant must be dropped. In order to have probable cause there must be facts sufficient to indicate the defendant committed a criminal act. The policy behind this rule is to uphold the integrity of our justice system by only prosecuting individuals when there are sufficient facts to constitute a cause of action. This rule also prevents undue costs and waste of the court’s time.

Here, Patty has made an ethical violation because she proceeded with the charges against Dave even after she learned the forensic investigation identifying Dave as the burglar was unreliable. Patty only initially brought the charges against Dave because of the forensic investigation identifying him as the burglar. This was sufficient probable cause because there was evidence indicating Dave committed a criminal act of burglary upon the shoe store. Thus far Patty has not committed a violation for filing charges against Dave for the burglary. However, four days ago, Patty received a report from a federal agency stating that the police department's forensic investigation identifying Dave as the burglar was unreliable. This negates probable cause to arrest Dave

because there does not appear to be any other evidence linking him to the shoe store burglary. Furthermore, it was a federal agency reporting to Patty that the investigation was unreliable. This should have been a clear indication to Patty that she did not have probable cause and thus charges against Dave should have been dropped. Patty committed a violation when three days later she announced "ready for trial" at a pretrial conference. There are no other facts to indicate Patty had any probable cause to link Dave to the burglary and thus she committed an ethical violation by bringing charges without probable cause.

In conclusion, Patty will be in violation of bringing charges against a defendant with lack of probable cause because she did not have any evidence linking Dave to the burglary and otherwise announced she was ready for trial.

Duty of Diligence and Competent Representation

Patty potentially committed a violation of diligent and competent representation when she knowingly carried out charges against Dave for burglary after learning she no longer had sufficient probable cause.

An attorney has a duty to competently and diligently represent a client with the required skill, knowledge and experience required for the matter.

Patty potentially violated her duty to represent the state diligently and competently because she did not drop the charges against Dave after a lack of probable cause. It can be argued it would have been diligent for Patty to drop the charges against Dave because once the jury is sworn in Dave cannot be charged again due to double jeopardy. If there was a lack of evidence it would have been prudent of Patty to drop the charges and await discovery of further evidence sufficient to support probable cause. This indicates a violation of her diligent and competent representation of the state (and essentially the shoe store) because she is prosecuting a defendant who may have committed the crime but will not be convicted due to a lack of evidence.

False Statement to the Court

Patty made a false statement to the court when she stated she was ready for trial at a pretrial conference but had insufficient probable cause to carry out the charges against Dave for burglary.

However, Patty will argue she did not commit a violation because she had probable cause when she learned that two eyewitnesses had identified Dave as the burglar. Patty will still be in violation because this information was obtained after she told the court she was "ready for trial" at a pre-trial conference. This may be considered a false statement to the court which is another violation of ethical conduct. By falsely telling the court she was ready for trial indicates she still had probable cause to charge Dave. However, Patty did not have sufficient probable cause at the pretrial conference because she received a report from a federal agency stating the forensic investigation identifying Dave as the burglar was unreliable. Again, no other evidence was apparent linking Dave to the shoe store burglary. Furthermore, Patty did not attempt to alert the court to this false statement and it was made knowingly because she knew the report made her forensic evidence unreliable. Thus, Patty made a false statement to the court when she told them she was ready for trial although she had lack of probable cause. By continuing trial this would result in a waste of the court's time and expenses of attorney fees upon the defendant not to mention the stress of facing criminal charges.

Although Patty will argue she had sufficient probable cause because she had two eyewitnesses to identify Dave as the burglar this evidence did not arise until after the statement was made to the court. Patty will not be able to retroactively rectify the fact she made a false statement to the court.

In conclusion, Patty made an ethical violation by giving the court a false statement that she announced she was ready for trial at a pretrial conference.

Disclosure of Evidence to Opposing Counsel

Patty will be in violation of providing exculpatory evidence when she did not disclose the federal agency's report to Dave's attorney.

A prosecuting attorney has a duty to turn over any evidence that is helpful to the defense even outside of discovery requests. This goes towards the policy of providing a defendant with a fair trial giving both parties the same evidence to use in arguing their case. A prosecutor has access to evidence and resources a defense attorney may not have, such as federal agency reports. An attorney who does not disclose such evidence will be found in violation of the codes of ethical conduct.

Here, Patty did not disclose the federal agency report to Dave's attorney. Dave's attorney is likely a public defender since Dave is a transient. The public defender's office may not have access to the federal agency report stating that the police department's forensic investigation identifying Dave as the burglar was unreliable. This evidence is beneficial and essential to Dave's case because it shows the prosecution has no probable cause to bring charges. Essentially the federal agency report making the evidence unreliable is a strong piece of evidence to argue Dave's innocence. Thus, as prosecutor Patty should have disclosed the evidence to Dave's attorney within a reasonable time of its discovery.

Patty will argue that she was not intending to use evidence from the forensic investigation so she did not disclose it to Dave's attorney. She will further argue that Dave's attorney has never asked her to provide discovery so she was not required to disclose the report and could not have committed an ethical violation where there was no duty to disclose. This defense will not stand because Patty as prosecutor had a duty to disclose the beneficial evidence to Dave's attorney of her own accord. Furthermore, Dave's attorney had no indication of knowledge of the report’s existence so he would not have known to ask for it. Thus, Patty remains in violation although Dave's attorney never specifically asked for the document.

In conclusion, Patty committed an ethical violation when she did not disclose the federal agency report which was of benefit to Dave's attorney.

Attorney Work Product Doctrine

Patty will argue the federal agency report is attorney work product doctrine and thus cannot not be turned over to Dave's attorney because of privilege. However, it is likely Dave's attorney can show undue hardship without the production of the federal agency report and thus Patty must turn over the report or will be in violation.

An attorney's work product of their thoughts, opinions, legal conclusions, labor or investigation by an agent falls under privileged information and is not discoverable by opposing counsel. However, when an attorney can show (i) a substantial need for the information or document and (ii) an undue hardship (such as excessive costs) and inability to reproduce the same document the court may grant an exception this rule. In California, the attorney needs to show a reasonable and compelling reason for the need to disclose the evidence. However, the information must be redacted (blacked out, crossed out) of any conclusions, opinions, thoughts about the case made by the attorney to whom the document belongs. This ensures the attorney's thoughts and any privileged information between themself and a client remains undisclosed to the opposing counsel.

Here, Dave's attorney will argue there was a substantial need for the information because it is proof his client is being wrongly accused for the shoe store burglary. Furthermore, Dave's attorney will have to show an undue hardship in obtaining the federal agency report and show he does not have access or it would be a great expense to duplicate the report. If the court were to grant the request then Patty's opinions, thoughts or legal conclusions about the case must be redacted or crossed out, thus keeping Patty's privilege intact and preventing inadvertent disclosures of client communications or her own legal conclusions.

In conclusion, it is likely Dave will have access to the federal agency document and Patty cannot use it in defense of her ethical violation of non-disclosure.

Extrajudicial Statements to a Judge

Patty committed an ethical violation when she made an out-of-court statement without the presence of counsel regarding the trial to the presiding judge.

An attorney may not make extrajudicial statements to the presiding judge regarding the case matter (outside of logistical issues) without the presence of other counsel or their knowledge. This prevents a prejudicial effect on the judge who will be presiding over the case and protects the defendant's sixth amendment right to a fair trial.

Here, Patty called the judge who will be presiding over Dave's trial to reassure him that there is ample non-forensic evidence to convict Dave. This is a statement out of court because Patty called the judge by telephone. Furthermore, Patty's statement was made to the judge without the presence of Dave's attorney. Patty's statement to the judge was regarding a matter for trial when she was telling the judge about evidence not yet admitted or presented at trial. Patty also "reassured" the judge there was ample non-forensic evidence to "convict" Dave. This statement puts in the mind of the judge Dave is guilty. Dave may waive his right to a jury trial and have a bench trial where the judge decides whether or not he is convicted. Thus Patty has given the judge information about the evidence not yet presented at trial. This was a clear ethical violation by making a prejudicial statement to the judge presiding over the burglary case and outside the presence of Dave's attorney.

In conclusion, Patty committed an ethical violation when she gave prejudicial information outside of trial to the judge that there was ample non-forensic evidence to convict Dave.

Q2 Community Property

Hank and Wendy are residents of California. Hank is a teacher and Wendy is an accountant.

In 2008, Hank and Wendy married. After their wedding, Wendy's mother deeded them a house as joint tenants. They moved into the house and used their earnings to furnish it in a lavish style, including an antique mirror in the entryway. One day, Hank gave the mirror to a friend who had admired it on a visit to the house.

In 2012, Wendy purchased a small office building where she established her own accounting practice. She paid for the building with funds saved from her earnings during her marriage and took title in her name alone.

In 2013, Hank and Wendy separated. Hank told Wendy that the house was henceforth her separate property and she said, "O.K."

After the separation, Wendy's income from the accounting practice tripled and she remodeled the office building with her increased earnings. Without Hank's knowledge, she then sold the building to Bob, who did not know that she was married.

In 2014, Wendy initiated dissolution proceedings.

1. What are Wendy's rights, if any, as to the antique mirror? Discuss.

2. What are Hank's and Wendy's rights, if any, as to the following:

    a) The house? Discuss.

    b) The accounting practice? Discuss.

    c) The office building? Discuss.

Answer according to California law.

Answer A

Community Property Generally

Since Hank and Wendy are residents of California, the law of California will be applied in their divorce proceeding. California is a community property (CP) state. The general presumption is that all property acquired by either spouse during the marriage, real or personal, is CP. On the other hand, all property that is acquired by gift, bequest, devise or descent is considered separate property (SP) of the spouse who received it. In this case, the ownership of each of the assets will depend on whether the CP presumption controls, or the actions of the parties or some other presumptions have changed the character of the property. Each asset will be discussed separately below.

The Mirror

The first issue is whether Wendy has any rights in the antique mirror that Hank gave away to his friend. In this case the mirror was acquired during the marriage, and was purchased using the earnings of both parties; therefore the mirror is considered CP. There are no facts to indicate that the parties changed the character of the mirror and therefore the CP presumption is controlling.

Gift To the Friend

The issue here is whether Hank has fully disposed of the mirror by giving it away to his friend. After 1-1-1975, both spouses to the marriage acquired the rights to equal management and control of the marital assets. Under the rules regarding the rights of equal management and control, one spouse may not make a gift of CP without the consent of the other spouse.

Here, Hank gave the friend the mirror, and there is no indication that he asked for Wendy's permission before doing so. Hank may argue that although spouses may not

make gifts of CP without the other spouse's permission, the general rule is that the parties can dispose of personal property. On the other hand, the general rule is that spouses may not dispose of personal property without the consent of the other spouse, for less than fair market value. Here, the facts indicate that the parties decorated their house in a "lavish style" and that the mirror was an antique; therefore it is reasonable to assume that this antique mirror was fairly valuable. Since Hank merely gave the mirror to a friend, and received no consideration for the gift, he has breached his spousal fiduciary duty owed to Wendy. The gift to the friend was improper.

When one spouse makes an improper gift, the other spouse has a right to set aside the gift. In this case, if Wendy were trying to contest the gift during the marriage, she could set aside the entire gift. However, at divorce, a spouse only has a right to set aside one-half of the gift, because the parties each have a one-half interest in all CP. In this case, Wendy would be able to set aside one-half of the gift at divorce. Since the gift was of personal property and a mirror cannot be physically divided, the court will probably value the mirror and award Wendy one-half of its value through another source of money during the dissolution.

The House

Next, the court must determine how to characterize the house that was given to Wendy and Hank sometime after 2008. Since the parties were married in 2008 and the house was acquired afterwards, it is presumed to be CP. However, in this case, the house was received as a gift. The facts indicate that Wendy's mother deeded it to them as joint tenants. As discussed above, gifts during the marriage are considered to be SP of the spouse receiving the gift. In addition, when parties own property in Joint Tenancy, during the marriage it is classified as two SP halves. Therefore, during the marriage, this house would be considered two SP halves owned by each spouse.

Actions By the Parties

The issue here is whether the discussion between Hank and Wendy in 2013 changed the character of the house. Here, the facts indicate that Hank told Wendy that the house was "henceforth her SP" and that Wendy said "ok." This is an attempt at a transmutation. A transmutation is an action by the spouses to change the character of the property that the spouses already own.

Prior to 1985, transmutations could be of the most informal character, including orally. Here, there was an oral agreement to transfer the house to Wendy's SP at the couple's separation in 2013. If this was prior to 1985, this would be valid. However, modernly a transmutation is not valid unless it is in writing, indicates that there is a change in the character of the property, and is signed by the adversely affected party. In this case, Hank would be the adversely affected party because he would be abandoning his one-half interest in the property and giving it to Wendy. However, since there was no signed writing, this oral promise to change the character of the property to Wendy's SP is unenforceable.

Anti-Lucas Legislation

Since the transmutation was ineffective, the court must now determine how to divide the property at dissolution. Here, the property is held in joint tenancy, which is inconsistent with the basic CP presumption that all property acquired during the marriage is CP. However, under the Anti-Lucas Legislation, for purposes of dissolution only, all property held jointly is treated as CP. This presumption can only be overcome by a statement in the deed that the parties intend to hold title differently or a written companion agreement. In this case, the mother merely deeded the property to the spouses as a gift. It is unlikely that they literally intended for the property to be owned one-half by each of them as their SP. In addition, there is no written agreement indicating otherwise. Therefore, the house will be treated as CP. Since the house is treated as CP at dissolution, both Hank and Wendy have a one-half interest in the property.

The general rule is that at divorce, CP should be divided equally in kind. However, the court can fashion other relief if necessary. In this case, since Hank evidenced an intent to give the house to Wendy, the court may allow Wendy to keep the house, and just award Hank the value of one-half of the house.

The Accounting Practice

Next, the court will address the accounting practice of Wendy's. Although Wendy was an accountant prior to the marriage, the facts indicate that she established her own practice in 2012 during the marriage. Since the work of a spouse is considered CP labor, the earnings a spouse earns from work are CP funds.

Calculating the Value Of the Business

When there is a spouse that has a SP business, the court must determine how to allocate the business and the earnings from the business. The court does this by applying one of two formulas, each of which will be discussed below.

Pereira

Under the Pereira formula, the court takes the initial investment of the spouse, multiplies it by a simple and arbitrary interest rate (typically 10%) and then multiplies that by the number of years the spouse worked in the business during the marriage. That figure is considered to be a rate of return on the initial investment, and is awarded to the spouse who started the business with her SP, the remaining amount is considered CP.

Van Camp

Under the Van Camp formula, the court will calculate a reasonable rate of earnings for the working spouse, and multiply that by the number of years the spouse worked during the marriage. This figure would then be awarded to the community as CP. The

remaining funds would be considered SP of the spouse, and attributable to standard increases in value to the business due to the market.

In general, the court will use the Pereira formula when the increased value of the business was attributable to the work of the spouse in the business. In contrast, the courts will use Van Camp when the increase in value of the business is due to the overall market economy.

In this case, however, it does not appear that the court would use either approach. The facts indicate that the business was opened during the marriage, using money that Wendy had earned during the marriage. Because the money was earned during the marriage, the business itself is considered CP and not Wendy's SP. Therefore, the accounting business as of 2013 should be considered CP and should be divided equally between the parties at dissolution.

Post-Separation Earnings

In this case, the facts indicate that the earnings of the accounting practice tripled after the separation. The general rule is that marital community ends when there is physical separation of the parties with no intent to rekindle the relationship. Here, the facts indicate that the parties separated in 2013. It is unclear whether there was physical separation, but since Hank told Wendy that the house was her SP, it is likely that he moved out of the house at that time. If the court finds that 2013 was the date the marital community ended, then no CP could be established after that time, and all of the increased earnings in the accounting practice would be Wendy's SP. If the court finds that there was no true separation until 2014 when Wendy filed for divorce, then the accounting practice value as of 2014 would be divided equally between the parties as CP earned during the marriage. But, under these facts, it is most likely that the court will find that 2013 was the date that the marital community ended, and award the increased profits to Wendy as her SP.

The Office Building

Last, the court must determine the character of the office building in order to determine if Hank has any interest in it, notwithstanding the fact that Wendy sold it to Bob.

The property was acquired during the marriage using funds from Wendy's earnings; therefore the office building is initially characterized as CP.

Actions Of the Parties

The issue here is whether the general CP presumption can be rebutted since Wendy took title to the property in her name alone. Under California law, there is a form of the title presumption, which holds that the holder of record title to a property is presumed to be the true owner. In this case, Wendy will argue that the property is hers because she took title in her name alone, and therefore the form of the title prevails.

However, in order for the form of the title presumption to apply, the title must itself have evidentiary value. In this case, the title may not prevail, because there are no facts to indicate that Hank agreed to her taking title in her name alone. Wendy may argue that since the office was purchased with CP earnings, the community made a gift to her and she could take the property as her SP. However, there are no facts to support this. There is no evidence to show that Hank knew that she took title in her name alone, let alone that he agreed for her to do so. Therefore, the title will not be controlling. Since the property was acquired with CP funds, the property will be considered CP.

Post 2013 Actions

Although the property will be classified as CP, the court must determine how to handle the fact that Wendy remodeled the business with her increased earnings after the date of separation. As discussed above, all property that is acquired after the date of

separation is considered to be SP of the acquiring spouse. In this case, Wendy's earnings from her accounting practice post 2013 are characterized as her SP.

SP Improvements To CP

Since the money used in the remodel was Wendy's SP, the court will treat this as a SP improvement to a CP asset. Historically, if a spouse contributed SP to a CP asset, it was considered a gift. However, modernly the general rule is that if a spouse contributes SP to a CP asset, he can be reimbursed for SP down payments, loan reductions, and improvements. Here, Wendy remodeled the office building and therefore this will be characterized as an improvement. Wendy will then be entitled to reimbursement to her SP for either the cost of the improvement, or the increased value to the building because of the improvement.

The Sale to Bob

In this case, the classification of the office building is slightly complicated by the fact that Wendy sold the property to Bob. The general rule is that when disposing of CP real property, both spouses must participate in the sale and sign the appropriate documents. However, in this case, the facts indicate that Wendy sold the house without Hank's knowledge, which means he clearly did not participate in the sale. Here, it was easier for Wendy to do this, because the house was titled in her name alone and therefore Bob was unaware that she was married.

When a spouse disposes of real property without the consent of the other spouse, the injured spouse can set aside the sale if it is done within one-year of the sale. In this case, the facts are not clear when exactly the sale took place, but it was sometime between 2013 when they separated and 2014 when Wendy initiated divorce proceedings; therefore one year has not passed. Hank may be able to set aside the sale once the court makes the determination that the office building was in fact CP. On the other hand, since Bob did not know that Wendy was married and he bought the

building for consideration, he is considered a bona fide purchaser. The court may not want to injure Bob by voiding the sale, so the court may instead award Hank the value of one-half of the building.

Spouse's Obligations to Each Other

As discussed above, spouses have equal management and control of the CP assets. In addition, spouses are in a reciprocal fiduciary relationship with each other, and therefore owe each other a duty to act fairly and honestly with each other. If the court finds that Wendy acted fraudulently when she took title in her name alone and when she sold the property to Bob without Hank's knowledge, then the court could penalize her for this fraudulent behavior for breaching her fiduciary duty to Hank. Since the fiduciary duty continues until the assets have been fully divided in dissolution proceedings, Wendy still owed Hank this duty as of the date that she sold the property. However, absent a showing of fraud, the court will divide all of the assets as discussed in detail above.

Answer B

California is a community property state and all property acquired during a marriage and before permanent separation is presumed to be community property ("CP"). Any property acquired by either spouse before marriage or after permanent separation is presumed to be separate property ("SP"), as is any property acquired by either spouse by gift, devise or bequest. At divorce, a court generally will award each spouse one-half of the CP in kind.

1. What are Wendy's rights, if any, as to the antique mirror?

The issue to be considered in determining Wendy's rights, if any, in the antique mirror, is whether the antique mirror is CP and whether Hank had a right to give the mirror to his friend.

The mirror is CP. Any property acquired during Hank and Wendy's marriage with CP is presumed CP. Earnings of either spouse are considered CP. Because the mirror was purchased with Hank and Wendy's earnings, it will be CP.

Under California law, both spouses have equal rights to manage and control CP. Thus, one spouse may not dispose of a piece of CP without the permission of the other spouse. Because Hank did not seek Wendy's permission in making a gift of the mirror, the gift is invalid and Wendy may try to rescind the gift and reclaim the mirror as CP. In the alternative, if the mirror is not recoverable, Hank may be required by the court to reimburse the community for the value of the mirror. Thus, in any event, unless Wendy consented to the gift, Wendy will retain her one-half interest in the antique mirror.

2. What are Hank's and Wendy's rights, if any, as to the following:

a) The house?

To determine Hank's and Wendy's rights, if any, in the house, we must determine whether the house is CP and whether any subsequent action altered that characterization.

The house was deeded to Hank and Wendy after their marriage as joint tenants. Under California law, any property held by husband and wife as joint tenants is presumed to be CP as holding in joint tenancy is antithetical to SP status; however, if the property is purchased or improved with SP, the SP is entitled to reimbursement from the community on divorce. (In contrast, on death, Lucas holds that any contribution by SP to property held in joint tenancy is a gift and there is no right to reimbursement.) The fact that Wendy's mother deeded the house to Hank and Wendy will not overcome the presumption that property held in joint tenancy will be considered to be CP. Although property given as a gift to one spouse (as one might have assumed Wendy's mother would have done) will be presumed to be SP, here Wendy's mother explicitly deeded them the house as joint tenants. Hence, it will be presumed to be CP as discussed above. Thus, prior to separation, each of Hank and Wendy had a one-half in kind interest in the house.

After the separation (which I presume for purposes of this question is a permanent separation as there are no facts to the contrary indicated in the question), Hank told Wendy that the house was henceforth her separate property and she said "O.K." In order to effectively transmute property that is CP to SP, and vice versa, under California law a valid transmutation agreement is required. Prior to 1985, an oral agreement could be effective to transmute property. However, after 1985, a transmutation must be in writing to be valid. As the purported agreement to cause the house to be SP occurred in 2013, it will be invalid. Thus, the house will remain CP and each of Hank and Wendy have a one-half in kind interest in it.

b) The accounting practice?

To determine Hank's and Wendy's rights, if any, in the accounting practice, we must determine whether the accounting practice is CP and whether any subsequent action altered that characterization.

Wendy established her accounting practice during the marriage with her labor. Any property acquired during Hank and Wendy's marriage with CP is presumed CP. Labor and earnings of either spouse are considered CP, and any goodwill created during the marriage and before permanent separation is CP. Although California allows the value of a business to be divided between SP and CP where the business was originally SP and appreciated during marriage, those rules (e.g., Pereira and Van Camp) will not apply here as the practice was established during the marriage. Thus, the value of the accounting practice that accrued until permanent separation is CP, and each of Hank and Wendy will be entitled to a one-half in kind interest therein.

However, here the facts state that Wendy's income from the accounting practice tripled after the separation. All property acquired after permanent separation is SP, including labor and wages of each spouse. Thus, Wendy's increased income post-separation and the post-separation increase in value to the accounting practice (because attributable to Wendy's labor) will be Wendy's SP and Hank will not have any interest therein.

c) The office building?

To determine Hank's and Wendy's rights, if any, in the office building, we must determine whether the office building is CP and whether any subsequent action altered that characterization.

The office building was purchased by Wendy in 2012 with funds from her earnings during marriage and she took title in her name. Under California law, all property acquired during marriage is presumed to be CP even if titled in one spouse's name. Here, we know that Wendy purchased the office building with her earnings during the

marriage. Under California law, such earnings are CP. Thus, because the office building was purchased with CP it will be CP notwithstanding that title is in Wendy's name alone, the presumption that the office building is CP will not be overcome, and as of separation each of Hank and Wendy have a one-half in kind interest in it.

After separation, there are two issues to consider to establish Hank and Wendy's respective rights with respect to the office building.

After permanent separation, Wendy's earnings become SP. The issue is whether Wendy's. Under California law, when CP is improved with SP, the property remains CP but the SP is entitled to a right of reimbursement from the community. Here, after separation when Wendy remodeled the office building with her increased earnings, she was entitled to reimbursement from the community for any increased value to the office building that resulted.

Wendy subsequently sold the office building to Bob, who did not know she was married. The issue is whether that sale is valid or whether it can be rescinded. Under California law, both spouses have equal rights to manage and control CP. Thus, one spouse may not dispose of a piece of CP without the permission of the other spouse. Where, as here, one spouse sells CP without the consent of the other, the sale may generally be rescinded within the first year, unless the sale is made to a bona fide purchaser. A bona fide purchaser ("BFP") is a purchaser for value who takes without notice of the claims of any other person. In the context of community property, to be a BFP a purchaser must not know that a seller is married. Here, we know that Bob did not know Wendy was married and the deed was in her name alone. Thus, he did not have notice of Hank's interest in the property and will be a BFP. Because Bob is a BFP, the sale cannot be rescinded. Even so, Wendy will be required to reimburse the community for the purchase price (although, as noted before, she will herself be reimbursed for the value of her SP improvements).

Thus, although neither Hank or Wendy will have an interest in the office building itself, Hank will have a one-half interest in the purchase price of the office building (less the value of the remodeling, if any) and Wendy will have a one-half interest in the purchase price of the office building and a right to be reimbursed for the costs of the remodeling.

Q3 Civil Procedure

Paul, a resident of State A, had worked as a manager at the only hotel in State A owned and operated by Hotel, Inc. (Hotel), a large national chain. Paul's compensation was $100,000 per year. Hotel was incorporated in State B, where the majority of its hotels are located. Hotel's main corporate offices are located in State C.

Hotel terminated Paul's five-year employment contract when it had two years remaining. Paul immediately found new employment with compensation of $90,000 per year.

Paul timely sued Hotel in state court in State B, alleging wrongful termination of his employment contract. In his complaint, he sought reinstatement or, in the alternative, damages of $200,000 for the two years remaining on his employment contract at the time of termination. In State B, the measure of damages for wrongful termination of an employment contract is the amount a plaintiff would have earned absent the termination, less what the plaintiff actually earned during the post-termination contract period.

After the complaint was served on Hotel at its main corporate offices in State C, Hotel timely removed the case to federal district court in State B. Paul then filed a motion in federal district court to remand to state court. The federal district court denied the motion. Paul appealed the denial to the federal court of appeals.

Paul meanwhile filed a motion in the federal district court for an injunction requiring Hotel to reinstate him to his job. The federal district court granted Paul's motion and issued the injunction. A month and a half later, Hotel appealed the injunction to the federal court of appeals.

1. Did the federal district court correctly deny Paul's motion to remand the case to state court? Discuss.
2. How should the federal court of appeals rule on Paul's appeal? Discuss.
3. How should the federal court of appeals rule on Hotel's appeal? Discuss.

Answer A

1. Did the Federal Court properly deny Paul's Motion to Remand?

The answer to this question is no. The remand should have been granted.

(a) Diversity Jurisdiction

The issue is the nature of the federal court's jurisdiction in this case. Article III of the Constitution limits the jurisdiction of the federal courts to specific types of jurisdiction, that is, jurisdiction based on diversity of citizenship and jurisdiction based upon questions of Federal law. There are no Federal laws raised in this fact pattern, so the basis for jurisdiction must be diversity of citizenship. The other areas of justiciability will not be discussed here as they appear to be satisfied (i.e. Paul has standing to bring a claim that ripe for resolution, satisfying standing, mootness, ripeness, and a case or controversy, because he was terminated, harmed and the harm is complete).

To establish diversity jurisdiction, every plaintiff must be diverse from every defendant, based upon a party's domicile if it is an individual person, or a corporation's state of incorporation and/or principal place of business, if it is a corporation. An individual may only have one domicile; a corporation may have up to two: its state of incorporation and where it conducts its principal place of business.

Here, Paul is a resident of State A. Hotel, Inc. is incorporated in State B, so Hotel is a resident of State B. Hotel's "main corporate offices" are located in State C. If we assume that "main corporate offices" is equivalent to the corporation's "nerve center" or locus of operations, then Hotel is also a resident of State C.

Hence, it is a citizen of State A v. a citizen of State B and State C, even though there is only one defendant.

The Federal diversity statute (28 USC 1332) not only has a citizenship test; it also has an amount in controversy test. This means that the amount in controversy for a cause of action (or aggregated causes of action) must be greater than $75,000, exclusive of interest and costs. If a plaintiff alleges such an amount, the court will generally not look behind that amount, unless it amounts to a legal certainty that plaintiff cannot recover it.

Here, Paul has asserted a claim for damages as a result of the breach of employment contract for $200,000 for the two years remaining on his employment contract or, in the alternative, he seeks reinstatement, which means he wants his old job back.

We are told that the law in State B is that the measure of damages for wrongful termination of an employment contract is the amount a plaintiff would have earned absent the termination, less what the plaintiff actually earned. Here, Paul has mitigated as he was contractually required to do and found new employment for $90,000 per year. But this will not defeat the amount in controversy for several reasons. First, Paul seeks as one of his remedies reinstatement to a job valued at $100,000 per year for two years — thus readily satisfying the "value of his complaint" in excess of $75,000. In addition, we do not know to a "legal certainty" that Paul will actually be employed by the new employer at $90,000 per year for the next two years. He might be fired again or he may not like the job and quit — perhaps it isn't a truly comparable position. And finally, it isn't even abundantly clear that State B law will apply. Paul was working in State A and he is a resident of State A. Generally speaking, the law of the state in which an employee performs services governs employment contract disputes (unless provided otherwise in the employment agreement). Accordingly, the amount in controversy is satisfied.

(b) Removal

A party is permitted to remove an action to federal court from state court pursuant to 28 USC 1441 if federal jurisdiction exists and the party acts to effectuate

removal within thirty days after receiving notice (not service) of a state court action upon which removal may be based. A removal is effective upon the filing of the notice of removal in state court. The action will then proceed as an originally filed federal action thereafter, except certain pleading timing rules are modified. But there is one other requirement not met here: only nonresident defendants may remove.

Hotel is a resident of both State B (where it is incorporated) and State C (its principle place of business). The case was filed in state B state court. Because Hotel is a resident of State B, Hotel cannot remove a case from State B court to a Federal court in State B, and the court should have granted Paul's motion to remand.

2. Paul's Appeal of the Denial of Remand

The Federal court of appeals should dismiss Paul's appeal because a denial of remand is not a final judgment from which an appeal may be taken to the Federal Circuit Court of Appeals ("CTA"). It would rather be deemed to be an interlocutory appeal. With a few limited circumstances, one of which is discussed below, a litigant may only prosecute an appeal to the CTA upon the issuance of a final judgment by the district court (i.e., final judgment after trial, a dismissal of a case pursuant to Fed R. Civ P 12b6 or a Fed. R. Civ. P. 56 summary judgment motion). Exceptions may exist, i.e., the district court may give permission to a litigant to file an appeal prior to a final judgment if it appears that it would be more efficient to proceed in that manner, i.e., the CTA may upon ruling, direct the district court to proceed in a particular manner that might impact the trial of the case. A denial of a motion to remand, however, is not an immediately appealable order and absent permission from the district court, it will not be entertained by the CTA. Paul otherwise must wait until the matter is concluded.

3. Hotel's Appeal of the Injunction

The CTA will deny Hotel's appeal as untimely. But it otherwise would have likely sustained Hotel's appeal on substantive grounds.

A party has thirty days to appeal from a district court's judgment or appealable order to the CTA. Here, we are told that Hotel did not appeal the injunction until a month and a half after its issuance. Hotel was late. Injunctions are an exception to the final judgment rule — if a party is mandated by a federal court to do something, that party may immediately (or within thirty days) appeal that order. This order is in the nature of a mandatory injunction.

A mandatory injunction differs from a prohibitory injunction in that the federal court mandates or orders a party to act. A prohibitory injunction is an injunction based upon a directive to a party to cease doing something. In this case, the court has ordered Hotel to reinstate Paul to his position as manager at Hotel A. This effectively requires Hotel to reinstate an employee it has just fired.

Courts typically do not grant mandatory injunctions for personal services contracts, like the one at issue here. There are several reasons for this view. It is simply not feasible to enforce these orders: requiring an employer to have an employee on the premises who may or may not discharge his work obligations may impact the employer's business. This is particularly apt here where the employee is a manager at a hotel — he may well come into contact with the public and may be in a very sensitive position. Second, a mandatory injunction in this context inserts the court directly into the business of the employer — it just isn't feasible for a court to determine whether the employee is being treated well, paid right, advanced, compensated, managed properly, carrying out the Hotel's instructions, etc. Setting those policy issues aside, however, there is an adequate money damages remedy here — a written employment contract with two years remaining, and clearly sets compensation for those two years (regardless of mitigation issues or which state's law applies). And there is no irreparable harm — again, even on balance of all the interests here, this a simple breach of employment contract case, remedied easily through money damages. Balancing the harms, as the court would do on an injunction, clearly favors Hotel: it is far more burdensome to require Hotel to take back Paul and supervise him where Paul

can ultimately recover a money judgment against a presumably solvent defendant, a large national hotel chain.

Answer B

Denial of Motion to Remand

The federal court erred in denying Paul's motion to remand to state court.

In order for a case to be removed to federal court, the federal court to which the case is removed (the district court for the district in which the state court is located) must be a court in which the case originally could have been filed. This requires that the court have subject matter jurisdiction, personal jurisdiction over the defendant, and that venue be appropriate in that court.

Subject matter jurisdiction can be based either on diversity jurisdiction or federal question jurisdiction. Federal question jurisdiction exists when, from the face of a well-pleaded complaint, plaintiff's claim "arises under" federal law. Here, there is no basis for federal question jurisdiction. Paul's claim is one purely in contract, based on a state law cause of action for wrongful termination. There is no indication whatsoever from the facts that his claim arises under federal law or that he is enforcing any federal right. Accordingly, there is no federal question jurisdiction.

Accordingly, the federal court can have jurisdiction only if there is diversity jurisdiction. Diversity jurisdiction is present in a suit between citizens of different states where the amount in controversy is at least $75,000. First, it does appear that Paul and Hotel, Inc. are citizens of different states. An individual is a citizen of the state in which he is domiciled, i.e., where he resides and intends to remain permanently. Here, the facts indicate that Paul is a resident of State A, and there is nothing to indicate that he resides in any other state or does not intend to remain permanently in State A; thus, he is a citizen of State A for purposes of diversity jurisdiction. A corporation, by contrast, is a citizen of both (1) the state in which it is incorporated and (2) the state in which it has its principal place of business, i.e., its "nerve center" from which responsible managers control the corporation's affairs. Here, Hotel is incorporated in State B, and its main

corporate offices are in State C. There is no indication from the facts that Hotel has its principal place of business in another state, and it thus appears that its principal place of business would be its corporate offices in State C. (It is certainly clear that Hotel does not have its principal place of business in State A, in which it has only a single hotel.) Thus, Hotel appears to be a citizen of both State B and State C for purposes of diversity jurisdiction. Therefore, Paul and Hotel are citizens of different states, and there is the requisite "complete diversity" for purposes of diversity jurisdiction.

However, it is unclear that the requisite $75,000 amount in controversy is satisfied on these facts. Paul's complaint advances claims for both damages and injunctive relief. When damages are at issue, the plaintiff's good faith assessment of damages will govern the amount-in-controversy analysis, unless it appears clear to a legal certainty that those damages are unobtainable. With respect to injunctive relief, the monetary value of the relief can be based on the greater of either (1) the benefit to the plaintiff or (2) the harm to the defendant.

Here, Paul's claim for damages does not appear to satisfy the amount-in-controversy. A plaintiff seeking damages is entitled only to his expectation damages (as well as incidental damages). Every plaintiff has a duty to mitigate damages, which Paul did here by obtaining another job at a rate of $90,000 per year. Accordingly, expectation damages — which are designed to return the plaintiff to the position he would have occupied absent the breach of contract — would be only $10,000 per year, or $20,000 total. It appears that State B has adopted this measure of damages and, under the Erie doctrine, State B's substantive law should apply to this case, since a federal case sitting in diversity is obligated to apply a state's substantive law. There is no federal law in direct conflict with State B's rule of damages; accordingly, it is necessary to consider whether applying State B's damages computation methodology would be outcome determinative, whether it would lead to forum shopping (causing plaintiffs to flock to federal court), and whether the state has a particular interest in having its law applied. It is clear based on these factors that the damages methodology is substantive in nature and should be applied — the amount of damages that a plaintiff can recover in a matter

are certainly outcome determinative, are highly likely to affect a plaintiff's choice of forum, and reflect the state's policy determination as to the matter at issue. In any event, the value of Paul's monetary damages claim is the same — and short of the amount in controversy requirement — whether one applies general contract law principles or State B's damages rule.

However, the injunctive relief Paul seeks does satisfy the amount-in-controversy requirement. If the injunction were granted, the benefit to Paul would only be the additional $20,000 in income over the next two years; but if granted, the harm to Hotel would be in the amount of $200,000, i.e., the two years of additional salary that it would be required to pay to Paul. Accordingly, the $75,000 amount in controversy is satisfied.

Nevertheless, although both requirements for diversity jurisdiction are met here, the federal district court erred in denying Paul's motion to remand. A defendant (or defendants) may not remove a case from state court to federal court if any defendant is a citizen of the forum state. Here, as discussed above, Hotel is a citizen of State B. Thus, Hotel was not entitled to remove the case, removal was procedurally improper, and the district court should have granted Paul's motion to remand.

Paul's Appeal

The Court of Appeals should refuse to hear Paul's appeal.

As an initial matter, a grant of a motion to remand is never appealable. Here, by contrast, the district court denied Paul's motion. However, under the final judgment rule, one has a right to appeal as of right only from a final judgment of the district court. A final judgment is one that is final as to all claims at issue and all parties involved, i.e., one that leaves nothing more for the trial court to do. A denial of a motion to remand is not such a final judgment, and is thus not appealable as of right.

Moreover, there is no indication in the facts that any of the exceptions to the final judgment rule apply here. For example, the Court of Appeals may choose to hear an appeal based on the "collateral order doctrine" where a decision of the district court is collateral to the merits of the case, involves an important issue of law that has been finally decided, and the party appealing would be effectively precluded from achieving review of the decision absent an immediate appeal. Here, however, while the district court's denial of Paul's motion to remand is collateral to the merits of the case and final, Paul will have the opportunity to obtain appellate review of that decision through a normal appeal at the conclusion of the matter. Accordingly, the collateral order doctrine does not apply. Nor is there any indication from the facts that the district court has certified this ruling for immediate appeal under the Interlocutory Appeals Act (or that the Court of Appeals has accepted such an appeal), or that any statutory exception to the final judgment rule applies.

Hotel's Appeal

The Court of Appeals should dismiss Hotel's appeal, because it is untimely.

As an initial matter, the order granting Paul's requested injunction is an appealable order. Although the grant of this motion would otherwise not be a final judgment under the final judgment rule, there is an exception for orders granting, modifying, or dissolving injunctions. Accordingly, though the case remains pending, the district court's order granting Paul's motion for an injunction was an appealable order.

However, Hotel, Inc. did not timely appeal from the district court's order granting Paul's injunction. A party must appeal within 30 days of an appealable order. Here, the facts indicate that Hotel, Inc. noticed its appeal "[a] month and a half later." The facts do not contain any indication of excusable neglect on Hotel's part, and Hotel's appeal should thus be dismissed as untimely.

Q4 Real Property

Jane owned a machine shop. It had one slightly buckled wall. It had been built years prior to Town's adoption of a zoning ordinance that permits office buildings and retail stores, but not manufacturing facilities.

Ira purchased the machine shop from Jane for $500,000. He gave her $50,000 in cash and a promissory note for an additional $50,000 secured by a deed of trust. He borrowed the other $400,000 from Acme Bank (Acme), which recorded a mortgage. Acme was aware of Jane's promissory note and deed of trust prior to the close of escrow.

Donna owns a parcel adjoining Ira's machine shop. She recently began excavation for construction of an office building. Ira complained to Donna that the excavation was causing the shop's wall to buckle further, but she did nothing in response.

Shortly thereafter, Ira's machine shop collapsed. Ira applied to Town for a building permit to rebuild the shop, but Town refused. He then defaulted on his obligations to Jane and Acme.

Ira has sued Donna seeking damages, and he has sued Town seeking issuance of a building permit. Acme has filed a foreclosure suit against Ira, and Jane has demanded a proportionate share of the proceeds from any foreclosure sale.

1. How is the court likely to rule on Ira's claim for damages against Donna? Discuss.

2. How is the court likely to rule on Ira's request that Town issue a building permit? Discuss.

3. How is the court likely to rule on Jane's claim for a proportionate share of the proceeds from any foreclosure sale? Discuss.

Answer A

1. Ira's Claim for Damages against Donna

Ira owned the machine shop that adjoined Donna's parcel of land. When Donna excavated her parcel it caused Ira's machine shop to collapse. Ira has many multiple causes of action that he may pursue against Donna in attempt to recover from the collapse of his machine shop. They include a strict liability claim based on lateral support principles, or based on negligence.

Strict Liability and Lateral Support:

Landowners have a right to the support of the surface of their property. When an adjoining landowner engages in action that causes the adjoining property to subside, the owner who caused the subsidence may be strictly liable for the damage caused. In order for strict liability to apply, the injured party whose property has subsided must show that the actions of the adjoining landowner caused the subsidence, and that the subsidence would have occurred even if no structures were built on the injured party's land. If the subsidence would not have occurred but for the weight of the structure built on the land, then strict liability will not attach and the injured party will have to pursue another cause of action to recover.

Here, Donna began excavation for construction of an office building on her parcel that was adjacent to Ira's machine shop. Despite complaints from Ira, Donna continued her planned excavation. Based on Ira's statements that the excavation was causing the wall of his machine shop to "buckle further," which eventually led to the collapse of the machine shop, it seems clear that the excavation is what actually caused the structure to fall. Ira can recover for strict liability as long as the subsidence would have occurred even if the machine shop were not built on the land. This is likely where Ira's cause of action will fail. Facts stipulate that the wall of the machine shop was slightly buckled, and the excavation caused the wall to "further buckle." Facts do not indicate that the

land on which Ira's shop actually subsided, only that the action caused the machine shop to collapse. It does not appear that the land would have been damaged or lost lateral support if the machine shop was not built on the land.

In conclusion, Ira cannot recover based on his right to lateral support in strict liability because the collapse of the structure and the land likely would not have occurred if the structure was not built. No facts indicate the land would have subsided despite the shop. Ira must look to another cause of action.

Negligence:

Ira may attempt to assert a negligence claim against Donna. Negligence occurs when a party breaches a duty owed to another and the breach is the actual and proximate cause of damages suffered by another party.

Duty:

Donna has a duty to act as a reasonably prudent landowner who adjoins other parcels with structure on them. Ira is an owner of an adjoining parcel, she had a duty to act as a reasonably prudent landowner to the adjacent owners.

Foreseeable plaintiff:

Under the majority view of Cardozo, a party only owes a duty to foreseeable plaintiffs. Foreseeable plaintiffs are those that reside within the zone of danger of the defendant's actions. Here, Ira was the adjacent landowner to Donna. When Donna began excavation all adjacent landowners were foreseeable plaintiffs because it is foreseeable that construction could cause injury to the adjacent land or landowners. Ira was a foreseeable plaintiff.

Breach:

Donna possibly breached her duty to act as a reasonably prudent landowner when she continued excavation despite the fact that she was informed it was causing a wall of Ira's to buckle and was likely going to cause damage. Facts do not indicate whether or not the excavation was executed with reasonable care or not, but the fact that Donna continued after being informed that her actions were causing damage may mean that she breached her duty of care to Ira.

Actual Cause:

Actual cause is also termed the "but for" cause. The issue is whether but for Donna's actions the building would have collapsed. Ira informed Donna that the construction was causing the wall to buckle further, and the continued excavation led to the collapse of the building. Donna's actions were the but for cause of the collapse.

Proximate Cause:

Proximate cause is called the legal cause and the issue is foreseeability. Here, it is foreseeable that a person doing excavation may end up causing damage to the structures of adjoining parcels. Ira will argue that Donna's actions were completely foreseeable. Donna on the other hand will argue that the proximate cause was not her excavation, but rather the fact that the machine shop already had a "slightly buckled wall." Donna will argue that it is not foreseeable that adjacent landowners have improperly supported structures that will collapse during excavation of adjoining parcels. Donna's argument that the buckled wall makes the collapse unforeseeable probably will not work, but it may be effective as a defense (discussed below.) Moreover, Donna knew that her actions were causing the wall to buckle more after Ira told her, so ultimately her actions were foreseeable because she was informed of them.

Damages: Damages must be causal, foreseeable, certain, and unavoidable.

Here, Donna's actions caused the entire shop to collapse, and it is very possible that a court will find that she breached her duty to Ira and that her actions were the actual and proximate cause of Ira's damages. Absent any defenses, Donna will be required to pay Ira for either the cost of repair of the building (which is substantial), or the reduced value of Ira's property now that the shop has collapsed.

Defenses: Comparative Negligence

Donna has a good argument that Ira was himself negligent and she should be absolved of liability or that her liability should be substantially reduced. Ira knew that the machine shop had a slightly buckled wall that would likely reduce its structural soundness. Ira had a duty to investigate the structural integrity of the building, and insure that it was not at risk for collapsing easily. This is a very strong argument and Donna will likely have her damages reduced by the amount of Ira's negligence, which is significant.

In conclusion, Ira may recover from Donna under a negligence theory but Donna's damages will be offset by the amount of Ira's own negligence.

2. Ira's Request to have Town Issue a Building Permit.

Here, Ira's machine shop has been destroyed, and he wishes to rebuild it. Because of the current zoning ordinance, Ira's machine shop is not permitted in the area where he wants to build it. The issue is whether Ira should be granted a permit to operate the machine shop.

Zoning Ordinances:

Zoning ordinances are an effective way for states and localities to regulate the land use of their jurisdiction. However, a person who seeks to violate a zoning ordinance may

seek a variance that will be granted or denied in the form of a permit.

Variance:

A variance is an individual exception to a zoning ordinance. There are two types, area variances and use variances. Area variances are more likely to be granted because it is simply an exception given to allow a building to exist in dimensions that slightly violate the zoning ordinance. Use ordinances are less likely to be granted — a use variance is a permit allowing a person to operate a structure for a purpose that is not permitted by the zoning ordinance. Here, Ira wishes to get a permit to allow him to use his property for manufacturing, which is a use that is not permitted. In order to get a use permit, Ira must show that he will (1) suffer a hardship without the ordinance, (2) that the variance would not damage or harm the neighborhood, and (3) that he is not at fault or a bad actor in his request.

(1) Suffer a hardship

Here, Ira has paid a substantial amount of money in order to purchase the machine shop and operate it at the location where it currently resides. But for the fact that the machine shop collapsed, Ira would still be able to operate it most likely as a nonconforming use (discussed below). Preventing Ira from being able to rebuild and operate the shop as he had previously would cause him significant injury and he will surely suffer an economic hardship if not allowed to resume his business.

(2) Won't Harm the Neighborhood

Here, the neighborhood permits office buildings and retail stores, just not manufacturing. If the neighborhood were zoned only for residential use by families, it is likely that granting such a variance would cause harm to the neighborhood because families would have to deal with the constant manufacturing noise. But, because the area allows offices and retail stores, it is unlikely that the manufacturing would likely

cause significant harm to the neighborhood, unless the manufacturing involved toxic materials or chemicals. This factor weighs in favor of Ira.

(3) Ira is not at Fault

Here, Ira was operating the machine shop until Donna's excavation caused the shop to collapse. Ira did not buy the property knowing about the ordinance and now seeks a variance to benefit knowing all along such action would be in violation. And, but for the collapse of the structure, Ira likely would have been able to continue to run the business as a nonconforming use. Ira is not at fault in seeking the variance.

Conclusion:

In conclusion, the court should rule that the Town should issue a building permit because all of the elements required for a proper use variance are satisfied, and Ira is not a bad actor.

Nonconforming Use:

The other argument that Ira may present is that his operation of the machine shop is a nonconforming use because it was in existence prior to the change of the ordinance. Nonconforming uses that are in effect prior to an ordinance change are allowed to continue unless they cause harm to residents or adjoining property. Even then, an amortization period is generally allowed to allow the owner to find a new location for the activity. Here, Ira was properly operating the manufacturing business prior to the ordinance, and the fact that the building collapsed should not deprive him of being able to rebuild a similar structure and continue with the nonconforming operation he had prior to the collapse. There is no evidence the manufacturing is causing harm to other residents.

In conclusion, the court also should have the Town issue a building permit because Ira's prior nonconforming use should still be considered in effect.

3. Jane's Claim for Proportionate Share of the Proceeds from Foreclosure.

Deed of Trust and Mortgage:

When Ira purchased the property from Jane, he gave her a 50K promissory note secured by a deed of trust. He borrowed the other 400K from Acme which recorded a mortgage. Mortgages and Deeds of Trust operate similarly.

A Deed of Trust is an arrangement where a third party holds a deed in a trust to stand as collateral for a debt owed. With a deed a trust, if the debtor (Ira) fails to make payments and ends up in default on the loan, the party that made the loan, Jane, can initiate foreclosure and execute a private sale of the property.

A Mortgage is an arrangement where a party who has or is buying property gets a loan and has the property itself stand as security for the debt. If a debtor fails to make the loan payments and ends up in default, then the holder of the mortgage, the mortgagee, may initiate public foreclosure proceedings against the property.

Here, Ira failed to make payments on the loan and was thus in default. Acme was within its right to initiate foreclosing proceedings against the property to recover for the debt owed. The order of payment from a foreclosure sale is determined by a number of factors, including whether the loan was a purchase money security interest.

Priority:

Upon a foreclosure sale, how proceeds from the sale are distributed is determined by the priority of the creditor's interest. Priority is determined by (1) whether or not the loan was a purchase money security interest and (2) when the interest or mortgage was

recorded. All purchase money security interests have priority over other creditor interests executed at the same time.

Here, Jane executed a valid deed of trust, and Acme executed a valid mortgage. The mortgage was recorded and had notice of the deed of trust secured by Jane. Because both loans were provided in order for Ira to obtain the purchase of the property, both interests should be considered purchase money security interests. If Acme had recorded the mortgage on the property without notice of the deed of trust secured by Jane, Acme would have had priority over all other creditors. However, because Acme had notice of the deed of trust, and because both loans will be considered purchase money security interests, Jane's Deed of Trust will have priority.

Order of Payment:

Foreclosure proceeds are not distributed in proportion. So, the court will not rule that a proportionate share of the foreclosure proceeds should be given to her. However, that does not mean that Jane's interest will necessarily be adversely affected. When a creditor forecloses on a property and provides notice to any junior interest, at the sale of the property the junior interest is extinguished. Here, Acme initiated the public foreclosure sale, and had Jane's deed of trust been a junior interest, then Jane was required to notice, but her interest would be extinguished at the end of the sale, whether or not she received proceeds. A senior interest remains intact on the property when a junior interest initiates the foreclosure. When a foreclosure is executed, the priority of payment is that (1) all fees are paid for the foreclosure, (2) Senior creditor interests are paid first and in order to the junior interests, and (3) anything left over is given the debtor, or owner of the property.

Here, Jane's interest in the property has priority to Acme's because her deed of trust was executed first, Acme was aware of the deed of trust, and both interests are purchase money security interest. Accordingly, Jane's interest will not be extinguished by the foreclosure sale by Acme. If the proceeds from the sale produce enough to pay

both the debts of Acme and Jane, then both will be paid, and any remainder will be given to Ira. If not, Acme's foreclosure sale will be subject to Jane's deed of trust, and the sale will not extinguish that interest. Jane will be able to foreclose on the property regardless of who purchases the shop during the public foreclosure sale.

CONCLUSION:

In conclusion, though the court will not order Acme to split the proceeds from the foreclosure sale with Jane proportionally, Jane's deed of trust is superior to Acme's mortgage, and the public foreclosure would not extinguish her interest in the machine shop.

Answer B

1. Ira v. Donna

The first issue is establishing what obligations, if any, Donna owes to Ira as a neighboring property owner.

Ira is claiming damages against Donna for the damage caused by Donna's excavation for the construction of an office building. Duties between neighboring property owners can arise in several ways, namely, through contract or tort law. Under contract law, if parties enter into covenants with each other to do something or refrain from doing something on their land, they may be obligated under contract law to fulfill those obligations. Another way in which neighboring property owners may owe each other a duty is through tort law. If Donna and Jane (Ira's predecessor) or Donna and Ira had created a covenant not to interfere with one another's sublateral support, Ira may have a claim for damages under that theory. However, it does not appear that they have an explicit agreement.

Tort law will also impose duties on neighboring property owners in some instances. For example, if one property owner's use of the property is in a way that causes a nuisance, that may give rise to liability under tort law. Likewise, neighbors have a general obligation to refrain from engaging in hazardous or inherently dangerous activities on their property that may interfere with others outside of their property. Additionally, property owners may have a duty under either a strict liability or negligence theory for interfering with a property owner's sublateral support.

Inherently Dangerous Activities

Ira may argue that Donna's use of the neighboring property (using an excavator) constitutes an inherently dangerous activity. When a property owner engages in an inherently dangerous activity she will be held strictly liable for injuries resulting as a

consequence of that activity's inherently dangerous propensities. In order to be considered inherently dangerous, an activity must be: 1) unusual for the community; 2) one that cannot be made safer by safety measures; 3) one whose utility is outweighed by the danger it is likely to cause.

In this case, Donna is excavating her property to build an office building. Donna is doing so in a zone that specifically permits office buildings. One may assume that if office buildings are allowed in the zone, their construction is also a usual activity for that area. Further, there is utility in developing a community for business and thus, there is utility in building office buildings. Further, the construction of office buildings can be made safer by taking safety precautions, by having licensed contractors, putting up warning signs, etc. Therefore, using an excavator will likely not constitute an inherently dangerous activity and Ira does not have a cause of action under this theory.

Interference with Sublateral Supports

An alternative theory will arise by asserting that Donna has interfered with Ira's subadjacent property rights. In cases where a neighbor excavates and causes a disturbance in their neighbor’s sublateral support for their property, the neighbor whose property was damaged may have a cause of action under either a negligence theory or a strict liability theory. Which theory applies depends on whether or not the neighbor (Ira) can show by clear and convincing evidence that her property and the weight of his buildings did not contribute to the damage. That is, there would have been damage regardless of whether or not the buildings were constructed. If the plaintiff (Ira) cannot show that his buildings did not contribute to the ultimate injury, then he must make out a case in negligence. If he can, then he may make out a case in strict liability.

In this case, when Jane owned the machine shop it already had a slightly buckled wall. Therefore, when Ira took the building, the wall was likely still buckled or even made worse with the passing of time. Because of this, the unsecured nature of the construction likely contributed in some way to the building’s ultimate destruction.

Therefore, strict liability is not available to Ira because he cannot demonstrate that the buildings on his property in no way contributed to the damage.

Therefore, Ira must make out a case in negligence. In order to make out a case in negligence, a plaintiff must show that: 1) defendant had a duty to the plaintiff; 2) defendant breached that duty; 3) the breach was the actual and proximate cause of the damage; 4) there were damages.

In this case, a duty has already been established under the sublateral support doctrine. The standard of care is an objective, reasonable person standard. Negligence causes of action incentivize individuals to act in a reasonable way in their interactions with others. The standard of care in this case would be what a reasonable person excavating property next to a neighbor's property would do.

The next issue is whether or not the defendant breached that duty. In this case, it appears as though Donna initially was acting as a reasonable person; as discussed, she was excavating property to build an office building in an area zoned for that use. However, Ira complained to Donna that the excavation was causing the shop's wall to buckle further. After Donna was put on notice of creating this damage, the question becomes whether a reasonable person would have done something to attempt to avoid the damage. In this case, Donna did nothing at all. It seems that a reasonable person would have assessed whether it was possible to move the location of the excavation or adjust construction in some other way to avoid the damage. Because there is no evidence that Donna did this, a court may find that she breached her duty toward Ira.

The next issue is whether her breach was the actual cause and proximate cause of the damage. Actual cause is but-for cause: but for the breach, would the damage have occurred? Actual cause may also be substantial cause if there are two or more contributing causes, either one of which may have been sufficient to cause the damage. In this case, it appears as though Donna's actions were the but for cause of the building's collapse. Ira complained to Donna that the excavation was causing the

building to further buckle. While it may ultimately be an issue of fact regarding whether it was the buckling of the wall or the excavation, for the purposes of getting the question to a jury a court would likely assume this element was met.

The next question is whether the excavation was the proximate cause of the injury. Proximate cause is the philosophical nexus between the act taken and the damage done -- it requires more than just actual cause and requires that the cause be something foreseeable from the defendant's actions such that it comports with notions of common sense and justice to hold the defendant liable for his actions. Under Palsgraf, the relevant question is whether the injury was foreseeable to the actor. A minority view would hold any damage is foreseeable if it resulted from the action. In this case, because Donna had notice of the damage the excavation was causing, and the excavation was occurring right under the building, it seems foreseeable the damage to the building was likely. Therefore, the proximate cause element is likely met.

Finally, Ira must show there was damage resulting from the breach. In this case, there was actual destruction of his building, resulting in substantial damage, so this element is also met.

Note, most jurisdictions would reduce the amount of damages that Ira receives based on a pure comparative negligence standard, which reduces the amount of recovery that plaintiff receives by her amount of fault. In a traditional comparative negligence state, the recovery would be reduced entirely if the plaintiff was at all at fault. In this case, it does seem as though Ira was partially to blame for not strengthening his wall or doing anything to avoid the damage. Therefore, his damage award will likely be reduced based on the findings of a jury.

2. Ira v. Town

Is the ordinance valid under the Constitution?

Ira's case against the town arises from the Town's refusal to permit him to rebuild a machine shop in a zone that permits office buildings and retail stores, but not manufacturing facilities.

The first issue is whether or not the town's adoption of a zoning ordinance is permissible under the Constitution. The Constitution permits state actors to take or incur on a private citizen's property rights for the public good provided they are given just compensation, measured by the value to the property owner, not the benefit conferred to the government. Generally, zoning ordinances, although they are not complete takings under the Constitution, are analyzed under this framed work.

The general rule is that if the government possesses a private actor's property, no matter in what degree, it will constitute a taking under the Constitution and the property owner will be entitled to compensation. In this case, because the Town has not physically possessed Ira's property, this does not constitute a complete taking.

However, a regulatory regime that destroys all economic viability will also constitute a complete taking under the Constitution and will require the property owner be justly compensated. In this case, the zoning ordinance is a regulation. However, it does not completely destroy the value of Ira's property because he could still build an office building, retail store, sell the property, etc. Therefore, it is not a complete taking under this theory either.

Finally, a partial taking may also require compensation under the Penn Central balancing test if a property owner's property interests are interfered with and his property value decreased. Courts look at: 1) the investment-backed expectations of the property owner; 2) the nature of the government action; 3) the benefit to the public and harm to the individual property owner and what the owner should rightfully have to bear for the benefit of the public. In this case, it is unclear whether Ira's property rights decreased. Clearly, he cannot do what he wants with the property, but that does not

mean it does not have other values. Therefore, a court would likely find the Town's refusal to issue a building permit proper under the Constitution.

Is a variance warranted?

The question becomes then, whether or not Ira is entitled to continue using the facility pursuant to a zoning variance for prior use. A zoning variance may be granted if the owner of property can show that the use of their property in the manner previously used will cause undue hardship to the owner and would not cause significant harm to the community if the variance was granted. Notably, when the zoning ordinance is valid, as this one is (see previous discussion), a Town has some discretion in balancing the harms to the application and to the community.

In this case, the zoning ordinance permits office buildings and retail stores, but not manufacturing facilities. The reasoning behind this ordinance seems apparent: manufacturing facilities are generally larger, more disruptive, more likely to emit noise, debris, etc. A town has a reasonable basis for preferring to have a community comprised of stores and office buildings, were people can shop and work without distraction and interference. Therefore, the harm to the community if the variance were granted seems great.

However, Ira does have an argument that because of the pre-existing use of the machine shop by Jane, he is entitled to a variance under the theory that he was grandfathered into the ordinance. However, there are three problems with this argument. First, as previously discussed, the Town has good reason for not wanting manufacturing facilities in the retail/office area of town and variances are discretionary. Second, there are privity issues between Jane and Ira and the Town. It was Jane, not Ira that had been using the building as a machine shop (presumably a manufacturing facility, though Ira might raise a classification argument), when the ordinance was passed. Third, the pre-existing use generally must be consistent if a variance is granted for pre-existing use. When the machine shop collapsed, it was no longer used as a

manufacturing facility and Ira likely lost his ability to claim any sort of entitlement to use the property as a manufacturing facility under the pre-existing use doctrine.

In conclusion, a court will likely deny Ira's request that the Town issue a building permit.

3. Jane v. Bank (re: proportionate share of the foreclosure proceeds)

The issue this question raises is how to be characterize the security interests that Jane and Acme have in the machine shop property and what the priority of those interests are.

Generally, mortgages are security interests in property, used by a mortgagee to secure a debt that she has issued to a mortgagor. In this case, Ira purchased the machine shop from Jane for $500,000, but as he clearly did not have that much money, he took out loans. A loan may be either secured or unsecured. An unsecured loan is one that does not have any collateral that a lender may use as compensation in the event of default. A secured loan is one that has property of some sort as collateral for the repayment of a loan. Unsecured loans take a second seat to secured loans when property is foreclosed upon.

Generally, mortgages are prioritized in the order they were made. A bank that loans money to a home purchaser will take a first mortgage on that home. If the purchaser later borrows more money, that lender may also secure the repayment with a mortgage on the home, but it will be subject to the first lender. Once the first lender is paid in full, the second lender will be entitled to proceeds. This is why second mortgages often have higher interest rates or are otherwise on less favorable terms -- they are less secure because they are subordinate to another's interests in the property. The proceeds come from a foreclosure sale, which occurs when the property securing the debt is sold to pay off the lenders.

Finally, there are special types of loans/mortgages called "purchase money mortgages". The mortgages occur when the money lent to a mortgagee is used for the purchase of the item itself. This typically occurs with owner financing -- if a homeowner sells her home and loans money to the purchaser to buy it, there is a purchase money mortgage in the house. These types of mortgages will take priority, even if there is a primary lender that attached prior to the purchase money mortgage being issued.

In this case, Ira purchased the machine shop from Jane for $500,000. Obviously Ira did not have that cash up front. Instead, he paid $50,000 in cash to Jane, which is hers to keep and is not up for grabs at the foreclosure sale. Next, he gave her a promissory note for an additional $50,000 secured by a deed of trust. Then he borrowed another $400,000 from Acme Bank, which recorded a mortgage.

If the $50,000 from Jane was secured by an interest in the machine shop, the very property the loan was made to purchase, this loan will take priority and Jane will be entitled to the first $50,000 received in the foreclosure sale.

Acme will argue that it is the primary lender and that it is entitled to all the money from the foreclosure sale, until it exceeds its $400,000 loan, at which case it may spill over to secondary lenders. There are two problems with this argument: 1) First, as discussed above, Jane's loan to Ira was a purchase money mortgage and takes priority over the Bank's loan. Even if it were not a purchase money mortgage, Jane was still the first lender. 2) Second, Acme knew of Jane's promissory note and deed of trust prior to the close of escrow. Notably, although Jane did not appear to record her mortgage, a recording is not required to secure an interest. Rather, a recording system serves to give subsequent mortgagees and purchasers notice, something Acme already had.

The issue then becomes, what is the effect of Acme's knowledge on its mortgage in the property? Generally, in order to take priority, a mortgagee must be a holder in due course, or a bona fide mortgagee, who takes without knowledge of any other interests in the property. In this case, because Acme knew about Jane's deed of trust, Acme was

not a bona fide mortgagee or holder in due course; therefore, Acme's mortgage could be subordinated on this ground.

Note: Generally the holder in due course requirements are intended to protect a subsequent mortgagee who takes from a first mortgagee. A holder in due course will be protected if he takes a negotiable instrument, made out to the holder, without notice of impediments, for valuable consideration and in good faith. A holder in due course will be free from personal defenses raised by the mortgagor (e.g., lack of consideration, waiver), but will take subject to non-personal defenses (e.g., duress). In this case, Acme did not take the mortgage from another mortgagee, but rather was the first mortgagee. Therefore, this doctrine does not apply, but its principles still do. Generally, courts do not reward mortgagees or other property holders who take knowing of another’s interest in land.

In sum, Acme, although it was the first to record, under either a notice or race-notice jurisdiction, Acme is not entitled to bona fide purchaser/mortgagee status because it took knowing of Jane's mortgage. Further, Jane is protected by her status as a purchase money mortgagee. Therefore, a court will likely rule that she is entitled to $50,000 from a foreclosure sale.

Q5 Constitution

For many years, the Old Ways Fellowship, a neopagan religious organization, received permission from the City's Building Authority to display a five-foot diameter symbol of the sun in the lobby of City's Municipal Government Building during the week surrounding the Winter Solstice. The display was accompanied by a sign stating "Old Ways Fellowship wishes you a happy Winter Solstice."

Last year the Building Authority adopted a new "Policy on Seasonal Displays," which states:

> Religious displays and symbols are not permitted in any government building. Such displays and symbols impermissibly convey the appearance of government endorsement of religion.

Previously, the Building Authority had allowed access to a wide variety of public and private speakers and displays in the lobby of the Municipal Government Building. Based on the new policy, however, it denied the Old Ways Fellowship a permit for the sun display.

After it was informed by counsel that courts treat Christmas trees as secular symbols, rather than religious symbols, the Building Authority decided to erect a Christmas tree in the lobby of the Municipal Government Building, while continuing to prohibit the Old Ways Fellowship sun display.

The Old Ways Fellowship contests the Building Authority's policy and its decision regarding the Christmas tree. It has offered to put up a disclaimer sign explaining that the Winter Solstice greeting is not endorsed by City. The Building Authority has turned down this offer.

The Old Ways Fellowship has filed suit claiming violation of the First Amendment to the United States Constitution.

What arguments may the Old Ways Fellowship reasonably raise in support of its claim and how are they likely to fare? Discuss.

Answer A

OLD WAYS FELLOWSHIP'S FIRST AMENDMENT CLAIMS

The Old Ways Fellowship ("Old Ways") has several arguments to support its First Amendment Claims. The threshold question for all of its claims is whether there is government action. Government action occurs when the government acts, when a private entity takes on a public function, or when the government is entangled (encourages, participates in, or enables) in private conduct.

Here, Old Ways' claim is against the City Building Authority, which is a part of the City's Municipal Government. Thus, the First Amendment applies because state action is involved.

First Amendment Right to Freedom of Speech

Old Ways has several arguments related to its first amendment right to freedom of speech.

Content-Based Restrictions. Old Ways may also argue that the Policy is an invalid restriction of speech in a public forum. Here, the speech is occurring in the City's Municipal Government Building, which is open to the public, and has permitted public use for speech purposes for many years.

All content-based restrictions on speech conducted in a public or designated public forum are subject to strict scrutiny. Under the strict scrutiny standard, the government has the burden to show that a law is narrowly tailored, using the least restrictive means, to reach a compelling governmental interest. Content-based restrictions on speech arise when the government regulates either subject-matter based speech, or viewpoint based speech. Content-neutral speech conducted in a public or designated public

forum must further an important government interest, be narrowly tailored, leave alternatives for speech open, but need not be the least restrictive means available.

Here, Old Ways would first argue that its five-foot diameter symbol of the sun constitutes symbolic speech, as it symbolizes the religion organization's beliefs. It would then argue that the Building Authority's Policy on Seasonal Displays ("Policy") is a content-based regulation because it bars the use of "religious displays and symbols" rather than all symbols and/or displays. If it successfully shows that the Policy is content-based, the city has the burden to establish a compelling interest, and that the Policy is narrowly tailored to reach that interest.

The City will likely argue that the purpose of the policy is not to stop symbolic speech, but to avoid the appearance of government endorsement of religion, which likely qualifies as a compelling interest. It would then argue that completely barring religious symbols and displays is the least restrictive means of accomplishing this goal. Although such an argument may be persuasive in a vacuum, these facts do not indicate that the Policy is the least restrictive means available. Old Ways offered to put up a disclaimer along with its symbol, stating that the sun is not endorsed by the City, but the Building Authority rejected this offer. Such an option restricts Old Ways' speech less, while arguably avoiding government endorsement of religion, but the Building Authority will not allow it. The City's refusal to adopt a less restrictive alternative is a failure to meet the requirements of strict scrutiny.

Prior Restraint. Old Ways can also argue that the Policy is an impermissible prior restraint on speech. Prior restraints are subject to strict scrutiny because they put a barrier on speech before the speech can occur. One such type of prior restraint is a permit that permits speech. To be valid, a permit must further an important government interest, involve little to no discretion by the person or group issuing the permit, there must be clear criteria to obtain the permit, and there must be a procedure in place for timely resolution of the permit and/or an immediate appeal of a decision.

Here, the fact that Old Ways needs a permit to display its sun arguably constitutes a prior restraint. Old Ways would argue that the permit requirement is impermissible because the Building Authority does not have a clear description of what items are and are not permitted to be displayed, beyond a bar on the religious symbols. Because the Building Authority decided to put up a Christmas tree, Old Ways can argue that the standards are not applied in an equal way because certain religious symbols are permitted (the Christmas tree), while other symbols (the sun) are not permitted. Also, Old Ways can point out that the Building Authority uses discretion in determining what to erect in the government building, and that there is no set policy in place for review of a decision rejecting a display. The City may, again, argue that its interest in avoiding the appearance of government endorsement of religion permits the permit requirement, and that there is no discretion involved in the policy because the City completely bars the use of any religious displays and symbols. It will also argue that the Christmas tree does not constitute a religious symbol. However, it is unlikely that the City will prevail in these arguments because there is no set procedure in place for determining who gets a permit, nor an appeals process for rejection of the permit.

Overbreadth. A government regulation of speech is overbroad and invalid where it regulates more speech than intended.

Old Ways may also argue that the Policy is an overbroad regulation of speech. It is unlikely that it will succeed in this argument, however, as the Policy clearly applies to "religious displays and symbols" and there are no facts indicating that the Policy has extended to restrict speech beyond religious speech.

Vagueness. A regulation of speech is vague and invalid where it is unclear what speech is prohibited and what speech is not prohibited.

Old Ways could argue that the Policy is vague because it does not define exactly what constitutes a religious display and symbol. It can argue that because the Christmas tree is not considered a religious symbol, the Policy is vague because Christmas trees are

often interpreted to be religious symbols. Such an argument might succeed here. The Building Authority's position is that "courts treat Christmas trees as secular symbols," but the Policy itself does not include a description of what does and does not constitute religious displays or symbols. The lack of specificity in the Policy results in confusion, and thus Old Ways likely will succeed in challenging the Policy on vagueness grounds.

First Amendment Right to Freedom of Religious Expression

Old Ways can also contend that the new policy on seasonal displays unjustifiably infringes upon its freedom to exercise its religion. The general rule regarding freedom of expression is that neutral laws of general applicability that have the effect of infringing on freedom of expression do not violate the right to freedom of expression. However, when a law is not neutral, strict scrutiny applies, requiring the government to show that the law is necessary to further a compelling government interest, and that the law is the least restrictive means possible.

Here, Old Ways would argue that the Policy is not neutral because it bars religious displays and symbols specifically, not just any displays and symbols. Old Ways would also point out that the policy interferes with its ability to spread its Winter Greeting, which is an important aspect of its religion. Thus, strict scrutiny likely applies. As explained above, although the City may have a compelling interest in avoiding government endorsement of religion, the policy is not the least restrictive means available. Thus, Old Ways will likely succeed in challenging the Policy on freedom of expression grounds.

First Amendment Right That the Government Will Not Establish Religion

Old Ways can also contend that the Policy, in practice, establishes religion.

Establishment Clause. The government may not establish a particular religion under the Establishment Clause of the First Amendment. To determine whether government

action violates the establishment clause, the court applies what is called the Lemon test, which analyzes the government action under 3 prongs: (1) whether the government action has a secular purpose, (2) whether the action has the effect of promoting or inhibiting a particular religion or religion in general, and (3) whether the action results in excessive entanglement between the government and religion.

Secular Purpose. Here, Old Ways may concede that the purpose of the Policy is secular, and a court would likely agree. The Policy states outright that it is meant to avoid the appearance of government endorsement of religion, and so the first prong does not indicate a violation of the establishment clause.

Effect. Old Ways will argue that the effect of the Policy actually inhibits its religion and promotes a certain religion -- Christianity -- because the Building Authority permitted erection of a Christmas tree but no other religious symbols. The court would likely agree that the effect does promote Christianity and not other religions because the Christmas tree -- and only the Christmas tree -- is displayed. Had the Building Authority permitted other types of symbols along with the Christmas tree, the effect may not be to promote Christianity, but the winter season generally. Thus, this factor supports a finding that the Policy establishes religion.

Entanglement. Finally, Old Ways would argue that the Policy results in excessive entanglement between the government and religion. The City would argue that the Policy seeks to avoid religious involvement completely. Although the Policy appears on its face to attempt to avoid entanglement with religion, because the Building Authority erected the Christmas tree, the City's position is weaker, and the court may find that entanglement has occurred because the Building Authority has permitted an arguably religious symbol, but not others.

Balancing the three factors, it is likely that Old Ways' argument would succeed, and that the court would find that the Policy, as applied by the Building Authority, establishes religion, and is unconstitutional.

Answer B

First Amendment: Freedom of Speech

Old Ways Fellowship will argue that the Building Authority's (BA) "Policy on Seasonal Displays" violates its right to free speech under the First Amendment.

State Action

In order for Old Ways to challenge the Policy under the Constitution there must be state action. Here, BA is the City's agency that issued the policy restricting religious displays and symbols from government property. Thus, since BA is a branch of the City, there is state action.

Content-Based vs. Content-Neutral

Old Ways' success under the First Amendment Free speech clause will depend on whether the Policy is found to be content-based or content-neutral. Here, BA adopted the Policy on Seasonal Displays which expressly prohibits "religious" displays and symbols on government property but does not appear to apply to non-religious displays. Old Ways will argue that the policy does not restrict groups or organizations from displaying other forms of artwork or paintings but directly is singling out religious displays and other secular symbols. Thus, the policy will likely be found to be content-based.

City may try and argue that the Policy does not single out a particular religion and thus it should be found to be content neutral but this is a weaker argument since religious content, by itself, is a category of speech and thus the policy will likely be found to focus on this content.

Strict Scrutiny

Laws that are content-based and restrict speech must pass strict scrutiny. The government bears the burden of showing that the law or statute is necessary to achieve a compelling state interest with no less discriminatory alternatives.

City/BA will claim that the policy is designed to prohibit the appearance of government endorsement of religion. City will further attempt to show that certain symbols are clearly religiously oriented and that simply by their presence in the Municipal building, this gives off the impression that the City endorses the religions associated with those symbols or displays. The prevention of endorsement of religion is likely a compelling interest since the First Amendment does not permit the government to favor one religion over another.

The weakness in City's arguments is that the law does not appear to be necessary, even if the City has a compelling interest in preventing the appearance of religious endorsement. Old Ways will argue that the City has a long history of allowing it to display its Winter Solstice display along with a variety of other public and private speakers and displays in the lobby. Old Ways will claim that the city is randomly choosing to single out religious displays by completely preventing them in government buildings via its new Policy. The law is likely not necessary to achieve the City's interest here.

As Old Ways will point out, there are less discriminatory alternatives in achieving the City's desired purpose. Old Ways offered to put up a disclaimer sign explaining that the Winter Solstice greeting is not endorsed by City. Presumably people that take the time to observe the displays in the Municipal building would also notice the disclaimer assuming it was prominently displayed beside the various displays. This would be sufficient to allow Old Ways to continue its time-honored tradition of wishing people a Happy Winter Solstice through its display while not suggesting that City endorses Old Ways religious beliefs. City could also hand out pamphlets at the entrances to

government buildings describing its policy of allowing the displays and putting the disclaimer there as well.

Thus, as strict scrutiny is a difficult standard to meet, it appears that BA will have a difficult time showing the policy is necessary when there are less discriminatory alternatives present. The law should be struck down as unconstitutional.

Time, Manner, Place

Even if the court were to find that the BA Policy is not content-based but rather is content-neutral because it does not single out any particular religion and appears to apply to all religions equally, Old Ways will argue that it is still an invalid time, place and manner regulation.

Time, manner and place regulations are permitted for content neutral and viewpoint neutral regulations depending on the type of location where the speech is being regulated. Traditionally, public forums are those that have historically been open to the public such as sidewalks and parks, while designated or limited public forums are those that the government has chosen to hold open to public speech but can close at any time. Public forums and designated/limited public forums must meet intermediate scrutiny, such that the law is substantially related to an important government and there must be other nondiscriminatory alternatives available.

Here, the Policy is affecting government buildings, including the lobby of the Municipal building. A lobby of a government building would not be a public forum but rather a designated public forum since it appears that City has for some time chosen to allow various organizations to put their displays and speakers in the lobby of the Municipal building. City could certainly close off the lobby to such displays if it wanted to.

Old Ways will argue that, while City may have an important interest, even a compelling interest as discussed above, in preventing the appearance of government endorsed

religion, the Policy is simply not substantially related to this interest. Furthermore City will have the burden of demonstrating the substantial relation. City will likely claim that the law is substantially related because it singles out displays from buildings that are government owned and that the Policy only focuses on the interior of government buildings. City will claim that there are other nondiscriminatory alternatives such as Old Ways displaying its displays outside the buildings or on the plazas in front of the building. This argument will likely fail however, because while Old Ways may indeed have other options for displaying its Winter Solstice display, it cannot join the other displays that are permitted to be inside the Municipal building and this particular location is where people have come to expect to see the Winter Solstice display each year.

Therefore, because the Policy still singles out only religious displays from government buildings, the City may have a difficult time prevailing on a time manner place argument since there are other less discriminatory options that would allow Old Ways to actually continue to display the displays inside the building while notifying viewers that there is no endorsement by City of any particular religion.

Symbolic Speech

Old Ways will argue that the policy impermissibly regulates symbolic speech. Symbolic speech can be regulated if it is done in a way that is unrelated to the suppression of speech and if there are other less discriminatory alternatives.

City will argue that by adopting the Policy it was not attempting to regulate Old Ways' right to free speech through the Winter Solstice displays. While there may be other alternatives, as previously mentioned, for Old Ways to continue this form of symbolic expression, City will likely lose on the ground that the Policy was related to the suppression of speech. The Policy directly bans symbols and displays with religious content. Thus, it would appear that the BA, in considering the adoption of the Policy, had a direct motive to regulate what types of displays would and would not be allowed.

Furthermore, Old Ways will argue that City continues to allow the display of Christmas trees in the buildings and that Christmas trees are typically associated with a religious holiday. Thus the policy may be found to impermissibly regulate only certain religious symbolic speech while other groups attempting to display Christmas displays will be allowed.

Since Old Ways' displays are not permitted in the buildings and the policy directly and expressly provides for this, the law will likely be found to be an unconstitutional restriction of symbolic speech.

Vagueness and Overbreadth

Old Ways may bring a vagueness or overbreadth challenge to the Policy. Laws are vague if one cannot tell what speech is banned and what is permitted. Overbreadth laws are those that impermissibly burden more speech than is allowed.

Here, the Policy could be struck down as vague because it does not define what exactly constitutes religious displays; thus it is insufficient to put one on notice as to whether its display is or is not affected by the policy. Furthermore, the policy may be overbroad in that it bans all symbols and displays, even if they do not have any religious meaning associated with them. Old Ways may or may not succeed on these grounds.

Free Exercise of Religion

The free exercise clause of the Constitution prohibits the government from preventing one's free exercise of his or her religion. Laws of general applicability are permissible while laws that target a specific religion must meet strict scrutiny.

Here, the Policy, while it does apply to all religious displays and symbols, does not appear to single out any particular religion. Nor is there any evidence of BA singling out Old Ways' particular religious beliefs as a motive for adopting the law. Thus, Old Ways

would have a better likelihood of success challenging the policy under the Establishment clause.

Establishment Clause

Old Ways will argue that the Policy respects an establishment of religion since the City is allowed to display Christmas trees while other religious displays and symbols are banned. The Establishment clause prohibits the government from respecting the establishment of a religion. If a law has a secular purpose on its face, it must meet strict scrutiny. Laws that are not secular on their face must pass the three part lemon test.

First the law must have a nonsecular purpose. Here, the law bans all religious displays and symbols. If the court finds that this is a secular purpose because it specifically targets religious displays, then this requirement will fail.

Second, the law must neither advance nor inhibit religion. The law appears not to advance religion since it bans displays to prevent government endorsement of religion so this requirement is satisfied.

Third, the law must lead to no excessive government entanglement with religion. Here, the problem is that the City policy is banning Old Ways displays while allowing the erection of a Christmas tree in the same space as where Old Ways displays were permitted. Thus, the court may find that the policy impermissibly entangles the government with religion if it finds that the City is really making space for its own preferred religious displays while forcing out other displays such as Old Ways that it finds unattractive or not interesting.

Thus, Old Ways may have a colorable claim under the Establishment Clause.

Q6 Remedies

Angela hired Mark, a real estate broker, to help her find a house to buy.

A week later, Mark contacted Angela and told her that he had found the perfect house for her. She asked him what he knew about the house. He said that the house had been owned for some years by Carol, who had kept it in pristine condition. When she visited the house, Angela noticed what appeared to be animal droppings on the deck. Carol assured her that they were only bird droppings, had never appeared previously, and would be removed before closing. Carol added that she never had any problem with any kind of "pests." Angela made an offer of $500,000 for the house, and Carol accepted.

After closing, Angela spent $10,000 to move her household goods to the house. A few weeks after moving into the house, Angela made several discoveries. First, the house suffered from a seasonal infestation of bats, which urinated and defecated on the deck. Second, Carol was in fact Mark's cousin, had owned the house for about a year, and had been desperate to sell it because of the bats. Mark was aware of all of these facts.

After the sale, Mark evenly split the proceeds with Carol and invested his $250,000 in stocks that are now worth $750,000.

At trial, Angela has established that Mark and Carol are liable to her in tort and contract.

1. What remedy or remedies may Angela obtain against Carol? Discuss.

2. What remedy or remedies may Angela obtain against Mark? Discuss.

Answer A

1. Angela v. Carol

Rescission

Angela (A) may seek to have the contract with Carol (C) for the sale of the house rescinded. There must be grounds for the rescission and no defenses preventing it. A asked C about animal droppings she saw on the back deck and C assured A that they were only bird droppings and had never appeared previously. C then added, on her own, that she never had any problem with pests. These statements amount to a material misrepresentation of fact by C to A. A material misrepresentation is grounds for rescission if the seller made a misrepresentation of a fact that a reasonable buyer would have relied on and the buyer did in fact rely on the statements. While generally the doctrine of caveat emptor applies to omissions, there is implied in every land contract a duty not to make material misrepresentations. Generally the failure to mention a material fact is not actionable, though in some instances a court may hold the seller liable for known latent defects. However, here, C affirmatively represented, of her own accord, the fact that there were no problems with pests. And C also misrepresented the fact that the droppings were from bats that seasonally infest the house. These assurances made by C to A are of the type reasonably relied on by a buyer, since a buyer can't inspect a house for a whole year, she must rely on the seller's representation regarding seasonal conditions. Here, A did in fact rely on the misrepresentation. Thus, A has grounds for rescission.

C may try to bring the defenses of laches or unclean hands, however, A did nothing wrong to make her hands unclean and she discovered the infestation within weeks of the sale. This short period of time did not unfairly prejudice C so laches does not apply either.

Compensatory Damages

Compensatory damages aim to make the plaintiff whole, to put them in the position they would have been in had the contract been fully and properly performed. Here, A expected to own a house free of infestation. With the contract rescission, A has a right to the return of the price paid for the house plus any consequential and incidental damages. Consequential damages are those damages specific to the plaintiff that were foreseeable at the time the contract was entered. Incidental costs are those associated with dealing with the breach. Here, A is entitled to a return of the purchase price ($500,000) plus the costs associated with moving her household goods into the house since it was foreseeable at the time of contract that she would need to move her items ($10,000) plus any other incidental damages incurred in dealing with the breach (for instance, moving out costs or protecting her personal property from damage from the bats).

Punitive Damages

Punitive damages are not awarded in contracts claims. However, C's misrepresentations likely raise to the level of fraud and are thus actionable under tort law. In that case, C may be liable for penal damages for fraud. See discussion below regarding Mark's liability for penal damages.

Restitutionary Damages

Alternatively, A may recover restitutionary damages from C. Restitutionary damages seek to prevent the defendant from being unjustly enriched. The plaintiff may recover the reasonable value of the benefit received by the defendant. Here, C was unjustly enriched when she received the full contract price of $500,000 for a house she knew to be seasonally infested with bats. A could recover the benefit to C of the contract price. However, the house was likely worth something, just not the full contract price. So any restitutionary recovery will likely look at the fair market value of the house as is (with

infestation) and award A the difference between the contract price and the fair market value.

Note that A may not recover both compensatory and restitutionary damages and thus will likely elect compensatory as the larger amount of damages.

Constructive Trust / Equitable Lien

A may get a constructive trust or an equitable lien over the compensatory or restitutionary money damages due to her. (See rules below)

2. Angela v. Mark

Angela may have entered into a contract with Mark (M) for his brokerage services but more likely he was held liable in tort for fraud. Fraud is the intentional misrepresentation of a past or present fact, made with the intent that the other rely on it and the other does reasonably rely. M was C's cousin, he knew of the bat infestation and that C was desperate to sell the house. He told A that the house was in pristine condition and he stood by while C represented that the house was free of any infestation. M also received half the proceeds from the house.

Compensatory Damages

See rule above. A may recover the full cost of the house as well as the cost of moving in ($510,000), which represents the position she would have been in if the tort had not occurred. If M had not committed a fraud and induced A to purchase the house, she would not have spent the money to purchase and move in to the bat infested house.

Punitive Damages

If a defendant acts wantonly, willfully or maliciously, the plaintiff may also recover punitive damages as long as she recovers either compensatory or nominal damages as well (and sometimes restitutionary). Punitive damages seek to punish the defendant for his willful wrongdoing. Here, M was related to C and knew of the poor condition of the house. He knew that the house was infested and that C was desperate to sell because of the bats. This knowledge made M's actions in showing the house to A, representing that it was in pristine condition and not warning A of the bats willful. Thus, A will likely recover punitive damages for M's willful conduct.

Note: As mentioned above, C may also be liable for fraud and her active misrepresentations could also be found to be willful and malicious. Thus, A may also recover punitive damages from C in connection with the compensatory or restitutionary damages owed by C.

Restitutionary Damages

See rule above. M has been unjustly enriched since he received half the proceeds from the sale to A which was based on his fraud. He may have also received a broker’s fee, also an unjust enrichment. A is entitled to the reasonable value of this benefit. Here, M received a $250,000 benefit. Thus, A may recover $250,000.

Constructive Trust / Equitable Lien

A constructive trust is a court order that the defendant hold the property in trust for the benefit of the plaintiff and return the property to the plaintiff, along with any enhanced value. If the property is no longer available but may be traced to another form, as long as it can be traced with certainty, the plaintiff may still recover the value of the property by tracing. Here, A may seek a constructive trust on M's $250,000. M invested the money in stocks that are now worth $750,000. Because the original $250,000 can be

clearly traced to the stocks, A may recover the full, enhanced value of the property. Thus A is entitled to the stocks which are now worth $750,000.

An equitable lien is a court-imposed security interest in the property which must be sold and the proceeds returned to the plaintiff. If the sale results in less money than is owed, the plaintiff may get a deficiency judgment and a lien on the defendant's other property to secure that judgment. However, the plaintiff may not recover any enhanced value in the property. Tracing may also be used to ensure return of the property. Here, A could get an equitable lien on the stocks (traceable from the money M received) and force a sale of the stocks in order to receive the $250,000 of restitutionary damages she is owed. She would not be entitled to the full $750,000 under an equitable lien.

Thus, A will seem a constructive trust in order to recover the restitutionary damages owed to her.

Answer B

2. Angela's remedies against Carol.

The issue is to what remedies Angela is entitled to obtain against Carol for Carol's liability in tort and contract.

In contract

Damages for breach of contract can either be legal or equitable.

Legal Remedies

Damages

The typical measure of damages in contract is the expectation measure. That is, the non-breaching party to a contract is entitled to be put in the same position that she would have been in had the other party not breached the contract. Here, at the end of the contract, Angela expected to be in possession of a house that was in "pristine condition" that did not have a bat infestation.

Presumably, the seasonal bat infestation reduced the market value of the house and Angela would not have paid $500,000 for the house had she known of it. Therefore, in order to protect Angela's expectation, she is entitled to receive the difference between $500,000 contract price and the market value of the house at the time of closing.

Angela is not entitled to her $10,000 of moving expenses as damages because she would have had to spend that amount if the house was in the condition she expected it to be, regardless of the bats.

Finally, Angela has not suffered any consequential damages from the purchase

of the house (losses that are foreseeable at the time of contract) and punitive damages are not recoverable in contract.

Restitution

Angela may also recover on a restitution theory. Restitution is a remedy that is used to avoid unjust enrichment from a party's wrongdoing. Here, due to Carol's misrepresentations, she was able to sell the house at a price above its market value. Therefore, Angela may recover the difference in the contract price and the fair market value of the house at the time of closing.

Again, Angela is not entitled to the $10,000 in moving expenses in restitution because those moving expenses were paid to a mover, not to Carol.

Equitable Remedies

Rescission

Rescission of a contract is an equitable remedy whereby the contract is rescinded as if it never happened. Essentially, the party seeking rescission must argue that the contract was never formed because there was no meeting of the minds. If the contract here is rescinded, Angela would receive her $500,000 purchase price while Carol would be put back in possession of the house. Grounds for rescission include: mistake and misrepresentation.

There are two types of mistake: Mutual Mistake and Unilateral Mistake. Mutual mistake exists where both parties to a contract are mistaken as to a fact that substantially affects the basis of their bargain. Here, Carol was not mistaken about any facts with regard to the contract--she knew of the bat infestation and its effects.

Angela will be able to successfully argue unilateral mistake. Unilateral mistake is not typically a grounds for rescission. However, when the non-mistaken party knows of the mistake of the other party and proceeds with knowledge in the face of that mistake, the mistaken party may rescind the contract. Here, because Angela did not know of the bat infestation, and Carol both knew of the infestation and knew that Angela did not know of it, unilateral mistake is applicable and Angela may rescind on that ground.

In addition to the ground of unilateral mistake, Angela may rescind on grounds of misrepresentation. Misrepresentation occurs when a party makes a material misrepresentation, with the intent that the other party rely on the statement, the reliance is justified, the other party does indeed rely on the statement and that party suffers damage. Here, Carol misrepresented that she had never seen the droppings before and that they were bird droppings. She intended for Angela to rely on the statement and Angela did indeed rely on the statement and suffer damages. The only issue is whether Angela's reliance was justified. Considering that Mark said that Carol kept the home pristine and Angela was assured by Carol, the homeowner, regarding the condition of the house, Angela's reliance was likely justified. Carol may be able to argue that Angela should have hired an independent appraiser of the house instead of relying on her statement, but this argument will fail because Angela's reliance was justified given Mark's corroboration of the condition of the house.

Therefore, the equitable remedy of rescission is warranted on grounds of unilateral mistake and misrepresentation and Angela should be entitled to her $500,000, and the house will be returned to Carol.

<u>In Tort</u>

Legal Remedies

Damages

Angela may sue Carol for damages in the amount that Carol's misrepresentation cost her. Therefore, she should be able to recover the amount that will be required to fix the bat infestation and any damage already caused by the bats.

In addition, Angela may be able to recover punitive damages from Carol because of Carol's outrageous lies and conduct. Not only did Carol lie about the droppings and that she had never seen them before, she had been desperate to sell the house and was Mark's cousin, with whom she perpetrated a fraud on Angela. Typically, punitive damages are limited to a cap of less than ten times the actual damages.

Equitable Remedies

Constructive Trust

A constructive trust is a restitutionary equitable remedy. If a constructive trust is imposed, the defendant must return the property to the plaintiff. A constructive trust will be imposed when 1) the defendant holds title to property, 2) title was acquired by the defendant's wrongful conduct, and 3) retention of the property would result in the unjust enrichment of the defendant. Typically, the plaintiff will pursue a constructive trust when the value of the property increases while the defendant has held the property.

Here, Carol holds the proceeds from the sale, she acquired it with wrongful conduct as discussed above, and retention of the proceeds would result in unjust enrichment. However, the legal remedies described above are adequate to remedy Angela's harm. Therefore, the court should not grant this remedy.

Equitable Lien

An equitable lien is also a restitutionary equitable remedy. If an equitable lien is imposed, the plaintiff will acquire a security interest in the property and the property will be subject to an immediate court ordered sale, and the plaintiff will be entitled to the

proceeds. An equitable lien will be granted upon the same conditions as a constructive trust.

Angela will be able to show the conditions for imposition of an equitable lien have been met. However, the legal remedies described above are adequate to remedy Angela's harm. Therefore, the court should not grant this remedy.

3. Angela's remedies against Mark.

Equitable Remedies

Constructive Trust

The requirements of a constructive trust are listed above. Because the source of the funds used to purchase the stock is directly traceable to his unjust enrichment from the transaction, Angela will be able to force Mark to turn over the stock to her in a constructive trust. She will be entitled to keep the entire value of the stock.

Equitable Lien

Angela will be able to show she is entitled to an equitable lien. The court will trace the proceeds that Mark used to purchase the stock to his unjust enrichment from his involvement in the transaction, and Angela will be granted a security interest in the property. Then, the stock will be subject to sale and Angela will be entitled to receive Mark's $250,000.

Legal Remedies

Replevin-

Damages-

Jul 2013

California Bar Examination

Essay Questions and

Selected Answers

The State Bar Of California
Committee of Bar Examiners/Office of Admissions

180 Howard Street • San Francisco, CA 94105-1639 • (415) 538-2300
845 S. Figueroa Street • Los Angeles, CA 90017-2515 • (213) 765-1500

ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2013

CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2013 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	Subject
1.	Professional Responsibility
2.	Constitutional Law
3.	Community Property
4.	Contracts
5.	Wills/Trusts
6.	Remedies

ESSAY EXAMINATION INSTRUCTIONS

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

Q1 Professional Responsibility

Patty was hit by a car, whose driver did not notice her because he was texting. Joe, a journalist, wrote a story about Patty's "texting" accident. Patty contacted Tom, a real estate attorney, and asked him to represent her in a claim against the driver. Tom agreed, and entered into a valid and proper contingency fee agreement. Tom later told Patty that he had referred her case to Alan, an experienced personal injury attorney, and she did not object. Unknown to Patty, Alan agreed to give one-third of his contingency fee to Tom.

Thereafter, Alan sent a $200 gift certificate to Joe with a note stating: "In your future coverage of the 'texting' case, you might mention that I represent Patty."

Patty met with Alan and told him that Walter, a homeless man, had seen the driver texting just before the accident. Alan then met with Walter, who was living in a homeless shelter, and said to him: "Look, if you will testify truthfully about what you saw, I'll put you up in a hotel until you can get back on your feet."

1. What ethical violation(s), if any, has Tom committed? Discuss.

2. What ethical violation(s), if any, has Alan committed? Discuss.

Answer according to both California and ABA authorities.

Answer A

(1) <u>What ethical violations, if any, has Tom (T) committed?</u>

<u>Lawyer/Client relationship</u>

A lawyer owes duties to his client as soon as the relationship is formed. The relationship is formed even if the client never retains the lawyer but approaches him regarding legal representation.

Here, the relationship between P and T began as soon as she contacted him and asked him to represent her in a claim against the driver who hit her. Even though P never retained or ultimately 'hired' T, he owes her duties as his client from this point forward.

<u>Duty of Competence</u>

Under ABA and CA, a lawyer (L) owes his client the duty of competence, which requires using the requisite skill, preparation, thoroughness, and knowledge to adequately represent his client's interests. If an L is not competent in an area of law, he must become competent without undue expense or delay upon the client; otherwise, he should associate with an L who is competent in that area.

Here, T is a real estate attorney who was contacted by P regarding an injury she suffered after a car hit her. P's cause of action is a tort, likely negligence or battery, which is entirely unrelated to real estate. T should not have taken the case if he had no knowledge in this area of law. In fact, T 'later' told P that he referred the case to Alan. This is not 'associating' with an attorney to help with an area of law, nor is it becoming up to speed on the requisite area of law.

T has breached his duty of competence to P because he was not able to represent her interests in a tort claim and did not adequately respond by not taking the case or by the steps noted above.

<u>Referring P's Case to Alan</u>

<u>Duty of Confidentiality</u>

ABA: A lawyer has the duty to maintain all confidential communications acquired in the course of representation. In CA, there is no delineated duty of communication; however, the Attorney's Oath requires lawyers to maintain the client's secrets and confidences.

Here, T has contacted another attorney regarding information he has obtained from P in the course of representation – specifically that she was hit by a car and needs a lawyer, as well as her personal information. T has breached his duty of confidentiality by revealing this information to Alan.

Exceptions to duty of confidentiality – consent

If a client consents, a lawyer may reveal her confidences.

Here, T told P only afterwards that he was referring her case to Alan, an experienced personal injury attorney. While she 'did not object' she certainly did not consent to the disclosure in the first place because she was entirely unaware of it. Second, a non-response will not be considered affirmative consent to disclose. T will not be able to use P's failure to object as evidence of consent.

Duty of Communication

A lawyer has the duty to communicate with his client regarding all stages of representation, to return phone calls and inquiries promptly, and to communicate the ultimate strategy decisions to the client for her decision.

Here, T failed to communicate to P that he did not have the requisite experience to represent her and that he had referred her case to Alan. This is an important juncture for communication that T owed to P; he should have let her know he was unable to take the case but would be able to refer her to someone else.

Referrals & Referral Fees

Under the ABA and CA, a lawyer may refer a client to another lawyer with the informed consent of the client and as long as the referral agreement is 'non-exclusive.' Under the ABA, referral fees are prohibited; under CA, they are permitted as long as the client gives informed consent and the total fees are not increased due to the referral agreement.

Here, T has referred P to A but failed to tell P about the referral, beaching his duty to obtain her consent. Further, it appears T has obtained a referral fee for this referral paid by 1/3 of the contingency fees in this case (see below) which is absolutely prohibited under the ABA. In CA, fees are permitted if the total fees to P did not increase; however, without P's consent this was an improper referral. Further, if A and T have an 'exclusive agreement' to refer to each other, the referral agreement also breaches their duties.

Fee splitting among lawyers

Fee splitting is prohibited by both the ABA and CA with non-lawyers. However, under the ABA, a lawyer may split fees with another lawyer if (i) it is in proportion to the services rendered or both L's are jointly and severally liable, (ii) the total fee is reasonable, (iii) the client gives informed consent, and (iv) the total fee is not increased. In CA, an L may split fees with a non-lawyer if (i) the total fee is not unconscionable, and (ii) the client gives written consent.

Here, T has entered into a fee sharing agreement with A to give 1/3 of a contingency fee to T. Under the ABA, this is not going to be 'in proportion' to the services rendered by T because it is likely he will not be engaging in the litigation that is outside of his practice area. However, if T remains jointly and severally liable, he may rebut this requirement. However, there was no consent given by P per this fee splitting arrangement so the agreement violates the rules under the ABA regarding splitting. The total 'fee' will be determined reasonable because it is not 'increased' as a contingency fee.

This arrangement under the ABA is a violation of fee splitting because it was not consented to in writing by P and it is not in proportion to the efforts to be made by T.

In CA, lawyers may split fees in the fashion A and T did as long as the total fee is not unconscionable and there is written disclosure to P. While the total fee will be determined as a percentage of the contingency, it is clear that P did not consent to this arrangement because "unknown to P" A agreed to give 1/3 of the fee to T. T has breached the fee splitting rules under CA as well.

Contingency Fees

Contingency fees are fees to be paid as a percentage of a successful judgment. Under the ABA and in CA, contingency fee agreements must be (i) in writing, (ii) signed by the client, (iii) describing the duties of the lawyer and client, (iv) the percentage of fees to be taken for the lawyer, and (v) whether these fees are before or after legal fees have been paid. CA additionally requires the L to note that the fees are negotiable and to indicate how legal fees not covered by the contingency will be paid.

Here, T has entered into a contingency fee agreement with A, the subsequent attorney, not P, the client. P has not signed any agreements, no agreement in writing has been made, there is no description of duties and a percentage has not been indicated. This is a violation of a lawyer's duties regarding fees.

(2) <u>What ethical violations, if any, has Alan (A) committed?</u>

<u>Attorney-Client Relationship</u>

See above.

Here, A has obtained P's information from T regarding representing her in his capacity as a personal injury attorney. Therefore, because this is related to legal representation, A owes P duties as his client.

<u>A and T's fee arrangement</u>

Unknown to P, A agreed to give T 1/3 of the contingency fee to T, violating many of the same rules as T under this agreement.

<u>Referral fees</u>

See above.

A breached his duty related to referral fees under the ABA in relation to giving part of the contingency to T which is likely a 'fee' and under CA because this was without the consent of P.

<u>Fee splitting</u>

See above.

For the same reasons noted above, the fee splitting arrangement between A and T is prohibited by both CA and ABA.

Fees Generally

Under the ABA, fees must be reasonable and agreed upon by the client (consented to) in writing. In CA, the fees must be 'not unconscionable' and agreed upon (consented to) by the client in writing.

Here, it is unclear whether the contingency fee that A will be taking for this case is either reasonable or 'not unconscionable' under the ABA and CA respectively; however, because the fee was likely determined in advance of A ever meeting with P, A breached his duty to P regarding fees because they were not consented to by P.

Contingency Fees

See above.

For the reasons noted above, A also breached his duty regarding contingency fees to P for failure to get them in writing, with the required terms under both ABA and CA.

$200 gift from A to Joe

Duty of Fairness

A lawyer owes the duty to the legal profession to maintain the public confidence, dignity, and efficiency of the legal system and the profession. Additionally, even those actions by an attorney that are not specifically prohibited by the ABA or CA professional conduct rules, or the law, may still be prohibited if they reflect poorly on the profession.

Here, A sent money to a journalist asking him to write in his newspaper coverage of the 'texting case' that A represents P. While it is generally public information as soon as a case is filed who is being represented by whom, this is an improper action by A to have a news organization write something in his favor so he gets public notoriety or even advertisement for his services. This reflects poorly on the profession because not only did A ask to be mentioned, he seems to have 'bribed' the journalist by sending a $200 gift certificate. This is an unethical move that will be looked down upon as not maintaining the public confidence in the profession.

Advertisements

Solicitation

Out-of-court statements regarding a case

A lawyer may not make public statements that are substantially likely to materially prejudice the case. He may comment on those topics that are generally public knowledge (who the parties are, what the cause of action is) and he may conduct 'damage control' if his client has been prejudiced.

Here, A is looking to have information publically noted about his case in Joe's news organization. He has requested only the fact that he represents P to be printed; therefore, this will not be considered an improper public statement if published because it is public knowledge and does not risk prejudicing the case.

A's meeting with Walter (W)

Meeting with unrepresented persons

A lawyer, if meeting with a person who is not represented by an attorney, must not make any indications that he represents that person's interests or is impartial.

Here, A met with W after finding out he is a potential witness in the P's personal injury case. Upon meeting him, he must indicate that he does not represent W and is not impartial in the case, but rather represents the best interests of his client. It is not clear whether A clearly indicated his position, but by offering W a hotel until he gets back on his feet, W may feel his interests are being represented by A, in which case A has breached his duty to express partiality.

Duty of Fairness

See above.

A lawyer has the duty to refrain from altering or obstructing access to legally discoverable evidence.

Here, A has contacted a witness with personal knowledge of the accident and indicated he would put him up in a hotel. This may make W harder to find for the opposing party and unfairly influence his testimony, in effect, altering the evidence. A's actions also reflect poorly on the legal profession because it is not an honest or ethical action to pay homeless individuals to testify by baiting them with a hotel room until they are back on their feet – something that A may not ultimately do for W and creating a significant risk of biased testimony.

Improperly influencing a witness

A lawyer may not pay a witness for their testimony. If it is an expert witness, the expert witness's expenses for travel and time away from work may be paid for.

Here, A has effectively 'paid' a witness in this case by offering to pay W's hotel until he 'gets on his feet.' W is living in a homeless shelter, so moving to a hotel is a very serious and significant 'bribe' for W to do as A wants and W will be regarded as being paid to testify for P because he is receiving a direct benefit for his testimony. This is a violation of A's duty of fairness to opposing counsel and the legal profession by improperly influencing a witness and paying a non-expert witness to testify.

Perjury

ABA and CA: In a civil case, a lawyer must not call a witness whom he knows will perjure himself. An L may not encourage perjury as this violates both his ethical duty and the law.

Here, it is not clear that W will 'perjure' himself, as A has indicated that he wants him to "testify truthfully." However, A has made it seem that if W gives him the testimony that A desires, he will have a hotel until he gets back on his feet – a very big incentive for the witness to do as A desires. By A calling W as a witness whom he has in effect bribed, even with the caveat he told him to testify truthfully, A may be regarded as having suborned perjury should W state anything that is untruthful but bodes well for P and A.

Answer B

TOM'S ETHICAL VIOLATIONS (Real Estate Attorney)

Agreement to Represent Patty

An attorney owes a duty of competence to his clients. An attorney should not agree to represent a client where the subject matter of the case is outside his area of knowledge, unless he can learn the relevant law without undue delay or expense to his client, or he can affiliate himself with an attorney who is experienced in that area of law. Here, Tom is a real estate attorney and he agrees to represent Patty in a personal injury suit. The suit is based on a personal injury claim because Patty was hit by a car whose driver was texting and thus did not notice her. Tom's experience in the area of real estate law does not relate at all to the area of personal injury. Thus, Tom must decline to take the case, learn about the relevant law, or affiliate himself with a knowledgeable personal injury attorney.

Here, Tom will argue that he referred the case to Alan, who is an experienced personal injury attorney, and thus did not violate the duty of competence. However, Tom did not merely affiliate himself with Alan and work with Alan on the case; rather, he referred the entire case to Alan, after entering into a valid representation agreement with Patty. Tom will argue that this may be deemed appropriate because Tom has no experience in the area of personal injury and thus is not competent to represent Patty in a personal injury suit. However, it would have been more appropriate for Tom to decline to take the case in the first place because, as a real estate attorney, he has no experience in personal injury law.

Tom acted appropriately in referring the case to a personal injury attorney, and thus did not violate the duty of competence; however, it would have been more appropriate for him to decline to take a case in the first place where the case necessarily requires knowledge of an area of law in which Tom has no experience.

Referral of Case to Alan for a fee

Under the ABA, an attorney may not refer a case to another attorney for a fee. Under California law, an attorney may refer a client to another attorney for a fee as long as the client is informed. Here, Tom referred Patty to Alan and accepted one-third of the contingency fee as a possible referral fee. Here, Tom did refer Patty's case to Alan, in breach of ABA rules. He also breached California rules because he failed to tell Patty that he made a referral to Alan until after the fact, and did not tell her at the time of the referral. Thus, he violated rules regarding referral of a client for a fee under both ABA and California.

Failure to Communicate to Patty that the case was referred to Alan

An attorney has a duty to communicate with is clients regarding the representation. Here, Tom referred the case to Alan without consulting with Patty first. Because Tom had agreed to represent Patty and had entered into a contingency fee agreement with her, and thus Patty was expecting Tom to be her attorney, Tom should have consulted with Patty and obtained her permission before referring the case to Alan. Because Tom failed to communicate with Patty when he failed to acquire her permission to transfer the case to Alan, Tom violated his duty to communicate with his client.

Contingency Fee Arrangement

A valid contingency fee agreement must be in writing, signed by the client, include the lawyer's percentage, the expenses to be deducted, and whether the lawyer's percentage will be paid prior to or after the expenses are deducted from the award. In California, the agreement must also include a statement as to how services not provided for under the contingency fee agreement will be provided, and that the lawyer's percentage is negotiable. As it appears that a valid and proper contingency agreement was entered into, no ethical violations arise from this agreement.

ALAN'S ETHICAL VIOLATIONS (Personal Injury Attorney)

Fee Splitting with Tom

An attorney may split fees with other attorneys outside of his firm, subject to certain restrictions. Under the ABA, the total fee must be reasonable; under California law, the fee may not be unconscionably high. Further, the client must be informed about the fee splitting and must consent to it. Finally, the fee must be split proportionately in accordance with the relative amount of work that each attorney performs.

Total Fee

Here, we do not know what the total amount of the fee was, but it appears that the total amount was the same amount agreed to under the original contingency fee agreement. We know this because Alan agreed to give one-third of his contingency fee to Tom, and thus Tom's share comes out of the original amount agreed on. Thus, if the original contingency agreement included a valid fee, then there should be no violation regarding the total fee due to the attorneys.

Informing the client

Here, Patty was not informed of the agreement between Tom and Alan. Because Patty should have been informed about the fee-splitting arrangement between Tom and Alan, the failure to notify her of the agreement constitutes a violation of fee-splitting rules under both the ABA and California law.

Proportionately splitting the fee

Here, Tom appears to be doing none of the work and Alan is doing all of the work in the representation of Patty's case. Under the rules on fee splitting, Tom should thus receive none of the fee and Alan should receive the entire fee. Because Alan has actually promised to give Tom one-third of his contingency fee, where Tom is not performing any of the work, Alan has violated the rules on fee splitting.

Alan has violated the rules on splitting fees with attorneys outside his firm, because he did not inform Patty that he was giving Tom one-third of the contingency fee, and

because the fee is not split in proportion to the amount of work that each attorney is actually performing in the representation.

Gift to Joe and Request that Joe Report Alan's Representation of Patty

An attorney has a duty of candor to the public. An attorney may not attempt to influence the press by granting gifts to journalists. Because a journalist has a duty to report fairly and in a manner that is not unduly affected by outside influences, an attorney's attempt to interfere with a journalist's duty of fair reporting constitutes a violation of the duty of candor. Here, Alan gave Joe a $200 gift certificate with a note stating that Joe might include the fact that Alan is representing Patty when Joe is covering the case. The gift certificate would appear to be a means of attempting to influence the journalist's coverage, in that Joe might feel compelled to actually include information favorable to Alan when reporting the case. The gift certificate might be seen as a gift, but it might also be seen as payment. Alan will argue that he is simply requesting that Joe include truthful information in his coverage, such as the fact of Alan's representation, and that the information does not influence the case in any way. However, because Alan made a gift and is attempting to influence the journalist's coverage of the case, he has violated a duty of candor to the public.

Advertising

Attorney advertising must abide by certain rules. An attorney cannot engage in real-time phone or live contact with prospective clients with whom he has no prior personal or business relationship. Any advertising must be labeled attorney advertising, it cannot make any misrepresentations or be misleading, and it must state the name of at least one attorney responsible for the material. In California, making any guarantees or warranties as to results is considered presumptively improper and constitutes a misrepresentation.

Here, Alan is essentially attempting to purchase advertising from Joe, by "paying" Joe with a gift certificate and asking Joe to essentially include Alan's name in coverage of the texting accident. This appears to constitute advertising, but in a way that makes it

appear that it is not advertising. The news article will be read by the public as impartial news, and will not be labeled advertising, even though Alan "purchased" the coverage regarding his relationship to the case. Alan will argue that the coverage merely states his representation of Patty, and the article does include his name as a responsible party.

However, if the coverage later states that Alan won the case for Patty, that may constitute a misrepresentation under California law, as the outcome may imply to the public that a certain result is guaranteed, even if it is the case that Patty's success is an anomaly and not indicative of typical results. Thus, depending on how Joe writes the coverage, including the information about Alan could pose an improper misrepresentation or otherwise be misleading to the public in violation of California rules.

Thus, because the coverage of Alan's representation of Patty in the case could be misleading in the message that it sends to the public, and because there would be no express indication in a news article that Alan is essentially advertising his services, Alan is violating the rules regarding proper attorney advertising by asking Joe to include Alan's name in Joe's coverage of the case.

Solicitation

An attorney has a duty not to solicit prospective clients. Solicitation is live or phone contact with potential clients with whom the attorney has no preexisting personal or business relationship. Alan has not violated any solicitation rules because newspaper articles and advertising do not constitute solicitation.

Offering to Put Walter Up in a Hotel

An attorney may pay reasonable expenses for a witness in connection with testimony at trial; however, any payment cannot be made in connection with the witness' testimony at trial. Here, Alan violated both of these rules.

Reasonable expenses

Reasonable expenses in connection with a witness' testimony could include travel expenses, a place to stay and meals during the time that the witness is required to be present at trial. However, here, Walter lives in a homeless shelter and Alan offered Walter a place to stay "until you can get back on your feet." This implies an indefinite period of time, and not just the time necessary for Walter to testify at trial. Because Alan is offering Walter a place to stay for a period of time that potentially exceeds the time of the trial, Alan has violated the rule that he may not pay expenses other than those that are reasonable in connection with a witness' attendance at trial.

Payment in connection with testimony

An attorney may not make the payment of reasonable expenses contingent on a witness' testimony at trial. Here, Alan stated that if Walter will testify truthfully at trial about what he saw, then Alan would put Walter up in a hotel until he can get back on his feet. It appears that Alan is making his offer to pay for a hotel contingent on Walter's truthful testimony at trial. Alan will argue that he simply wants to assure that Walter will testify truthfully, and that he is fulfilling his duty of candor to the court by ensuring truthful witnesses. However, because Alan conditioned his "payment" of a hotel stay to Walter on the nature of Walter's testimony, he violated an ethical rule, nonetheless.

Alan violated the rules regarding the payment of a witness' expenses in connection with testimony at trial because he offered to pay expenses that exceeded a reasonable limit, because he offered to pay for a hotel for an indefinite period of time, and because he conditioned the payment of expenses on the nature of Walter's testimony.

Q2 Constitution

The Legislature of State X recently completed a study on the behavior of teenagers residing in the state that revealed a connection between an increase in the school dropout rate and an increase in the level of criminal activity. The study indicated that the connection was most pronounced among boys ages 15 to 18 years old.

Troubled by what it perceived as a breakdown in personal responsibility and social order among its teenagers, State X's Legislature has enacted a statute creating the State Forestry Corps ("Corps"). The Corps drafts boys ages 15 to 18 who have dropped out of school. It sends them to camps located on public lands administered by the State Forest Service. It also provides them with a comprehensive education leading to a high school diploma. To defray a portion of the costs, the Corps requires the boys to work on reforestation projects for a few hours each day.

Pete, age 15, has dropped out of school and, consequently, has been drafted into the Corps. Pete and his parents have filed a declaratory relief action attacking the validity of the statute under three provisions of the United States Constitution: (1) the Thirteenth Amendment's Involuntary Servitude Clause; (2) the Fourteenth Amendment's Due Process Clause; and (3) the Fourteenth Amendment's Equal Protection Clause.

What arguments could Pete or his parents reasonably make in support of their action, and how should the court rule on each? Discuss.

Answer A

State Action

In order to prevail in their constitutional declaratory action under the 13th Amendment, 14th Amendment due process, and 14th Amendment equal protection against State X, Pete and his parents will need to show state action by State X in passing and enforcing the law against them.

The law in question regarding the compulsory forestry school was enacted by State X law and is applicable to Pete. Because the law was passed by State X, its procuring the law and enforcing it will constitute state action against Pete because he stands to be injured as well as Pete's parents so long as they can prove standing.

Standing

The constitution requires that each plaintiff have standing to seek any type of relief under its provisions. It requires (1) actual or certainly imminent injury in fact, (2) causation, and (3) redressability through judicial remedies.

Here, it appears that Pete has been actually drafted by the Corps against his will. Pete stands to face injury in fact because he is compelled against his will to enlist and it is certain that he will enlist if he takes no action. State X law caused the law to be passed and enforced; thus causation is clear. Further, a declaratory judgment deeming the law facially invalid as to Pete will save him from the injury of entering the Corps.

Pete's parents have standing, in their argument, because they are losing their son and being discriminated against in the fundamental right to parent and make choices for their minor child. By compelling Pete to work at the Corps, their fundamental right is arguably undermined and infringed as they cannot choose a school for their son. Thus, they can likely show injury in fact. The State X law caused injury, as above. Also, a declaratory judgment would save the parents from injury as it would give them the fundamental power to make parenting decisions for their child and not be compelled by the State.

11th Amendment Sovereign Immunity

States are protected from being sued in federal court (and in some state courts where states retain traditional sovereign immunity in their own courts) where the action seeks money damages from its treasury. However, declaratory judgments do not seek money damages and may be adjudicated.

Here, the 11th Amendment is not implicated because no plaintiffs seek money damages; rather, they seek declaratory relief and thus the action is not preempted by sovereign immunity concerns.

A. 13th Amendment

The 13th Amendment of the Constitution abolished involuntary servitude in all of the United States. It applies directly to states like State X. Further, it was construed to allow Congress to pass laws which abolish the badges of slavery, which continue to linger, and which allows Congress to make prophylactic legislation to correct existing badges of slavery in the several states. Laws which force servitude to other individuals or the state are invalid absent an exception in federal case law or other federal authority.

Here, Pete will challenge that the law violates the 13th Amendment because the law purports to require three hours of compulsory labor at the Corps per day and that it threatens to infringe on the constitutional mandate against involuntary servitude. The strongest argument against Pete is that, absent a narrow exception for the Amish, the Supreme Court has ruled that states have the right to mandate that all children under the age of 16 be enrolled in compulsory education. This embraces the states' rights to oversee education and welfare of its citizens guaranteed to the states under the 10th Amendment, which states that all states retain power not otherwise usurped by the federal government in the constitution. Thus, the state will argue that since the Corps is educational, and that the forestry work on projects is part of that education, and that because Pete is merely 15 years old, that the requirement is akin to that of requiring students to attend regular public school in a compulsory manner absent special circumstances. The state will argue that Pete is not Amish or that he has a special disability to set him apart from other participants and that he should be required to

attend school at the Corps. The goal of the program is educational, just like regular school.

Pete will argue that the Corps's education labor is not aimed at education, but rather at reducing state costs, and thus since the state gains pecuniary benefit the program's work mandate is akin more to slavery than it is akin to formal education. Pete will argue that the program is an alter ego of the state's goal of saving money at the hands of slave labor by him and similarly situated individuals.

Because of the prior Supreme Court mandates regarding the 13th Amendment, and because there is no prophylactic federal legislation to pre-empt education of this kind, Pete will have difficulty showing that the law, as applied to him, infringes on the 13th Amendment's mandates. This is because prior case law allows states to require school attendance under the age of 16. Since Pete is 15, he would need to show special circumstances and argue those to show that he should be an exception to the rule. While the cost-saving goal of the state brings some questions regarding slavery intent, ultimately it prepares Pete for the real world of jobs, which is likely reason enough. Also, the goal of the program is to avoid criminal activity through education for this critical class of young men.

Thus, on balance, Pete would likely fail under a 13th Amendment argument.

B. Due Process

Substantive Due Process

The Constitution guarantees certain fundamental rights to individuals that they will not be deprived of life, liberty, or property without due process of law. The Supreme Court has interpreted the 5th Amendment, applied to the states via the 14th Amendment, to extend other fundamental privacy rights to individuals as well, which give them rights to procreate, have children, and to raise those children as they please without interference from the state as to that right. When a state infringes on fundamental rights of individuals, such as the right to liberty or the right to privacy, the state must show that the law is narrowly tailored to serve a compelling government interest, the highest judicial scrutiny under constitutional law. This is substantive due process and applies here to State X's Corps law. The burden is on the state to meet the strict scrutiny.

Pete

Pete has a fundamental right to liberty in his person. This includes the right to free movement and not to be compelled in movement of his body by the state without due process of law. Pete has not been adjudicated a criminal or otherwise, and thus the compelled requirement that he attend Corps infringes on his fundamental right to move freely as he pleases has been infringed upon by the law. Because the right of liberty in movement is a fundamental right, the state must show that the Corps law is necessary to further a compelling government interest. Pete will also argue that he has a privacy interest in his body and personal choices.

Pete will argue that the law violates his liberty interest because it compels his movement and participation in the Corps program. He will argue that he is not a criminal and that his rights have not been sacrificed merely because he dropped out.

The state will argue that it has a compelling interest in educating its young men and women below the age of 16. The state will likely prevail on that point. The state will further argue that its concerns regarding criminality avoidance and preserving future peace is compelling. This is also correct as it is part of the state's interest in welfare to protect its citizens. The state will argue that it has rights to dictate the education of its youngsters under the age of 16 under Supreme Court decisions. The state will likely prevail on that point, because of the above rules.

However, Pete will argue that while the purpose of the law is compelling, the means are not narrowly tailored because the program reaches too far in undermining his rights of freedom. The program is at a remote camp, far from a regular school, and subjects students to daily labor that appears to be more physical than other students. Pete will argue that the school would do better to have a day program that is supplemented by the required work and not mandated daily, which is more like prison over the students.

Pete will have the most success on this argument. The state will argue that the means are narrowly tailored because of the woes of young men 15-18 through the study. However, the study does not show that compulsory physical labor is the answer to the problems facing State X teen boys; it is but one idea, and a relatively extreme one at

that. The state could have employed its goals in a less infringing fashion on the liberty of its students.

While schools are entitled to more deferential invasions of students' freedoms, such as to discipline as a parent, and to search the student upon reasonable suspicion, the compulsory work mandate does not fall within those categories because of its extreme nature. Because the state's means are not narrowly tailored, the law will be unconstitutional as applied to Pete.

Parents

Parents have a fundamental right in making decisions about how to raise their child. Laws that infringe on parents' right to choose and raise their children are subject to strict scrutiny above. Parents also have a fundamental right to keep a family together.

Here, the law infringes on the parents' rights to choose which school Pete attends because the decision is mandatorily imposed by the state. While the state may require attendance to school under 16, parents' fundamental interest in choice is still fundamental and must generally be deferred to by the state. Here, because the parents could have forced their child to go to school under state law at a different school or done homeschool, for example, the school's infringement by making the parental choice for them infringes on their fundamental right.

The State will argue that their rationale is compelling because of the study indicating criminality with dropout rates. However, as above, the means that it carries out is likely too broad. The parents will show that the concerns could have been met by allowing the parents to choose the schooling forum, rather than the state, and that it hurts their right to decide as parents. Thus, the law is not narrowly tailored.

Further, the parents will argue that they have a fundamental right to keep their family together. The law undermines that right by taking their boy away from them for months at a time. The state's broadly applied law could also apply to children who drop out for good cause, another basis for being too broad. Stripping families apart requires strict scrutiny and narrow laws that fit the purpose well. Here, the action is simply too broad for its extremity on hurting family relations.

Thus, because the parents' fundamental rights to parent and to keep the family together exist, the state failed to show that its law is narrowly tailored and the parents will be successful.

Procedural Due Process

Whenever a fundamental right is infringed upon, generally a plaintiff is entitled to a notice and pre-deprivation hearing prior to the state intentionally depriving that individual of life, liberty, or property. This is procedural due process. Once a fundamental right/liberty is identified, there is a three part balancing required to know whether additional process is necessary.

Here, both Pete and his parents are deprived intentionally of their rights to liberty and privacy (respectively). These are fundamental rights and under the 14th Amendment, State presumptively was required to give notice and hearing with fact finding by a neutral fact finder in determining the rights of the individuals prior to deprivation of those rights. Here, no such process was given to either Pete or his family and the law does not provide for one. In balancing, the court considers (1) weight of interest, (2) interest in additional procedures based on the interest, and (3) efficiency and cost to the government.

Here, the weight of interests is great. Pete faces compulsory servitude to the state as a student and the parents lost their right to parent and choose what is right for their son. A process should have been in place to avoid prejudice.

Further, society has a great interest in liberty of their movement, even for young students, and privacy right of parents is compelling. Without those choices, parents are stripped of their ability to raise their children and protect them.

On balance, an additional process would not be costly to employ by the state; they would simply need to give notice to Pete and his parents, allow for facts to be presented, and make sure that Corps was in Pete's interest and/or that he qualifies for the program. Safeguards should have been in place.

Thus, because fundamental rights were at issue, both Pete and his parents were entitled to due process of law.

Equal Protection

Where a state discriminates based on class either facially or actually and with intent to do so, this triggers equal protection. Laws that discriminate based on fundamental rights trigger strict scrutiny. Laws that discriminate based on sex must be narrowly tailored to serve an important interest with exceedingly persuasive justification. The burden is on the state. Other laws need only further legitimate state reasons and be rationally based and burden is on the challenger.

Pete

Pete will first argue that the law discriminates against him in his exercise of a fundamental right of liberty without adequate justification. Just as under the above arguments, the state will have to show a compelling interest. Here, because of lack of narrowly defined means and the broad requirement of all boys to attend between 15-18 who drop out, the discrimination as to the fundamental right is on the face of the law (boys are clearly required to join the Corps who qualify) and thus the law is unconstitutional as applied to Pete because it infringes on his assertion of his liberty rights. State will argue that it can do so and that it is justified under the above arguments, but it will likely fail.

Pete will then argue that the law is facially discriminatory against him and others based on their sex, males. Pete will argue that State's study and criminal reasoning are not exceedingly persuasive based on the fact that many girls drop out, yet are not included and that State's law is under inclusive, discriminatory, and lacks sufficient rationale.

The State will argue that its basis is important because it is aimed at lowering crime. This is likely sufficient. It will also argue that the study specifically showed that boys were the prime offenders who needed the Corps program specifically. However, the state fails to point to facts showing why girls are not treated alike. It appears no equal program exists for delinquent girls, but just for the boys. Also, manual labor is often a

stereotype attached to boys, that they can handle it and girls cannot. The State's law leaves many questions as to its unequal treatment of the boys over the girls, which may rest on stereotypes based on sex which the Supreme Court has clearly stated it does not support. Also, not all dropout boys offend. The State lacks some hard numbers showing recidivism and actual offender likelihood to justify its one-sided measures that are discriminatory. Only boys are impacted, not girls.

Thus, because there lacks an exceeding persuasive justification and because the law is under inclusive, it will fail equal protection and Pete will be successful in his action on these grounds.

Pete will also argue that because the law targets only boys between 15-18 that it discriminates based on age. He would be correct. However, the court only applies rational basis review for discrimination based on age and experience.

Here, the State's interest in protecting young men and the community through the Corps is a rational basis because it makes sense; saving boys from dropping out and avoiding the statistics of offending is legitimate and it is rational that a special school may help. Pete has the burden to prove otherwise, and it is unlikely that he can do so. This is because logic shows that boys who get through school will not offend as much.

Parents.

Like Pete, the parents will be successful in showing discrimination based on their assertion of the fundamental right to privacy. The law is too overbroad in its infringement and offends equal protection of the parents' fundamental right to choose Pete's school and parent him and keep the family physically together.

Answer B

1. Thirteenth Amendment Involuntary Servitude Clause

The Thirteenth Amendment is one of the broadest amendments to the Constitution, applying not only to government actions, but also private actors. A regulation is unconstitutional under the Thirteenth Amendment if it compels one person to work for another, even if compensation is paid. Here, Pete will argue that he is being forced into indentured servitude because the Corps requires the boys to work on reforestation projects for a few hours each day. On the other hand, State X will argue that the work on reforestation projects are part of the education process for the boys. State X will argue that the work is only to defray a portion of the costs, and that it is only for a few hours per day. State X will try to compare the project to community service, where people are compelled to work on a community service project on a daily basis. Nevertheless, the boys have not committed a crime. The Corps and the work is not a punishment for the boys, but rather an attempt by State X to reduce criminal activity. It is therefore improper to compare the work to community service. Thus, the statute compels the boys into involuntary servitude and should be found unconstitutional under the Thirteenth Amendment.

2. Fourteenth Amendment's Due Process Clause

There are two prongs to the Due Process Clause of the Fourteenth Amendment. The procedural due process prong strikes down any law that deprives a citizen of a fundamental right without proper procedural safeguards. On the other hand, the substantive due process prong strikes down any law that denies a citizen a fundamental right. Here, Pete and his parents can challenge the State X statute under both the procedural and substantive due process prong.

Procedural Due Process – Deprivation of a Fundamental Right without a Hearing

Procedural due process requires the government to provide the proper procedural safeguards to prevent the erroneous deprivation of a fundamental right. Typically, procedural safeguards include notice, a hearing, and/or the right to have an attorney. When evaluating whether a particular law requires these procedural safeguards courts

look at the person's interest in the right, the court's interest inefficiency, fairness and accuracy. Here, the State X statute compels boys 15 to 18 years old to attend camps run by the Corps. Pete is 15 years old and was drafted by the Corps. By being forced to join the Corps and live on the camps in the State Forest lands, Pete has been deprived of his fundamental right of liberty. The right of liberty is the most tantamount of the fundamental rights, and Pete therefore has a very strong interest in receiving proper procedural due process.

State X will argue that with a high number of dropouts, it would be impossible to administer hearings for each student efficiently. State X would also argue that the hearings would not create a fairer or more accurate outcome as its study already linked school dropouts with criminal activity. Pete and his parents will argue that the statute is too broad, and a hearing should be held to determine whether Pete has a propensity to commit criminal activity, and therefore needs to join the Corps. Ultimately, because State X is essentially creating an educational juvenile detention system, at least a hearing is required before State X can deprive Pete of his liberty. Therefore, Pete could successfully challenge the statute under the procedural due process prong of the Fourteenth Amendment.

Substantive Due Process – Right of Liberty

As previously discussed, the statute violated Pete's right of liberty because it forces him to live on the State forest land, to receive their comprehensive education and to work on reforestation projects a few hours each day. There is no indication that Pete is free to come and go as he pleases. Instead, the facts tend to indicate that the boys must remain at the camp at all times until they reach the age of majority. Because this statute denies Pete his fundamental right of liberty, it must meet strict scrutiny. Strict scrutiny requires State X to prove that the statute is necessary to achieve an important government interest. Courts use the least restrictive alternative test – if there is a lesser restrictive alternative to the statute, then the court will strike the statute down.

Here, the state's interest is preventing criminal activity. This is a compelling state interest and State X may enact laws to further this interest. The statute creating the Corps, however, is not necessary to achieve this interest. State X will argue that it has

linked an increase in criminal activity with the dropout of boys aged 15 to 18. It will further argue that in order to prevent these boys from entering into illegal activities, it had to create the Corps to remove the boys as a threat to society. However, there are many other less restrictive alternatives State X could have used to decrease criminal activity. State X could invest more in its educational system, providing better education to boys at an earlier age to prevent them from dropping out. State X could provide the Corps as an option for parents that were having difficulty dealing with children. State X could set up a scholarship fund for graduating boys to encourage them to stay in school. All of these actions could decrease the dropout rate and thus criminal activity without depriving the boys of their fundamental right of liberty. The law therefore is not necessary and would most likely be found unconstitutional.

Substantive Due Process – Right of Privacy

Pete's parents can argue that the law unconstitutionally violates their rights to privacy. The Supreme Court has held that the "penumbra" of the Bill of Rights, incorporated and applied to the states through the Fourteenth Amendment, has created a fundamental right to privacy. Moreover, the Supreme Court has found that included in the fundamental right of privacy is the right of parents to control the upbringing of their children. Here, the State X law drafts boys who are aged 15 to 18. These boys are still in the minority, and their parents therefore still have a legitimate interest in their upbringing. In addition, the law compels these boys to attend camps on public lands administered by the State Forest Service. On its face, the law does not appear to give parents a choice once their boy drops out of school. The parents cannot refuse to send him to the Corps, nor can they take their own remedial actions – hiring a tutor, homeschooling, sending the boy to private or military school, etc. Control is taken away from the parents.

Because the law takes away the ability of the parents to control the upbringing of their children by compelling the boys to enter the Corps when they drop out of school, the law is unconstitutional unless it passes strict scrutiny. That is, the law must be necessary to achieve a compelling state interest. As discussed previously, while reducing criminal activity is a compelling state interest, the Corps is not necessary to

achieve this purpose. This statute therefore could also be successfully challenged by the parents under the Due Process Clause of the Fourteenth Amendment.

3. Fourteenth Amendment's Equal Protection Clause

A regulation that has a classification on its face is subject to constitutional attack under the Equal Protection Clause of the Fourteenth Amendment. The Equal Protection Clause provides that no state shall enact a law favoring one citizen over another. Here, State X has two classifications on its face: an age-based classification and a gender-based classification.

Age-Based Classification

The Supreme Court has ruled that age-based classifications are non-suspect classifications that are subject to the rational basis test. Under the rational basis test, the law will be upheld unless Pete or his parents can prove that the law is not rationally related to a legitimate government purpose. Here, State X completed a study on the behavior of teenagers, which indicated a positive correlation between school dropout rate and criminal activity. Moreover, the connection was most pronounced among boys 15 to 18 years old. The reduction of criminal activity is a legitimate government purpose. Because of the link between criminal activity and school dropout rate, State X decided to send boys aged 15 to 18 to camps in order to provide them with a comprehensive education, and to remove them as a threat for criminal activity elsewhere in the state. State X's law creating the Corps to draft boys aged 15 to 18 is therefore rationally related to the government's purpose of reducing criminal activity. If most 15 to 18 year-old male school dropouts become involved in criminal activity, sending them to the Corps should reduce criminal activity. Thus, the law will be upheld as constitutional if it is attacked as an age-based classification.

Gender-Based Classification

While age-based classifications are subject to the rational basis test, gender-based classifications required heightened scrutiny. In order to withstand a constitutional challenge, a gender-based law must be substantially related to an important government interest. Unlike the rational basis test, here the government bears the

burden of proving that the law is constitutional. As previously discussed, the statute aims to reduce the amount of criminal activity within State X by confining male dropouts to the Corps. Reducing criminal activity is an important government interest. The dispositive question is therefore whether the Corps is substantially related to State X's interest in reducing criminal activity.

As already discussed, the law is not necessary as it is not the least restrictive means of achieving the government's objective. The law also does appear not to be substantially related to the government's purpose. A study linked the dropout of boys ages 15 to 18 years old with an increase in criminal activity. There is no evidence, however, that this is a strong causal connection. For example, a 50% increase in dropout rate could only lead to a 1% increase in crime. State X must positively demonstrate a strong correlation between the Corps law and its purpose of reducing criminal activity. Without more evidence, it is unlikely a court would find that the law is substantially related to State X's interest and thus the law will likely be found unconstitutional.

Q3 Community Property

In 2007, while married to Hank and residing in California, Wendy inherited $150,000. Wendy used the money to purchase $50,000 worth of Chex Oil stock and a restaurant that cost $100,000. Hank managed the restaurant and, solely through his own efforts, it prospered and is now worth $300,000.

In 2008, Hank inherited an unimproved lot in California worth $75,000. Hank and Wendy obtained a construction loan from a bank for the purpose of building a rental house on the lot. In making the loan, the bank relied upon the salaries earned by both Hank and Wendy and, in addition, required that Wendy pledge the Chex Oil stock. A rental house was constructed on the lot. The present market value of the property, as improved, is $500,000.

In 2011, Cathy, a customer at the restaurant, tripped and fell over a box carelessly placed in the entryway by Hank. She obtained a judgment against Hank for injuries suffered in the fall.

Hank and Wendy have now decided to dissolve their marriage.

1. What are Wendy's and Hank's respective rights in:

    a. The Chex Oil stock? Discuss.

    b. The restaurant? Discuss.

    c. The rental property? Discuss.

2. To satisfy her judgment, may Cathy reach the community property, Hank's separate property, and/or Wendy's separate property? Discuss.

Answer according to California law.

Answer A

Community Property

California is a community property (CP) state. All property acquired during marriage is community property. Separate property (SP) includes property owned before marriage, property acquired by gift, will, or inheritance during marriage, rents, issues, and profits from SP, and earnings after separation.

Characterization of property as either CP or SP depends on: (1) the source of the property; (2) any legal presumption affecting the property; and (3) any actions of the parties that may have changed the character of the property.

With these principles in mind, each item of property will be analyzed.

The Chex Oil Stock

Source

In 2007, while married to Hank (H), Wendy (W) inherited $150,000. Wendy used the $150,000 inheritance to purchase $50,000 of Chex Oil stock and a $100,000 restaurant. Thus, the source of the Chex Oil stock was W's inheritance, which is W's SP.

Presumptions

All property acquired during marriage is presumed CP. This presumption can be rebutted by tracing to a SP source or by an agreement to the writing to the contrary. Here, W can trace the $50,000 used for acquisition of the Chex stock to her $150,000 inheritance. W's inheritance is her SP. Thus, the general CP presumption is rebutted by tracing the funds used to purchase the stock to a SP source, the inheritance.

Actions

The only action taken by the parties with respect to the Chex stock was to pledge it as collateral for the loan to build the rental property.

Parties may transmute property from SP to CP and vice versa, which is a change in character of the property. After 1/1/1985, any transmutation must be in writing, clearly state the change in character of the property, and be signed by the spouse whose interest is adversely affected.

Here, there was no agreement between H and W that the Chex stock be transmuted from W's SP to CP. The fact that the bank required H and W to pledge the Chex stock as collateral for the bank loan to build the rental property is not sufficient evidence of a transmutation because it does not state any intent that W is transmuting her SP to CP.

Thus, the pledging of the Chex stock as collateral does not change the character of the stock.

Disposition

Because the stock can be traced to a SP source, the general CP presumption is rebutted, and has had no change in character; the Chex stock is W's SP. Now that H and W are seeking dissolution of their marriage, the Chex stock will be awarded solely to W as her SP.

The Restaurant

Source

In 2007, while married to H, W inherited $150,000. Wendy used the $150,000 inheritance to purchase $50,000 of Chex Oil stock and a $100,000 restaurant. Thus, the source of the restaurant was W's inheritance, which is W's SP.

Presumptions

All property acquired during marriage is presumed CP. This presumption can be rebutted by tracing to a SP source or by an agreement in writing to the contrary.

Here, W can trace the $100,000 used for acquisition of the restaurant to her $150,000 inheritance. W's inheritance is her SP. Thus, the general CP presumption is rebutted by tracing the funds used to purchase the restaurant to a SP source, the inheritance.

Actions

Hank managed the restaurant during the marriage.

CP Contribution to SP Business

A spouse's effort, skill, and industry during marriage is a CP asset. Where a spouse contributed his or her effort, skill, and industry during marriage to his or the other spouse's SP asset, and the asset increases in value, the community receives an interest in the asset. There are two different accounting methods to determine the value of the respective SP and CP interests in the business at dissolution.

Here, H contributed his effort, skill, and industry, which is a CP asset, to the restaurant, which is W's SP asset, during marriage.

The court is not required to use either formula and may choose, or may use whichever formal the parties provide evidence in support of.

Pereira

The Pereira formula is used where the major factor contributing to the increase in value is the spouse's personal effort. Under Pereira, the value of the SP portion of the asset is equal to the value of the SP asset at the time of marriage or the time of acquisition during marriage, plus a reasonable rate of return, usually 10% per annum. The residual value belongs to the community.

Here, managing a restaurant takes personal effort and industry. The facts state that "solely through [H's] own efforts, it prospered." Thus, it appears that Pereira would be the more appropriate formula to use in this circumstance.

Here, the restaurant was purchased in 2007 for $100,000. Now, in 2013, H and W seek dissolution of marriage. Assuming that the purchase price was the fair market value of the restaurant at the time, the SP portion of the restaurant will be equal to $100,000 plus $10,000 per year for six years, or $160,000. The residual value, of $140,000 ($300,000 - $$160,000) is the community's interest in the restaurant.

Thus, under the Pereira formula, the restaurant will be $160,000 CP and $140,000 SP.

Van Camp

The Van Camp formula is typically used where the SP business is valuable and increases in value due to the existence of the business and market forces, and not the personal effort or industry of the spouse. Under Van Camp, the community receives a reasonable salary in return for the spouse's contribution of time and effort, reduced by the amount of community expenses paid by the returns from the business. The residual is the owning spouse's SP.

Here, as explained above, the restaurant in value because of H's contribution of effort and industry, not because of market forces. Thus, the Van Camp formula is probably not the more appropriate formula.

Under Van camp, the community would be credited with a reasonable salary for the 6 years that H spent managing the restaurant, less any community expenses paid by the returns from the restaurant. The balance will be W's SP.

Disposition

Since Pereira is probably the better formula, the restaurant will be $160,000 CP and $140,000 SP.

The Rental Property

Source

In 2008, H inherited an unimproved lot worth $75,000. Inheritance during marriage is the inheriting spouse's SP. Thus, the source of the lot is H's SP.

Regarding the construction loan, the personal credit of either spouse during marriage is a community asset. Here, a loan was obtained from the bank for the construction of the rental property. The loan was obtained in both spouses' names and the bank relied upon the salaries earned by both H and W. The bank also required W's Chex stock as collateral.

Since the bank relied on the personal credit of both spouses, the bank loan is CP.

Presumptions

All property acquired during marriage is presumed CP. The presumption can be rebutted by tracing to a SP source or a written agreement to the contrary. Here, the lot was acquired in 2008, during the marriage. However, the lot can be traced to H's inheritance, which is SP. The bank loan is presumed CP because it was acquired during marriage. There are no facts that can rebut this presumption. W may argue that her pledge of collateral of the Chex stock makes the bank loan her SP, but this argument will be rejected because the bank specifically relied on the salaries earned by both H and W.

Actions

Improvement of Separate Real Property with CP

Here, the bank loan (CP) was used to improve an SP asset (H's lot).

Where CP is used to improve a SP asset, the community is entitled to an interest. The formula used for calculating such an interest is from In re Marriage of Moore. The community is entitled to reimbursement for the value of the contributions for down payment, improvements, and payment of principal, plus a pro rata share of the appreciation.

Here, the community will receive reimbursement of the principal payments made on the bank loan, plus a pro rata share of the appreciation calculated by dividing the CP contribution by the total contribution of SP and CP. The facts do not give enough details to make such a calculation, but it will be some portion of the $500,000 present market value.

Disposition

The rental property is part CP and part SP as discussed above. The CP portion will be divided equally upon dissolution.

What Can Cathy Reach to Satisfy Her Judgment?

Liability of CP and SP for Tort Judgment

CP is liable for all debts incurred by either spouse before or during marriage. Where a judgment results from a tort committed by one spouse, the order of satisfaction of the judgment depends on whether the tortfeasor spouse was acting for the benefit of the community at the time the act giving rise to the judgment was committed. If the tortfeasor spouse was acting for the benefit of the community, the judgment may be satisfied first by CP and then by the tortfeasor spouse's SP. The non-tortfeasor spouse's SP is not liable. If the tortfeasor spouse was not acting for the benefit of the community, the judgment may be satisfied first from the tortfeasor spouse's SP and then from CP. The non-tortfeasor spouse's SP is not liable.

Here, H placed a box in the entryway of the restaurant, presumably while working at the restaurant. Cathy, the customer, obtained a judgment against Hank. If Hank was working at the restaurant and placed the box in the entryway negligently, in the course of his work, he was acting for the benefit of the community because the community had an interest in the restaurant and H's wages from the restaurant were CP. Alternatively, if H placed the box there and injured Cathy intentionally, or did not place the box there as part of his work at the restaurant, he was not acting for the community. Here, it is probably more likely he was acting for the benefit of the community.

As such, Cathy must first satisfy her judgment from CP, which includes a portion of the restaurant and a portion of the rental property. Once CP is exhausted, and if it is, Cathy must satisfy the balance of her judgment from H's SP, which includes a portion of the rental property. Cathy cannot reach the portion of the restaurant that is W's SP and cannot reach the Chex Oil stock, which is also W's SP.

Answer B

California is a community property state. In California, there is a community presumption. Under the community presumption, property obtained during marriage by the spouses is presumed community property. There are also areas of separate property. Property obtained by either spouse before or after the marriage is typically separate property. Additionally, any property obtained by gift, will, or inheritance by either spouse is that spouse's separate property. Property that is obtained using separate property also remains separate property. With these considerations, Hank and Wendy's respective rights will now be considered.

1. Hank and Wendy's Rights in Property

Chex Oil Stock

While married to Hank and residing in CA, Wendy inherited $150,000. As described above, an inheritance by a spouse is separate property of that spouse despite the community presumption. Wendy used $50,000 of this money to buy the Chex Oil stock. The use of separate property to obtain other property results in that other property remaining separate property. Therefore, the Chex Oil stock was separate property when it was bought by Wendy.

Hank may argue that Wendy intended to make the stock a gift to the community when she used it as part of the collateral for the loan obtained by the couple in 2008. Since 1985, however, a transmutation of property from separate property to community property must be in writing and show the intent of the separate property holder to effectuate a gift to the community. Because Hank would not be able to produce such a writing, he will not be able to show that Wendy made a gift to the community.

The Chex Oil stock is Wendy's separate property.

Restaurant

While married to Hank and residing in CA, Wendy inherited $150,000. As described above, an inheritance by a spouse is separate property of that spouse despite the community presumption. Wendy used $100,000 of this money to buy the restaurant.

As described above, the use of separate property to purchase other property results in that property remaining separate property. Therefore, the restaurant was separate property when it was bought by Wendy.

The restaurant has increased in value because of Hank's efforts. Hank's labor is considered community property. The use of community property to enhance the value of a spouse's separate property is analyzed by the court in different ways.

When the separate property is the separate property of one spouse and then other spouse uses community property to enhance the value of the first spouse's separate property, courts in CA may sometimes consider this a gift by the second spouse to the first spouse. Here, hank used community property assets (his labor) to increase the value of the separate property owned by Wendy (her restaurant). Some courts may interpret this as a gift by Hank to Wendy.

The gift interpretation, however, is more likely to be used when a monetary or similar transfer of community property is made to enhance the separate property's value. Here, Hank worked for at least 4 years (depending on when they seek dissolution of the marriage – it could be 6 years) at the restaurant. It is unlikely he intended these years of work to be a gift to Wendy's separate property. Some courts will refute the presumption that the community property going to the other spouse's separate property was a gift and instead hold that the portion is community property.

In determining what portion is community property, courts will apply analysis either from the *Pereira* case or the *Van Camp* case.

The *Pereira* formula is often applied when the labor of the spouse has resulted in the increase in the value of the business. This is the case here, where the facts state that the restaurant has prospered "solely through his own efforts" as manager of the restaurant. The *Pereira* formula considers the value of the property at the time it was acquired (or time of the marriage if that comes after), and gives the spouse owning the separate property a fair return on the investment, which would be 10% per annum. Based on this analysis, and assuming 6 years have passed, Wendy would get 10% of the restaurant's initial value, or $10,000, each year. This would result in $60,000 of

increase. So $160,000 of the property remains Wendy's separate property and the other $140,000 is community property.

The fact that Hank was working instead of Wendy does not change this analysis. Typically the owning spouse may work on her own separate property. Regardless, community property (Hank's labor) was put towards the business to make it grow, and so the *Pereira* formula would view the fair investment return to be community property.

The *Van Camp* formula applies when the property increases in value because of its inherent worth. This does not apply here because the property increased due to Hank's efforts, not the restaurant existing itself. This formula would look at the reasonable rate of compensation for the spouse and deduct the expenses of the couple. The remaining value of the salary would be community property, and the remaining value of the business would be separate property of the spouse. As mentioned above, it does not apply here because the restaurant increased in value due to Hank's efforts and because it was Hank working on the property rather than Wendy.

Their respective rights in the property should be $160,000 separate property of Wendy and $140,000 community property, which the couple would split upon divorce.

Rental Property

While married to Wendy and residing in CA, Hank inherited an unimproved lot worth $75,000. As described above, an inheritance by a spouse is separate property of that spouse despite the community presumption. The unimproved lot, therefore, was separate property of Hank.

The community then obtained a loan to improve the property into a rental property. Whether a loan is considered community property or separate property depends on what the creditor looked at for satisfaction of the loan.

Here, the creditor looked at the salaries of each and the value of the Chex Oil stock. Because of the inclusion of the Chex Oil stock, Wendy may argue that the loan should be considered her separate property that then went into the rental property. The value of the stock, however, was only $50,000. In order to go from an unimproved lot to a rental property worth $500,000, the creditor likely made a substantial loan and relied

primarily on the salaries of each spouse. The salaries of each spouse at that time, and therefore their creditworthiness, is a community asset. The loan, therefore, should be considered a community asset.

As above, this involves the use of community property to enhance the value of separate property of a spouse. Hank may argue that Wendy intended her use of community property to enhance the value of his separate property to be a gift. Courts have analyzed this in different ways, as described above. Here, it is unlikely that a court would determine this to be a gift and instead hold that the community has some interest in the property.

Wendy may argue that Hank intended a gift to the community by using the community loan to build up his property. As explained above, however, a transmutation requires a clear writing by the party giving the gift. Here, there is no writing showing that Hank intended a gift. The court would determine that Hank did not gift the entire property to the community.

Instead, the court must then determine what percentage of the property is community property. The land went from unimproved and worth $75,000 to improved and worth $500,000.

Wendy may argue that the increase should all be considered community property, potentially subject to a reasonable increase in the original investment. This would essentially be like an argument that *Pereira* should apply because it is now a business and community assets went into it to increase its value. If this were used, the property would receive a fair 10% increase per annum and the community would receive the remaining value of the property.

Alternatively, the court looks at the amount of the loan that was received. The court could then compare this amount to the original value of the land to do a proration analysis. Under this theory, the court would look at the original $75,000 value of the land and compare it to the value of the loan (I'll assume $125,000 for basic calculation and demonstration purposes). If the loan were $125,000, then the total value going into the property would be $200,000 (75,000 + 125,000). The court would then prorate the proportion of separate property and community property to the value of the property

today, which is $500,000. The proportions of the separate property (3/8 in assumption) and the community property (5/8 in assumption) would be prorated to the $500,000 value to determine amounts of separate property and community property.

The court may also alternatively look at the amount of the loan and view this as the community property and merely require a reimbursement for the amount of money that went into the undeveloped land.

Because of the increase in the property value due to the improvements, some form of proration would likely be better for the court to apply to afford a more fair split of the property value.

2. Cathy's Judgment

Cathy, a patron at the restaurant, has received a judgment against Hank for his negligence. Based on the facts, it appears that the judgment is only against Hank individually and not against the restaurant itself. The analysis below will assume that Hank is individually liable and the restaurant is not vicariously liable for the judgment.

Because Hank is personally liable for the judgment, his separate property is subject to Cathy's judgment. Cathy may therefore go after Hank's portion of the rental property that is his separate property. She may also go after any other separate property owned by Hank.

The tort liability of one spouse can affect the community assets. Cathy would be allowed to go after the community assets to satisfy her judgment. The order in which she obtains her judgment, however, depends on whether the spouse was acting for the benefit of the community at that time or for his own separate benefit. Here, Hank was working at the restaurant for the benefit of the community when the tort liability was incurred. Because Hank was acting for the betterment of the community, Cathy may go after the community property before she is forced to go after Hank's separate property for the judgment. To the extent that Wendy's community property interest is infringed by Cathy's judgment, she may be able to seek reimbursement from Hank at the divorce because she is not personally liable for the tort.

Wendy's separate property is not subject to the tort liability of Hank. Wendy is not individually liable for the tort (again, assuming that the restaurant is not vicariously liable). Additionally, community property of Wendy, such as wages, kept in a separate account that the other spouse cannot access could not be reached by a creditor unless for the necessaries of the other spouse. Here, Hank is liable for a tort, not a contract for necessities, so the necessaries exception would not apply. Additionally, Cathy's Chex Oil stock that she keeps separate is separate property rather than community property that she keeps separate, so it could not be reached by Cathy.

Therefore, Cathy may go after Hank's separate property and the community property to satisfy her judgment. She may not go after Wendy's separate property.

Q4 Contracts

On March 1, Ben, a property owner, and Carl, a licensed contractor, executed a written agreement containing the following provisions:

1. Carl agrees to construct a residence using solar panels and related electrical equipment manufactured by Sun Company ("Sun") and to complete construction before Thanksgiving.

2. Ben agrees to pay Carl $200,000 upon completion of construction.

3. Ben and Carl agree that this written agreement contains the full statement of their agreement.

4. Ben and Carl agree that this written agreement may not be modified except upon written consent of both of them.

Prior to execution of the written agreement, Ben told Carl that Carl had to use Sun solar panels and related electrical equipment because Sun was owned by Ben's brother, and that Carl had to complete construction prior to Thanksgiving. Carl assured Ben that he would comply.

In August, Ben began to doubt whether Carl would complete construction prior to Thanksgiving; Ben offered Carl a $25,000 bonus if Carl would assure completion, and Carl accepted and gave his assurance.

To complete construction prior to Thanksgiving, Carl had to use solar panels and related electrical equipment of equal grade manufactured by one of Sun's competitors because Sun was temporarily out of stock.

Carl completed construction prior to Thanksgiving. Ben, however, has refused to pay Carl anything.

What are Carl's rights and remedies against Ben? Discuss.

Answer A

Governing Law

Contracts are governed by either the UCC or Common Law. The UCC relates only to contracts for the sale of goods. Here, the contract is for the construction of a residence, using certain products manufactured by Sun. Although this involves the goods manufactured by Sun, it is primarily for the purpose of having Carl build a residence for Ben. Therefore, common law controls.

Valid Contract

To have a valid and enforceable contract there needs to be (1) an offer, (2) acceptance, and (3) consideration. Here, the facts indicate that Ben and Carl reached an agreement related to the terms. Thus, the first two elements are present. Additionally, the contract calls for Carl to construct a residence to Ben's specifications and for Ben to pay Carl $200,000 in return. Thus, there is a bargained-for exchange of legal detriment by the parties because they are both doing something that they have no legal obligation to do, in exchange for a benefit.

Therefore, there is a valid contract formed between Ben and Carl.

Terms of the Contract

Generally, the terms of the contract are determined by the written agreement itself. Here, the written agreement indicates certain terms, including that Carl will construct a residence using solar panels and related electrical equipment manufactured by Sun and that Ben will pay Carl the $200,000 upon completion.

However, these promises contained in the agreement are not the only terms that the parties may claim exist.

Parol Evidence Rule

The parol evidence rule bars the introduction of an oral or written agreement which was made prior or contemporaneous to the execution of the contract and which contradicts or varies the terms of the integrated contract.

Here, Ben may argue that prior to the execution, Ben and Carl agreed that the use of Sun products and completion prior to Thanksgiving were conditions, not promises. A condition precedent to performance is a term in the agreement that must be satisfied strictly in order for the party's performance to be due. If the condition never occurs, the party never has a duty to perform. A promise, on the other hand, only needs to be substantially performed under the common law in order for the other party's performance to become due. In the contract, the use of Sun products and completion by Thanksgiving are merely promises because they do not indicate any mandatory language or language to show that Ben's performance is not due unless they are strictly followed.

Carl will argue that introducing the evidence of Ben and Carl's oral agreement prior to the execution of the contract regarding the mandatory nature of the Sun product and completion terms is barred by the parol evidence rule.

Although this does constitute a prior oral agreement, the parol evidence rule does not bar the introduction of evidence to show that there was a condition precedent to performance. This is one of the rule's exceptions. Therefore, if this agreement did make those terms conditions, rather than promises, then the argument can be used to show that.

Here, the agreement between Carl and Ben does show that Ben told Carl that he "had to use Sun" products and that he "had to complete construction prior to Thanksgiving." Although these do indicate more definiteness, there is no express language stating that unless Carl does so, Ben will not have to perform. Thus, Carl will argue that this agreement only enforced the terms of the written agreement, not changed them into conditions.

Ultimately, because there is no express language and because the courts do favor promises over conditions because of the strict compliance requirement of conditions, this will likely be found to be an enforcement of the promise in the agreement and therefore not parol evidence to contradict the terms.

Bonus Agreement

Ben began to doubt whether Carl would complete construction prior to Thanksgiving, so he offered Carl a $25,000 bonus if Carl would assure completion. Carl accepted and gave such assurances. Carl will argue that this was a new contract or a modification to their existing contract.

Modification in Writing

If Carl argues that this agreement modified the written agreement that Carl and Ben had, Ben will point to the term in the agreement which states that “this written agreement may not be modified except upon written consent of both of them.” These modifications in writing terms are generally not enforced under common law.

Statute of Frauds

A writing is only required to modify an existing agreement under common law if the modification places the contract within the statute of frauds. The statute of frauds generally does not apply to services contracts unless they are not capable of being performed within one year. Here, the agreement that attempts to modify the existing agreement states that performance must be completed by Thanksgiving (late November). The original contract was made on March 1, and the modification in August. Therefore, this is requiring that performance be completed under a year from the time of the contract or the modification. Therefore, the statute of frauds does not require a writing.

Therefore, Ben cannot challenge this modification on the basis of a lack of a writing.

Enforceable Agreement

Although it is permissible for the parties to orally modify their agreement, a modification or subsequent contract requires the three elements required in every contract: (1) offer, (2) acceptance, (3) consideration. Here, there was an offer from Ben to Carl for $25,000 extra if Carl finished construction prior to Thanksgiving. There was an acceptance because Carl accepted these terms as they were, without condition. There also must be, however, consideration.

Pre-Existing Duty Rule

The pre-existing duty rule holds that a promise to do what a party is already contractually or otherwise obligated to do is not consideration for a new agreement. The exceptions to this agreement are for (1) if a third party will perform the obligation, (2) if unforeseen circumstances have made it such that the performance would otherwise be excused, or (3) there is a change in the amount or type of performance.

Here, the performance between Ben and Carl was set in the agreement to be completed before Thanksgiving. Thus, Carl was under a pre-existing contractual duty to perform by Thanksgiving. As such, there is no consideration given by Carl in the agreement, only by Ben in offering to pay more money.

Carl might argue that because Ben began to doubt Carl's ability to perform, this rule is excused. However, that is not the law. Common law, unlike the UCC, strictly requires adequate consideration for a modification or a creation of a new agreement. Here, there was not an excuse of Carl's performance under the circumstances, nor did he promise to do more than he was already obligated to do under the agreement, and he did not assign his duties to a third party.

Therefore, there is no consideration to support the agreement between Ben and Carl made in August. Thus, Ben has no obligation to pay Carl $25,000.

Thus, the terms of the agreement are unmodified and remain just as they were in the original written integration.

Performance of the Contract Terms

Carl's Performance

Under common law, a breach of contract occurs if a party fails to fully perform its obligations under an existing contract. However, in order to discharge the other party's obligation to perform its obligations, there must be a material breach. Therefore, in order for Carl to have sufficiently performed to give Ben an obligation to perform, Carl must have substantially performed his obligations under the contract.

Under this contract, Carl constructed a house for Ben. That was his primary obligation and he completed it. Additionally, he completed it on time: by Thanksgiving. Therefore, Carl fully and completely performed two of his three obligations under the contract.

Carl did not, however, perform his obligation to use Sun manufactured solar panels and related electrical equipment in constructing the house. Carl knew he was supposed to do this, but he failed in this because in order to get it done on time, he had to use solar panels manufactured by one of Sun's competitors. Therefore, by not complying with the contract terms as to this requirement, Carl did commit a breach of contract.

This breach, however, is minor. Carl substantially performed his obligation under the contract because he built an entire house for Ben and got done on time. Therefore, the failure to use Sun products was a minor breach for which Carl is liable, but it does not discharge Ben's obligation to perform.

Ben's Performance

Ben flatly refused to perform at the time that his performance was due: upon completion of the construction. Therefore, because his performance was due, he is in material breach of the contract.

Excuses for Non-Performance

Carl's Non-Performance

Waiver of Promise

Carl will argue that his performance was discharged by Ben's waiver of the promise to use material made by Sun when he mandated and offered more money for Carl to complete performance by Thanksgiving.

Generally, a party may waive a condition precedent to performance if the condition is in the contract to protect them, but it is not permissible to waive performance of a promise under a contract unless there has been a modification of the agreement.

Here, as shown above, the offer to give Carl an extra $25,000 was not supported by consideration. Therefore, it is not enforceable as a modification. Further, even if it was enforceable as a modification, it does not indicate that Ben "waived" the right to have Sun products used in his home. Carl never informed him that it would not be possible to use those products and perform on time.

Therefore, the promise is not waived.

Impossibility/Impracticability

Carl will also argue that impossibility or impracticability discharged him of the obligation to use Sun products. Impossibility discharges performance if it would be objectively impossible to perform due to unforeseen circumstances. Impracticability discharges a party's performance if the performance has become extremely and unreasonably difficult and expensive as a result of unforeseen circumstances.

Here, although Carl may claim that it was objectively impossible to get Sun products in time to construct the house before Thanksgiving, Ben will counter that difficulty in obtaining Sun products was not an "unforeseen circumstance."
To be unforeseen, the circumstance must be one that the parties did not, or could not, contemplate at the time of the agreement. Here, the possibility that it would be

challenging to get Sun products specifically, is a condition that the parties, particularly Carl, should have contemplated at the time of the agreement since the agreement was specific as to their use. Further, it is unknown exactly what the hardship or difficulty was in obtaining those products on time. If it was a totally unforeseen circumstance which led to the hardship, then Carl would have a stronger argument.

However, in the absence of information showing that an unforeseen event caused the inability to obtain these products on time, Carl's performance on that term will not be excused.

Ben's Non-Performance

Non-Occurrence of a Condition Precedent

Ben will argue that the condition precedent that the house be built using Sun products discharges him of any liability for payment. However, as discussed above, it is most likely that the court will construe the written term and the oral agreement as creating a promise, not a condition.

Therefore, his obligation is not discharged since Carl substantially performed his obligation under the contract (see above).

Conclusion

Therefore, Ben is liable to Carl for a material breach of the agreement. Ben is not responsible to pay the extra $25,000. But Carl is responsible for the damages caused by his minor breach of the agreement.

Carl's Remedies

Compensatory Damages

Compensatory damages in contract are aimed to place the plaintiff in the position that he expected to be in but for the breach. This is the general measure of contract compensatory damages.

In order to recover compensatory damages, the damages must be shown to be (1) caused by the defendant, (2) foreseeable, (3) unavoidable, and (4) certain.

Here, the damages were caused by Ben's refusal to pay. They were foreseeable because it was foreseeable that Ben would simply refuse to pay; this is not an attenuated or unexpected event. The damages were unavoidable to the extent that Carl could not have done anything else to mitigate his loss. He built the house and has not received payment; he is not in the type of contract where he can seek cover or performance from another.

Finally, the damages must be certain. In a construction contract, the damages for a party who completes a performance but is not paid is the contract price. Here, the contract price is $200,000. Therefore, Carl's damages are certain in sum based on the contract.

Therefore, he can recover $200,000 in compensatory damages from Ben.

Offsetting Damages

Carl's compensatory damages award will be offset by the damages that he caused Ben as a result of his failure to use Sun products. Since the products used by Carl were of equal grade to those used by Sun, the damages will be fairly nominal.

Ben will try to retrieve consequential damages arising from his brother's lost profits. However, although Ben's brother owns Sun and would have benefitted from the contract, it was only incidentally. Thus, Ben's brother is not entitled to anything on a third party beneficiary theory since only intended beneficiaries have such rights.

Consequential damages here would not be available for loss to the brother's business unless Ben can show that those are his own personal damages. However, if he can show a personal loss stemming from this failure, he can recover consequential damages since the ownership of Sun was known to Carl at the time of making the contract.

Therefore, Ben's $200,000 will be offset by Ben's damages.

Specific Performance

Specific performance is an equitable remedy which requires the contract to be performed. To be granted, it must be shown that (1) there is a valid, certain, and definite contract, (2) the plaintiff's conditions for performance were met, (3) there is not an adequate remedy at law, (4) enforcement is feasible, and (5) there are no defenses.

Here, the contract is valid, and definite in the terms of the integrated writing (see above). Carl (the plaintiff's) conditions for performance were met. But there is an adequate remedy at law. Since the payment of money is not unique, unless there is an indication that Ben is insolvent, there is a perfectly adequate legal remedy in compensatory damages. Finally, feasibility would be enforceable.

Unclean Hands

Further, even if there was not an adequate remedy at law, Ben might raise the defense of unclean hands. Unclean hands is an equitable defense which says that the contract should not be enforced in equity if the plaintiff committed wrongdoing in the transaction. Here, Ben will argue that Carl breached the agreement by not using Sun products and therefore comes to the court with unclean hands. This will likely not prevail since Carl's breach was minor.

Regardless, Carl's best remedy is legal. Specific performance will not be granted.

Answer B

Carl's rights and remedies against Ben will be determined by principles of contract law.

Applicable Law

The common law of contracts will govern the contract that Carl and Ben made. The common law governs all contracts except for contracts regarding the sale of goods, which are governed by the UCC. The common law governs services contracts, and therefore covers construction contracts. Here, Carl is a licensed contractor, and he has agreed to construct a residence for Ben. Therefore, Carl has entered into a services contract, which will be governed by the common law. One may argue that Carl has agreed to provide a house, which is a good, but this argument will fail. Carl was hired for his services in constructing a house.

Formation

The facts show that a validly executed contract was formed. A contract requires mutual assent and consideration. Here, Ben and Carl entered into a written agreement, whereby both manifested consent to be bound by the terms of the contract.

Moreover, there is adequate consideration. Consideration is a bargained-for legal detriment. Here, Carl agreed to build a house and Ben agreed to pay $200,000 in consideration.

Terms of the Contract and Ben's Alleged Breach

The written contract states that Carl agreed to construct a residence using solar panels and related electrical equipment manufactured by Sun Company. In addition, Carl agreed to complete construction before Thanksgiving. Ben agreed to pay Carl $200,000 upon completion of the contract.

Carl constructed the home before Thanksgiving. Now, Ben refuses to pay Carl anything. Carl's rights and remedies under the contract will be determined by the court's interpretation of the contractual terms and whether the parties modified the terms of the contract.

Promise or Condition to Use Panels from Sun Company

A condition precedent is a condition that must be fulfilled in order to require the party with the benefit of the condition to render full performance under the contract. If a condition precedent is not fulfilled, the party with the benefit of the condition is not required to perform. Here, Ben will argue that the contract includes a condition precedent that Carl had to use Sun Company solar panels in construction of the house. Ben will argue that Carl did not use Sun Company solar panels and related electrical equipment, and that Carl therefore did not satisfy the condition. Therefore, Ben will argue that he was not required to render performance under the contract and pay Carl the $200,000 for the house.

In contrast, the non-occurrence of a promise or the failure to fully satisfy a promise contained in a contract does not relieve the other party of liability. If a party promises to render performance of a contract, the other party will not be relieved of performance unless the party who made the promise materially breached the contract. A material breach occurs when the party does not render substantial performance. A minor breach does not relieve the non-breaching party of their duty to perform, although they can sue for damages. In order to determine whether a breach is minor or material, a court will consider the extent of performance, the hardship to the breaching party, the adequacy of compensation, and the additional work needed to fulfill the promise.

A court will consider the intent of the parties in order to determine whether a clause at issue is a condition or a promise. As explained above, Ben will argue that the use of Sun Company products in construction of the house was a condition while Carl will argue that he merely promised to use the products. Here, the court will likely hold that, under the terms of the written contract, the agreement to use Sun Company products was a promise. The language of the contract does not expressly condition Ben's

performance on the use of Sun Company products. In a large construction project like this, a court will likely require unambiguous language that the parties intended to create a condition and not a promise. Solar panels and electrical equipment are relatively minor elements of an overall house. Therefore, based on the terms of the contract, the court likely will not find that the clause requiring Sun Company products was so important that the parties intended for it to be a condition. Here, Carl used solar panels of equal grade and otherwise constructed the house per the terms of the contract.

Parol Evidence

However, Ben will argue that the court should consider the parties' discussions prior to entering into the contract when interpreting the terms of the contract. Ben will argue that he explicitly told Carl that he had to use Sun Solar panels and related electrical equipment, because Sun was owned by Ben's brother. Therefore, Ben will argue that the use of the Sun Company products was a very important part of the contract. Ben will argue that he would not have made the contract with Carl unless Carl agreed to use Ben's brother's products.

Carl will argue that the Parol Evidence rule bars the court from considering evidence of these discussions. The parol evidence rule applies when a contract has been fully integrated. Integration occurs when the parties intend the contract to integrate all prior discussions and that all terms be included in the final written agreement. A merger clause in a contract is probative of the parties' intent to integrate but it is not conclusive.

If a contract is integrated, prior communications between the parties cannot be used to contradict the terms of the contract. However, the parol evidence rule does not bar the use of prior communications to show the non-occurrence of a condition, to challenge the validity of the contract, or to construe ambiguous terms.

Here, the court will likely find that the contract was integrated. The contract contains a merger clause, which shows that it is likely that the parties intended to reduce their agreement to a final written agreement. Moreover, the written contract is complete and includes all material terms.

Therefore, the use of parol evidence to contradict the terms of the contract will be prohibited. Carl will argue that Ben's statement that Carl "had to use Sun Solar Panels . . . because Sun was owned by Ben's brother" cannot be considered by the court, because it contradicts the terms of the written contract. Carl will argue that the contract language is clear, and it does not state that the use of Sun Company products was a condition. Carl will argue that such an important provision of the contract would have been included in the final written agreement. However, Ben will likely prevail in arguing that this statement can be used by the court to consider whether clause 1 of the contract is condition. As explained above, prior communications can be used to show the non-occurrence of a condition. Moreover, the parol evidence does not directly contradict clause 1 of the contract. Instead, whether clause 1 is a condition or promise is unambiguous and will need to be determined by the court. Therefore, the court will likely consider this evidence in order to determine the parties' intent. Here, the oral communication shows that Ben told Carl that he "had to use" Sun Company products and Carl assured him that he would comply. However, even if the court does use the parol evidence, it still may not conclude that the parties intended the use of Sun Company products to be a condition. As explained above, a court usually will presume that a clause is a promise and not a condition.

Material v. Minor Breach

If the court determines that the clause was a promise and not a condition, then Carl will argue that Ben must pay him for constructing the house. However, Ben will argue that Carl still breached the promise by not using Sun Company products. Therefore, Carl will be liable for some damages. Whether Ben will be required to pay Carl for the house will be determined by whether Carl committed a material or minor breach.

As explained above, the court will consider several factors in determining whether a breach is minor or material. Here, the court will likely conclude that the breach was minor. Carl substantially performed under the contract. He built a house for Ben and he did so within the time limit that Ben wanted. Moreover, solar panels are a minor component of the house, and not a very important part of the overall construction. Finally, the solar panels and products used were similar in quality and design to the Sun

Company products. Therefore, the hardship to Ben here is minimal. Carl has provided Ben with a sufficient home, and Ben should not be allowed to escape payment by arguing that Carl materially breached for the mere failure to use Sun Company products.

Impossibility

Even if Ben is successful in arguing that Carl materially breached, Carl will argue that his breach is excused by impossibility. Impossibility occurs where the nonoccurrence of an event was a basic assumption of the parties, and neither party assumed the risk of the occurrence of the event. Impossibility must be objective. Here, Carl will argue that Sun was temporarily out of stock of solar panels and products. Therefore, it was impossible for him to use Sun Company products in the home.

Carl will likely succeed in this argument. Ben will argue that the impossibility was not objective, because Sun Company was only out of stock temporarily.

However, Carl was limited by the term in the contract requiring construction to be finished by Thanksgiving. Therefore, under the terms of the contract it was impossible for him to use both Sun Company products and complete the construction prior to Thanksgiving.

Frustration of Purpose

Carl may also argue that the purpose of the contract was frustrated. This occurs when an event occurs that was not foreseeable, the non-occurrence of which was a basic assumption of the contract, and the occurrence of which frustrates a purpose of the contract that both parties intended. Carl will argue that Sun Company's inability to provide product was a supervening event which frustrated the purpose of his contract with Ben. Therefore, he will argue that his performance of his promise to use Sun Company products was excused.

Carl's Liability and Damages

Therefore, Carl likely committed a minor breach of the contract. Ben can sue Carl for damages caused by the breach. But, Ben must perform under the contract and pay Carl for his work. Therefore, Ben will be required to pay the $200,000 less any damages caused by Carl's breach. Here, the damages are likely minimal. The purpose of damages is to compensate the damaged party. Carl may ask for expectation damages, which is measured by the damaged party's expectations. The purpose is to put the party in a position they would have been in but for the breach. Here, Ben expected a home constructed with Sun Company products. However, he received a home constructed with products of equal grade. Therefore, he has not suffered any economic damages, for which he can be compensated. He may argue that he is personally dissatisfied with the home, but the court will be unlikely to recognize these damages as legitimate or be able to quantify these damages.

Ben may also argue for specific performance. Here, the court will be unwilling to grant specific performance. Requiring Carl to deconstruct and then reconstruct the home using Sun Company products would place an extreme hardship on him and be difficult to supervise by the court.

Even if Carl is found to have materially breached the contract or failed to perform a condition under the contract, he will likely be compensated under a quasi-contract restitution theory. Ben will not be allowed to be unjustly enriched by Carl's work. Under this theory, Ben will have to pay Carl for the value of the benefit that Ben received less any damages that Ben suffered.

Modification

Carl will argue that he is also owed the $25,000 bonus that Ben offered him in order to complete the home by Thanksgiving. A modification to a contract under the common law must be supported by consideration. Under the UCC, modifications in good faith without consideration are permitted. Here, Ben will argue that the modification is not valid or binding, because it was not supported by any consideration. Consideration is a bargained-for legal detriment. Ben offered to pay $25,000; however, Carl merely

agreed to assure completion by Thanksgiving. Ben will argue that under the terms of the contract, Carl was already required to complete the construction by Thanksgiving. Therefore, consideration does not exist.

Carl may argue that the contract pre-modification was not a “time is of the essence” contract. Therefore, pre-modification Carl did not agree to forfeit his pay if the contract was not fully performed by the specific date (Thanksgiving). He may argue that the modification made performance by Thanksgiving mandatory, because time is of the essence. Therefore, Carl will argue that there was consideration. This argument will likely fail. Regardless, under the terms of the contract Carl agreed to perform by Thanksgiving. Even though he might not have committed a material breach by performing later, his agreement to perform an obligation he already has is not consideration.

Second, Ben will argue that the modification was invalid, because it was not made in writing. The parties’ contract in clause 4 states that the agreement may not be modified except upon written consent of the parties. This argument will fail. Under the common law, a clause requiring modifications to be in writing is not enforceable, although such a clause is enforceable under the UCC.

Q5 Wills / Trusts

In 2000, Ted was married to Wilma, with whom he had a child, Cindy. Wilma had a young son, Sam, from a prior marriage. Ted typed a document entitled "Will of Ted," then dated and signed it. Ted's will provided as follows: "I give $10,000 to my stepson. I give $10,000 to my friend, Dot. I leave my share of all my community property to my wife. I leave the residue consisting of my separate property to my daughter, Cindy. I hereby appoint Jane as executor of this will."

Ted showed his signature on the document to Jane and Dot, and said, "This is my signature on my will. Would you both be witnesses?" Jane signed her name. Dot was about to sign when her cell phone rang, alerting her to an emergency, and she left immediately. The next day, Ted saw Dot. He had his will with him and asked Dot to sign. She did.

In 2010, Wilma died, leaving her entire estate to Ted.

In 2011, Ted married Bertha.

In 2012, Ted wrote in his own hand, "I am married to Bertha and all references to 'my wife' in my will are to Bertha." He dated and signed the document.

Recently, Ted died with an estate of $600,000, consisting of his one-half community property share of $300,000 in the $600,000 home he owned with Bertha plus $300,000 in a separate property bank account.

What rights, if any, do Bertha, Sam, Dot, and Cindy have in Ted's estate? Discuss.

Answer according to California law.

Answer A

The issue is whether Bertha, Sam, Dot, and Cindy have rights, if any, in Ted's estate. In determining this, it is first critical to consider the validity of any of the testamentary documents executed by Ted.

Ted's 2000 Will

First, it is critical to consider whether Ted's executed will in 2000 is valid. To determine this we must consider whether there is (i) testamentary capacity, (ii) testamentary intent, and (iii) formalities have been met.

Testamentary Capacity

A testator must have legal and mental capacity.

First, legal capacity requires for the testator to be above the age of 18 at the time of executing the will. Here, Ted was married and had a child; therefore, presumably Ted was over the age of 18.

Second, mental capacity requires for minimum mental capacity test to be met. That is, the testator must (i) understand the nature of his bounty (his relationships), (ii) understand the nature of his assets, and (iii) understand the nature of his actions.

First, here, Ted likely understood the nature of his relationships, given that he described in the will his stepson, friend Dot, daughter Cindy, and his wife. Second, Ted likely understood the nature of his assets given that he gives $10,000 to his stepson and friend and leaves the shares of his community property to his wife. Third, Ted likely understands the nature of his actions given that he entitled the document that he typed "Will of Ted."

In short, the minimum mental capacity test is likely met.

Further consider whether Ted suffers from an insane delusion. Under this doctrine, a testator does not have capacity if suffering from a mental defect that causes the testator to suffer from an insane delusion, and but for such a delusion the document or provision of the testamentary document would not have been produced. Here, the facts do not indicate that Ted suffered from any mental defect or insane delusion.

In short, Ted has testamentary capacity.

Testamentary Intent

A testator must have present testamentary intent, which can be inferred from the document having material provisions and appointing an executory.

Here, Ted typed a document called “Will of Ted” and he set forth provisions distributing his property as well as appointing an executor. In short, Ted has testamentary intent.

It is critical to note whether there is any fraud, undue influence, mistake, or whether the will is a conditional or sham will. The occurrence of any of these instances may negate testamentary intent. The facts here do not suggest or reflect any incidence of fraud, undue influence, mistake, or the will being a conditional or sham will.

Thus, Ted has testamentary intent in executing the document.

Formalities

A will can either be a holographic or attested will.

For an attested will to be valid it must be in writing, signed by the testator, and also signed by at least two witnesses. Note, that the two witnesses must be in the presence of the testator (presence includes sight, hearing, etc.) when the testator signs the will or acknowledges his signature on a will; the witnesses must also understand that they are signing as witnesses to a will. Note, that witnesses need not sign the will in the

presence of the testator or in the presence of each other. Witnesses need only sign the will prior to the death of the testator.

Here, Ted typed the will, dated and signed it. Next, he showed his signature on the document to Jane and Dot and said, “This is my signature on my will. Would you both be witnesses?”

Jane signed her name, and Dot was about to sign when her cell phone rang, alerting her to an emergency, and she left. However, the next day, Ted saw Dot and asked Dot to sign the will and she did.

Given the facts above, here both witnesses were in the presence of the testator when he acknowledged his signature on the will and both witnesses signed the will prior to the death of Ted.

Thus, since the will is in writing, signed by the testator as well as at least two witnesses the will is valid.

Interested Witnesses

Witnesses who sign a will and are receiving a gift under the will are interested witnesses. Signing of a will by interested witnesses does not invalidate the will. Instead, a rebuttable presumption of undue influence/fraud applies to the interested witnesses; if the witnesses are not able to rebut the presumption then the gift fails and the witnesses would only get the amount from the testator that they would be entitled to under intestate succession. Note, however, that a person in the will given a fiduciary title or executory title is not an interested witness.

Here, Jane and Dot are the witnesses. Jane is appointed as the executor of the will and is, thus, not an interested witness as discussed above. Dot is a friend of Ted’s and is granted $10,000 in the will and is an interested witness. As a result, the rebuttable presumption of undue influence/fraud applies to Dot. If Dot is unable to rebut the presumption, then the gift is invalidated and goes into the residue and Dot would only

take what she would receive under intestate succession, which would be nothing as Dot is only a friend of Ted and would not receive anything under intestate succession. If Dot was able to rebut the presumption then Dot will be entitled to the gift.

The facts here do not indicate whether there was any undue influence or fraud on behalf of Dot. Regardless, note that the interested witness problem may be cured by a republication by codicil (see below). If there is a valid codicil (see below), republication by codicil will apply and will cure the interested witness problem, which means that Dot will then be entitled to the $10,000.

Now that the 2000 will is valid, it is also critical to consider whether the 2012 note by Ted is a valid codicil.

2012 Note by Ted

The issue is whether the 2012 note by Ted is a valid codicil. A codicil is any writing that can accompany a will; note that an invalid codicil does not invalidate a will. Further note that a codicil must meet the same validity requirements as discussed above with respect to a will. That is, a codicil is valid if (i) testator has capacity, (ii) testator has intent, (iii) all formalities have been met.

Testamentary Capacity

See rule above.

First, regarding legal capacity, see above.

Second, regarding mental capacity, in 2012, Ted wrote “I am married to Bertha and all references to my wife in my will are to Bertha.” Such writing reflects that Ted understood the nature of his action, relationship, and assets as he refers to his will and clarifies the term “to my wife” to be Bertha, the woman he married after Wilma’s 2010 death.

In short, the facts support that Ted had testamentary capacity.

Testamentary Intent

See rule above.

Here based on the statements in the writing there appears to be testamentary intent. Furthermore, the facts do not indicate any fraud, undue influence, or mistake.

Formalities

A holographic codicil must be in writing and signed by the testator. Note that the writing may occur on any paper or surface.

Here, Ted wrote in his own handwriting “I am married to Bertha and all references to ‘my wife’ in my will are to Bertha.”

Given that the codicil was signed and in Ted’s handwriting, the codicil is valid.

In summary, the 2000 will and the 2012 codicil are both valid.

Integration

Integration entails that all documents in physical and legal connection will be read together at the testator’s death.

Here, the 2000 will and the 2012 codicil are valid and have a legal connection to one another. Therefore, both will be read together.

Distribution of Ted’s Estate

Upon Ted’s death, his estate consisted of his one-half community property share of $300,000 in the $600,000 home he owned with Bertha plus $300,000 in a separate

property bank account. Ted's estate should be distributed as follows.

$10,000 to Stepson

Ted's 2000 will states, "I give $10,000 to my stepson." This is a general gift; a general gift is a gift that can be satisfied by the general estate.

Here, Ted's stepson is presumably Wilma's young son Sam. Note that if there are any ambiguities in a will, the court will consider extrinsic evidence clarifying any ambiguities (whether latent or patent ambiguities). Here, the court will likely consider that Ted's prior marriage to Wilma, who had a young son Sam from a prior marriage. Therefore, even if any opposing arguments are made to contest this interpretation, it is likely that the court will find that Sam was Ted's stepson, as there is no evidence to the contrary.

Given that the 2000 will is valid and the 2012 codicil has not revoked or amended the will with respect to the general gift to the stepson, the stepson is entitled to $10,000 from the $300,000 separate property bank account.

$10,000 to Dot

As discussed above, at the time of execution of the 2000 will Dot was an interested witness. However, as discussed above, the 2012 codicil was valid and therefore republication by codicil took into effect. When republication of codicil occurs, it cures any interested witness problems; this means that the court will only consider now whether there was any interested witness at the time of the 2012 codicil instead of the 2000 will.

As a result, the republication by codicil cures any interested witness issues and Dot will be entitled to receive the $10,000 gifted to her in Ted's will. This $10,000 is a general gift for the same reasons as discussed with regards to the gift to the step-son. Thus, the $10,000 will be satisfied from the $300,000 separate property bank account.

Community Property to “My Wife”

Here, the 2000 will devises all of Ted’s “community property to his wife.” Furthermore, in the 2012 codicil Ted wrote “I am married to Bertha and all references to my wife in my will are to Bertha.”

Note that the court will likely consider the 2012 reference of “my will” as an act of incorporation by reference. A testator may incorporate by reference any document so long as that document is existing and it is described sufficiently and the testator so intends. Here, by referring to his “will” Ted is incorporating his will by reference. Since the will existed at the time of the codicil and the codicil was specific in referencing the will, the court will likely presume that Ted intended to incorporate the will.

Furthermore, as discussed above, the court will consider extrinsic evidence if there is any ambiguity in any testamentary document. Thus, the court will consider the codicil as well as the fact that in 2011 Ted married Bertha after Wilma had died in 2010.

In short, whether by incorporation by reference or by considering extrinsic evidence, the court will find that the statement “to my wife” is intended to identify “Bertha.”

As a result, the codicil and the will together, Bertha is entitled to Ted’s one-half community property share of $300,000 in the $600,000 home Ted owned with Bertha.

Residual Estate to Cindy

A residual gift is a gift of anything remaining after the distribution of the estate.

Here, Ted’s 2000 will states “I leave my residue consisting of my separate property to my daughter Cindy.”

As this is a residual gift, Cindy gets whatever remains in the residual estate. That is, after deducting the $20,000 paid to Sam and Dot, Cindy, Ted’s daughter, is entitled to $280,000 of the separate property bank account.

In conclusion, Bertha, Sam, Dot and Cindy have rights in Ted’s estate as described above.

Answer B

For convenience: Ted = T, Wilma = W, Sam = S, Dot = D, Jane = J, Bertha = B

a. Is T's 2000 Will Valid?

The rights of the respective parties will depend on whether T's 2000 will is valid.

Capacity

In order to make a valid will, a testator must have the capacity to do so. A testator has capacity when he is over the age of 18, understands the nature and extent of his property, understands the natural objects of his bounty (his relationships), and understands the nature of the testamentary act.

Here, T is married, and is thus presumably over 18. Additionally, he drew up a document purporting to be his will, entitling it "Will of Ted," and made dispositions of his property, mentioning cash and community property. He left gifts to his friend, his stepson, his wife and his daughter. Therefore, it can be said that he knew the extent of his property, his relations with others, and the nature of the testamentary act. Therefore, T had capacity to make this will.

Present Testamentary Intent

A testator must also have the present intent to make the will effective upon his death. Here, because of the reasons above, and the fact that he had Dot and Jane sign it as witnesses, likely satisfies T's intent to make this will effective. Therefore, present testamentary intent is satisfied.

Attested Will Validity

An attested will is a witnessed will. In order to be valid, the will needs to be in a writing, signed by the testator, the signature was either done in the joint presence of 2+ witnesses or acknowledged in the joint presence of those witnesses, the witnesses both sign during the testator's lifetime, and the witnesses understand that they are witnessing a will.

Here, T drafted an instrument purporting to be his will, dated and signed it. Additionally, he approached Jane and Dot, while they were both together, and said “This is my signature on my will. Would you both be witnesses?” Therefore, he acknowledged his signature on his will written within the joint presence of 2+ witnesses.

However, after he acknowledged the signature, only Jane signed immediately. Dot did not sign until the next day. However, for attested wills the witnesses do not need to both be present when one another sign; they just both need to be present when T acknowledges his will. Therefore, this requirement was satisfied, and Dot validly signed it as a witness the next day.

Because both witnesses signed in T’s lifetime, both witnesses were present when T acknowledged his signature, and they both understood they were witnessing his will by T’s statement and identification of the instrument.

Therefore, this was a valid attested will.

Interested Witness Problem

A witness is deemed to be interested if they are a witness to the will and also take under the will. However, this does not affect the validity of the will for lack of witnesses but has an impact on the interested witnesses’ gift. Therefore, even though D takes under the will, she can still be a witness. Her gift will be discussed below.

Additionally, while J is also a witness and named in the will, she is not an interested witness since she is only named in an executor capacity.

Holographic Will

A will can be valid as a holographic will if all material terms are in the testator’s handwriting, and the testator signs the will. All material terms refer to the naming of gifts and beneficiaries. Here, this writing was all typed and not in T’s own handwriting. Therefore, this would not be a valid holographic will.

Terms of Will

Since the 2000 will is valid, the disposition of T’s estate will be pursuant to it unless it is otherwise altered or revoked. The terms are as follows:

$10,000 to his stepson

$10,000 to D

All of my share in community property to T's "wife"

Residue to J.

b. Rights of Bertha

Under the will, all of T's interest in community property was to go to "his wife." T has $300,000 of a community property interest in the house he owned with Bertha. Bertha will argue that this allows her to take his share of the community property for two reasons:

Is the reference to "my wife" an act of independent significance

A will can allow the completion of a gift to be made based on an event to be happening in the future. This is called an act of independent significance. The requirements for a valid act of independent significance are that the event has an independent significance outside of the wills making process.

Here, T stated that his share of community property would go to "his wife." Therefore, this gift is conditional on T having a wife at his death. Because marriage is separately significant from the wills making process, this is a valid gift conditioned on an act of independent significance, and will allow B to take the $300,000 community property interest.

Valid Codicil

A codicil is an instrument that amends, alters, or revokes a will. In order for it to be valid, it needs to comply with the formalities required for wills.

Here, B will argue that T's 2012 handwritten note that identifies B as T's wife under the 2000 will is a valid codicil allowing her to take the community property share in the house. Thus, the validity of this instrument depends on its compliance with formalities.

Attested Will

See the rules for attested wills above. This instrument would not qualify as an attested will because it is not witnessed. Therefore, it cannot be a valid testamentary instrument on this basis.

Holographic Will

See the rules regarding holographic wills above. Here, this was signed by T and was in his own handwriting. It describes that all references in his will are to B. Therefore, all material terms are set out, and in T's own handwriting. Therefore, this is a valid holographic codicil.

Incorporation by Reference

A testamentary instrument is allowed to refer to an instrument to complete the gifts if the instrument clearly refers to a written document, that document is in existence at the time of execution of the instrument, and it was the testator's intent for the document to be incorporated into his will.

Here, in the 2012 instrument, T clearly identified his prior will, that will was already in existence, and it was T's intent to incorporate the will into this current instrument as he uses the instrument to explain that all references are to B. Therefore, his prior will was validly incorporated to complete the gift in the 2012 instrument.

Therefore, B will take T's $300,000 community property interest in the home.

c. Rights of Sam

The 2000 will makes a gift to T's "stepson," of $10,000. However, T's stepson is not identified by the instrument.

Ambiguities

At common law, parol evidence (evidence outside of the will) was not allowed to correct a patent defect under the will. Parol evidence was only allowed to cure latent ambiguities. A will was patently defective if the identity of a beneficiary cannot be ascertained.

Here, the gift only mentions T's stepson, which would seem to be S, but since T is no longer married to Wilma from her death, and it does not appear B has any son of her own from a prior marriage, it is unclear if there is a stepson any more. Therefore, under common law, this gift would fail for lack of an identifiable beneficiary.

However, CA allows all parol evidence in to clear up any ambiguities, whether latent or patent, in order to more closely effectuate the intent of the testator.

Therefore, S will be able to introduce evidence that he was, when the 2000 will was drafted, T's stepson, and it was T's intent that the gift should go to S. This evidence will likely be properly admitted by the court to allow the gift to pass to S.

Therefore, S will likely take the $10,000.

d. Rights of D

Under the 2000 will, D will claim a gift of $10,000.

Interested Witness Problem

The issue presented is that D was a witness to the 2000 will as well as a beneficiary. If a witness to the will is also a beneficiary, there is a rebuttable presumption that the witness exercised undue influence in the drafting process. If the witness is a relative, they are still allowed to take the gift up to what their intestate share would have been; however, non-relatives, who would not have an intestate share, do not take at all.

Here, D is a non-relative since she is specifically listed as T's friend. Therefore, if she is unable to rebut the presumption, she would take nothing under the will. She can rebut this presumption by showing with clear and convincing evidence that there was no undue influence. Here, there are no facts suggesting that D procured her gift improperly: T typed up the will on his own, later executed a codicil as discussed above without validating the gift to D, and there was nothing said by D regarding her gift when T asked her to sign. Therefore, the presumption is likely rebuttable, and D can take her $10,000 gift even as an interested witness.

Republication by Codicil

When a valid codicil is executed, it updates the date of execution of the will to the date

that the codicil was executed. Here, as discussed above, T had executed a valid codicil in 2012. Thus, the will has been republished by codicil. Additionally, because it was deemed to be a re-execution of the will, any prior interested witness problems with the will are cured unless the interested witness was also a witness to the codicil who takes a new gift under the codicil.

Here, as discussed above, T executed a valid codicil in 2012, and this codicil was holographic. D did not witness this instrument, nor was she named in it. Therefore, this has been a republication which cured the interested witness problem posed by D being a witness and a beneficiary under the 2000 will.

Therefore, even if D could not rebut the presumption of undue influence, she will take her $10,000 gift because of republication by codicil.

e. Rights of C

As discussed above, S will get $10,000, D will get $10,000, and B will get T's $300,000 community property interest. Therefore, there is $280,000 left undisposed in T's estate.

The leftover of an estate that is disposed of by will is referred to as the residue. Unless there is a direction of disposition, the residue is distributed by intestate succession. However, a testator can include a residue clause which leaves the residue of his estate to an identified beneficiary.

Here, T set out that the residue of his estate was to go to his daughter C. Therefore, C is a residuary beneficiary, and thus will be able to take the $280,000 not specifically disposed of under the will.

Therefore, C gets $280,000 out of T's $300,000 separate property.

Q6 Remedies

Paul owns a 50-acre lot in the country. Doug owns a smaller unimproved lot to the north. A stream runs through Paul's lot near the boundary line with Doug's lot. Paul has a house at the south end of his lot and uses it for summer vacations. He plans to build a larger house in the future.

Doug began to clear his land to build a house. To do so, he had to fell trees and haul them to a nearby lumber mill. He asked Paul if he could take a short cut across Paul's lot to the mill, and Paul agreed.

On his first trip, Doug dumped the trees on Paul's lot near the stream, in a wooded area Paul was unlikely to see, much less use. Several of the trees rolled in the stream, blocking its natural flow.

Paul left for the winter. As a result of the winter's normal rainfall, the stream overflowed, causing water to rush down to Paul's house at the other end of the lot, flooding his garage and damaging a 3-year-old motorcycle.

Paul returned in the summer and learned what had happened. It will cost $30,000 to remove the trees. The trees' presence on the lot has depressed its market value from $50,000 to $40,000. It will cost $5,000 to repair the motorcycle, and $4,000 to buy a new one.

What intentional tort claims can Paul reasonably bring against Doug and what remedies can he reasonably seek? Discuss.

Answer A

License

Doug may first claim that there have been no intentional torts committed against Paul. He may argue that he had permission to do what he did. Paul will admit that he did give Doug a license. A license is a permission to use another's land in a particular way. A license need not be in writing or evidence any of the formalities of an easement. However, a license is freely revocable.

Scope of the license.
Importantly, a licensee may only act within the scope of the license. Here, Paul gave Doug permission to cut across his land with his lumber. Doug had represented to Paul that he intended to bring the trees to a lumber mill. As such, the license only involved temporarily passing through the land with the lumber. It did not include Doug dumping the trees. Where a licensee exceeds the scope of his license, he trespasses on the land.

Trespass to Land

Trespass to land occurs when an individual intentionally invades the real property of another. The trespasser need not know the land is not his own – he need only intend to go where he goes or do what he does. Another important aspect of the rule is that trespass can occur with more than just the trespasser's body. When a trespasser causes a physical object to go onto the land of another, he has trespassed, even if his body does not actually break the relevant plane.

Trespass to land also occurs when a licensee (or any other guest) goes to a part of the land where he does not have permission to go. Here, Paul can reasonably claim that Doug did exactly that – he caused a physical object (the trees) to go exceed the scope of the license (being dumped into the forest). Doug may claim that he had permission to have the trees in this area – however, this permission was for transitory passing through – by allowing the trees to stay, Doug trespassed. Moreover, Doug likely further

trespassed by allowing the trees to go into the stream. It is not clear what caused the trees to roll away – however, it seems quite foreseeable that dumping a bunch of trees close to a stream might end up in a few of the trees going into the stream. Assuming this is a reasonably foreseeable consequence of Doug's actions, the trees in the stream would be a further trespass.

Remedies for the Trespass to Land

Legal Remedies

Law prefers money damages. As such, the first question will be whether Paul can recover any legal damages for the trespass to land that Doug has committed. Damages will be accorded to a plaintiff if four conditions are met: the tort was the actual cause of the damages, it was the proximate cause of the damage, the damages are certain and ascertainable, and there was no failure to mitigate.

Actual cause.
A tort is an actual cause of damages when the damage would not have caused but for the tort. This element is fairly easily satisfied here. We are told that the rainfall was normal, suggesting that the flooding would not have normally occurred. Since the rainfall was normal, the best explanation for the actual cause of the flooding was the blocked river, which would not have happened but for the trespassory dumping of the trees. As such, this element is met.

Proximate cause.
A tortfeasor is only liable for those damages that are proximately caused by his tort. Proximate cause is a question of foreseeability – where the result is a foreseeable result of the actions of the tortfeasor. At the point where the damages become unforeseeable, law is willing to cut off liability and let the damages fall on the victim.

Here, Paul will plausibly be able to argue that all of the damages were reasonably foreseeable. The first step is that the blocking of the river was a reasonably foreseeable

consequence of dumping the trees. This is discussed above – the trees going in the river is certainly foreseeable.

The next step is whether the flooding was reasonably foreseeable. Doug may argue that the rain was an "Act of God" that should cut off his tort liability. He will lose this argument though – critically, there was only normal rainfall during the winter season. Normal rainfall is practically by definition not an Act of God, and as such should be reasonably foreseeable.

The next step is whether the flooding of the house was reasonably foreseeable. We are not given many facts here. Doug may argue that it was odd that the water would flow across a large, 50-acre plot of land and flood the house. However, this is likely foreseeable. Doug knew about Paul's house, and he knew where the stream was. A reasonable person should have been alert to the possibility that flooding over the course of an entire season should cause flood damage.

The final step is whether the damage to the garage and motorcycle are foreseeable. This comes closer to the eggshell skull doctrine that you take your victim as you find him – once you flood someone's garage, you are arguably liable for all the damage to the valuables therein. However, even sticking with merely proximate cause, the damage to the motorcycle is foreseeable. The motorcycle is not especially valuable or special. It is a normal vehicle and it suffered a normal amount of damage given flooding. As such, Paul would likely be able to recover damage to his motorcycle via the trespass to land theory (the precise amount is discussed below).

Additionally, it is fairly easy to see that the decrease in the market value of the property is reasonably foreseeable. Having your river backed up and your property flooded will tend to make the land worth less. As such, Paul would likely be able to recover, at least, for the decrease in property value (whether he will get this amount or the amount to remove the trees is discussed below).

Certainty.

Certainty does not seem to be an issue here. We know precisely how much it will cost to repair the bike or buy a new one, and how much the property value has been decreased. The only issue is if there is other damage to the garage that has not been accounted for. Any damages would need to be certain and ascertainable.

Mitigation.

A plaintiff has a duty to mitigate the damages wherever possible. There are several reasons to think this won't bar damage. First, he was gone for the winter, so he would not have been able to mitigate. Second and more importantly, the trees were dumped in an area where Paul was unlikely to see them. As such, mitigation would not have been reasonable. Paul is not under any duty to mitigate damages he should not ordinarily be aware of.

Mitigation may also play a role in deciding on the damage given for the motorcycle. Doug will reasonably argue that Paul could mitigate the damages by simply buying a new motorcycle instead of repairing his old one, since the price is $1000 less. This is a good argument. Unless there is some special value that should give Paul a right to repair his own motorcycle, Paul is likely only entitled to the $4000 cost to replace the bike as a form of mitigation. Indeed even this might be too much. Doug need only put Paul in the place where he found him, with a three-year old motorcycle. The value of this may well be less than $4000. This is discussed more in the conversation section below.

Trees or property value.

One of the most difficult questions the court will face will be whether to award Paul the $30,000 to actually remove the trees or only the $10,000 for the decrease in the property value. Giving both amounts is likely inappropriate, since it seems that the decrease in property value is attributable to the presence of the trees.

On the one hand, Doug will argue that it would be wasteful to spend $30,000 to remove the trees when the decrease in property value is only $10,000. He will argue that if Paul didn't like the trees, he would be better off to simply sell the land and buy new land.

However, Paul has a strong counter: law recognizes that land is unique. Paul has a right to have trespassory items taken off the land, since, to Paul, the land is implied to have special value. Since the land is unique, and since Paul is entitled to be put into the condition he would have been on had the trespass not occurred, Paul is entitled to have the trees actually removed, despite the higher cost. As such, Paul should be able to recover the $30,000 and not the $10,000.

Restitutionary remedies

Paul might alternatively be able to recover restitutionary remedies. Restitution is appropriate where the tortfeasor has been unjustly enriched by his activities. Here, Paul might be able to argue that Doug effectively used his land as a tree storage space instead of taking the trees to the lumber mill. Paul might even argue that the value of this storage is $30,000, since that is how much it costs a person to move the trees away, or $10,000, since that may be equivalent to the amount of property value diminution Doug avoided by moving the trees. However, these values are not particularly certain, and we'd probably need more evidence to know the proper value that was conferred on Doug by simply leaving the trees on Paul's land.

Injunction

Paul might also ask for an injunction. Specifically, he may request that Doug actually remove the trees. For an injunction to be appropriate, there the legal remedy must be inadequate, the injunction must be enforceable, and we must balance the hardships. There must also not be any defenses.

Inadequate Legal Remedy.

Doug's best argument here is that there is an adequate legal remedy. To wit: since we know that it would cost $30,000, the court could simply give that amount of damages if it concluded that the trees needed to be moved. Moreover, it seems that Doug could also make Paul whole by giving him $10,000 to correct the decrease in property value of his land. As such, since it is not clear why a legal remedy would be inadequate, an injunction is probably inappropriate.

Enforceable.

Even if an injunction would be appropriate, here it would be questionable whether it would be enforceable. Affirmative injunctions are disfavored since they require supervision. Perhaps it would not require much time to move the logs. Nevertheless, making sure that Doug has actually performed would be troublesome, although not impossible.

Balancing hardships.

Since the conduct was willful, most courts would not balance the hardships. Nevertheless, it is doubtful whether forcing Doug to remover the trees would cause any significant hardships.

Defenses.

There are no valid defenses. Doug might point to laches (the failure to bring an action in a reasonable amount of time), but this argument fails because Paul was not on his land for the winter and could not have known about it sooner.

Ejectment

Another possible remedy is ejectment. Ejectment allows a person in rightful possession of land to eject a trespasser who is present on his land. This action is only appropriate where the trespasser is still on the land. Here, the ejectment action would be equivalent to an action to have Doug remove the trees, since the trees are the only item or person which remains as an invasion of Paul's property. For this, see the earlier section on the injunction.

Trespass to Chattel and Conversion

Trespass to chattel occurs when someone intentionally interferes with the possessory right to another's chattel. This can occur in two ways: the trespasser can actually deprive the owner of the chattel temporarily or permanently, or the trespasser can cause damage to the chattel. Here, the latter has occurred. The motorcycle is chattel

of Paul. Because of Doug's trespass, the chattel has been harmed, thus interfered with Paul's possessory rights.

Doug may argue that he did not intentionally interfere with the chattel. However, intentionality here only refers to the intention to do the actions that eventually gave rise to the trespass, a general intent. The question would be whether the actions that Doug engaged in reasonably foreseeably caused the damage to Paul's motorcycle. Please see the discussion above related to foreseeability. Paul has a strong claim that the dumping of the trees foreseeably caused the flooding, which foreseeably caused the damage to Paul's garage and bike. Since all these steps are foreseeable, Paul would likely be able to recover from Doug via a trespass to chattel theory.

The remedies to this theory of tort liability turn on the distinction between trespass to chattel and conversion. These torts are largely overlapping – the main difference is one of degree. Conversion consists of the trespass to another's chattel that so interferes with his right to possession that the owner is entitled to a replacement of the chattel. Essentially this is a "forced sale," where the tortfeasor has to pay the reasonable market price of the chattel.

A court would most likely find that the trespass consisted of conversion. The key fact is that the repair cost of the motorcycle is more than the cost to purchase a new one. This suggests that the damage is quite extensive, and that Paul should have the right to force a sale of the motorcycle on Doug for its reasonable fair market value.

Damages.
As stated above, the damages for conversion is the fair market value of the chattel. Here, we are only told that it would cost $4000 to buy a new motorcycle. But Doug will argue that this is actually an overcompensation: Paul should be entitled to the fair market value of his motorcycle. The motorcycle is three years old, while it costs $4000 to buy a brand new motorcycle. As such, Paul can reasonably argue that the appropriate damages are actually somewhat less than $4000 and should be whatever it costs to buy a 3-year-old bike.

Punitive Damages

Paul may well try to seek punitives. Punitive damages have three requirements: there must be actual damages awarded, the punitives must be proportional to the actual damages, and the conduct must be more than negligent. Here, Doug's conduct seems intentional, at least at the outset. He may argue that he did not actually intend any harm, which would diminish any argument for punitives. However, since he did indeed intentionally trespass, and since the damages were reasonably foreseeable, he may well be able to get punitive damages.

Nominal Damages

Even if none of the above damages hold up, Paul would likely be able to get nominal damages, which are awarded when there is a violation of someone's rights but there are no actual damages.

Intentional Infliction of Emotional Distress

This tort requires outrageous conduct that causes severe emotional distress in the plaintiff. The conduct here is probably not so transgressive of all bounds of human decency. And, most importantly, we are not told anything about the emotional consequences that Paul suffered.

Battery

Battery requires an intentional conduct with another's person that would be considered harmful or objectionable to the ordinary person. Here, Doug's actions did not so contact Paul.

Answer B

Paul (P) v. Doug (D)

Trespass to land.

Trespass to land is an intentional interference with one's possession of his land. The only interference necessary to constitute a trespass is the entry onto one's land because a person has a right to possess their land, free from others. The entry need not be by a person, but can be by a chattel caused to enter by the defendant.

Here, there are several instances in which D might have trespassed on P's land.

Doug's first trip.

Doug entered Paul's land initially with intent to cross it in order to bring the trees to the lumber mill. This was an intentional entry. Further, this interfered with P's possession because P was no longer in exclusive possession of his land. Therefore, D's entry was potentially a trespass to land.

Defenses: consent.

Where one has consent to commit an intentional tort, this will generally function as a complete defense.

Here D "asked Paul if he could cut across Paul's lot to the mill, and Paul agreed," thereby affecting his consent. Therefore, D has a defense of Paul's consent to part of the trespass, to the extent that it was to "cut across Paul's lot to the mill" this trespass will be excused. To the extent that D's actions exceeded the scope of this consent, D will be liable to P for trespass.

Leaving the trees on Paul's land

A trespass can also be a "continuing trespass," by leaving of chattels that the defendant caused to be present on the plaintiff's land, on the plaintiff's land.

Here, D likely is responsible for his continuing trespass by "dumping trees on Paul's lot near the stream in a wooded area [where] Paul was unlikely to see [them]." Note that D's dump[ing]" was likely done intentionally, and not negligently, satisfying the intent requirement for trespass to land. It makes no difference whether or not P was aware (except in his actual awareness to bring this action in tort) in order to constitute trespass. The interference with possession need not affect Paul's use and enjoyment— it is an interference with possession. Placing these trees on P's lot is sufficient trespass to constitute a continuing trespass, and Doug will be liable for this, as well.

Defenses: consent.

D will argue consent, for the same reasons above. It will fail, as the scope of the consent granted was very narrow - to cross P's land, not to dump trees on P's land.

Defenses: necessity.

D may argue that he had a necessity to dump the trees on P's land, thereby alleviating him from responsibility for all but the actual damage caused by his trespass. This will not work, as there is nothing in the record to suggest that D had any private necessity.

Trees rolling down and blocking the stream.

Transferred intent.

When a defendant acts with the requisite intent to commit a tort, the fact that another intentional tort is committed in a different manner will still have the original intent, even if the exact ends are not what the defendant foresaw.

Here, D will argue that he did not intend for the trees to roll down the hill and block the stream. P will counter that as D had the intent to "dump the trees," that this intent should be transferred to the unintentional consequence of blocking the river. A court is likely to accept P's argument as courts are more willing to hold tortfeasors liable than innocent plaintiffs.

Proximate cause.

Proximate cause is not generally at issue in intentional torts, but it merits addressing here. In order to determine if D is liable for the following, it must be clear that he was the proximate cause of the damages. This requires determining whether it would be foreseeable at the time D committed his tort that this harm might occur.

Here, it is very foreseeable that intentionally blocking the stream would be foreseeable. The amount of rain that caused the flood was the "winter's normal rainfall." D may argue that he did not foresee it because his only experience with the area was as the owner of a "small unimproved lot." Apparently, D was not a resident of the area. However, blocking a stream with trees and leaving for winter, it would be foreseeable that it might flood and cause damage to the nearby property. Accordingly, on this theory alone, D will be liable to P for the damage issues that follow. However, in an attempt to hold D liable for as many torts as possible, potential intentional tort theories are also discussed.

Paul's motorcycle

Trespass to chattels.

There is a possible argument that D's original trespass's intent transfers sufficiently to constitute a trespass to the chattel that was P's three-year-old motorcycle. A trespass to chattel is an intentional interference with the use and enjoyment of the chattel.

Here, D intentionally set into motion the events that caused P's motorcycle to be damaged. Provided that this causal chain is sufficiently clear for the court, the court will

find that this constituted a trespass to chattel, relying on the doctrine of transferred intent.

Conversion.

A severe interference with P's chattel so significant as to justify the Defendant being forced to pay the market value of the good at the time of the interference is known as conversion. Importantly, transferred intent does not apply to conversion.

Here, as the intent to harm P's motorcycle likely came from the transfer of intent from D's dumping of trees, there is likely not basis to find that D intentionally interfered with P's motorcycle in a sufficient manner to constitute conversion.

P's garage.

Trespass to land: garage.

For all of the reasons noted above, D will be liable to P's land for damage done to the garage, under a trespass to land theory.

Remedies.

Damages.

The underlying theory of damages in Tort is to place the plaintiff in the position as if the tort had never been committed. Further, under the doctrine of "thin shell plaintiffs," the D is liable for all harm proximately caused (as discussed above) whether economic, noneconomic, or property.

Trespass to land.

Nominal damages.

Nominal damages are recoverable where there is no harm to the land.

Accordingly, P will be able to recover the essentially declaratory relief of D's fault, in a nominal damage claim for the exceeding of P's consent in trespass to land.

Actual damages.

Actual damages are also recoverable in a trespass to land tort, where they occur. The calculation is either diminution in value of the property or cost to repair the property. As courts abhor waste, they tend to award the lowest dollar amount, but on a factual consideration may award one or the other.

Diminution in value.

The diminution in value is the decrease in value of the property. Here, D will argue that this is the appropriate amount that should be awarded.

The trees' presence on the land (as caused by D), has decreased the value of the land $10,000, from $50,000 to $40,000. D will argue, and some courts will agree, that as this is the lower cost (cost of repair is $30,000), this should be awarded to avoid waste and forfeiture. However, many courts will award against D as he is the more wrongful party.

Cost of repair: removal of the trees.

The cost of repair is the cost to bring the land back to how it was before the tort was committed.

In this case, the tort caused trees to be present on the land and to remove them would cost $30,000. The fact that Paul has owned this 50-acre lot for a significant amount of time (potentially) and uses it for summer vacations will go in favor of the court awarding cost of repair. That P was "unlikely to see, much less use" the area where the trees were is not as important as the fact that P "plans to build a larger house [on the lot] in

the future." Courts will be likely to award the diminution in value as P intended to continue using the land and to build a bigger house on the land.

Punitive damages.

Punitive damages are available in cases where the tort was committed willfully. Here, there is nothing to suggest that D dumped the trees willfully and with intent to harm P, so punitive damages are unlikely to be awarded.

Special damages.

If the court views the garage and the motorcycle not as separate torts, but as special damages caused by D's trespass to land, damage to repair those costs (or potentially to replace the motorcycle—discussed below) will be awarded.

Defenses: avoidable consequences.

P will not be able to recover for damages that he could have reasonably avoided.

Here, there is nothing in the record to show that P could have avoided any of the damages caused by D's tort. D may attempt to argue that P's recovery should be reduced because P "left for the winter," thereby increasing the amount of damages. D may, unpersuasively, argue that had P been present, he could have stopped the flood and prevented the damage to his garage and his motorcycle. This is, as indicated, unpersuasive because P's duty to avoid consequences is a reasonable one, and it is unreasonable to assume that someone will stay at their house, avoiding floods.

Trespass to land: garage.

The same damage discussion as above would apply if the court determines that the garage was a separate trespass to land.

Trespass to chattel or conversion.

Conversion.

Despite the doctrinal limitations of transferred intent, as noted above, there is an interesting remedy issue with conversion. If the court were willing to consider the motorcycle as being damaged so significantly as to constitute a conversion, the remedy is the fair market value at the time of conversion, and the tortfeasor gets title to the converted chattel. It is a forced sale.

Here, oddly, D may argue that this should be considered a conversion so that he need not pay the $4,000 for a “new one” (assuming that “new one” means the fair market value of a three-year old motorcycle). P may well be happy with this, depending on the extent of the damage to his motorcycle.

Trespass to chattel.

The proper remedy for trespass to chattels is cost of repair. Here, there is a $5,000 dollar cost to repair, so it is possible that P will argue that this is the appropriate measure of damages. D will argue, as noted above, that the damages should be limited at the replacement value of 4,000 and this may well be persuasive.

Restitution.

Restitutionary damages.

Restitutionary damages seek to disgorge any unjust enrichment from the defendant by making the defendant pay the plaintiff any ill-gotten gain.

Here, P will argue that D received an unjust benefit because he did not have to pay (do you have to pay?) to have the lumber taken to the lumber mill, and rather was able to avoid that cost by dumping the trees on P’s land. There is nothing in the record to indicate the value of this, so no further discussion will be had as to valuation.

Ejectment.

Ejectment is a legal restitutionary remedy that removes trespassers from land.

Here, P may argue that an ejectment action may be a proper means for placing the entire burden on D to remove the trespassing logs. This is not a typical use of an action in ejectment, but perhaps. . .

Injunction.

P may seek an injunction.

A permanent injunction is an equitable remedy. It requires that there be no adequate remedy at law, that there be a feasible enforcement of the injunction, that the hardships balance in favor of granting of the injunction, and that there are no defenses.

Here, P will argue that the remedies discussed above are not adequate because he wanted to maintain the property as it had been before the trespass. P will rely on the fact that courts are particularly sensitive to the nature of real property as unique and may well consider the legal remedy inadequate.

Feasibility may well work too. While the courts are generally reluctant to order a mandatory injunction requiring the D to do some affirmative act (here—removing the trees) they may well do that here. It would be a one-time enforcement and would not require supervision over a long period of time.

Hardships.

Hardships balance in favor of the plaintiff. He was entirely innocent in this case, according to the record. D wanted to not have to take the trees to the lumber mill but wanted the benefit of having his lot clear so that he could build a house. D was almost lazy and avoiding costs whereas P was innocent. There is nothing to place on P's scale and, therefore, the injunction should grant.

Feb 2013

California

Bar

Examination

Essay Questions

And

Selected Answers

February 2013

THE STATE BAR OF CALIFORNIA

OFFICE OF ADMISSIONS
180 HOWARD STREET • SAN FRANCISCO, CALIFORNIA 94105-1639 • (415) 538 - 2303
1149 SOUTH HILL STREET • LOS ANGELES, CALIFORNIA 90015-2299 • (213) 765 – 1500

ESSAY QUESTIONS AND SELECTED ANSWERS

CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2013 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

California Bar Examination

Answer all three questions.

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and facts upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles; instead try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly. Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

Q1 Criminal Law and Procedure

Max imports paintings. For years, he has knowingly bought and resold paintings stolen from small museums in Europe. He operates a gallery in State X in partnership with his three sons, Allen, Burt, and Carl, but he has never told them about his criminal activities. Each of his sons, however, has suspected that many of the paintings were stolen.

One day, Max and his sons picked up a painting sent from London. Max had arranged to buy a painting recently stolen by Ted, one of his criminal sources, from a small British museum.

Max believed the painting that they picked up was the stolen one, but he did not share his belief with the others.

Having read an article about the theft, Allen also believed the painting was the stolen one but also did not share his belief.

Burt knew about the theft of the painting. Without Max's knowledge, however, he had arranged for Ted to send Max a copy of the stolen painting and to retain the stolen painting itself for sale later.

Carl regularly sold information about Max's transactions to law enforcement agencies and continued to participate in the business for the sole purpose of continuing to deal with them.

Are Max, Allen, Burt, and/or Carl guilty of:

(a) conspiracy to receive stolen property,

(b) receipt of stolen property with respect to the copy of the stolen painting, and/or,

(c) attempt to receive stolen property with respect to the copy of the stolen painting?

Discuss.

Answer A

(a) Max, Allen, Burt, and Carl's liability for conspiracy to receive stolen property

Max

The issue is whether Max is liable for conspiracy to receive stolen property.

Conspiracy requires (i) an agreement, express or implied, to accomplish an unlawful objective or to accomplish a lawful objective with unlawful means, (ii) an intent to agree to commit conspiracy, (iii) an intent to achieve the unlawful objective, (iv) an overt act in furtherance of the objective of the conspiracy.

(i) Agreement

There was no express agreement among Max and any of his sons, Allen, Burt, and Carl that the paintings were stolen. Max has knowingly bought and resold paintings stolen from small museums in Europe, and operates a gallery in State X with his sons. Max never told them about his criminal activities; thus there was no way they could have expressly agreed to commit the conspiracy. However, Max and Ted have an agreement, because Max had arranged to buy a painting recently stolen by Ted, one of his criminal sources.

There was no implied agreement among Max and his sons because there is no circumstance or conduct to indicate that they were in agreement. Max never affirmatively ensured that his sons were additionally compensated for keeping it a secret that they were undergoing criminal acts, nor had any of them given Max an indication confirming their understanding even if no explicit words were exchanged regarding the conspiracy. Here, each of his sons suspected that many of the paintings were stolen. However, Max had no idea that his sons might be aware. When Max picked up the painting that he thought was stolen, he did not share this belief with the others.

(ii) Intent to agree to the conspiracy

There must be at least two guilty minds to be liable for conspiracy. Under the minority jurisdictions, unilateral intent is sufficient if the guilty mind genuinely believed that the other non-guilty mind had the intent to agree to the conspiracy. There was no intent to agree to commit the conspiracy because Max never shared his beliefs with the others that he was dealing with stolen paintings. Here, Burt did not share his knowledge about the theft of the painting. Nor did Carl have an intent to agree, because he was solely continuing to participate in the business for the sole purpose of selling the information to the police. Thus, there could not have been an intent to agree to the conspiracy with either Burt nor Carl based on the majority rule. Under the minority approach, there is still no intent to agree because the facts indicate that Max did not tell Carl about his illegal activities and nothing suggests Carl shared his information with Max. Because there was no agreement in the first place among Max and any of his sons, Max did not have the intent to agree to commit the conspiracy.

Max and Ted have the intent to agree to the conspiracy, as evidenced by Max's arrangement to pick up the painting that Ted stole.

(iii) Intent to achieve the unlawful objective

There must be an intent to achieve the objective, which here is the intent to receive stolen goods. Max had the intent to receive the stolen goods because he has knowingly bought the paintings stolen from small museums in Europe.

(iv) Overt act in furtherance of the objective

There must be an overt act in furtherance of the objective, which is anything including mere preparation. Here, Max committed an overt act when he picked up the painting which he thought was the stolen painting.

Max is guilty of conspiracy with Ted.

Allen

See rule above.

(i) Agreement

Allen did not enter into an agreement to commit the conspiracy because even though he suspected that many of the paintings were stolen, and that he believed the one stolen by Ted was stolen, he did not share his belief with others.

(ii) Intent to agree

Allen did not intend to agree to the conspiracy because he did not share his belief that the painting may have been stolen with others. He only learned that the painting was stolen from reading an article and not from the other members.

(iii) Intent to achieve the objective

Allen may have had the intent to achieve the objective because he did nothing to stop the receipt of the stolen paintings.

(iv) Overt act

An overt act was the picking up of the painting sent from London.

Thus, Allen is not liable for conspiracy.

Burt

See rule above.

(i) Agreement

Burt made no agreement to enter into the conspiracy, because even though he suspected that they were stolen, and knew about the painting, he did not share his knowledge with the others. However, Burt has an agreement to enter into the conspiracy with Ted, because he arranged for Ted to send Max a copy of the stolen property and to retain the stolen painting itself for sale later.

(ii) Intent to agree

Burt had no intent to agree with the others, because he did not tell Max, and he arranged for Ted to send Max a copy of the stolen painting and to retain the stolen painting itself for sale later. However, Burt had the intent to agree with Ted, given that Ted was the other end of the deal and he arranged for Max to receive the stolen painting.

(iii) Intent to achieve the objective

Burt had the intent to achieve the objective because he knew the painting was stolen, and was going to sell it later at a more convenient time to gain a personal benefit.

(iv) Overt act

Overt act was committed when they picked up the painting from London.

Thus, Burt is liable for conspiracy with Ted.

Carl

See rule above.

(i) Agreement

Carl made no agreement to enter into the conspiracy.

(ii) Intent to agree

As discussed under Max's discussion, in the majority jurisdiction, because two guilty minds are necessary, there is no intent to agree since Carl was acting solely to sell the information to the police, and not to actually engage in the unlawful conduct. However, under the unilateral approach, one guilty mind, Max's guilty mind, would be sufficient for Max to be guilty of conspiracy. However, Carl would not be liable because he has no intent to agree himself.

(iii) Intent to achieve the objective

Carl has no intent to steal property, but is only participating to sell the information to the police.

(i) Overt act

Overt act was committed when the painting was received from London.

Conclusion

Because there is no agreement to conspire, neither are liable for conspiracy with each other, but Burt and Max are liable for conspiracy as a result of their individual agreements with Ted.

(b) Max, Allen, Burt, and Carl's liability for receipt of stolen property with respect to the copy of the stolen painting

Co-conspirators are liable for the target crime and any crimes committed in furtherance of the conspiracy. As above, anyone who was liable for the conspiracy would be liable for the crime of receipt of stolen goods. However, the target crime of receipt of stolen goods did not occur because it was a copy of the stolen painting. Thus, no liability for the target crime at this point.

Receipt of stolen property requires (i) receipt or control of stolen property, (ii) of personal property by another, (iii) with the knowledge that the property was obtained in a way that constitutes a criminal offense, (iv) with the intent to permanently deprive.

Max

Max knew the property was obtained in a way that constituted a criminal offense, because he arranged to buy the painting recently stolen by Ted, one of his criminal sources. A painting is personal property, and it was stolen by another, Ted. He had the intent to permanently deprive because his motivation was to resell the stolen paintings. However, he did not actually receive or come into control of the property because the one he received was actually not stolen. Thus, he is not liable.

Allen

For the same reasons as Max, Allen is not liable because he did not actually receive the stolen painting.

Burt

For the same reasons as Max, Allen is not liable because he did not actually receive the stolen painting.

Carl

For the same reasons as Max, Allen is not liable because he did not actually receive the stolen painting. Further, Carl did not have the intent to permanently deprive because he was only working with the police so that the police could regain the stolen property and return it to its rightful owner.

Conclusion

Because no one actually came into receipt or control of the stolen property, they cannot be liable for the copy of the stolen painting.

(c) Max, Allen, Burt, and Carl's liability for attempt to receive stolen property with respect to the copy of the stolen property

Attempt requires the specific intent to achieve the criminal act and a substantial step in the direction of the commission of the act or dangerously close to the commission of the act.

Max

Max had the specific intent to receive stolen property. He believed that the painting was the stolen one. Even an unreasonable mistake would negate specific intent. However, if the facts were as he believed them to be, it would have been a crime, and thus, his intent cannot be negated. Mistake of fact is no defense. He committed a substantial step when he picked up the painting from Ted.

Allen

Allen also believed the painting was stolen because he read an article about the theft. Even if the stolen painting was not actually stolen, mistake of fact is no defense, and the

act would have been criminal had the facts been as he believed them to be, and thus, he is also liable for attempt.

Burt

Burt knew about the theft of the painting. He had specific intent to receive the stolen painting. But as to this copy, he had arranged for it to be simply a copy, and had told Max to retain the stolen painting for sale later. Thus, he had no specific intent to receive stolen property when he picked up the copy of the painting. Thus, he is not liable for attempt.

Carl

Carl suspected that many of the paintings were stolen. However, he did not have the specific intent to receive stolen property. He did not intend to permanently deprive because he was merely working with the police.

Conclusion

Max and Allen are liable for attempt, but Burt and Carl are not.

Answer B

A. Conspiracy to Receive Stolen Property

The crime of conspiracy requires: (1) an agreement between two or more people to accomplish an unlawful or fraudulent purpose, and (2) an overt act taken in furtherance of the conspiracy. Under the majority rule, all parties to the conspiracy must agree to pursue the unlawful or fraudulent purpose; however, under the minority rule, the agreement of only one participant is sufficient to establish the conspiracy (for instance, in circumstances where one participant conspires in an effort to commit a crime and the other is an undercover law enforcement officer). Regarding the overt act requirement, nearly any act taken by any co-conspirators in furtherance of the unlawful objective will suffice.

Co-conspirators are liable for both conspiracy as a separate crime, for and all foreseeable crimes committed by any co-conspirators in furtherance of the unlawful objective. There is no doctrine of merger applied to conspiracy, and thus one may be convicted of both conspiracy and the underlying crime(s) committed in furtherance of it. A co-conspirator need not personally participate in an underlying crime committed by a co-conspirator in furtherance of the conspiracy, so long as the crime was a foreseeable result of the unlawful objective.

In this case, there was no express or implied agreement between M, A, B, and C to receive the painting stolen by and acquired from T. Agreement among co-conspirators need not be in writing and need not even be expressed orally, but rather can be implied from conduct and knowledge under the circumstances. However, there must be some evidence of an understanding and meeting of the minds among the parties of the conspiracy that they will pursue an unlawful objective for conspiracy liability to occur. Here, while M certainly had the requisite knowledge and intent to receive stolen property, he did not do anything to obtain the agreement of A, B, or C to do anything in furtherance of that objective. In fact, M never told any of his sons that he regularly

bought stolen paintings from Europe, nor did he share his belief as to the specific painting in question being the stolen one. Far from agreeing with them to receive stolen property, he was trying to shield them from that fact. Moreover, the mere fact that A. B, and C suspected their father's nefarious activities does not suffice to create an implied agreement between any or all of them and him to pursue that common unlawful objective, as they neither shared those suspicions and/or knowledge with M or with each other. Nor does it matter that A believed the painting was stolen (and that the one they picked up was the stolen one), as he never did anything, through words or conduct, to share that belief. The same is true for B and C -- though each independently suspected or knew of their father's activities, there is nothing to suggest that through words or conduct, an agreement was reached between M, A, B, and C (or any subcombination of them) to receive stolen property. Thus, there is no conspiracy liability for M, A, B, and C here.

Moreover, if evidence of an agreement existed, there would also be a question as to whether C's role sufficed to show an agreement among the co-conspirators. As noted above, under the majority rule, all co-conspirators must agree to pursue an unlawful objective. Thus, C's status as informant to law enforcement and participation for the sole purpose of continuing to deal with law enforcement would destroy his agreement to further the objective in question. As a result, under the majority rule there would be no conspiracy for this reason as well. Under the minority rule, however, the agreement of only one participant will do, and thus there would be an agreement, if evidence of it existed, notwithstanding C's status.

If evidence of such an agreement did exist, however, the overt act requirement would be satisfied. The four of them going to pick up the painting that T had sent from London would qualify as an overt act in furtherance of a conspiracy, as nearly any conduct that is in furtherance of the objective in question will qualify.

Further, if an agreement existed, the defense of impossibility would not be available to M and his sons. While a defense of legal impossibility would work (i.e., if the objective of

the conspiracy is not actually illegal, there can be no conspiracy liability for agreeing to commit a lawful act), here the defense would be factual impossibility (i.e., that though they had hoped to receive a stolen painting, it was not in fact the stolen one but rather a copy). Factual impossibility is not a defense to crimes in general, nor is it to the crime of conspiracy, and thus if evidence of an agreement had existed it would not prevent their guilt.

Lastly, M and T may well be guilty of conspiracy to steal and/or receive the stolen painting. M and T agreed for T to sell the stolen painting to M, and T took the act of sending the copy and arranging for payment in furtherance of the conspiracy. Similarly, B has conspired with T, and if he receives the stolen painting from T, he may face conspiracy liability for the theft and/or receipt or sale of the painting as well.

B. Receipt of Stolen Property

The crime of receiving stolen property requires that the defendant: (1) receive property that has been wrongfully taken from the rightful owner with the intent not to return it to its true owner, and (2) know that the property in question was wrongfully taken from its rightful owner. A defendant's knowledge may be express or implied under the circumstances, and, furthermore, the knowledge requirement may be met if the defendant under the circumstances is "willfully blind" to the fact that the property has been stolen.

In this case, however, the painting that M, A, B, and C received was not in fact stolen. Thus, they will not be guilty of having received stolen property based on their receipt of the copy. However, if B later does receive the true stolen painting from T, he would be guilty of this crime. With regard to receipt of the copy, however, B is not guilty for the reason that the copy was not stolen and for the additional reason that he knew that it was not the stolen item in question, and thus could not be found to have known or be willfully blind to the fact that it was stolen.

M, A, B, and C might also argue factual impossibility, as discussed above. However, since one of the prima facie elements of this crime is that the property is in fact stolen and that element is not met under these facts, there is no need to apply this defense here.

If M and his sons had received the authentic stolen painting, even in the absence of a conspiracy agreement among them, each of M, A, B, and C would be guilty of this crime. M and B plainly knew it was stolen, and A believed it was from the article, making his knowing receipt of the true article a crime (absent his immediately returning it to the authorities). C regularly sold information about M to the authorities, and thus also likely knew the painting was stolen. Thus, if they had received the true painting, each would be guilty of receipt of stolen property.

C. Attempt to Receive Stolen Property

Attempt is a specific intent crime. It requires: (1) that the defendant take sufficient action toward the completion of a crime, and (2) specifically intend to commit that crime. There is a split of authority as to the appropriate test to use for determining whether a defendant has done enough to constitute an attempt. While all courts agree that "mere preparation" for the crime is not sufficient to impose criminal attempt liability, some courts require that the defendant take a substantial step toward the commission of the crime. Other courts require instead that the defendant come dangerously close to succeeding in committing the underlying crime in question. Unlike conspiracy, the crime of attempt is subject to the doctrine of merger, meaning that if a defendant actually does commit the underlying crime, the attempt merges into the completed crime, and the defendant thus cannot be liable both for attempt and for the completed crime.

M and A: In this case, M knew the painting had been stolen and believed the copy was the real thing, and A also knew it had been stolen and believed that this one was the real thing. Thus, M and A each specifically intended to commit the crime of receiving stolen property. Moreover, each took a substantial step toward doing so, and came

dangerously close, by picking up the copy of the painting. But for B's dirty double-crossing of his father and brothers, M and A would have succeeded in committing this crime. Thus, each of M and A is guilty of attempt to receive stolen property, regardless of the fact that the painting they picked up was a copy.

M and A will argue factual impossibility, as discussed above. However, this defense will fail, as factual impossibility is not a defense in general, nor is it a defense to attempt. After all, if M had tried to pickpocket someone's wallet but that person had left their wallet at home, M would nonetheless be liable for attempted larceny. So it is here with regard to attempt liability.

B: B presents a different case. Clearly he took a substantial step toward and came dangerously close to committing the crime, but he did not specifically intend to commit the crime of receiving stolen property by taking the copy of the painting. He in fact knew that the painting they picked up was a copy, and had not been stolen, and thus lacked specific intent. Thus, B would not be guilty under these circumstances for attempted receipt of stolen property by taking the copy of the painting sent from London. As noted above, he may be guilty for other conduct -- such as actually receiving the true stolen painting if T sends it to him, or for receiving proceeds of the sale of the true stolen painting under his agreement with T.

C: C, however, did believe that the painting that he picked up with the others was in fact stolen, and thus, like M and A, would be guilty for attempt. The fact that he was participating with law enforcement would not change this fact. C might be able to obtain immunity from prosecution as a result of his assistance, but absent a grant of immunity, he would be guilty along with M and A of attempted receipt of stolen property.

Q2 Professional Responsibility

Carol, a woman with young children, applied to rent an apartment owned and managed by Landlords, Inc. Landlords, Inc. rejected her application.

Believing that Landlords, Inc. had rejected her application because she had young children, Carol retained Abel to represent her to sue Landlords, Inc. for violation of state anti-discrimination laws, which prohibit refusal to rent to individuals with children.

Landlords, Inc. retained Barbara to represent it in the lawsuit. Barbara notified Abel that she represented Landlords, Inc.

Abel invited Ford, the former manager of rental properties for Landlords, Inc., to lunch. Ford had participated in the decision on Carol's application, but left his employment shortly afterwards. Abel questioned Ford about Landlords, Inc.'s rental practices and about certain conversations Ford had had with Barbara regarding the rental practices and Carol's application.

During a deposition by Barbara, Carol testified falsely about her sources of income. Abel, who attended the deposition, suspected that Carol was not being truthful, but did nothing.

After the deposition ended and Carol had left, Barbara told Abel that Landlords, Inc. would settle the dispute for $5,000. Abel accepted the offer, signed the settlement papers that day, and told Carol about the settlement that night. Carol was unhappy with the amount of the settlement.

What, if any, ethical violations has Abel committed? Discuss.

Answer according to California and ABA authorities.

Answer A

Any ethical violations Abel may have committed will have arisen out of his representation of Carol. Carol's rental application was denied by Landlords, Inc. (Landlord). Carol retained Abel as her attorney because she believed Landlords rejected her application because she has young children, which would be a violation of the state's anti-discrimination laws.

Abel's Lunch with Ford

Duty of Fairness

An attorney owes a duty of fairness to his opponent. In this case, Abel owes a duty of fairness to Barbara, Landlords' attorney.

An attorney may not communicate with the opposing party or its employees without the opposing party's attorney's consent or presence. While it may be permissible for an attorney to communicate with low level employees, communication with a high level employee requires the opposing party's attorney's consent. In this case, Abel invited Ford, Landlords' former manager of rental properties, to lunch. Abel knew Barbara was Landlords' attorney because she had notified him of her representation. Nonetheless, Abel did not ask Barbara's permission before he invited Ford to lunch. However, Ford had left his employment with Landlords shortly after Carol's application had been denied, so he was no longer an employee of the opposing party. On this other hand, he participated in the decision to deny Carol's application. Abel would argue he did not act unethically because a former employee may speak with whomever he or she wishes. Barbara would counter that Ford had just recently been a high level employee and Abel should have obtained her consent before speaking with Ford one-on-one. However, Abel likely did not commit an ethical violation because Ford was no longer an employee of Landlord.

Attorney-Client Privilege

The attorney-client privilege is an exclusionary rule of evidence. It is held by the client and may be invoked to prevent the attorney from disclosing information that arose out of the client seeking professional advice from the attorney during their relationship. A corporation is also protected by the privilege. Conversations between high level employees and the corporation's attorney are privileged. In this case, it is again important that Ford was no longer an employee of Landlord. By the time Barbara was retained by Landlords, Ford had apparently already left his job at Landlords. Thus, his conversations with Barbara would not be protected by the privilege because he was no longer a high-level employee such as a manager.

Carol's Deposition Testimony

Duty of Confidentiality

An attorney owes a duty of confidentiality to his client. Under the ABA Model Rules (ABA), an attorney may not disclose anything related to the representation without the client's consent. California does not have such a rule, but the Attorney's Oath requires a lawyer to "maintain inviolate" the secrets of his client. Abel owes a duty of confidentiality to Carol. In response to any ethical questions about not revealing his suspicions that Carol testified falsely at the deposition, Abel would likely claim that he could not say anything without violating his duty of confidentiality.

Exceptions

Under the ABA, there are exceptions to the duty of confidentiality to prevent substantial harm or death or great financial loss. California law limits the exception to substantial harm or death. Carol's false testimony related only to her sources of income which does not implicate substantial bodily harm or death. Likewise, even if she was trying to recover more from Landlord by lying about her income this probably does not

rise to the level of the serious financial loss exception recognized by the ABA. Further, these exceptions are permissive so they would not require Abel to disclose anything.

False Testimony

Under ABA, when a lawyer knows his client will give or has given false testimony the lawyer must counsel the client not to do so, attempt to withdraw from the case, and finally tell the judge if the attempt to draw is unsuccessful. In California, an attorney may not tell the judge but must allow his client to testify in a narrative fashion. Further, the attorney must counsel the client not to lie. Even though Carol's testimony was given during a deposition and not a trial, it was still given under oath and thus Abel should have counseled Carol not to lie (and attempted to withdraw and if he could not then have gone to the judge if ABA controls). However, Able will argue that he only suspected Carol was lying, he did not actually know. While Abel probably should have done further investigation to determine if his client was being truthful, he has not acted unethically by doing nothing because he did not know if Carol was lying.

Settlement

After the deposition Abel accepted Barbara's offer to settle with Landlords for $5,000 by signing it that day without telling his client. Abel did not inform Carol of the settlement until that night and Carol was unhappy with the amount.

Duty of Competence

A lawyer has a duty to competently represent his client. A lawyer must use the knowledge, skill, thoroughness, and preparation required to do so. Included in the duty of competence is a duty to communicate with the client.

Duty to Communicate

An attorney must keep his client up to date on the case. The attorney must give the client enough information so that she can make intelligent decisions going forward. In this case, Abel did not inform Carol of Landlord's offer to settle for $5,000. All settlement offers must be related to the client. While the attorney may make strategic decisions during the representation, whether to accept or reject a settlement offer is a substantive decision that must be made by the client. Thus, Abel acted unethically when he first did not tell Carol about the offer and second when he accepted it without her consent.

Answer B

Abel's Ethical Violations

Abel's Lunch with Ford

Under both the ABA and CA rules, a lawyer cannot speak to a represented party. Abel was notified that Landlords, Inc. was represented by Barbara. A lawyer cannot speak to the employees of a represented person or corporation in the absence of opposing counsel. Here, Abel invited Ford, Landlord, Inc.'s former manager of rental properties, to lunch with him. Since Ford was a former employee and no longer employed by Landlord, it was not improper for Abel to speak with Ford to investigate the facts of his client, Carol's, case. A lawyer owes his client a duty to diligently advocate his client's case to completion and thoroughly investigate all facts and locate relevant witnesses who will support his client's case. However, in diligently advocating for one's client, the lawyer must conduct himself with integrity, honesty, fairness and good faith in respect to the public, his adversary, the court and to the legal profession.

Here, although Abel's lunch meeting with Ford was not a violation of any ethical duty, Abel crossed the line into unethical territory when he asked Ford about certain conversations Ford had with Barbara regarding the rental practices and Carol's application. Abel was aware that the information he was inquiring about was covered by Barbara's duty of confidentiality to Landlord, Inc. and would also be privileged and inadmissible in court or at a deposition under the evidentiary attorney-client privilege, if that privilege was invoked by Landlord, Inc. Although Ford was currently a former employee, at the time Ford had the conversations with Barbara, he was an employee of the corporation and was speaking within the scope of his employment relationship and those conversations were made in confidence to the corporation's attorney. By asking these questions to Ford without advising him that such information was covered by the attorney-client privilege, Abel violated his duty of fairness and honesty to his adversary and his actions reflected negatively on his integrity and respect for the legal profession.

Carol's Deposition

During Carol's deposition by Barbara, Abel suspected that Carol had testified falsely about her sources of income but Abel did not do anything to correct Carol.

Duty of Honesty and Candor to Tribunal and Adversary

A lawyer owes the court and his adversary a duty of candor, fairness and honesty. A lawyer cannot knowingly offer a false statement of law or fact to the court and upon learning of the falsity, the lawyer owes a duty to the court to correct the false statement. Here, Abel suspected that Carol testified falsely at her deposition. Deposition testimony is taken under oath under penalty of perjury and thus if Abel knew Carol had falsely testified or intended to testify falsely, then he would have allowed her to commit perjury which he has an ethical duty to try to avoid without prejudicing his client. Here, the facts do not indicate that Abel knew for certain that his client had testified falsely, nor do the facts show that Abel had knowledge that Carol had planned to testify falsely. Upon becoming suspicious of Carol's false testimony, Abel owed the court a duty to investigate whether or not the statement was false and to persuade his client to correct the false statement on her own. During the deposition, Abel should have asked to stop the deposition briefly to speak to his client in private, and should have persuaded her that if she was not being truthful, to go back into the deposition and correct herself and restate accurate information. Abel should have advised his client that she was under oath and that the deposition transcript could later be used against her and could ultimately harm her case if not corrected as soon as possible. If at that point Carol refused to correct her false testimony, and Abel was certain that she had committed perjury, he should have sought to withdraw as her counsel, as long as his withdrawal would not severely prejudice her case, because not doing so would continue to confer a falsity upon the court.

Duty of Confidentiality

Under the ABA and under CA, Abel would not be able to disclose the false statement to the court or to Barbara because doing so would breach his duty of confidentiality to Carol. A lawyer owes his client a duty to keep all confidential information related to the representation confidential and not to disclose such information without the client's consent. There are some exceptions where a lawyer is permitted to reveal confidential information, such as where a dispute arises between the lawyer and the client which allows the lawyer to reveal confidential information to the extent necessary to defend himself, or under the ABA and CA where disclosure of confidential information is necessary to prevent certain death or risk of substantial bodily injury or under the ABA where disclosure is necessary to prevent or mitigate fraud or substantial financial loss where the lawyer's services were used in furthering the fraud or financial injury. Here, no exceptions apply to allow Abel to disclose Carol's perjury so Abel's only option if she will not correct the false statement is to withdraw.

Settlement

Abel violated several ethical duties to his client by settling the case without his client's input and consent.

Duty to Communicate

A lawyer owes his client a duty to communicate by informing his client of all developments in the case and by informing his client of all settlement offers. The lawyer is free to make tactical decisions, such as trial strategy, but the client must make all decisions about the case, including whether or not to accept a settlement offer. A lawyer cannot accept a settlement offer without his client's approval and consent. Here, Abel accepted Barbara's settlement offer of $5,000 without informing Carol of the offer and obtaining her approval and consent to settle at that amount. By accepting the offer,

signing the agreement and telling Carol after the fact, Abel breached his duty to communicate to Carol.

Duty of Diligence and Duty of Competence

By accepting and signing the settlement offer without Carol's input and approval, Abel also violated his duty to diligently represent Carol to the case's completion as well as breached his duty of competence. A lawyer owes a client a duty to diligently see the case to completion and zealously advocate for the client. Here, Abel breached that duty by terminating the case right after his client's deposition, by accepting a settlement offer without his client's input. The facts do not indicate whether Abel had previously deposed Barbara's client, but if not, accepting the settlement before having the opportunity to do so, prevented Abel from learning more information that could have potentially increased the value of his client's case. Furthermore, since Carol was not happy with the settlement and probably would not have approved it, Abel did not zealously represent his client's interests.

A lawyer also owes his client a duty of competence, which requires the lawyer to represent his client with the knowledge, skill, preparation, experience and thoroughness that a competent lawyer would exercise under the same circumstances. A competent lawyer would not have accepted the settlement offer without consulting his client and without negotiating a larger amount and without being confident that his client was receiving a fair amount under the circumstances. Since Abel did not consult with his client nor try to get her a better offer, Abel breached his duty of competence as well as his duty of care.

Q3 Remedies

In 2004, Mary and Frank orally agreed to jointly purchase a small storefront space in City for $80,000. Mary contributed $40,000 of her own money. Frank contributed $40,000 he had embezzled from his employer, Tanner. Mary and Frank agreed to put the property in Frank's name alone because Mary had creditors seeking to enforce debts against her. They further agreed that Frank would occupy the property, which he planned to use as an art studio and gallery. They also agreed that, if and when he vacated the property, he would sell it and give her one half of the net proceeds. He then occupied the property.

In 2005, Tanner discovered Frank's embezzlement and fired him.

In 2012, Frank sold the property, obtaining $300,000 in net proceeds. Frank offered to repay Mary her $40,000 contribution, but Mary demanded $150,000.

Mary and Tanner each sued Frank for conversion.

At trial, the court found Frank liable to both Mary and Tanner for conversion.

1. What remedy or remedies can Mary reasonably obtain against Frank for conversion, what defenses (if any) can Frank reasonably raise, and who is likely to prevail? Discuss.

2. What remedy or remedies can Tanner reasonably obtain against Frank for conversion, what defenses (if any) can Frank reasonably raise, and who is likely to prevail? Discuss.

Answer A

(1) Mary v. Frank

Mary's Remedies. There are several possible remedies Mary can obtain for the tort of conversion.

Tort of Conversion. The tort of trespass to chattels or conversion occurs when the defendant wrongfully interferes with the plaintiff's right to possess property. This tort constitutes the trespass of chattels when the interference is not so severe as to constitute conversion. The damages for trespass to chattel are the cost of repairing the property. The tort of conversion occurs when the interference with the plaintiff's personal property is substantial and severe. The damages for conversion are the fair market value of the property at the time and place of conversion.

In this case, Frank is guilty of converting Mary's 1/2 interest in the storefront space as his own. He is liable for conversion, and the damages would be 1/2 of the fair market value of the storefront space at the time of conversion. In this case, the conversion occurred when Frank failed to give Mary her 1/2 of the net proceeds. Thus, under tort law, her damages would be 1/2 of the fair market value of the storefront space when Frank failed to give Mary her 1/2 of the proceeds. If the sale of the storefront space for $300,000 was close enough in time to the conversion, then a court can find that Mary is owed $150,000 for the conversion.

Purchase Money Resulting Trust. A purchase money resulting trust occurs when one party purchases property, but another party supplies the consideration. The other party must have supplied consideration before the purchasing party obtains title. In such a situation, the court imposes a resulting trust on the purchasing party, construing her as a trustee holding the property in trust for the beneficiary, which is the party who supplied consideration. Because the resulting trust is a remedy implied at law, the requirements to create a valid trust are not required.

In this case, there is a purchase money resulting trust between Mary and Frank. They orally agreed to purchase a storefront space for $80,000, and each agreed to contribute $40,000. The title was placed in Frank's name alone, but Mary supplied one-half of the consideration required to purchase the storefront space. If Mary can show that she contributed the $40,000 before Frank took tile, then she is entitled to a purchase money resulting trust as a remedy. Mary can likely show that she contributed money before Frank took title, since the full purchase price of real property is usually conveyed before the deed to title is transferred.

Pro Rata Resulting Trust. Where the party who supplied consideration for the purchase of real property did not provide the total consideration, but only partial consideration, the court will construe a resulting trust in an interest pro rata to the amount of consideration supplied by the party.

In this case, Mary only supplied one-half of the consideration for the storefront space. Thus, she will be construed as having a 1/2 interest in the storefront space. However, the storefront space itself has been sold. Equitable rights to property are cut off by a sale to a bona fide purchaser who pays value and has no notice of prior wrongdoing. There is no indication in this case that Frank did not sell the property to a bona fide purchaser. Thus, because Frank already sold the storefront space, Mary will be deemed as having a 1/2 interest in the net proceeds from the sale. Under a pro rata share of a purchase money resulting trust, her remedy would be $150,000, which is 1/2 of the $300,000 in net proceeds that Frank obtained for selling the property.

Constructive Trust. Similar to the resulting trust, a court can impose a constructive trust on the defendant, which construes the defendant as holding property in trust for the plaintiffs. This remedy applies where the defendant has wrongfully obtained title to the plaintiff's property, and the defendant's retention of such property would result in unjust enrichment. The plaintiff can trace the property to another form, as long as the trust res can be identified. Additionally, the plaintiff is entitled to any increase in value in the property to avoid unjust enrichment to the defendant. Where the property has been

commingled with other funds and withdrawals have reduced the account's balance below the plaintiff's claim, the plaintiff is entitled to the next lowest intermediate balance.

In this case, Mary would argue that she obtained a 1/2 interest in the storefront property when she contributed $40,000 for its purchase. This 1/2 interest was wrongfully appropriated by Frank when he sold the house and retained all proceeds except for the $40,000 he was willing to give Mary. Additionally, Frank's retention of the 1/2 interest would amount to unjust enrichment because he only contributed 1/2 of the purchase price himself (and those funds were embezzled). Furthermore, Mary can trace her 1/2 interest to $300,000 in net proceeds that Frank obtained from selling the property, she is entitled to the increase in value under the remedy of constructive trust, and there is no indication that the funds have been commingled with other funds or withdrawn to a balance lower than $150,000. Frank would argue that he is entitled to a greater interest because he did more work by occupying the property, improving it, and selling it. However, Frank is likely to lose this argument because of the oral agreement he had with Mary. Mary is likely entitled to a constructive trust, compelling Frank to pay her $150,000.

Equitable Lien. Similar to a constructive trust, a court can impose an equitable lien on the defendant's property in favor of the plaintiff. This remedy is appropriate where the defendant misappropriated the plaintiff's property under circumstances giving rise to a debt or obligation owed to the plaintiff, the property can be traced to the defendant, and the defendant's retention of the property would result in unjust enrichment. Like the constructive trust, the defendant can trace the property to another form as long as the res can be identified. However, unlike the constructive trust, the plaintiffs are not entitled to any increase in value in the property under an equitable lien. Where the property has been commingled with other funds and withdrawals have reduced the account's balance below the plaintiff's claim, the plaintiff is entitled to the next lowest intermediate balance.

The analysis for whether Mary would be entitled to an equitable lien is the same as the analysis conducted above for a constructive trust because Frank's misappropriation of

Mary's 1/2 interest in the property gave rise to a debt owed to Mary for that amount. However, under the remedy of equitable lien, the court would impose an equitable lien in the amount of $150,000 in Mary's favor on the net proceeds that Frank received.

Specific Performance & Replevin. Specific performance and replevin are remedies where the defendant retains possession of the property in question. They do not apply here since Frank no longer owns the storefront property.

Damages. When a plaintiff also sues for conversion, she may be able to obtain damages for lost use of the property during the time it is wrongfully appropriated by the defendant. Mary here may be able to obtain additional damages if a substantial amount of time has passed between the conversion and her ability to obtain a remedy in court.

Frank's Defenses.

Statute of Frauds. The statute of frauds requires that any interest in real property, other than a lease for one year or less, be in a writing, signed by the party to be bound and identifying the related material terms and conditions. In this case, Mary and Frank's oral agreement pertained to an interest in real property; thus, it must be in writing in order to be enforced. Frank will most likely be able to raise the defense of statute of frauds to defeat Mary's remedies. If this is this case, Mary may be able to argue that she is entitled to restitutionary damages instead of the remedies above. Restitutionary damages grant damages in the amount that the defendant is unjustly enriched by.

Unclean Hands. Unclean hands are a defense where the plaintiff has engaged in misconduct related to the transaction sued upon. In this case, Frank would likely argue that Mary had unclean hands in the transaction because she agreed to put the title in Frank's name alone to avoid creditors who were seeking to enforce debts against her. He would argue that her avoidance of her creditors is misconduct, is related to their agreement to purchase the storefront space, and thus, bars Mary from obtaining a remedy. However, Frank's argument is likely to fail because Mary's decision to put the

title in Frank's name alone was unlawful, and her motivation to avoid creditors was not illegal. Thus, Mary's right to remedies would not be barred by unclean hands.

(2) Tanner v. Frank

Tanner's Remedies.

Tort of Conversion. See rule above. In this case, Frank committed conversion when he wrongfully appropriated $40,000 from Tanner, rendering him liable for damages to Tanner.

Purchase Money Resulting Trust. See rule above. In this case, although Tanner was unaware of it at the time, it contributed $40,000 to the purchase of a small storefront space in City, which was then titled to Frank. If it can show that it contributed this $40,000 before Frank obtained title, then Tanner is entitled to a purchase money resulting trust as a remedy. It is likely that Tanner can show this, since title to property is usually transferred to the buyer after the buyer conveys the full purchase price.

Pro Rata Resulting Trust. See rule above. Since Tanner contributed only 1/2 of the consideration for the property, it is entitled to a 1/2 interest in the property. As noted above, a sale to a bona fide purchaser cuts of equitable rights to title, and there is no indication that Frank did not sell the property to a bona fide purchaser. Because Frank already sold the property, Tanner has a 1/2 interest in the $300,000 in net proceeds from the sale.

Constructive Trust. See rule above. In this case, Tanner would argue that it obtained a 1/2 interest in the storefront property when it unknowingly contributed $40,000 to its purchase. The 1/2 interest was wrongfully appropriated by Frank when he embezzled it from Tanner in 2004. Frank's retention of the 1/2 interest contributed by Tanner would result in unjust enrichment because the $40,000 did not belong to Frank, and Frank supplied no consideration from his own funds to the purchase of the property.

Furthermore, Tanner can trace its 1/2 interest to the $300,000 in net proceeds that Frank obtained from selling the property, it is entitled to the increase in value under the remedy of constructive trust, and there is no indication that the funds have been commingled with other funds or withdrawn to a balance lower than $150,000. Thus, Tanner is likely entitled to a constructive trust in 1/2 of the $300,000 in net proceeds, which is $150,000.

Equitable Lien. See rule above. The analysis for whether Tanner would be entitled to an equitable lien is the same as the analysis conducted above for a constructive trust because Frank's embezzlement of $40,000 from Tanner gave rise to an obligation to repay Tanner. However, under the remedy of equitable lien, the court would impose an equitable lien in the amount of $150,000 in Tanner's favor on the net proceeds that Frank received.

Frank's Defenses.

Laches. Laches applies where the plaintiff has unreasonably delayed in bringing a lawsuit, and that unreasonable delay prejudices the defendant. The time for laches begins running when the plaintiff first learns of the injury. In this case, Frank would argue that he initially embezzled the $40,000 in 2004, and Tanner discovered the embezzlement in 2005, but that Tanner did not bring suit until 2012, which prejudiced Frank. While the seven years that Tanner waited between learning of its injury and filing suit amounts to an unreasonable delay, there is no evidence that Frank's ability to defend himself has been prejudiced. Thus, Tanner cannot successfully raise this defense, unless he can show that he has been prejudiced in his ability to defend himself.

Answer B

What remedy or remedies can Mary reasonably obtain against Frank for conversion, what defenses (if any) can Frank reasonably raise, and who is likely to prevail?

Mary's Remedies

Mary has several avenues she can pursue to try and recover damages from Frank.

Constructive Trust

The most promising remedy Mary can pursue against Frank is a constructive trust. A constructive trust is an equitable remedy whereby a court requires a person who wrongfully acquired title to property to hold that property as a forced trustee and to return it to its rightful owner. Although it will not defeat a bona fide purchaser, it does allow tracing. Moreover, a constructive trust will allow a person to recover any increase in value of the property. This remedy is generally only allowed when money damages would be inadequate.

Here, Mary will argue that she and Frank both owned the property and that he converted the property they owned when he sold it to another person. Because it appears that a bona fide purchaser bought the property, Mary will not be able to recover the house.

Tracing

However, a constructive trust allows a party to trace their converted property. Here, Mary gave Frank $40,000, this went into a home, and then the home was sold for $300,000. Mary will be able to argue that the money she put into the home can be traced to the home and then to the sale and that a constructive trust of one-half of the sale price should be placed on the $300,000 proceeds that Frank gained from selling

the property. This is likely Mary's best argument because a constructive trust will make Frank the trustee and require him to pay the increased money over Mary's $40,000.

Money Damages Inadequate

Mary will likely also be able to show that general tort damages are inadequate. Under general tort recovery from conversion, the individual is entitled to receive the market value of the item that was converted at the time it was converted. It could be argued that the $40,000 was converted when Frank took the property, leaving Mary entitled to only $40,000. Accordingly, damages would not be sufficient. Moreover, there is the risk, that without forcing Frank to be the trustee, he could spend the money, become insolvent, and leave Mary without any remedy.

Equitable Lien

Mary could also argue that an equitable lien should be placed on Frank's bank account. An equitable lien is also an equitable remedy whereby a person who acquires the personal property of another can have a court put a lien on that property. It is generally most useful when the property of another has been used to improve some other property or where the property has decreased in value and the owner of the property is seeking a deficiency judgment.

Here, Mary may argue that she should be entitled to an equitable lien, but this would be substantially less attractive than a constructive trust. For one thing, the value of the property, which can be traced, has increased significantly and can be secured through a constructive trust. For another thing, under the equitable lien theory tracing is not allowed. Thus, Mary would not be able to trace her money to the value of the increased value of the property that is now in the form of cash proceeds. Accordingly, this theory is less attractive to Mary.

Damages

As mentioned previously, Mary could be entitled to damages for conversion. But traditional tort damages for conversion allow recovery for the value of the property at the time it was converted. Here, it could be argued that the property was converted at the time that Frank took possession of the home. This would potentially limit Mary's recovery to $40,000.

Restitution

Mary could also argue that she is entitled to restitution. Restitution is a remedy that is available to prevent a party from being unjustly enriched at the expense of another. Here, it could be argued that a court should split the $300,000 that Frank received from the sale in half because if it was not for the contribution that Mary made, he would not have purchased the property and would not have later sold it at an enormous profit. For these reasons, restitution for the $150,000 that Frank made in the subsequent sale may also be a viable option.

Frank's Defenses

Frank is likely to assert several defenses.

Adverse Possession

Frank may argue that he adversely possessed the property after occupying it for 8 years by himself and thus gained title to the full share. This will fail because he had Mary's permission to occupy the property.

Laches

Laches is a defense that arises because a party takes such a long time to bring a cause of action that it materially prejudices the opposing party. This defense will likely

fail. There is no indication that Mary waited an exceedingly long time to sell the property.

Statute of Frauds

Frank may also argue that Mary's agreement is barred by the statute of frauds. The statute of frauds is a defense that a party cannot assert to prevent a claim that a contract existed. It is applicable to an alleged contract to purchase or sell land, which must be in writing, signed by the grantor and include a purchase price. But this defense will likely not apply here. While the underlying issue involves an agreement regarding land, Mary is not suing to force the sale or purchase of property; rather, she is suing for money that was converted. Accordingly, this defense will likely not stand.

Unclean Hands

Frank's best argument will probably be unclean hands. The doctrine of unclean hands applies, especially in the equity context, to prevent a party from recovering where that party was involved in bad behavior relating to the underlying transaction. Here, Mary entered the agreement with Frank and put the property in his name for the purpose of avoiding creditors who were seeking to enforce debts against her. Accordingly, Frank could argue that Mary cannot recover in equity here because her own bad conduct was involved.

Who will likely prevail?

Under these facts, unless the court deems that Mary's conduct of trying to avoid creditors will bar her under the doctrine of unclean hands, she is likely to prevail. She will most likely seek a constructive trust or restitution for the additional money gained from the sale.

What remedy or remedies can Tanner reasonably obtain against Frank for conversion, what defenses, if any can Frank reasonably raise, and who is likely to prevail?

Tanner's Remedies

Tanner, like Mary, has several remedies it can seek against Frank.

Constructive Trust

See above definition. Tanner will argue that a constructive trust should be imposed because the money that Frank embezzled from them was used to purchase the property. Embezzlement consists of unlawfully obtaining title to the property of another by a person in lawful possession. Based on the facts here, Frank embezzled the $40,000 from Tanner and thus obtained title to it.

Tracing

Under a constructive trust, tracing is allowed. Here, Tanner will argue that the $40,000 was spent to purchase the property so title can be traced to the property, and when the property was sold, $150,000 of the $300,000 sale price can be traced to the original $40,000. While it may be argued that a constructive trust does not apply here because this is an instance where the property of another was used to improve other property, that is likely not the case. The $40,000 was used to purchase property that was kept in Frank's name and then sold with the proceeds going to Frank.

No adequate damages remedy

A problem may arise for Tanner in this instance if Frank can show that an adequate damages remedy would just be forcing him to pay back the $40,000 that he had converted. This problem may prevent Tanner from successfully having a constructive trust set up to recover the $150,000.

Equitable Lien

See above definition. An equitable lien may also be an option, but as mentioned previously, funds cannot be traced using an equitable lien. As a consequence, the money that was taken from Tanner would not be able to be traced to the home and then to the bank account. Accordingly, this option is not viable.

Damages

Tanner may just argue that it is entitled to damages for the money take. As mentioned, damages for conversion are the market value of the property at the time it was converted. Here, Tanner will be able to show that it is entitled to the $40,000 that was taken from it.

Restitution

Tanner may also argue that it is entitled to either the $40,000 or the $150,000 under a theory of unjust enrichment. It would be clearly entitled to $40,000 under this theory, but it may be able to argue that Frank would be unjustly enriched as a result of his fraudulent action if he is able to keep the money he made in addition to the $40,000 that he stole.

Frank's Defenses

Laches

Frank's best defense against Tanner is Laches. See above definition. Here, Frank may be able to argue that Tanner found out about the embezzlement in 2005, but did nothing until 2012. On the other hand, Tanner may argue that it was not aware that Frank had any money to make a lawsuit worthwhile until it found out that the house was

sold for a significant profit. Because this is an equitable defense, a court will likely side with Tanner and not the wrongdoers.

Who will likely prevail?

Tanner will likely prevail on a theory of damages for the conversion limiting recovery to $40,000 or restitution under which the recovery for unjust enrichment of Frank could be up to $150,000. Either way, Frank's laches defense will likely not work.

FEBRUARY 2013

ESSAY QUESTIONS 4, 5 AND 6

California Bar Examination

Answer all three questions.

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and facts upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles; instead try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

Q4 Torts

Darla is in the pest control business. She develops and produces fumigation gas for her own use. She also sells the gas to consumers. Some of her competitors do not sell gas to consumers because consumers sometimes do not follow safety instructions.

Darla sold a container of fumigation gas to Albert for use in ridding his apartment of insects. Although she had intended to produce gas of standard toxicity, she had unknowingly produced gas of unduly high toxicity. Albert used the gas and succeeded in killing all the insects in his apartment. Because he used the gas carelessly, some made its way into the apartment of his neighbor, Paul. The gas caused Paul to suffer serious lung damage and to fear that he would contract cancer as a result.

1. Is Darla liable to Paul? Discuss.

2. If so, may Paul obtain damages from Darla for fear of contracting cancer? Discuss.

Answer A

Darla is in the pest control business and produces fumigation gas for her own use, and sells it to consumers. She unknowingly produced gas of unduly high toxicity which ended up causing Paul, a neighbor of the user Albert that bought gas from her, lung damage and fear of contracting cancer. Although Albert, who was in privity with Darla as he purchased the gas from her, was negligent in his use, there are several theories that Paul can employ to hold Darla liable for her personal injuries.

Paul can potentially sue Darla on theories of an abnormally dangerous activity that caused Paul harm, strict products liability, negligent products liability, implied warranty and express warranty and misrepresentation theories, as well as intentional tort theories.

Abnormally Dangerous Activity

A defendant will owe a plaintiff a strict duty of care, regardless of the conduct of the particular defendant, when the defendant undertakes an abnormally dangerous activity. An abnormally dangerous activity is one with a high risk of harm, that is not commonly found in the community, which has a risk that cannot be eliminated with due care. The utility is usually lower than the risk of harm. The defendant is liable if the dangerous character actually and proximately causes the plaintiff damages.

Here, Darla is in the business of developing and producing fumigation gas, which she sells to consumers. Fumigation gas contains toxins that carry a risk of harm inherently. Darla will argue this is not an inherently dangerous activity, because fumigation gas is safe in normal amounts of toxicity, and is commonly used to control pests. She will argue it is "common in the community." Paul can counter that toxic gas always carries with it a high risk of harm, and unduly high levels of gas is not common in the community. Paul will argue that the gas is so dangerous that D's competitors will not sell it to consumers for fear that warnings are not enough to abate the danger.

Darla can point out that the risk can be eliminated with due care, as people call pest control and have fumigation all of the time, and this is safe. Paul will argue that no matter the due care, chemicals always carry risk of harm to people.

Causation

Paul will argue that the dangerous character was the but-for cause of his harm, because but for the dangerous toxins, he would not have suffered lung damage and fear of contracting cancer. However, in terms of proximate cause, Darla will argue that Albert, the user of the gas, used it carelessly and the fact that the gas made its way to Paul's apartment was a supervening cause. Paul will counter that while this may have been a supervening cause, only unforeseeable intervening acts will break the chain of causation, and Albert's negligence was foreseeable, since Darla herself knew that "consumers sometimes do not follow safety instructions." It is likely that Albert's negligence does not absolve Darla here. Thus, the dangerous character of the chemicals can be said to be the actual and proximate cause of Paul's harm. If Darla's production of the fumigation gas is an "abnormally dangerous activity" then Darla is liable to Paul on this theory.

The issues of proximate cause and causation will be detailed below under the other theories of liability.

Strict Products Liability

A defendant is strictly liable in tort when the defendant manufactures, distributes, and/or sells a product that is unreasonably dangerous and thus "defective" and the dangerous character actually and proximately causes harm to a plaintiff.

Duty and Standard of Care

A defendant owes a strict duty of care to all foreseeable plaintiffs. The focus in necessarily on the character of the product, and not the actions or due care of the defendant, in a strict liability analysis.

First, it is necessary to see if P and D are proper parties. A proper defendant for strict products liability is a commercial seller of a product. This includes all parties in the chain of distribution. Here, Darla is in the pest control business. She develops and produces fumigation gas for her own use and sells it to consumers. She will argue that since she produces it for her own use, she is not a "commercial" seller and falls outside of the strict liability framework. However, Paul will rightly point out that since she "sells the gas to consumers" she is a property defendant here.

Proper plaintiff-- Strict products liability does not require privity, or a contractual relationship between the defendant and the injured party. A proper plaintiff is thus a buyer, a user, or even a bystander that is harmed. Here, Paul was not a user or purchaser of the gas; his neighbor Albert was. Albert's careless use of the gas resulted in the gas making its way into Paul's apartment and causing him lung damage from breathing the fumes. Since Paul is a "bystander" harmed by the dangerous character of the product, Paul is a proper plaintiff and has standing to sue Darla.

Defect

The defendant, Darla, is liable for a defect in the product that is unreasonably dangerous. There are three types of defects in products liability: a manufacturing defect, a design defect, and a failure to warn defect which is a subset of a design defect.

Manufacturing Defect

A manufacturing defect is a defect caused during the manufacture of the product, whereby the product becomes unreasonable dangerous as a result of a problem during the manufacturing process. The defect is a result of a "one off" problem where the product emerges more dangerous than the other products that are manufactured with it.

Here, Darla may be liable for a manufacturing defect. She intended to produce fumigation gas of standard toxicity, which is presumably safe for human use when properly manufactured, as she is in the pest control business and sells to consumers. However, Darla unknowingly produced gas that was of unduly high toxicity, and sold it to Albert. Since this gas was "unduly toxic" this can demonstrate a product that was made to be unreasonably dangerous, as a result of the production process, and is different than the normal gas.

A manufacturing defect is demonstrated by the "Consumer Expectations Test" which essentially asks, would an ordinary consumer find the product to be more dangerous than they would anticipate? Here, while adult consumers are likely aware of the attendant dangers of toxic pest control fumes, Paul can argue that consumers do not expect that they will suffer serious lung damage as a result of someone spraying to kill some bugs in their apartment. This is likely a good argument for Paul. However, Darla can argue that consumers DO expect that fumigating can cause damage if they breathe in the fumes, and it is common sense that someone should not use too much gas. Darla will point out that the same is true for other items, such as household bleach. Paul likely has the better argument here, as consumers that spray for insects would probably not expect that the gas has "unduly high toxicity." Therefore, Paul has enough facts to prove a manufacturing defect here.

Design Defect

A design defect occurs when a product as designed is unreasonably dangerous, and is measured in terms of whether there is a "reasonable alternative design" for the product that makes it more safe without impairing its utility and function and without making it unduly expensive so as to price the defendant out of the market. It may be the case that Darla's product of the gas was a design defect in terms of the way the chemicals were used. If she used a different chemical combination, she may have been able to avoid the problem of accidentally making it too toxic. However, there are no facts to show this, and it appears that Darla simply made one batch of gas too toxic. There does not appear to be a reasonable alternative design, because pest control fumigation gas is inherently toxic.

Failure to Warn Defect

If there are either no warnings or inappropriate warnings on a dangerous product, this is a type of design defect. Here, it is not clear if there were warnings and what they were. However, because Darla's competitors do not sell the gas to consumers because they don’t always heed instructions, there is some evidence that the gas does come with instructions. However, more facts would be needed to show that there were inadequate warnings here.

Causation

Actual Cause

There must be a showing not only that the product was dangerous but that the dangerous property actually caused the harm to the Plaintiff. The defect must have been present while the product was in Darla's control.

Here, but for the high toxicity levels, Albert's overuse of the product would not have caused the harm to Paul, or so Paul will argue. It is not clear if overuse of the normal gas would have caused the same problem. However, it is likely that the unduly high levels of toxicity caused the harm to Paul, when the fumes from Albert's apartment from Albert's spraying for bugs wafted into Paul's apartment. Therefore, Paul can likely argue that the dangerous defect was the actual, but-for cause of his harm.
It appears that Darla did have control of the product while it was defective, because it can be inferred that when she produced the gas with such high levels of toxicity this was the gas she sold to Albert, who used it and injured Peter.

Proximate Cause

The harm must also have been proximately caused, meaning that it was foreseeable that the harm would occur, and that the defendant created the scope of risks. A strict products liability defendant is liable for all foreseeable misuses of a product, so a misuse that is foreseeable will NOT cut off the chain of liability because it is not an unforeseeable independent or abnormal dependent event such as would break the chain.

Darla will argue that Albert's negligence was an independent intervening cause and she should not be liable for Albert's negligent use of the gas. However, it is foreseeable that users may accidentally use too much gas, or do this purposefully without understanding the true harm. In fact, this was so foreseeable that Darla's competitors have in fact refused to sell gas to customers, because customers sometimes do not follow directions. This demonstrates the danger of the product and the fact that consumers are likely to misuse the gas, and harm themselves or others. Thus, Paul will be able to show that Darla's product was the proximate cause of his harm, despite the fact that Albert was negligent.

Damages

Paul suffered serious lung damage as a result of ingesting the gas fumes. He also worried that he would contract cancer as a result. Typically, products liability actions will only allow a recovery of personal injury or property damage but Paul's emotional distress may also be parasitic to this. This will be addressed below. However, Paul did suffer his requisite damage to recover.

In sum, Paul can likely recover on a strict products liability theory.

Defenses: Assumption of the Risk?

Darla can invoke this defense, which means that one knows of a risk and voluntarily proceeds in spite of it. Paul did not know of the risks, and was an innocent bystander. Therefore, there is no defense.

Contributory Negligence

The plaintiff's conduct is not an issue and cannot be a defense in strict liability, because the focus is on the character of the property, not the parties' conduct.

Negligent Products Liability

Negligence focus on the conduct of the defendant, and not just the character of the property.

Duty

A commercial producer owes a duty of reasonable care to foreseeable plaintiffs, who are plaintiffs in the "zone of danger" per Cardozo in Palsgraf. Here, Paul was arguably in the zone of danger. Even though he was not a user, it is foreseeable that the fumes

could leak out and harm people that are nearby, including neighbors. Darla will argue it is not foreseeable that someone in a different apartment would be harmed; however it is foreseeable that the toxic gas can waft.

Standard of Care

Darla owed a duty to act as a reasonably prudent producer of fumigation gas would act under the circumstances. Since others in the pest control business do not sell gas to consumers, this is evidence of a lack of prudence on her part. She unknowingly produced high levels of toxins in her gas, and should have had safety controls, monitoring, and someone to check the gas before it went out. She likely breached her standard of care here.

The analysis of causation and damages is the same as above; therefore, Darla is likely liable for strict liability as well.

Contributory Negligence

Paul was not negligent here, and thus this will not reduce a potential recovery.

Paul can recover for negligent products liability.

Implied Warranties of Merchantability

A product is deemed merchantable for its intended purpose. Therefore, Paul may be able to argue a breach here, if the product was not fit for its intended purpose and was too dangerous. However, this is likely not the issue; the spray worked well and as intended, because it killed all of the bugs in Albert's apartment here. Therefore, Paul cannot recover on this theory.

Express Warranties/Intentional Torts/Misrepresentation

Here, it does not appear that Darla made any representations to Paul at all, since she did not interact with him. Therefore, he cannot recover on express warranty or misrep theory.

Darla may be liable for battery if she knew to a substantial certainty that she would cause Paul harm but there does not appear to be evidence of this.

(2) Can Paul obtain damages for fear of contracting cancer?

Proper damages for products liability in strict liability or tort involve personal injury and property damage only. Emotional distress can constitute a personal injury, but even if it did not, it is 'parasitic' to Paul's actual physical injury of lung damage so it would likely be awarded on this theory. If fear of contracting cancer is "emotional distress" which it likely is, then it is a proper measure of damages.

Damages must be foreseeable, certain, definite, and unavoidable.

Paul can recover if his emotional distress is reasonable and foreseeable. Here, it is foreseeable that Paul would fear contacting cancer after ingesting toxic gas and suffering severe lung damage. An average person would have this fear especially since it is certain that he developed severe lung damage.

Paul could face problems proving his damages with definiteness/certainty. It is difficult to quantify this measure, and Darla will argue as such. However, a jury would weigh his suffering, and the credibility and likelihood of his distress, and award a number. Juries award damages for pain and suffering routinely, and could award damages based on "fear."

Paul did not need to mitigate here, since he was not a wrongdoer, and he cannot easily mitigate fear, unless he sees a therapist to reduce his fear, which would also cost money and be a measure of damages.

Therefore, it is likely that Paul would also recover damages for fear of contracting cancer, if this constitutes "emotional distress."

Answer B

1) Is Darla liable to Paul?

Paul may bring a variety of claims against Darla including a claim based on strict liability, products liability, and negligence.

Strict Liability

A claim for strict liability may be made when the defendant is engaged in an abnormally dangerous activity, in which case he/she owes a strict duty of care to the plaintiff, and that activity causes harm to the plaintiff. Whether an activity is considered an abnormally dangerous one requires a determination of whether the activity is common in the community and whether the defendant, taking all reasonable and proper measures to ensure safety of the activty, the risks involved in the dangerous activity cannot be completely protected against.

In this case, Darla is engaged in the business of developing and producing fumigation gas which she uses for her own purposes in addition to selling to consumers. While some of her competitors do not sell the gas to consumers because consumers sometimes do not follow the safety instructions, the use of fumigation gas to rid one's home or business of pests may arguably be considered a matter common in the community. In this case, Albert did in fact use Darla's gas to rid his house of pests and thus an argument can be made that while the risk danger of using the gas cannot entirely be protected against, it likely is a matter common in the community, thus, a claim for strict liability will likely fail if P brings one against D.

Strict Products Liabilty (SPL)

For a claim of SPL, a defendant must be a commercial supplier of a good who supplies a dangerously defective product into the stream of commerce that causes, both actually and proximately, the harm to the plaintiff that results in damages.

Commercial Supplier

In this case, D is in the pest control business in which she manufactures and distributes fumigation gas. While she does use it for her own use, she also sells the gas to consumers. In this case, she sold the gas to Albert who used it to kill the insects in his apartment. Thus, Darla would owe a strict duty to Albert, but also to Paul. The fact that the gas injured Albert's neighbor Paul, who was not in privity of contract with Darla for the sale of the gas is of no consequence because a commercial supplier owes a strict duty to all foreseeable consumers/users or people who may come into contact with the product. Here, despite the fact that Paul did not purchase and use the gas himself from Darla, this will not prevent him from pursuing a SPL claim against her. Because D may be considered a commercial supplier, this element is met.

Defective Product

A consumer may attempt to show that a commercial supplier supplied a dangerously defective product by claiming that the product contained either a manufacturing defect (using the consumer expectation test), a design defect (feasible alternative tests), or an inadequate warning defect (information defect, which is a subset of a design defect.). In this case, Paul should argue that there was a manufacturing defect in the fumigation gas because Darla had produced gas of unduly high toxicity, and the ordinary consumer would have expected the gas produced to be of standard toxicity.

Manufacturing Defect

As discussed above, using the ordinary consumer expectation test, Paul will argue that a reasonable consumer would not have expected Darla to supply the market (and here Albert) with fumigation gas that had an unduly high toxicity level as compared to the standard toxicity levels that are generally supplied. The fact that Darla produced the higher toxic gas unknowingly and unintentionally is of no consequence in a SPL suit because the supplier owes a strict duty of care to the reasonably foreseeable consumer (here Paul), and breach of that duty (by supplying the dangerously defective product) is enough to make out the prima facie case for duty and breach of the standard of care.

Inadequate Warning

Alternatively, because the facts indicate that some of D's competitors do not sell gas to consumers because the consumers sometimes do not follow safety instructions, there may also be an issue of inadequate warning here; however, there is no evidence that D did in fact fail to supply a warning against the dangers of using the gas, so P's best argument would be to argue that the product was dangerously defective on account of the manufacturing defect.

Causation-actual cause

The injury sustained by P must also be the actual cause of the supply of the defective product. In this case, D's supply of the product to Albert (A) actually caused the harm to P because but for the sale and use of the product in A's apartment, P would not have been harmed. Rather, the issue that D will argue here is that she is not the proximate cause (or legal cause) of P's injuries on account of A's misuse of the product.

Legal Cause (Proximate cause)

Proximate cause is a legal limit on a D's liability, whereby courts will only cut off a D's liability to P's when it exceeds the foreseeable scope of liability. In this case, D will argue that A's misuse of the product in that A carelessly allowed the gas to seep into his neighbor P's apartment, should absolve her of liability because a reasonable person using the product would ensure that it would not injure others. However, this argument will likely fail because a commercial supplier must take into account a user's foreseeable misuse of the product, and such a misuse occurred in this case. It is foreseeable that a user of highly toxic pest control gas may injure other individuals on account of his negligent use of it. Thus, because a court would reject the argument that A's negligent misuse was an intervening and superceding cause that should cut off D's liability to P, this element will also be met.

Damages

Finally, a P must have suffered some form of cognizable damages in order to affect a recovery. Because Paul suffered serious lung damage, a personal harm to his body, he will meet this requirement and his claim against D based on SPL will likely succeed.

Defenses--assumption of risk and contributory negligence

D might try and argue that P assumed the risk of being injured by A's use of the pesticide; however, for an assumption of the risk defense to work, the individual must have knowingly and voluntarily assumed the risk of the activity involved. Here, there are no facts to suggest that P assumed any risk whatsoever, let alone voluntarily accepted such risks. Thus, this defense will fail.

Alternatively, D will argue that A was contributorily negligent in allowing the gas to injure his neighbor; however, as discussed above, this defense will not work in a SPL case because the negligence of the user is not taken into account when there was foreseeable misuse of the product by the user.

Negligence claim against D

The prima facie case for negligence includes duty, breach of that duty by falling below the requisite standard of care, causation (actual and proximate) and damages.

Duty

Under the Andrews minority view, a person owes a duty to everyone; thus D would owe a duty to P in this case. However, under the Cardozo majority view, a person only owes a duty to all those foreseeable persons within the zone of danger. Under this view, D would also owe a duty to P because the fact that P's apartment was located next to A's apartment (from which the gas leaked out of and into P's apartment), it is likely that P was within the zone of danger as to the use of the toxic chemicals and also was a foreseeable plaintiff because D would reasonably foresee that someone's neighbor may be injured by use of the toxic chemicals, especially in the context of apartment homes

which are generally separated by walls and hallways from each other. Thus D owed a duty of care to P in this case.

Breach-Standard of Care

D owed a duty to P and the standard of the duty would be to act as a reasonably prudent manufacturer and supplier of toxic chemicals used for pest control. Here, P will argue that D's actions fell below the requisite standard of care because D negligently produced a much higher toxic gas than she had intended to produce, and a reasonably prudent supplier of such gas would either test the levels of the gas before placing them in the market and selling them or, at the very least, having certain safeguards available to ensure that the gas level of the product produced would not exceed certain specifications. Because P can argue that D likely breached its standard of care in this case, P will have to show that his injuries were also the cause of his damages as well.

Actual Cause

P will argue that but for D's supply of the negligently manufactured product to A, P would not have been injured. Because as discussed above this element is met, P must show that D is also the legal cause of his injuries.

Proximate cause

D will argue, again, that A was in fact the legal cause of P's injuries because of his misuse of the product, and that such misuse was an unforeseeable intervening and superceding cause of P's injuries and should thus absolve D of any liability to P. However, for the reasons discussed above, this argument will likely fail because it is entirely foreseeable that an apartment owner who shares his residency in close proximity to other tenants might injure those tenants by misusing a toxic substance in an attempt to kill the pests in his apartment. Thus, P will be able to succeed on this element as well.

Damages

Again, P must prove that he suffered damages that the law recognizes as compensable. Here, P suffered lung damage and because this is a form of personal injury for which the law provides a remedy, P will be able to easily meet this element.

Thus, P has also made out a prima facie case for negligence against D as well.

Defenses

Contributory negligence

A P's contributory negligence traditionally barred his claim for recovery against the D; however, many courts have adopted a form of comparative negligence to lessen the harshness of the result with regard to the complete bar on P's claim. In this case, D might try and argue that P was contributorily negligent because he should have been able to recognize the smell of the gas or that something was causing him discomfort in his apartment, and should have sought fresh air by going outside or moving out temporarily. However, there aren't any facts to suggest that the gas had an odor; for all intents and purposes, it might have been an odorless gas. Moreover, P might have been asleep while A used the gas and would not have noticed its effects on him. Because there is very little in the facts to suggest that P was contributorily negligent, this defense will likely fail for D to assert. Similarly, an assumption of the risk defense will also fail for reasons discussed above.

2) May P obtain damages for Darla for fear of contracting cancer?

The issue is whether P can recover damages against D for his emotional distress. The claim that P would bring against D is one for negligent infliction of emotional distress, since the elements of an intentional infliction of emotional distress are not applicable here.

Negligent infliction of emotional distress (NIED)

The elements for an NIED claim occur when a defendant negligently causes emotional distress to a plaintiff on account of the D's actions. Traditionally, an NIED claim required the P to suffer some form of physical harm, and not merely some intangible emotional harm out of fear that the courts would receive a large influx of junk cases for unsubstantiated claims. Here, P will likely be able to recover his emotional distress, i.e. fear that he will contract cancer from the exposure to the gas, because he has in fact suffered a physical manifestation of the harm in the form of the lung damage that he has seriously suffered. Thus, because P can show that he has suffered physical harm to his body, he will also be entitled to recover for his emotional distress as well.

Q5 Civil Procedure

In March 2008, Pat, a citizen of State A, learned that Devon Corp. ("Devon"), a citizen of State B, may have been illegally releasing toxic chemicals into the air near her home.

In February 2011, Pat sued Devon in federal court, alleging a cause of action for negligence and seeking damages for a persistent cough. The court had subject matter jurisdiction over Pat's lawsuit.

During discovery, Pat requested Devon to produce all documents relating to reports by local residents about foul odors coming from its plant. Devon objected to Pat's discovery request, contending that the plant's odors came from legally produced and harmless chemicals, and that therefore the request sought irrelevant information. In further response, Devon provided a privilege log that listed a document described as a summary of all communications with local residents concerning odors that emanated from the plant. As a basis for refusing to disclose the document, Devon claimed the summary was protected from disclosure under the work product doctrine because it had been created by its counsel, who therein described the underlying facts of the residents' comments as well as counsel's thoughts about them. Pat filed a motion to compel Devon's production of the documents she requested. The court denied Pat's motion.

In October 2012, while the lawsuit was still pending, Pat learned from a scientific report in a newspaper that the chemicals Devon released cause lung cancer.

In November 2012, Pat amended her complaint to add a cause of action for strict liability and sought to require Devon to pay for preventive medical monitoring of her lungs.

Devon moved to dismiss Pat's strict liability cause of action on the basis that the applicable three-year statute of limitations had run.

1. Did the court correctly deny Pat's motion to compel? Discuss.

2. How should the court rule on Devon's motion to dismiss? Discuss.

Answer A

1. The trial court incorrectly denied Pat's motion to compel. The scope of discovery is whether the request is reasonably calculated to lead the discovery of admissible evidence. As a general matter and absent any other exceptions, evidence is admissible if it is relevant. Relevance means it has any tendency to make the existence of any fact, that is of consequence to the determination of the action, more or less probable than it would be without the evidence.

Here, Pat requested Devon to produce all documents relating to reports by local residents about foul odors from its plant. Devon objected to the discovery request on the grounds that the plant's odors came from legally produced and harmless chemicals. Pat's lawsuit against Devon is brought under negligence theory and concerns Devon's release of toxic chemicals into the air. Pat's request is within the permissible scope of discovery. Although Devon contends that the odors are legal and harmless, that is not conclusive. During litigation, Pat may gather evidence to support her belief that Devon has been illegally releasing toxic chemicals. She is not required to merely accept Devon's assertion that it is not acting illegally. The reports by local residents may lead to relevant, admissible evidence. If Pat learns that other residents have likewise experienced a persistent cough or other symptoms, or developed cancer, she can use their testimony to rebut Devon's contention that the odors are harmless. Additionally, the reports of local residents are relevant to show that Devon had notice of the harmful effects of the chemical/odors on local residents. Moreover, the evidence could support Pat's assertion that her persistent cough was a reasonably foreseeable result of the chemicals/odors because Devon knew that it the chemicals had similar effects on other residents. Therefore, Pat's document request should be granted unless a privilege applies.

In response to Pat's discovery request, Devon produced a privilege log listing a document described as "a summary of all its communications with local residents concerning odors that emanated from the plant," claiming it was privileged under the

work product doctrine. When a discovery request is within the permissible scope of discovery, but it seeks protected or privileged information, the responding party must provide a privilege log describing the privileged document with particularity and asserting why it is privileged. If the summary is in fact privileged, then Devon properly complied with the discovery rules by responding with a privilege log identifying its existence and explaining why it is not required to disclose it.

The work product privilege applies to all materials prepared by an attorney, or a client at the attorney's request, in anticipation of litigation. As the summary was prepared by Devon's counsel, the first requirement is satisfied. However, the facts do not state whether it was prepared in anticipation of litigation. If Devon's counsel prepared the summary before any litigation concerning the toxic chemicals began, then it may not be covered. Pat learned that Devon may be illegally releasing toxic chemicals in 2008, and did not sue until 2011. If there had been previous complaints, Devon very well may have prepared the summary in anticipation of future litigation, even if not specifically for Pat's case. In those circumstances, the work product privilege would nonetheless apply even if it was made before Pat's lawsuit was initiated.

Not all aspects of the work product privilege are absolute. Any mental impressions, opinions, theories of the case, and related information is absolutely privileged and is never discoverable. However, the remaining aspects of a document may be disclosed if the requesting party establishes: (1) there is a substantial need for the information; and (2) he or she cannot obtain the information from any other source. First, Pat can likely establish that she has a substantial need for the information. As explained above, this information will help support her claim that Devon acted negligently, and rebut Devon's contention that the chemicals/odors are harmless. However, Pat may have more difficulty meeting the second requirement. Devon could argue that Pat could simply interview local residents to determine whether they complained to Devon. However, the court will likely find that this would be an undue hardship because Devon could provide Pat with the names of residents who complained and what their complaints were, without requiring Pat to undergo all that effort. Based on the above analysis, the

underlying information in the summary is discoverable. The communications between local residents and Devon do not fall under the work product privilege because they were not made in anticipation of litigation. Rather, they were likely routine business records. Therefore, if the actual reports of communications that were used to compile the summary are separately available, the court should have ordered that the separate reports be produced to Pat. Then, Pat would receive the information she needed and no privileged information would be disclosed. Conversely, if there are no such separate individual reports in existence, then the court may order Devon to produce the summary with counsel's thoughts redacted from the document.

In sum, the court incorrectly denied Pat's motion to compel. First, the documents requested are within the permissible scope of discovery. Second, although the summary of the communications with residents may be privileged under the work product doctrine, the individual separate reports would not be and could have been produced. Finally, if there are no individual separate reports for each resident, then the court should have ordered that Devon produced the summary with counsel's mental impressions redacted because Pat has a demonstrated a substantial need for the information and that she is unable to obtain the information from another source.

2. The court should deny Devon's motion to dismiss. Civil Rule 15 allows a plaintiff to amend her complaint once before the answer is filed or anytime thereafter with leave of court. Rule 15 requires a court to freely grant leave to amend a complaint as justice requires. When a complaint is amended to include a new claim, it relates back to the date of the original filing as long as the claim arises out of the same transaction or occurrence. Here, Pat seeks to amend her complaint to add a cause of action for strict liability. Her strict liability claim arises out of the same occurrence -- Devon's alleged illegal release of toxic chemicals into the air -- as her negligence claim. Accordingly, her cause of action will relate back to the date of the filing of her complaint in February 2011. Pat discovered Devon's illegal release in March 2008, so her strict liability claim accrued, at the earliest, in March 2008. Accordingly, her strict liability claim was timely filed within the 3-year statute of limitations.

Further, Pat's additional request for relief -- that Devon pay for preventative monitoring of her lungs -- is valid. A party may amend his or her request for damages in the complaint. This new claim for damages relates to Pat's new strict liability claim.

Therefore, the court should deny the motion to dismiss and allow Pat to amend her complaint in the interest of justice because she just discovered the scientific report regarding lung cancer.

Answer B

Denial of Pat's Motion to Compel

The Scope of Discovery

The scope of discovery under the federal rules includes all materials that are 1) relevant and 2) not privileged.

As to relevance, an item is relevant if it has a tendency to make the existence or nonexistence of a fact of consequence to the action more or less probable than it would be without the item.

As to privilege, the most commonly asserted privilege objections in discovery are attorney-client privilege and work product privilege. The attorney client privilege protects confidential communications between an attorney and her client from disclosure in discovery, and the work product privilege protects materials prepared by a party in anticipation of litigation. Materials protected by the attorney client privilege are absolutely privileged from disclosure in discovery.

Materials, for which the work product privilege is claimed, however, may sometimes be required to be disclosed. If the party seeking discovery can show that 1) the claimed work product materials contain information which is not reasonably available to him by any other means, and 2) his interests would be substantially prejudiced if he were not allowed access to those materials, the court may order disclosure. However, even if the disclosure of work product is ordered pursuant to this standard, the court may not order the disclosure of an attorney's mental impressions or legal theories, because such items are absolutely protected.

Devon's Relevance Objection

In response to Pat's request for Devon to produce documents relating to reports by local residents about foul odors from Devon's plant, Devon objected and refused to produce such documents on the basis that the odors came from legally produced and harmless chemicals and therefore the request sought irrelevant information. Such documents are properly discoverable because they are relevant and not privileged. Information about reports of odors from the plant by local residents are relevant to Pat's claim that the plant was illegally releasing toxic chemicals into the air, because it is more probable that the plant was in fact releasing chemicals if local residents reported that they smelled odors. Such reports may also be relevant to the issue of the quantities, types, and times the chemicals were released into the air, which is relevant to Pat's claim that she had sufficient exposure to the chemicals to cause her persistent cough.

Devon's claim that the documents are not relevant because the odors were "legally produced" and "harmless" should have been rejected by the court. A party may not avoid discovery by self-serving claims as to what its documents would show. Moreover, the issues at the heart of this claim are precisely whether 1) the odors were legally produced, as Devon claims, or illegally produced, as Pat claims, and 2) the chemicals are toxic, as Pat claims, or harmless, as Devon claims. Devon must produce documents that show what chemicals were released and how they were being produced so that Pat and her experts can evaluate for themselves the nature of the chemicals.

Therefore, to the extent Devon claimed a relevance objection to Pat's request, the Court should have overruled that objection and ordered Devon to respond in full to the request.

Devon's Work Product Privilege Objection

Devon has also produced a privilege log indicating that it has a summary of all communications with local residents concerning odors emanating from the plant, and has claimed that the summary is protected by the work product privilege because it was created by Devon's counsel. The mere fact that a document was created by counsel does not mean that it is protected by the work product privilege. Devon must also show that the document was prepared in anticipation of litigation. If Devon's counsel prepared the document, for example, as part of a report that was required to be given to the EPA on a routine basis, it would not be protected by work product. Devon bears the burden of showing that the document is entitled to work product protection.

In addition, even if the document is work product, Pat may be able to discover it if she can show that she cannot get the information by any other means, and she would be substantially prejudiced without it. This is a very fact specific showing. Pat's alternative means of finding out what residents have complained to the plant about regarding odors would be to walk the streets and interview the neighborhood, hire an investigator, place an ad seeking responses with such information, etc. Depending on the size of the area at issue, that may not be reasonably feasible or particularly productive. Moreover, it is possible that some residents who have been extremely bothered have moved out of the area entirely and would not be accessible through such an investigation. The best source of the information is likely what is contained in the plant's summary of complaints, and it would be very difficult for Pat to collect that information otherwise.

To the extent that the document contains verbatim reports of residents' complaints, the court should compel Devon to release it. To address Devon's claim that the document also contains counsel's thoughts about the residents' complaints, that information is mental impressions, and is absolutely protected against disclosure. The court should order Devon to produce the document for in camera review, so that the court can determine to what extent it does in fact contain such information. The court

could also order Devon to disclose the document with the work product material redacted.

Ruling on Devon's Motion to Dismiss

The issue here is whether the court should grant Devon's motion to dismiss the amendment to Pat's complaint adding a claim for strict liability and medical monitoring as barred by the statute of limitations, or whether the complaint relates back to the timely filed original complaint.

Relation Back Standard

An amended complaint filed after the statute of limitations has run "relates back" to the original complaint, and therefore is not time-barred, if: 1) the original complaint was timely filed; and 2) the new claims in the amended complaint arise out of the "same transaction or occurrence" as the claims in the original complaint.

Was the original complaint timely filed?

Here, it appears the original complaint was timely filed because Pat discovered her injury in March of 2008 and filed the complaint in February of 2008 for negligence. If the three year statute applies to personal injury complaints whether asserted under negligence or strict liability claims, the original complaint was timely filed within 3 years, and the first part of the relation back test is satisfied.

Do the new claims arise out of the same transaction or occurrence?

As to the question of whether the claims arise from the same transaction or occurrence, the answer is likely yes. Pat's negligence claim relates to the occurrence of Devon's release of chemicals into the air near her home. Her strict liability and medical monitoring claims arise from the same event - Devon's release of chemicals. She is

simply pleading a new theory of liability and requesting an additional remedy for the same conduct by Devon that was at issue in her original complaint.

Devon may argue that, even if the strict liability claim relates back, to the extent that Pat is making a claim for medical monitoring in her amended complaint, it does not arise out of the same transaction or occurrence because it concerns Pat's fear of lung cancer, not her persistent cough. However, a court would likely reject this argument, especially because Pat only recently learned of the potential for the chemicals to cause lung cancer by the Nov. 2012 news article, and filed her amended complaint within a month of learning that information.

Prejudice to Devon

Devon may argue its interests would be prejudiced by permitting the late amendment because it has been engaging in discovery for nearly two years on the basis of the allegations in the original complaint. However, a court would also likely reject this argument because Pat's allegations against Devon in both the original and the amended complaint concern the health effects of the released chemicals, and therefore the scope of the discovery and the preparation Devon must do to defend is not significantly changed by the amended complaint.

In sum, because the original complaint was timely filed, the amended complaint arises out of the same transaction or occurrence as the original complaint, and Devon would not be prejudiced in having to defend against the new claims, the court should deny Devon's motion to dismiss the amendment as time-barred.

Q6 Business Associations

In 2011, Molly and Lenny started a computer software business. Molly prepared marketing materials and Lenny made sales calls. During the first year, Lenny sold 10 copies of certain software programs for $50,000 each. The business had a net profit of $480,000 and Molly and Lenny each received $240,000.

In January 2012, Molly and Lenny hired an attorney to incorporate their business under the name “Software Inc.” The attorney properly prepared all necessary documents to incorporate the business but carelessly failed to file them with the Secretary of State.

Lenny continued to make sales calls to sell the software. He also sold a five-year service contract developed by Molly. Due to brisk sales, Software Inc. projected income of about $300,000 per year for the next five years from the service contracts alone. Software Inc. obtained a $100,000 business loan from National Bank secured by the accounts receivable for the service contracts.

In May 2012, Lenny had an automobile accident, caused solely by his own negligence, on the way to visit a prospective buyer. The accident injured a pedestrian. As a result of the accident, Lenny stopped working and sales collapsed.

In July 2012, Software Inc. went out of business, leaving negligible assets and the unpaid loan to National Bank.

1. Is Software Inc., Molly, and/or Lenny liable to the pedestrian for the injury? Discuss.

2. Is Software Inc., Molly, and/or Lenny liable to National Bank for the loan? Discuss.

Answer A

I. Liability to the Pedestrian

A. Lenny's Liability

This issue is whether Lenny is liable to the pedestrian for the automobile accident.

Generally, persons are liable for their own negligent conduct. While employers can be vicariously liable (discussed below) for an employee's tortuous conduct, this liability is in addition to the employee's liability. However, if an employee was acting within the scope of their employment, to further the goals of the business, they could seek indemnification from the business.

Here, Lenny had an automobile accident, caused solely by his own negligence, on his way to visit a prospective buyer. The accident injured a pedestrian. Lenny will most likely be liable for the damages he caused. However, because he was on his way to visit a prospective buyer, Lenny could seek indemnification from Software Inc., because he was driving solely for the purpose of furthering Software's business by attracting a new buyer. In addition, his conduct was negligent, rather than intentional, which would prohibit indemnification. If, because of a failure to incorporate (as discussed below), Software Inc. is not actually a valid corporation, Lenny could still seek indemnification from the partnership between him and Molly, since he was still acting in furtherance of Software, the partnership (also discussed below). However, given Software's negligible assets, and its debt to National Bank, there may not be much to seek indemnification from.

Therefore, Lenny is liable to the pedestrian, but may be able to seek indemnification from Software, Inc.

B. Software Inc.'s, Vicarious Liability

This issue is whether Software Inc. is vicariously liable for Lenny's tortuous conduct.
A corporation/partnership/principal can be vicariously liable for the tortuous conduct of its agents if those agents act in furtherance of the principal, under the principal's control, and with the principal's express, implied, or apparent authority.

Here, Lenny had an automobile accident, caused solely by his own negligence, on the way to visit a prospective buyer. By driving to visit a buyer, it appears clear that Lenny was acting in furtherance of Software Inc. While Software Inc.'s corporation or partnership status will be discussed below, it is clear that Lenny was functioning as both a principal and as an agent. He was a principal in the sense that he was expressly authorized to make sales calls and presumable visit prospective buyers given that he started the computer software business and that he and Molly agreed to divide the work as such. He was an agent acting for the benefit of Software Inc. in driving to meet the buyer and further Software Inc.'s goals of collecting buyers.

Therefore, regardless of Software Inc.'s status, Software Inc. is probably vicariously liable for Lenny's tortuous conduct.

C. Molly's Liability

1. De Facto Corporation

This issue is whether Software Inc. had a de facto corporation status, such as to shield Molly from personal liability for Lenny's tortuous conduct.

A corporation is a unique organizational framework for a business, in which management is centralized, and shareholders enjoy limited liability. A corporation must file its articles of incorporation with the Secretary of Interior in order to be a valid corporation, and thus to enjoy this limited liability. However, a corporation that does not

file its articles of incorporation may nevertheless enjoy limited liability via de facto corporation. A de facto corporation 1) attempted to incorporate in good faith, 2) is otherwise eligible to incorporate, and 3) subsequently acted like a corporation in good faith.

In January 2012, Molly and Lenny hired an attorney to incorporate their business under the name "Software Inc." However, while the attorney properly prepared all necessary documents to incorporate the business, he carelessly failed to file them with the Secretary of State. It does not appear that Molly or Lenny knew that the attorney had failed to file the documents. Instead, Molly and Lenny continued to make sales and sell the software. In fact, they obtained a business loan from National Bank secured by its accounts receivable, thereby acting like a corporation in which corporation debts are secured by corporation profits. By hiring an attorney, and subsequently acting like a corporation, it appears that Molly and Lenny attempted to incorporate in good faith, and later acted as if they were a corporation in good faith, with no knowledge (or should have had the knowledge) that they were not actually a corporation. In addition, Software Inc. appears otherwise eligible to incorporate, but-for the failure to file the documents with the Secretary of State.

Therefore, it is possible that Molly will be shielded from liability if Software Inc. has de facto corporation status.

2. Piercing the Corporate Veil

This issue is whether Molly can be personally liable if the pedestrian pierces Software Inc.'s corporate veil.

Shareholders of a valid corporation may nevertheless be personally liable for corporation debts if the corporate veil is pierced. Courts allow a corporation's veil to be pierced when it is clear that there is such a commonality between the corporation and the shareholders, that the shareholders are actually the "alter ego" of the corporation,

and to not permit piercing would sanction a grave injustice. Failing to comply with corporate formalities and insufficient capitalization are common reasons courts have pierced a corporation's veil.

Here, if Software Inc. has de facto corporation status, Molly can be shielded from liability, unless Software Inc.'s corporate veil is pierced. There is no evidence that Molly and Lenny intentionally aimed for Software Inc. to act as their corporate alter ego. However, there is evidence that Software Inc. was severely under-capitalized. In 2011, Molly and Lenny made a net profit of $480,000. However, instead of investing any of that profit back into the business, they instead each received $240,000. In 2012, Software Inc. sold a five-year contract, and projected an income of $300,000/year based just on service contracts. In addition it took out a $100,000 loan. However, in July 2012, after Lenny stopped working for just two months, Software Inc. had only negligible assets AND its unpaid loan. It appears that either Molly and Lenny were taking dividends when the corporation could not pay its debts, or that Software Inc. was otherwise severely under-capitalized. Further, there are no facts to suggest that Molly and Lenny abided by any corporate formalities, such as holding a general meeting, issuing bylaws, or keeping accounting books. However, there is no information that they did not do these things either.

Therefore, it is possible that the pedestrian can pierce Software Inc.'s corporate veil and hold Molly personally liable.

3. General Partnership

This issue is whether if Software Inc. does not have a corporation status, they are instead a general partnership, and Molly can be held personally liable thereby.

A general partnership is a partnership between two or more people to go into business together. The formation of a general partnership only requires the intent to form a partnership. No documents need to be filed with the Secretary of State, unlike a limited partnership, a limited liability corporation, and a corporation. A general partnership only includes general partners who are personally liable for the debts and obligations of the partnership. The equal sharing of profits is presumptive evidence that parties intended to form a general partnership.

In 2011, Molly and Lenny started a computer software business. Molly prepared marketing materials and Lenny made sales calls. At the end of the year, the business had a net profit of $480,000, and Molly and Lenny each received $240,000. In 2012, Lenny and Molly continued to operate their software business in apparently the same way, with the same division of labor, as they had in 2011. They attempted to form a corporation, but their attorney negligently failed to properly file the forms. By sharing the profits equally in 2011, Molly and Lenny appeared to have presumptively formed a general partnership. In 2011, it appears that they operated as a general partnership, with an equal, but distinct division of labor. By sharing the profits, they implicitly agreed to also equally share the business's obligations, should there be any. When the attorney failed to incorporate Software, and assuming that Software is unsuccessful in obtaining de facto corporation status, Molly and Lenny continued to have a general partnership. It does not matter that they never formally agreed to form a partnership. Their sharing of the profits equally makes their relationship a general partnership until they agree otherwise. Thus, if Software Inc. does not have de facto status, Molly will be liable as a general partner. However, she will only be liable to the extent the business is without funds.

Therefore, Molly can be liable as a general partner.

II. Liability to National Bank

A. Software Inc.'s Liability for the Loan

This issue is whether Software Inc. is liable for the loan to National Bank.

Generally, corporations and partnerships are liable for the debts incurred during the normal course of business.

Here, National Bank issued a $100,000 business loan to Software Inc., secured by Software Inc.'s accounts receivable. If Software Inc. has de facto status, then the loan was authorized by the corporation. If Software Inc. is a partnership, the loan was similarly taken during the course of business, for the purpose of the partnership, and was authorized by the partners. Regardless of Software Inc.'s status, the loan was received by Software, which subsequently enjoyed the benefits of the loan, and will thereby be held to have at least ratified the loan by accepting the loan.

Therefore, Software Inc. is liable for the loan, regardless of its status.

B. Lenny and Molly's Liability for the Loan

1. De Facto Corporation

This issue is whether Lenny and Molly can escape personal liability through de facto corporation.

This rule is discussed above, in section I.C.1.

Because Lenny and Molly made a good faith attempt to incorporate, and acted in good faith as if they were incorporated, they potentially could receive de facto corporation status, and thereby its included limited liability.

Therefore, Lenny and Molly could escape liability through de facto status.

2. Corporation by Estoppel

This issue is whether Lenny and Molly can escape personal liability through corporation by estoppel.

Even if a corporation fails to properly file its articles of incorporation with the Secretary of State, and even if a corporation fails to receive de facto corporation, a creditor may nevertheless be estopped from denying the existence of a corporation. If a creditor treated a corporation as such, and looked to corporate assets in making a loan, a corporation can be protected though corporation by estoppel.

Here, Software Inc. projected income of about $300,000/year for the next five years from its service contracts. National Bank provided Software Inc. a $100,000 business loan secured by the accounts receivable for the service contracts. National Bank believed Software, Inc. was a valid corporation. They could have done their due diligence to verify their corporation status. Further, National Bank only looked to Software Inc.'s assets, not Molly or Lenny's, in determining whether to issue the loan. Finally, they issued a business loan, underpinning National Bank's focus upon Software as a corporation. Because they treated Software as corporation in issuing the loan, they will be estopped from denying Software's corporation status in attempting to collect on the loan.

Therefore, Molly and Lenny could escape personal liability through corporation by estoppel.

3. Piercing the Corporation Veil

This issue is whether even if Software Inc. has de facto or corporation by estoppel, National Bank can go after Molly and Lenny personally by piercing the corporate veil.

This issue is discussed above, in section I.C.2.

Because Lenny and Molly failed to properly capitalize Software Inc., it is possible that National Bank could similarly seek to pierce Software's corporate veil.

Therefore, Molly and Lenny could be personally liable for the loan thru piercing the corporate veil.

4. Liable as General Partners

This issue is whether if there is corporate status, Lenny and Molly are liable as general partners.

This issue is discussed above in section I.C.3. General partners are personally liable for the remaining debts of the business.

Because Lenny and Molly originally functioned as a general partnership, if Software Inc. does not have corporate status, Lenny and Molly will be held to be general partners. Just as general partners get to share profits equally, they also must share the obligations equally.

Therefore, Molly and Lenny will each be liable for one half of the remaining obligation on the loan to National Bank.

Answer B

Liability towards Injured Pedestrian:

Software Inc. v. Pedestrian

De Jure Corporation:

A de jure corporation is one that is properly formed. To form a de jure corporation the parties have to prepare the necessary documents required by the state for incorporation. Here, Molly and Lenny did not create a de jure corporation due to the fact that their attorney carelessly failed to file the documents. The fact that the corporation was not created does not mean that there are not other corporate like entities that could have arisen.

De Facto Corporation;

Molly and Lenny's strongest argument would be that they created a de facto corporation. A de facto corporation is where the parties take all the necessary steps to incorporate, but for some reason their attempt to incorporate was unsuccessful. If the parties have a good faith belief that a corporation was formed a court can find that a de facto corporation was created, which gives the parties all the same benefits and obligations that would arise under a normally created corporation. Based upon these facts a court would most likely find that a de facto corporation was created, Lenny and Molly took all the necessary steps to create a corporation and held themselves out to be a corporation and if it were not for the carelessness of their attorney in filing the paperwork they would be considered a corporation.

Liability of Shareholders in a De Facto Corporation:

Now that it is found that a de facto corporation was created we look to see if it is liable towards the pedestrian for the injuries suffered. The bonus of a corporation is that it protects its shareholders from liability, and therefore if a de facto corporation was formed Software Inc. might be liable for the injury, and possibly Lenny as it was caused by his negligence but Molly would be shielded from liability beyond what she had invested in the company.

Liability of a Corporation for Damages Caused by its Agents

A corporation can be liable for damages caused by its agents during the scope of their employment. In a corporation directors and officers are considered agents of the corporation and this is further demonstrated by the fact that they had the ability to bind Software Inc. to contracts and that they seemed to be the only two people working for the corporation. If the damages were created completely outside of the scope of their employment then a corporation will not be found to be liable for the damages but here based upon the facts Lenny was going to visit a prospective buyer and his driving to the meeting was within the scope of his employment.

What the corporation would have to argue is that while the accident occurred on his way to the meeting it did not benefit from Lenny's reckless driving and therefore the corporation would not be liable because the accident was caused by Lenny's negligence. This argument would most likely fail because a corporation can be held liable for negligent acts by their employees if they are not wandering too far from the scope of their employment and since Lenny was on the way to the meeting he was not wandering outside of the scope of employment and therefore the corporation can be held liable for the injuries caused to the pedestrian.

Lenny v. Pedestrian

The question would be whether Lenny could also be held liable due to his negligent acts. The Pedestrian would argue that Lenny negligently caused the injuries that he suffered and while as a SH of the corporation he might not be held liable he could still be held liable for negligently driving and causing the accident. The fact that Lenny was working in furtherance of the business interests of the corporation does not mean that he could not be held liable separately. Due to the fact that the accident was caused solely by his negligence Lenny could be found liable for the injuries to the plaintiff along with the corporation.

Molly v. Pedestrian

If a de facto corporation is formed then Molly cannot be held personally liable for the actions of the agents of the corporation. The only time a shareholder can be liable is if the plaintiff is able to pierce the corporate veil by showing that the corporation was merely an alter ego of the party or that it was underfunded. This is not the case here and therefore Molly would not be liable if a de facto corporation was formed.

General Partnership:

If the courts find that no de facto corporation was formed then Molly and Lenny would be in a general partnership with one another. A general partnership arises when two people agree to enter into a business venture for profit. That is demonstrated by the fact that previous to their attempted incorporation Molly and Lenny worked together selling software equipment and that they equally split their profits between each other. Under a general partnership the partners are not protected from liability like a shareholder of a corporation is. Therefore, if a general partnership is formed and a party brings a suit against one partner for damages arising out of their work for the partnership then all partners are personally liable for any award against the partnership. Therefore, unless Molly was able to argue successfully that Lenny's actions were

outside of the scope of the partnership then she would be held personally liable for any damages that are caused by the actions of Lenny. Because it does not seem likely Molly would be able to successfully argue that his actions were outside of the scope of employment, both Molly and Lenny would be personally liable for any injury suffered by the other party due to Lenny's accident.

Liability towards National Bank for Loan:

Corporation by Estoppel:

Even if a de facto or de jure corporation is not formed Molly and Lenny could argue that a corporation by estoppel was formed. Their argument would be that even if they were not a corporation the fact that National Bank dealt with them as if they were a corporation would estop them from denying that they were a corporation and holding the shareholders personally liable.

Software Inc. would be Liable

Software Inc. would be liable for the loan obtained from National Bank. The loan was taken out by them as a corporation and there does not seem to be any evidence to demonstrate that it was taken out for anything other than proper purposes. National Bank would try to argue most likely that Software Inc. is not liable for the loan because at this time Software Inc. only has negligible assets and therefore this would not provide much capital to repay the loan to National Bank.

Most likely Software Inc. would not be attempting to escape liability as they are already out of business and only have negligible assets so a recovery against them would not harm the corporation. This could lead National to make an argument to pierce the corporate veil because of undercapitalization but this argument would fail because the business was not undercapitalized; instead it was not able to fulfill the contract which was the basis on which National Bank loaned the money to them.

Because Software Inc. took out the loan and there is no evidence that it was used for any purposes other than to help the company they will be found liable to the bank for the loan and therefore National Bank will be able to bring an action against Software Inc., even though there is little for them to recover.

Molly would not be Liable

Unless a general partnership was formed as discussed above Molly will not be liable for the National Bank loan. The fact that National Bank acted as if it was dealing with a corporation would stop it from then asserting that it was in actuality a partnership and so therefore Molly would not be liable under a theory that it was merely a partnership.

As a shareholder in a corporation she is protected and there is no evidence to show that she did anything that would cause her to not be protected. National Bank might try to argue that it based its loan based upon the accounts receivable from the service contract developed by Molly but this argument would fail. She created the service contract within the scope of her employment and there is no evidence to show that she was at fault in any way for the failure of the business. Due to the fact that National Bank would not be able to show that Molly did anything that would make her liable for the losses suffered by Software Inc., a court would not find her liable to National Bank and she would therefore be safe.

Lenny would not be Liable

Due to the fact that Software inc. left negligible assets when it went out of business for National Bank to collect on they would most likely go after Lenny for the damages. Their argument would be the fact that the reason for the failure of the corporation was the fact that Lenny stopped working due to the car accident. They would argue that he was the person that created the revenue for the corporation through his sales calls and once he stopped working Molly did not have the experience

to continue running the business profitably and therefore by Lenny's actions the corporation went out of business. They would argue that his quitting was not in the scope of his employment and that it was in no way beneficial to the business and they would therefore argue that Lenny should be liable because their loss is due to Lenny's decision to not return to work.

Lenny would argue that even if his failure to go to work was the cause of the business to fail that does not make him liable for the debts entered into by the business. There is nothing here showing that Lenny or Molly did anything improper in obtaining the loan and that the loan was made with the corporation based upon the assets of the corporation and therefore Lenny should not be held liable.

Even though it seems like National Bank has an argument based upon the fact that the sole reason that the business failed was the fact that Lenny stopped going to work, this would not be sufficient to create liability on Lenny's behalf because the bank loan was entered into by Software Inc. and not with Lenny. Additionally, Lenny could argue that the loan was based solely upon the service contracts and not the sale of products, which was his main area of involvement. Alternatively, National Bank will argue that while it might have been prepared by Molly, Lenny was the one that sold the service contract and therefore it was his area of involvement. Even if the court found this they still would not find that Lenny had acted sufficiently in bad faith to find that he was liable to National for the loan.

Jul 2012

California
Bar
Examination

Essay Questions
and
Selected Answers

ESSAY QUESTIONS AND SELECTED ANSWERS
JULY 2012
CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2012 California Bar Examination and two answers to each question that were written by actual applicants who passed the examination after one read.

The selected answers were assigned good grades and were transcribed for publication as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

JULY 2012
ESSAY QUESTIONS

California Bar Examination

Your answer should demonstrate your ability to analyze the facts in question, to tell the difference between material and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

Q1 Civil Procedure

Pam and Patrick are residents of State A. While visiting State B, they were hit by a truck owned and operated by Corporation, a freight business.

Corporation is incorporated under the laws of Canada and has its headquarters there, where its President and Secretary are located. State B is the only state in which Corporation conducts its business. Corporation's drivers and other employees work out of its warehouse in State B.

Pam and Patrick jointly filed a lawsuit against Corporation in federal district court in State A. In their complaint, Pam demanded damages for personal injury in the amount of $70,000 and for property damage in the amount of $10,000; Patrick demanded damages in the amount of $6,000.

Corporation filed a motion to dismiss the complaint for lack of personal jurisdiction. The federal district court denied the motion. After trial, it entered judgment for Pam in the amount of $60,000 and for Patrick in the amount of $4,000.

Corporation has appealed on the grounds of lack of subject matter jurisdiction and lack of personal jurisdiction.

How should the court of appeals rule on each ground? Discuss.

Answer A

1. Did the Federal District Court of State A have Personal Jurisdiction over Corporation?

Waiver?

Personal Jurisdiction is waived if not challenged. Here, Corporation ("Corp") filed a motion to dismiss for lack of personal jurisdiction ("PJ") at trial. Therefore, Corp did not waive its right to appeal based on lack of PJ.

Personal Jurisdiction

Personal jurisdiction is the power of a court to have jurisdiction over an individual or entity. Here, a corporation. The exercise of personal jurisdiction must comport with the requirements of Due Process.

TRADITIONAL BASIS

Traditionally, PJ could only be exercised if the defendant consented to suit in the forum, was served in the forum, or was domiciled in the forum. Here, there are no facts to indicate that Corp consented to jurisdiction ("JDX") because they did not make a general appearance, or in any way consent. Further, Corp is not domiciled in the forum. A corp is domiciled where it has its principal place of business, based on nerve center, and where it is incorporated. Both of those are in Canada for Corp. Finally, facts do not state where Corp was served or if they had an agent for service of process in State A, but assuming that they were not served in state A, there is no traditional basis in state A.

LONG ARM STATUTE

If there is no traditional basis for the exercise of Personal jurisdiction, the court will next look to the state's long-arm statute to determine whether the court has jurisdiction to reach out to another state, or country to exercise jdx over the defendant. Here, there

are no facts to indicate that state A has a long-arm. If it did, the federal district court would have jdx to the same extent as the state.

CONSTITUTIONAL ANALYSIS

To comport with due process, personal jurisdiction is only proper if the defendant has such minimum contacts with the forum state that the exercise of jdx comports with traditional notions of fair play and substantial justice.

MINIMUM CONTACTS

Minimum contacts requires a showing of purposeful availment and foreseeability.

PURPOSEFUL AVAILMENT

A party purposefully avails itself of the forum state if it has taken advantage of the benefits and protections of that state's laws. Here, Corporation is incorporated in Canada and has its headquarters there. Further, its warehouse is in state B. Further, Corp oprates a freight business and was driving in state B when the Accident occurred, and state B is the only state in which Corp conducts its business. There are no facts to show that Corporation had any contact at all with state A. Therefore Corp will argue it did not purposefully avail itself of the privileges and benefits of State A.

Foreseeability.

Because State B is the only state in which corp does business, it will argue that it was not foreseeable that it would be haled into court in state A. P and P could argue that a trucking company should foresee being sued anywhere, but if the trucks are only on the road in state B, this argument will not likely prevail. It was not foreseeable that Corp would be sued in state A.

Relatedness of the claim to the contact

The court will look at the quality and nature of the contacts. There is general jurisdiction if the defendant's contact is so systematic and continuous that he is essentially at home

in the forum. There is specific jurisdiction if the contact is less than systematic and continuous, but the claim arises out of the defendant's contact with the forum.
Here, there is neither general or specific jdx because the claim neither arises out of the contact with the forum nor is Corp "essentially at home" in the state A because its contact there is not systematic and continuous.

Specifically, the accident occurred while Pam and Patrick were visiting in State B, not state A, and therefore the claim does not arise out of contact with State A, and there can be no Specific Jdx as a result.

Additionally, Corp only does business in State B, has its warehouse in state B and is incorporated and has its president, secretary and headquarters in Canada. Therefore there is no general jdx because there is no contact with State, and certainly not systematic and continuous contact.

Therefore, there is neither specific nor general Jurisdiction.

Fairness

The fairness factors include the convenience of the parties and witnesses as well as the forum state's interest. The court will also look at the interstate judicial system's interest. Although state A has an interest in providing a forum for redress for its citizens, and Pam and Patrick are State A citizens, State B has a stronger interest because that is where the accident occurred, on its roads. Further, because Corp operates in State B only, state B has a strong interest in adjudicating the claims against its citizens for their conduct while in the state. As to convenience, any and all witnesses and evidence would be located in State B, rather than the forum, state A.

Therefore, the fairness factors are in favor of not finding PJ over Corp.

RULING:

Therefore, Under a Due Process Analysis, The court of appeals should rule that there was no personal Jurisdiction over Corp.

2. Did the Federal District Court have Subject Matter Jurisdiction over the matter?

Federal courts are courts of limited jdx and must have jurisdiction under arising under/federal question jurisdiction or diversity jurisdiction.

In some cases, the court may be able to exercise supplemental jurisdiction.

Federal District Court must have had jurisdiction over each and every claim in the matter. Here, both Pam and Patrick brought claims. Therefore, each claim is considered separately below.

WAIVER?

Here, it does not appear that Corporation contested subject matter at trial. However, subject matter is not waived if the party fails to raise it at trial, and may be raised at any time, even on appeal. Therefore, Corporation could appeal based on this ground.

SUBJECT MATTER JURISDICTION OVER PAM'S CLAIM

May have SMJ under either federal question or diversity. Here, the claim arises from personal injury, a tort claim, which is a state claim. Therefore, Pam must show diversity jurisdiction.

Diversity jurisdiction requires complete diversity between the parties (Strawbridge v. Curtiss) and an amount in controversy in excess of $75,000.

COMPLETE DIVERSITY

Complete diversity requires that all plaintiffs are citizens of different states than all defendants. Or, as in the case here, that the suit be between a citizen of a state, and a foreign citizen.

A natural person is a citizen of the state in which she is domiciled. Domicile is physical presence plus intent to remain indefinitely. Here, facts state that Pam is Resident of State A. Therefore, Pam will be domiciled in state A.

A corporation is a dual citizen of every state in which it is incorporated and the state which is its principal place of business. ("PPB") PPB is determined by the "nerve center," or the place from which corporate managers run the corporation. (Hertz v. Friend).

Here, Corp is incorporated under the laws of Canada and thus is a citizen of Canada. Further, Corp has its "nerve center" in Canada because that is where its headquarters is located and where its President and Secretary are located. Although Corp keeps a warehouse in state B and its drivers and other employees work out of the warehouse in state B, no facts indicate that any direction of corporate activity occurs here. Therefore, this is the muscle center, not the nerve center, and the Supreme Court ruled that the Nerve center is the PPB.

Therefore, Corp will be deemed a citizen of Canada, meaning that it is a foreign citizen. Because Pam is a citizen of State A and Corp is a Foreign Citizen of Canada, there is complete diversity between the parties.

AMOUNT IN CONTROVERSY

The amount in controversy must exceed $75,000 exclusive of interests and cost. The plaintiff's good faith claim will control, unless it is clear to a legal certainty that plaintiff cannot recover the required amount (in excess of $75,000).
Here, Pam demanded damages of $70,00 for personal injury and $10,000 for property damages. Neither amount alone satisfies the amount in controversy.

AGGREGATION

Generally, aggregating claims is not required. However, a single plaintiff may aggregate all claims against a single defendant. This means that Pam can add together

her claims against Corp. Therefore, adding Pam's claims together, her good faith claim was for $80,000. Because there are no facts to indicate this amount was not in good faith, or that there is a legal certainty prohibiting Pam from this recovery (such as a statutory damages cap), Pam has met the amount in controversy.

RESULT IF PLAINTIFF RECOVERS LESS THAN THE AMOUNT IN CONTROVERSY:

If the plaintiff recovers less than the amount in controversy, that will not defeat diversity jdx, because the good faith claim controls. However, in such a case, the plaintiff may be required to pay the defendant's fees in the litigation. Therefore, because Pam recovered on $60,000 that will not defeat diversity, but she may be liable for costs.

RULING:

The federal district court had subject matter jurisdiction over Pam's claim by virtue of diversity jurisdiction. Therefore, the court should deny the appeal based on lack of SMJ over Pam's claim.

SUBJECT MATTER JURISDICTION OVER PATRICK'S CLAIM

As above, this is a tort claim, not arising under federal law, and therefore the court will not have "federal question" jurisdiction. Therefore, Patrick will have to meet the requirements of diversity jurisdiction for the federal district court to have had SMJ.

COMPLETE DIVERSITY

Like Pam above, Patrick is domiciled in state A and will therefore be a citizen of state A. Under the analysis above, Corp is a foreign citizen of Canada. Therefore, as above, there is complete diversity.

AMOUNT IN CONTROVERSY

Patrick requested only $6000 in damages. This is less than $75,000 and therefore does not meet the amount in controversy. Patrick may not aggregate his claim together with Pam, because plaintiffs may not aggregate claims with other plaintiffs.

Therefore, the court did not have diversity jdx over Patrick's claim.

SUPPLEMENTAL JDX

Where the court has jurisdiction over one claim in a matter, it may exercise supplemental jurisdiction over other claims that arise from a Common Nucleus of Operative Fact. The common nucleus test is generally considered broader than the same transaction or occurrence test, and therefore any party that would meet the Same Tran. and Occ. test will meet the Common Nucleus of Operative Fact test.

Here, Pam and Patrick are both suing for injuries and damages arising from the same car accident. While visiting State B, they were hit by a truck owned by Corp, the same truck, in the same accident. The witnesses to both will be the same, as will the evidence. Therefore, Patrick's claim arises from a Common nucleus of operative fact with Pam's claim, and the federal district court could exercise supplemental jdx over Patrick's claim.

DIVERSITY LIMITATIONS ON SUPPLEMENTAL JDX

However, where the underlying claim is in diversity, the court cannot exercise supplemental jdx over a claim by a plaintiff that would defeat complete diversity. Here, Patrick is a plaintiff. However, if supplemental jdx is exercised over Patrick’s claim it will not defeat complete diversity because all Plaintiffs will still be citizens of State A, and all Defendants of Canada.

Where the supplemental claim does not meet the amount in controversy, but will not destroy complete diversity, the court may exercise supplemental jurisdiction over the claim. Here, Patrick's claim did not meet the amount in controversy, but will not destroy complete diversity and therefore the court may exercise supplemental jdx over the claim.

DISCRETION

In some cases, a federal district court should exercise discretion not to exercise supplemental jdx, such as where there is a novel or complex issue of state law, or state claims predominate, or all federal questions have been dismissed. On these facts, this

is a tort claim for personal injury and therefore not novel or complex. Further, the claim is in diversity and not federal question, and thus there is no concern about the federal claims being dropped out.

This is not a claim over which the court should decline supplemental based on the discretionary factors.

RULING

The Federal district court had subject matter jurisdiction over Patrick's claim based on supplemental jurisdiction. Therefore, the appeals court should deny the motion on the basis of lack of subject matter jurisdiction.

Answer B

Pam and Patrick v. Corporation

Pam and Patrick have raised a claim against Corporation (C) in federal district court in State A. Corporation attempted to dismiss the case based on lack of personal jurisdiction (PJ) and subject matter jurisdiction (SMJ). These motions were denied, Pam and Patrick were awarded damages in the case, and Corporation has appealed the case on the grounds listed above. The following considers how the court of appeal should rule on these claims.

Subject Matter Jurisdiction

Subject matter jurisdiction (SMJ) considers whether the court has the power to hear the particular case. This case was brought in federal court; federal courts are courts of limited power, unlike state courts, which can generally hear any case save for several exclusively federal categories. In order for federal courts to have proper SMJ over a case, the case must either be based on a federal question, or meet the requirements for diversity of citizenship jurisdiction. Each of these will be examined in turn to see if the federal courts have jurisdiction over this matter.

Federal Question

A case may properly be held in federal court when the case is based on a federal question. This requires that the plaintiff assert a claim arising under the federal constitution or a federal law. The "well pleaded complaint rule" dictates that the claim be asserted in plaintiff's complaint. It is not enough that a federal issue generally be raised by the case, nor that the defendant will defend on the grounds of a federal law.

Here, the case involves personal injury damages for the injuries that Pam and Patrick suffered when they were hit by a truck owned and operated by Corporation. Thus, it appears that the case is just a simple tort case, which would be based on state law, and not on the constitution or federal law.

Thus, there is no federal question here.

Diversity in Citizenship

However, the federal courts have another means of jurisdiction available, in the form of diversity of citizenship. To be valid, all plaintiffs must be "diverse" in citizenship from all defendants, and the amount in controversy must exceed $75,000.

Diversity

There is an absolute diversity requirement, wherein each plaintiff must be entirely diverse in citizenship from each defendant. The federal rules allow for diversity between citizens of different states, or citizens of a state and a foreign country. Citizenship for individuals is based on their domicile, which is evidenced by physical presence and intent to remain. For corporations, citizenship is determined by place of incorporation, and principal place of business, which is where the owners, directors, and management manage and direct the company's affairs.

Here, Pam and Patrick are residents of State A. Though the facts do not give us any hints into whether they have the intent to remain there, it is reasonable to presume that they did have that intent. Thus, their citizenship is State A.

C is incorporated under the laws of Canada and has its headquarters there, where its President and Secretary are located. Thus, the place of incorporation and the principal place of business is in Canada. Of note, Corporation's drivers and other employees work out of its warehouse in State B. Several years ago, this may have met the "muscle" test, and thus demonstrated citizenship in State B for C; however, this test has been done away with. Nonetheless, there still would be diversity in citizenship even if C was a citizen of State B.

Thus, there is diversity in citizenship, because Pam and Patrick are citizens of State A, and C is a citizen of Canada. Because the rules of civil procedure allow for diversity between residents of a state and a foreign country, there is proper diversity.

Amount in Controversy

Next, the amount in controversy must exceed $75,000 excluding interest and attorney's fees. The court will examine this based off of a good faith pleading of damages by the

plaintiff. To reach this amount in controversy, any single plaintiff may aggregate as many claims together to meet the minimum requirement. However, multiple plaintiffs may not aggregate claims in order to reach the minimum requirement.

Here, Pam demanded damages for personal injury in the amount of $70,000, and for property damage in the amount of $10,000. This is an example of aggregation by one plaintiff against one defendant. This is proper. Further, because $70,000 plus $10,000 equals $80,000, it exceeds the amount in controversy requirement.

Patrick demanded damages in the amount of $6,000. This would not be able to be aggregated with Pam's claims in order to reach the amount in controversy; however, because Pam has reached the amount all on the basis of her own claims, this does not impact Patrick's claim. We will need to examine whether Patrick's claim can be joined, however. I will do this later under supplemental jurisdiction (see below).

The conclusion is that the amount in controversy is met, as Pam's claims exceed the required $75,000 minimum amount.

The Effect of Receiving Less Than $75,000 At End Of Trial

C may argue that SMJ was invalid because Pam and Patrick ended up receiving less than $75,000 in damages at the end of the trial. This is incorrect. The mere fact that the parties recovered less than $75,000 at the end of the trial does not mean that the court loses jurisdiction, or never had it in the first place. All that is required is a good faith claim exceeding $75,000. Thus, this will have no effect on the question of SMJ.

Supplemental Jurisdiction: Pat's Claim of $6,000

As discussed above, Pat's claim alone did not meet the amount in controversy requirement. Each and every claim must meet the requirement in order to satisfy SMJ. When the amount in controversy is not met, we can look to supplemental jurisdiction to see if the claim can nonetheless get into federal court.

Supplemental jurisdiction requires that the claim contain a common nucleus of fact with the other claims asserted. If the claim arises out of the same transaction or occurrence, then this test is always met. Supplemental jurisdiction cannot be invoked when it would defeat complete diversity in a diversity case. Here, Pat's claim is based on the exact same incident as Pam - the accident with C's truck. Thus, it is the same transaction or occurrence, and will be able to be heard. The federal courts do have discretion to not hear these claims, but it is likely that they would hear this to get the whole case out of the way at the same time. Further, adding Pat's claim does not defeat diversity, because he is a citizen of State A.

Thus, Pat's claim can properly be heard in federal court.

When Can SMJ Be Asserted?

Finally, we must consider at what point can SMJ be raised as an issue. Some claims must be asserted before certain stages of the trial in order to be preserved, and if not raised, then they are waived. SMJ, however, is never waived, as it is a strict requirement that the federal courts have subject matter jurisdiction. Thus, it is of no concern that C apparently has not raised the SMJ issue prior to the appeal; they can still properly raise it.

Conclusion: The federal court system has proper SMJ over Pam and Patrick's claim.

Personal Jurisdiction

Personal jurisdiction (PJ) considers whether this state can properly hear this claim against this defendant. It asks whether the state has the power to force the defendant to come into the state to defend the claim. To examine whether PJ exists over C in State A, we must look to the traditional bases of exercising jurisdiction, the state long-arm statute, and to the constitutional limitations on exercising PJ.

Traditional Bases of Exercising Jurisdiction

Traditionally, PJ can be asserted over a defendant if the defendant (1) is domiciled in the state; (2) consents to jurisdiction; or (3) is served with process while in the state. As discussed above, C is not domiciled in State A, but is rather domiciled in Canada. Further, it does not appear that C has consented to jurisdiction in State A in any way (though we will later talk about the need to timely raise the argument of lack of personal jurisdiction). And finally, there is no indication that C was served in State A.

Thus, the traditional bases of exercising jurisdiction seem to not be present.

Long-Arm Statute

A long-arm statute is a state statute that states when the state can reach and "grab" an out-of-state defendant, and force the defendant to defend in the state court. Some of these long-arm statutes require that the defendant commit a tortuous act in the state, or break a contract in the state, while others simply grant the state the ability to reach out to grab defendants to the full extent as allowed by the U.S. Constitution.

Here, the facts do not mention the reach of State A's long-arm statute. It is reasonable to assume that it reaches the constitutional limits. Thus, we must examine the constitutional limits of PJ.

Constitutional Limitations

To exert PJ over an out-of-state defendant, the constitution requires certain minimum contacts with the forum state such that maintenance of the suit there does not offend traditional notions of fair play and substantial justice. To determine if this is true in this case, we can break the above test down into three sections: minimum contacts, relatedness of the claim to the contact, and fairness.

Minimum Contacts

The constitutional requires the defendant to have some minimum contacts with the forum state in order for the state to exert jurisdiction. The defendant must have

purposefully availed himself in the state, such that being subject to a claim in that state would be foreseeable.

Purposeful Availment

Purposeful availment requires that the defendant commit a voluntary act in the forum state. Defendant must avail himself in some way to the state, whether it be by using the state's roads, or attempting to make money in the state.

Here, C is incorporated in Canada, and has its principal place of business there. It conducts business solely in State B, which is also where it has a warehouse. Further, the accident occurred in State B. It is possible that C drives on State A roads from time to time, but the facts do not give this information. Also, there are no facts which say that C ships goods to State A, or otherwise tries to make money there. Simply put, on these facts, there seem to be no contacts whatsoever with State A, other than that Pam and Patrick are residents of State A.

The court of appeal should find that there was no purposeful availment.

Foreseeability

The minimum contacts must be sufficient enough to make it foreseeable that defendant would be "haled into court" in the forum state. Here, as discussed, there appears to be nothing that C did that would make it foreseeable that they would end up in State A. The mere fact of driving on State B's roads does not make it foreseeable that they would end up in State A's court. I suppose if State A were located directly adjacent to State B that it would perhaps be more foreseeable, but again, the facts do not share that information. A case against C in State A court was not foreseeable.

Relatedness of the Claim to the Contact

The more related the claim is to the contact with the forum state, the more likely the court will be to allow for jurisdiction over the defendant.

If the claim arises directly out of the contact with the forum state, this gives rise to specific personal jurisdiction. Here, there was no contact with State A, and so there cannot be specific jurisdiction.

Next, general personal jurisdiction may exist if the defendant consistently and regularly conducts activity in the forum state, such that he is "essentially at home there." Merely selling goods in a state does not give rise to general PJ, there must be an actual physical presence. Here, C is not in State A whatsoever, or so it seems. Thus, it is not essentially at home in State A. It may essentially be at home in State B, where it has a warehouse, but this does not affect the discussion of whether State A has jurisdiction.
The claim is not related to C's contact with State A, as C has no contact with State A.

Fairness

Finally, the court will look to see if holding the suit in the state meets general standards of fairness. Under this, the court considers convenience to the parties and the witnesses, the forum state's interests, and the plaintiff's interests.

Convenience

Under the convenience factor, the court will look to see how convenient it is to hold the case in the forum state, based on a variety of factors including where the parties are, where the witnesses are, where the evidence is, etc. If the inconvenience to the defendant grossly impacts his ability to defend against the case, the court will likely dismiss for lack of PJ.

Here, the accident occurred in State B, so any witnesses are likely in State B. It is unknown where the wreckage is located, but the vehicles are likely also in State B. Thus, a good portion of the pertinent materials needed would be in State B. Further, C has no connection with State A, and will have to travel there to defend against the suit. This is likely not entirely burdensome, because they are a corporation, and likely would have the resources to get there.

However, it was likely entirely inconvenient to have the case in State A, based on where the evidence, witnesses, and the defendant was located.

State's Interests

Next, the court will look to see if the forum state has a strong interest in providing a forum for the claim. Here, State A is interested in providing a forum for its residents; it wants to be sure that they are compensated for their injuries. However, the accident occurred on State B's roads, and so State B would have more of an interest, because it wants to be sure that dangerous drivers are kept off of their roads.

In the end, a court would likely find that State A has a limited interest in holding this case.

Plaintiff's Interests

Finally, the court looks to the plaintiff's interests in having the case in the forum state. It is likely that Pam and Patrick have suffered some injuries and thus would prefer to not have to travel. However, they had already been in State B on vacation, and could likely travel there again if needed. The court generally will be deferential to the plaintiff's choice of forum, however.

In the end, it is likely that it is simply not fair to have C defend in State A court.

When Can PJ Be Asserted?

On a final note, PJ must be asserted either in a 12b motion prior to the answer, or along with the answer. If not, it is waived. Here, it appears that C raised the PJ motion at some point early on, and thus likely did not waive it, so that it can be heard on appeal. Some courts require that a party immediately appeal a decision on PJ by way of an extraordinary writ.

Conclusion:

The Court of Appeal should hold the court had SMJ over the matter, but not PJ. Thus, provided that PJ has not been waived, it should dismiss the case. If it has been waived, the court should reject the PJ argument as well.

Q2 Community Property / Professional Responsibility

Wendy and Hal are married and live in California.

A year ago, Wendy told Hal that she would not tolerate his drinking any longer. She insisted that he move out of the family home and not return until he completed an alcohol treatment program. He moved out but did not obtain treatment.

Last month, Hal went on a drinking spree, started driving, and struck a pedestrian. When Wendy learned of the accident, she told Hal that she wanted a divorce.

Hal has consulted Lawyer about defending him in a civil action filed by the pedestrian. He is currently unemployed. His only asset is his interest in the family home, which he and Wendy purchased during their marriage. Lawyer offered to represent Hal if Hal were to give him a promissory note, secured by a lien on the family home, for his fees. Hal immediately accepted.

1. Is Wendy's interest in the family home subject to damages recovered for injuries to the pedestrian? Discuss. Answer according to California law.

2. Is Wendy's interest in the family home subject to payment of Hal's legal fees? Discuss. Answer according to California Law.

3. What, if any, ethical violations has Lawyer committed? Discuss. Answer according to California and ABA authorities.

Answer A

1. Is Wendy's Interest in the Family Home Subject to Damages Recovered for Injuries to the Pedestrian?

California is a Community Property State

California is a community property (CP) jurisdiction. Thus, any property acquired by either spouse during the course of the marriage by either spouse's labor is presumptively community property. Property acquired before or after the marriage by either spouse, or during the marriage by gift, inheritance, or devise, is presumptively separate property (SP). In determining the character of a particular asset, it is helpful to look at (1) the source of the asset or the source of the funds used to purchase the asset, (2) any actions by the spouses changing the character of the property, and (3) any relevant presumptions.

The House

Source

The facts tell us that Wendy (W) and Hal (H) purchased the family house during their marriage. However, we don't know what funds were used to purchase the house. If W's or H's earnings were used (or a combination thereof), and those earnings were earned during the course of the marriage, then the house would be CP because spousal earnings are CP to the extent they're earned during the marriage.

However, if one spouse partially used inheritance money or other SP acquired before the marriage, then that spouse would likely have a SP interest in the home to the extent SP was used to purchase it.

However, without more, the best assumption is that spousal earnings were used to purchase the house. The facts say H is currently unemployed, but he may have been employed in the past (and thus had earnings). Further, we can assume W earned money somehow, likely from a job.

Actions

There is no evidence that the house was put in only one spouse's name, suggesting that the house was the separate property of that spouse. Pre-1975, if the house was in W's name, the married woman's special presumption would operate to render the house (or the share of the house in W's name) W's SP.

Modernly, if title was taken in only one spouse's name, a court would not likely hold that to be conclusive evidence that the house was that spouse's SP absent some manifestation by the other spouse that the house was intended as a gift.
If H and W took title to the house as joint tenants with a right of survivorship, each would have a 1/2 SP undivided interest in the whole during life. On death, the form of title would control. On divorce, under CA's anti-Lucas statute, the house would be treated as CP, with a right to reimbursement for any SP used by either spouse to improve the home.

Finally, there's no evidence of a transmutation changing the character of the house, which, after 1985, would have to be in writing.
Thus, absent any of these actions, it appears the house is still CP.

Presumption

All property acquired during the course of marriage is presumptively CP. Here, nothing rebuts that presumption.

Community Responsibility for Debts of One Spouse

All debts incurred by either spouse prior to or during the course of marriage are community debts. Tort obligations are "incurred" when the tort occurs, not when judgment is handed down. Thus, any obligations arising out of H striking the pedestrian were "incurred" when he hit the pedestrian.

W will argue that the marital economic community was not in existence when H hit the pedestrian because she had kicked him out of the house. The marital economic

community begins at marriage and terminates upon permanent physical separation when at least one spouse has no intent of continuing the marriage.

Here, W kicked H out of the house. However, she told him that he could return when he completed an alcohol abuse program. Thus, the marital economic community had not yet ended when H got in the accident because W was still open to the possibility of him returning. W will argue that H manifested an intent to never continue the marriage because he refused to go to treatment. In other words, W will argue that by rejecting the pre-condition to the continuation of the marriage--i.e. getting treatment--H effectively terminated the marital economic community. Indeed, W can point to the fact that 11 months after she kicked H out, he hadn't obtained treatment. Given this length of time, W can argue, it's clear that the community had ended.

However, the stronger argument is that the marital economic community continued until W told H that she wanted a divorce. If W viewed the marital community as over prior to the accident, she would have likely filed for divorce then. Instead, it appears the accident was the "last straw." Thus, the request for a divorce was the clearest signal by either party that the physical separation was permanent and there was no intent to continue the marriage.

Thus, the marital economic community had not ended when H struck the pedestrian, any obligation incurred because of the accident is a community debt.

Order of Payment

When a tort is committed during an activity for the benefit of the community, the debt will be satisfied first by CP, then by the tortfeasor's SP. The non-tortfeasor spouse's SP is not subject to the debt.

When a tort is not committed during an activity for the benefit of the community, the debt will be satisfied first by the tortfeasor's SP, then by CP. Again, the other spouse's SP is safe.

Here, H committed the tort against the pedestrian while driving drunk. This was not an activity for the benefit of the community--to the contrary, H was supposed to be seeking alcohol abuse treatment while he was living away from the family home. Thus, recovery would be taken out of H's SP before the CP.

However, on the facts, it doesn't seem as though H has any SP to satisfy the debt. Thus, any recovery will likely be against the H and W's CP.

Reimbursement to the Community

To the extent any CP--i.e. the house--is used to pay any obligation arising out of H's accident with the pedestrian, the community may be entitled to reimbursement from H. Where CP is used to pay an obligation arising out of spouse's tort that was committed not during an activity for the benefit of the community, the community is entitled to reimbursement for that payment if the tortfeasor's SP was available to pay (or if the order of payment was not followed). However, as mentioned, it doesn't appear H has any SP available to pay the debt and, thus, reimbursement may be unlikely.

Distribution of Debts on Divorce

At divorce, community assets are generally divided under the "equal division rule"--i.e. each spouse gets 1/2 of each community asset in kind.

However, a judge has more discretion as to the allocation of debts at divorce. Typically, a judge will allocate a tort debt to the tortfeasor spouse if the tort was incurred not during an activity for the benefit of the community. However, a judge may take into account ability to pay to effect a more just allocation of debts.

Here, on divorce, the judge would likely allocate any judgment based on H striking the pedestrian to H. H will argue that he's unemployed and can't pay, but it's highly unlikely a judge would saddle W with an obligation to pay H's tort liability post-divorce.

Conclusion

Thus, during the marriage, H and W's CP will be liable for damages recovered for injuries to the pedestrian. Even though H and W have filed for divorce, until community assets and debts are distributed, the community estate continues and the pedestrian can recover against it. However, as mentioned, on divorce, the debt will be allocated to H. Further, W may be entitled to reimbursement for CP used to pay the debt.

*Note: If the court decided that the marital community was terminated when H struck the pedestrian, then CP--i.e. the house--would not be liable for the debt because the debt would be H's SP.

2. Is Wendy's Interest in the Family Home Subject to Payment of H's Legal Fees

Equal Management

Each spouse generally has equal rights to manage community property. This includes the right to sell and encumber community property. However, with respect to real property, one spouse may not encumber community owned real property without the other spouse's consent. If one spouse, without consent, sells or encumbers community real estate, the non-consenting spouse has the power to void that transaction within 1 year.

Lien on the House

Here, H has given Lawyer a lien on the family home without W's consent. Thus, W has the power within 1 year to void the encumbrance.

H will argue that because he gave the lien on the house after W told him she wanted a divorce, he was only granting a lien on his 1/2 SP interest in the family home. However, there's no evidence that W actually filed for divorce or that divorce proceedings were held during which a judge divided the community estate. While the marital economic community may no longer exist because there has been permanent physical separation, the community estate lives on until it has been distributed.

Thus, a court would likely allow W to void the encumbrance on the community real property due to her lack of consent in making the encumbrance.

Timing of the Attorney's Fees

Furthermore, H sought legal advice after W told him she wanted a divorce. Because W asking for divorce terminated the marital economic community, CP--i.e. the family home--is not liable for the debts incurred by H after such separation.

Thus, any obligation owed to Lawyer based on legal services rendered to H cannot be satisfied out of CP because such an obligation would not be a community debt.

He would argue that payment of attorney's fees is an obligation arising out of the accident of the pedestrian, when the marital economic community still existed. However, the attorney's fees represent an entirely different event. Furthermore, contractual obligations arise when the contract was made. Here, any contract and/or agreement with Lawyer was made after the economic community ended. Therefore, W's interest in the family home is not subject to payment for the additional reason that CP is not liable for H's separate post-marriage debts.

Necessaries

Post-separation, a spouse can still be liable for obligations relating to necessaries that the other spouse incurred during the marriage. Necessaries generally refer to food, shelter, and medical expenses. Here, H's legal fees don't likely constitute necessaries and, as such, this theory cannot be invoked to hold W's interest in the family home subject to payment.

3. Lawyer's Ethical Violations

Obtaining Pecuniary Interest in Outcome of Case

Under the ABA, a lawyer cannot obtain a pecuniary interest in the subject matter of a case other than in the case of a contingency fee arrangement or an attorney's lien. However, in CA, attorneys' liens are impermissible.

Here, Lawyer effectively acquired an attorney's lien on H's family home. Thus, Lawyer will argue that this was permissible because the only purpose here was to secure payment. In CA, this would constitute an ethical violation. Under the ABA, it's less clear.

While under the ABA, an attorney's lien is permissible, if Lawyer knew that H couldn't rightfully encumber the family home, then it's possible that Lawyer committed an ethical violation because accepting the attorney's lien would constitute a violation of a third party's (W's) rights in the course of representing H.

Entering into Business Transactions with Clients

An attorney can only enter a business transaction with a client if (1) the terms are fair and reasonable, (2) the terms are communicated to the client in an easily understandable manner, (3) the client is advised to get independent counsel to represent him in the transaction and is given a chance to do so, and (4) the client consents.

Here, by taking a lien on H's family home, Lawyer entered into a business transaction with H. However, it's not clear that Lawyer ever advised H to seek independent counsel or that he adequately informed him of the material terms of the lien. Although H immediately accepted, he did so without knowing what would trigger enforcement of the lien (1 missed payment? total failure to pay? late payment? H's insolvency?). Thus, by failing to adequately inform H and encouraging him to seek independent advice, Lawyer likely violated the ethics rules.

Fees

Under the ABA, a fee must be reasonable. In CA, fees can't be unconscionable. Further, in CA, a fee agreement must be in writing unless it's (1) less than $1k, (2) with a corporation, or (3) for a routine matter involving an existing client.

Here, the lien agreement was essentially a fee agreement. However, the terms were not adequately disclosed to H. Further, there was no written fee agreement. Because a writing was likely required--there's no evidence H was an existing client or that Lawyer's services were valued at under $1k--this is a violation of CA rules.

Further, the lien was likely unreasonable and unconscionable. Because H was unemployed, it was extremely unlikely that he was going to be able to pay Lawyer's fees. If Lawyer knew that H was unemployed--which he likely did, considering he conditioned representing H on having a lien on the house--then Lawyer must have known that H wouldn't be able to pay. Thus, the fee agreement was unconscionable because it was akin to a mortgagee lending to a mortgagor knowing that the mortgagor was going to default and the foreclosure was inevitable. Lawyer must have known (a) that H wasn't going to be able to pay and (b) that the value of the lien on the home was worth more than the value of the services to be provided.

Thus, the fee arrangement likely constituted an ethical violation.

Violating Rights of Third Parties

Lawyers cannot violate the rights of third parties in the course of representing a client. To the extent the lien violates W's rights and Lawyer knew of this, he likely acted unethically. Furthermore, if Lawyer knew that H could not rightfully encumber the family house, then Lawyer arguably breached his duty of competent and candid representation by not informing H that he couldn't offer a lien on his house without W's consent.

Answer B

1. <u>Is Wendy's interest in the family home subject to damages recovered for injuries to the pedestrian hit by Hal under California law?</u>

The parties were married and live in California. Thus, their property rights as a couple, specifically with regard to the property acquired during the marriage, are governed by California community property law. Whether the house was community or separate property can be determined by the source of the asset, whether any presumptions apply, and the actions of the parties during the marriage.

<u>Community Presumption</u>

There is a community presumption regarding property acquired during the marriage that it is community property. This would apply to the family home given, as the facts state, it was acquired during the marriage. The presumption can be rebutted by a showing that the house was not actually acquired during the marriage, it was acquired during the marriage but with separate property funds, the house was a gift/devise/inheritance, or the house was the rent/issue/profit derived from separate property.

Their house was purchased during the marriage so it was not a gift or devise. Although it is possible that the house was purchased with separate property funds, there are no facts to indicate this was the case. Because it was purchased during the marriage, and there are no facts to rebut the presumption, the house is considered community property.

<u>Judgments Against Spouses</u>

A tort judgment against a spouse will subject both the community property and the separate property of the tortfeasor to the judgment. But once the community property is divided, debt cannot be recovered from the spouse who received her half of the community property from what she received under the divorce decree unless she was the spouse that incurred the debt or the debt was assigned to her. Thus, for a judgment

against Hal for drinking and driving, the community will be liable for this debt, and it can be satisfied from the community property.

For the Benefit of the Community

Although the community property is liable for the judgment by the pedestrian, the judgment must be satisfied first from the separate property of the tortfeasor spouse if the tort was not committed by conduct that was being performed for the benefit of the community. For example, if Hal was on his way to drop the kids off at school or to pay the mortgage on the house, this would be for the benefit of the community. In that case, the judgment would be satisfied first from community property, and if there was any deficiency, then from the separate property of the tortfeasor.

Here, Hal had been kicked out [of] the house for his drinking problem at the time of the accident. Wendy had clearly communicated her disapproval for Hal's drinking. The drinking, including drinking and driving, would actually harm, not benefit, the community. Although we do not know where Hal was headed, he had already been kicked out of the house and was, generally, involved in a drinking binge at the time. Therefore, his actions were not to the benefit of the community and can be satisfied first from his separate property assets.

But the facts state that his only asset, at the present time, is his interest in the family home. Because it appears he has no separate property from which to satisfy the judgment, the judgment will be satisfied from the community property home.

End of the Economic Community

The accident in which the pedestrian was hit occurred after Hal had been kicked out of the house but before Wendy told Hal she wanted a divorce. As stated above, the source of property or debt, whether it was incurred before, during or after the marriage, can indicate whether it is community or separate debt. The pedestrian's claim is a form of debt because, once rendered, the plaintiff can reduce it to a judgment and attach liens to the tortfeasor's property. Thus, the question arises whether the economic

community ended when Wendy kicked Hal out of the house, because if so, the injury and judgment would have occurred after the economic community ended and would be the separate debt of Hal. In this case, the judgment could not be satisfied from community property, including the house.

In California, end of the economic community occurs when there is physical separation and an intent not to carry on the marital relationship anymore. If the parties maintain the facade or marriage, although physically separated, the economic community will not be considered to be at an end. The economic community will certainly result, if the above elements are not satisfied, when the divorce decree is entered.

Here, Wendy kicked Hal out of the house one year ago. She did not say anything about ending the marriage or never wanting to see him again. She did tell him he could not return until he completed alcohol treatment. Thus, Hal being kicked out was not indicative of an intent to permanently end the marriage relationship, it was indicative of a temporary physical separation by Wendy for the limited purpose of motivating Hal to get treatment and save the marriage. Thus the economic community would not have ended simply when he left the house.

But, after having moved out and hitting the pedestrian while drinking, Wendy learned of the accident and told Hal she wanted a divorce. At this point, both elements would be met. Hal and Wendy would have been physically separated, and one spouse has indicated an intention not to resume the marital relation by telling the other she wants a divorce.

Because the economic community did not end until that time, when Wendy told Hal she wanted a divorce, and the accident and/or the cause of action that is the basis for any judgment accrued before that time, the judgment resulting would be a community debt because it was essentially incurred before the end of the economic community.

Debt

Debt incurred before or during the marriage can be satisfied from the community or from the tortfeasor's separate property. Debt incurred by a spouse for necessaries, including medical care, can be satisfied from community property or the separate property of either spouse, although indemnity may be available. Here, the debt is for tort judgment and, as stated above, can be satisfied from either community property or separate property of Hal, first from his separate property and then from the community property.

In California, for the purpose of debt for necessaries or medical services, end of the economic community can only occur on divorce. Judgment may not be able to be satisfied from Wendy's earnings if she kept them in a separate (versus joint) account from which Hal had no right of withdrawal.

CONCLUSION--Because the debt was incurred before end of the economic community, it is a community debt. Therefore, it can be satisfied from community property or separate property of Hal. Because the tort that is the basis of the judgment was not conducted for the benefit of the community, the judgment must be satisfied first from Hal's separate property. But because Hal has no separate property, his only asset is the house, it will be reduced to judgment and recovery sought from the asset that is the community home, which as above is classified as community property. Wendy may be able to seek indemnity.

2. Is Wendy's interest in the family home subject to payment of Hal's legal fees under California law?

As stated above, the economic community ended when Wendy kicked Hal out of the house and told him she wanted a divorce. Hal appears from the facts to have consulted the lawyer after that time. Debt incurred after the end of the economic community will belong to the debtor spouse.

Attorney Fees for Divorce Lawyer

Generally, a spouse may not unilaterally encumber community real property without a joint action on behalf of both spouses. Additionally, the spouse may not separately

encumber her half interest in the property. The one exception to this rule is for the spouse to satisfy attorney fees in the divorce proceeding between the spouses.

Here, because the lawyer is not representing Hal as a family attorney in his anticipated divorce proceeding with Wendy, this rule would not apply. The lawyer fees incurred by Hal after the economic community ended for the purpose of defending against the tort suit could only be satisfied from Hal's separate property.

Division of Assets on Divorce

Generally, assets are divided pro rata at divorce, 50-50, no cashing out one spouse to give the other an entire asset. The only general exceptions to this rule are: for a closely held corporation whose shares are community assets where one spouse is the CEO and division would destroy the business; a pension plan from which one spouse can take a cashout instead of receiving payments from the pension so the spouse, who no longer wish to have any connection can go their separate ways; or, for the family home when selling it and dividing the proceeds will uproot the children and cause them harm.

While this is the family home, there appear to be no children and no reason not to apply the binding pro rata division, 50-50, by sale of the house and splitting the assets.

This means that on divorce, the assets of the house will be split evenly between the parties. Once the divorce decree is entered, the proceeds from the house that Hal receives are going to be his separate property. Upon divorce, the legal fees of Hal's lawyer can be paid by his share of the proceeds.

But the question asks whether the payment of Hal's legal fees will be satisfied from Wendy’s interest in the home. Wendy has no interest in Hal's proceeds after divorce from sale of the community property house, and thus the proceeds subject Hal's interest, not hers, to liability.

CONCLUSION--because the attorney fee debt will have been incurred after end of the economic community, it will be separate debt of Hal, and does not subject any of Wendy's interest in the family home to liability for those fees. The exception for divorce attorney fees does not apply.

3. What ethical violations has the lawyer committed according to both the ABA and California law?

A lawyer is a fiduciary of the client. She has a duty of confidentiality (not to communicate information relating to representation), a duty of loyalty not to act on behalf of her own, a client's, or a third party's best interests that are adverse to her client's, financial duties, and duties of competence which are all owed to the client.

Duty of Loyalty

Under the duty of loyalty, the lawyer must not develop an interest or maintain an interest that is adverse to the client, whether it is the interest of the lawyer herself, an interest of one of the lawyer's other clients, or an interest of a third party with whom the lawyer is closely related.

Loyalty--Financial Assistance to Clients

Under the ABA rules, a lawyer is not permitted to lend the client money for the representation, with the exception of forwarding costs of litigation to indigent clients and forwarding costs associated with a contingent fee arrangement. Under the California rules, the lawyer can lend the client any amount for any reason, as long as she does not promise to satisfy the existing debts of the client in order to buy the client's business.

Therefore, from this perspective, the loan would be considered acceptable under the California rules but unacceptable under the ABA rules. Under the ABA rules, once the client becomes indebted to the attorney, the attorney's personal interest against the client in collecting the money and receiving payment for the debt may conflict with his duty to act for the sole benefit of the client. Under the California rules, because this is not a promise to satisfy pre-existing debt for the prospective client, this is acceptable.

Loyalty--Transacting Business or Developing Adverse Interest to Client

Whenever the lawyer enters into business with the client, the terms must be fair, the lawyer must disclose the terms (effect of the transaction) to the client in writing, allow for an opportunity for the client to consult with independent counsel and probably should suggest she do so if the lawyer's interest will be adverse to the client's in the litigation, and obtain consent from the client in writing.

This loan would essentially be such a transaction. The facts do not indicate the above elements are met. Additionally, there is a question whether it would be fair to encumber a client's sole asset in order to receive payment. But the above rules that specifically address lending a client money are going to govern whether the transaction is permissible. Regardless, even though the loan is permissible under California law, the attorney should ethically consider whether the terms of the loan are fair and suggest receiving independent legal advice if the client wishes to fund the representation in this manner.

Financial Duties

The reason the nature of the fee arrangement is important is to judge whether it is permissible for the lawyer to charge the client in this way. Under the ABA, the fee must be reasonable considering the experience of the lawyer, novelty of the case, difficulty of legal issues, time and effort required, etc. In California, it simply must not be unconscionable. The question is whether the lawyer has complied with the requirements for charging a fee, and whether the amount is justified.

Contingent Fee

A lawyer can enter into either an hourly fee arrangement or a contingent fee arrangement with a client, or potentially a flat fee arrangement. Under the ABA rules, contingent fee arrangements (lawyer forwards fees and sometimes costs in order for a stake in the recovery, if there happens to be one) are not available in criminal or domestic cases. They must include the percentage of recovery taken, the costs deducted from recovery, and whether they are deducted before or after. In California,

the agreement must also indicate that it is subject to negotiation with the lawyer and what costs will not be covered by the contingent fee arrangement.

Under ABA rules, this may be a criminal case, but considering the question implies a money judgment that could subject the house to liability, brought by a private party pedestrian; using contingent fee arrangement in this case would be permissible. But here, if the mortgage is being used as payment, and thus this is more likely to be considered an hourly fee arrangement.

Hourly Fee

The agreement, under ABA rules, must disclose the rate at which the fee is charged, the services it covers, and the respective duties of lawyer and client. In California, it must also be in writing unless it is for less than $1,000, with a corporate client, routine matter for regular client, or emergency renders this impossible.

CONCLUSION--There is nothing in the facts to indicate the lawyer has complied with any of the above requirements regarding the fee arrangement. He made the offer to encumber the property without explaining the calculation of the rate, providing a writing, explaining what services it would cover, etc. Additionally, the case appears to be a simple one, involving culpability for drunk driving. Depending on how much the house was worth, a lien on the home could be unreasonable or unconscionable under either California or ABA approach.

Duty of Competence

A lawyer has a duty of competence, to represent the client with the skill, knowledge, thoroughness and preparation necessary to carry out the representation effectively.

As stated above, the home is community property. It cannot be encumbered unless both spouses jointly enter into the transaction. The non-consenting spouse can recover the house even from a BFP, and set aside the transaction, if she has not agreed to it.

There is a one year statute of limitations, but if the buyer knew the seller was married and failed to seek consent from the other spouse, there is no statute of limitations.

Here, an attempt to encumber the community property house to satisfy the separate debt of Hal would be a failure of competence on the part of the lawyer. A lawyer of reasonable skill, knowledge, thoroughness and preparation would be aware of this and would not attempt to encumber property to pay his debts knowing it was community property not subject to this type of transaction without consent of Wendy. This would ineffectively carry out the representation.

CONCLUSION--Under ABA rules only, the lawyer has breached his duty of loyalty to the client by lending him money in regard to the transaction. Although, he may argue he is permitted to do so because he is permitted to forward costs of litigation to indigent clients and Hal is indigent because he is unemployed and has no assets but the house. But because the house cannot be encumbered this way without the consent of Wendy, and a lawyer of reasonable skill and knowledge would know this, the attempt to encumber the house without Wendy's permission may also be a breach of duty of competence, subjecting the lawyer to discipline, sanctions, and malpractice liability. There is also a question of whether the amount of the fee is reasonable or unconscionable in light of the nature of the litigation and employment of the lawyer.

Q3 Evidence

Vicky was killed on a rainy night. The prosecution charged Dean, a business rival, with her murder. It alleged that, on the night in question, he hid in the bushes outside her home and shot her when she returned from work.

At Dean's trial in a California court, the prosecution called Whitney, Dean's wife, to testify. One week after the murder, Whitney had found out that Dean had been dating another woman and had moved out, stating the marriage was over. Still angry, Whitney was willing to testify against Dean. After Whitney was called to the stand, the court took a recess. During the recess, Dean and Whitney reconciled. Whitney decided not to testify against Dean. The trial recommenced and the prosecutor asked Whitney if she saw anything on Dean's shoes the night of the murder. When Whitney refused to answer, the court threatened to hold her in contempt. Reluctantly, Whitney testified that she saw mud on Dean's shoes.

The prosecution then called Ella, Dean's next-door neighbor. Ella testified that, on the night Vicky was killed, she was standing by an open window in her kitchen, which was about 20 feet from an open window in Dean's kitchen. She also testified that she saw Dean and Whitney and she heard Dean tell Whitney, "I just killed the gal who stole my biggest account." Dean and Whitney did not know that Ella overheard their conversation.

Dean called Fred, a friend, to testify. Fred testified that, on the day after Vicky was killed, he was having lunch in a coffee shop when he saw Hit, a well-known gangster, conversing at the next table with another gangster, Gus. Fred testified that he heard Gus ask Hit if he had "taken care of the assignment concerning Vicky," and that Hit then drew his index finger across his own throat.

Assuming all appropriate objections and motions were timely made, did the court properly:

1. Allow the prosecution to call Whitney? Discuss.

2. Admit the testimony of:
    (a) Whitney? Discuss.
    (b) Ella? Discuss.
    (c) Fred? Discuss.

Answer according to California law.

Answer A

California Proposition 8: Truth in Evidence Rule

Under Proposition 8 in California, all non-privileged, relevant evidence is admissible in a criminal prosecution brought in California unless it falls within one of the specified exceptions to the rule. Evidence that is admissible under Proposition 8 is still subject to CEC 352 balancing.

Here, as this case involves the prosecution charging Dean with murder, Proposition 8 will apply to admit any evidence that is relevant and is not excluded for CEC 352 balancing.

1. Allow the Prosecution to call Whitney

The first issue is whether the prosecution should be allowed to call Whitney. This depends on whether Whitney ("W") can claim one of the spousal privileges: spousal communications privilege or spousal testimonial privilege.

Spousal Communications Privilege

The spousal communications privilege protects all confidential communications between spouses that are made in the course of an existing marriage and in reliance on the intimacy of the marriage. This privilege belongs to both spouses and may be claimed by either to prevent the other spouse from testifying. Moreover, the privilege exists regardless of whether the marriage has ended in divorce, so long as the communication itself was made during a period when the marriage existed. For purposes of the privilege, marriage does not end until there is a valid divorce.

Here, Whitney was called by the prosecution to testify that she saw mud on Dean's shoes. This observation occurred when Dean and W were still married as Dean and W have yet to obtain a divorce and reconciled prior to W providing any testimony. Although W and D had separated because W had discovered that D was dating another woman and W had moved out, for the purpose of this privilege, it extends for any

communication made prior to divorce. Finally, as W was called to testify to an observation, rather than a communication between W and Dean, it would not be protected under the communications privilege.

Thus, this privilege would not apply to prevent W from testifying as she did or to prevent her from taking the stand.

Spousal Testimonial Privilege

The spousal testimonial privilege allows one spouse to refuse to testify against another spouse in any action. For this privilege to apply, a valid marriage must still exist. The privilege belongs to the testifying spouse, as the privilege is designed to protect the harmony of the marriage, which is not salvageable if the testifying spouse wishes to testify. Moreover, in California, the privilege allows the testifying spouse to avoid taking the stand entirely.

Here, W was called to the stand to testify that she saw mud on D's shoes during the night of the murder. Although W and D had been separated, because W moved out and stated the marriage was over when she discovered that D had been dating another woman and moved out, the marriage had not ended for the purposes of the privilege, which requires a valid divorce. As such, W was privileged to choose not to take the stand.

In this case, W initially was angry and was willing to testify against D and thus agreed to take the stand and testify. W actually took the stand and was sworn in, prior to the recess in which W and D reconciled and W decided not to offer testimony. Thus, the prosecution will argue that W waived the privilege because she took the stand and was sworn under oath.

By contrast, W will assert that she did not waive the privilege because, although she took the stand, she asserted the privilege the first time that she was asked a question

by the prosecution. W refused to answer when court resumed and the prosecutor asked W if she saw anything on D's shoes at the night of the murder.

As W asserted the privilege prior to answering any questions, the court will find that she had a spousal testimonial privilege and could not be forced to testify against D. However, W took the stand voluntarily and thus it was proper to allow the prosecution to call W because she was the holder of the privilege and had not yet claimed it. Proposition 8 does not allow privileged information to be admitted and thus will not change the outcome.

2. Admit the Testimony

(a) Whitney

The first issue is whether the court should have admitted the testimony of Whitney.

Logical Relevance

Under California law, evidence is relevant if it makes a fact of consequence that is actually in dispute more or less probable then it would be without the evidence.
Here, W testified that she saw mud on D's shoes. As V was killed on a rainy night, and the prosecution was arguing that D hid in the bushes outside her home and shot her when she returned from work, this evidence would make it more likely that D was present in a muddy flowerbed and committed the murder.
Thus, it is relevant.

Legal Relevance

Evidence is legally relevant if its probative value is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, waste, or undue delay.

Here, D will argue that the testimony about mud on his shoes is likely to confuse and mislead the jury, particularly if the prosecution has failed to establish that the mud came from a flowerbed near Vicky's home. However, as this evidence has high probative value in that it shows that D was standing outside in mud on a rainy night, it will likely be admitted. Thus, this objection will fail.

Personal Knowledge

In order to be competent to testify, a witness must have personal knowledge of the facts to which she is testifying based upon her percipient observations.

Here, W saw mud on D's shoes in the night in question and thus testimony about the state of the shoes is within her perception and personal knowledge.

Spousal Communications Privilege

As discussed above, this will not protect W's testimony about the mud on D's shoes as it was not a communication, but was an observation.

Spousal Testimonial Privilege

As discussed above, this will protect W's testimony because she is still married to D and therefore cannot be compelled to offer evidence against him in the criminal action. Prop 8 does not change the outcome as privileged information is excluded.

Conclusion

W's testimony will be excluded as a result of the spousal testimonial privilege.

(b) Ella

The second issue is the admissibility of Ella's testimony.

Logical Relevance

See rule above.

Ella's testimony that she overheard D tell W that he "just killed the gal who stole my biggest account" is highly relevant to the case. D is charged with murder and his alleged motivation for killing Vicky is that they were business rivals. The statement thus indicates that D committed V's murder, particularly because it was made on the night that V was killed. This fact is in dispute as it relates to whether or not D is guilty of the crime with which he is charged. Thus, this testimony is logically relevant.

Legal Relevance

See rule above.

Although D will argue that this statement is highly prejudicial and should be excluded because it could be misinterpreted and it fails to identify V specifically, the court will likely find that its probative value in showing that D committed the murder and that he had a motivation to commit the murder far outweighs the risk of prejudice. Moreover, the information goes to the heart of D's guilt or innocence.

Thus, the evidence will not be excluded on this ground.

Personal Knowledge

See rule above.

Here, Ella was standing by an open window in her kitchen, which was about 20 feet from an open window in D's kitchen. Ella could both see D and W and could hear D tell W that "I just killed the gal who stole my biggest account." Thus, Ella's testimony was based on her percipient observations as she could personally see and hear what was happening in D and W's house.

Thus, this objection will be overruled.

Hearsay

Hearsay is an out-of-court statement that is offered to prove the truth of the matter asserted. Hearsay is inadmissible unless it falls within an exception or is being used for a non-hearsay purpose. Proposition 8 will not apply to admit otherwise inadmissible hearsay as hearsay is an exception to Proposition 8.

Here, Ella's testimony that D told W, "I just killed the gal who stole my biggest account" is offered to show that D was in fact the person who killed V. Thus, it is an out-of-court statement offered to prove the truth of the matter asserted and is only admissible if it falls within an exception.

Party-Opponent Admission

A statement by a party-opponent regarding a relevant fact of the case is admissible over a hearsay objection as it is a California exception from the hearsay prohibition.

Here, the statement that Ella testified about was a statement by D, who is the defendant in the criminal action. This statement is highly relevant to the issues involved in the case because it indicates whether or not D actually committed a murder of V, for which he is being charged.

Thus, this exception would allow the statement to be admitted.

Statement Against Interest

A statement is admissible under an exception if it qualifies as a statement against interest. A statement against interest is a statement of a now unavailable witness that was against the person's proprietary, pecuniary, penal, or social interest when made and that the declarant knew was against his interest when made.

Here, D made the statement to W that "I just killed the gal who stole my biggest account." This statement would be against D's penal interest, because it could subject him to prosecution for murder. Moreover, it could subject him to social ridicule, ostracism and humiliation because he would be labeled as a murderer. D will argue

that the statement was not against his interest because it was made to his spouse in reliance on the confidentiality of their marital relationship and thus he did not think that it could be used against him. Moreover, he did not believe at the time it was made that it would subject him to social disgrace as he expected his spouse to maintain the confidentiality of the statement. As D likely did not know that the statement could be used against his interest when it was made, this exception likely would not apply.
A declarant is unavailable if he can claim a privilege against testifying. As D can claim the privilege against self-incrimination under the Fifth Amendment, he would be considered unavailable for the purposes of this exception.

Thus, this exception would not apply because D likely did not know it was against his interest when made.

Spontaneous Statement

A spontaneous statement is a statement made shortly after witnessing a startling event and while the declarant was still under the stress of excitement.

Here, D made his statement to W and said "I just killed the gal..." indicating that he may still have been under the stress of excitement from the murder. Moreover, a murder is likely a startling event, especially when it involved hiding in the bushes and shooting someone at their home and then seeking to avoid detection.

Thus, D's statement might be a spontaneous statement if he was still experiencing the stress of excitement.

Contemporaneous Statement

A contemporaneous statement is a statement made at or near the time of an event that explains or describes the defendant's actions.

Here, D told W, "I just killed the gal who stole my biggest account." Because D specified that he "just" killed a gal, the statement may have been made near the time of

the event. Moreover, the statement describes D's own conduct in killing the gal and explains his reasons for that conduct--she "stole my biggest account."

Therefore, provided it was made sufficiently close in time, it may qualify as a contemporaneous statement.

Spousal Communications Privilege

See rule above. In addition, the spousal communications privilege is waived if the privilege is not made in reliance on the intimacy of the marriage. A statement is not made in this reliance, if it is made in the presence of a third person who does not fall within the privilege. If the spouses could not have reasonably foreseen that the communication would be overheard by a third party, then the privilege is not waived and D may prevent Ella from testifying on the basis of the privilege. However, if the spouses made the statement negligently when it could be overheard by a third party, then the privilege has been waived as no reasonable efforts were made to maintain its confidentiality.

Here, D and W had a conversation in their kitchen. No one else was present in the home and D and W were having an intimate conversation as spouses, thus suggesting that the conversation was made in reliance on the intimacy of the marriage. However, D and W had this conversation while the window to their kitchen was open. This window was only 20 feet from a neighbor's window which was also open and D was talking in a sufficiently loud voice such that Ella could overhear the conversation. But, because D and W engaged in a private communication between themselves and they did not know that Ella overheard the communication, they likely were not so negligent as to waive the confidentiality of the communications. D and W could rely on the privacy of their home, even with an open window.

Thus, the spousal communication privilege will prevent this testimony.

(c) Fred

Logical Relevance

Fred's testimony that the day after Vicky was killed he was having lunch and heard that two gangsters had "taken care of the assignment concerning Vicky" is relevant to establish that Dean was not the person who killed Vicky. As whether or not D killed Vicky is the primary issue in the murder trial, this is both highly relevant and in dispute. This objection will be overruled.

Personal Knowledge

Here, Fred was having lunch at a coffee shop when he saw Hit and Gus conversing and overheard the conversation. Thus, Fred had personal knowledge regarding the statements that were made.

This objection will be overruled.

Hearsay

See rule above.

Here, F is offering testimony regarding the statements of both H and G, and both of these statements must fall within a hearsay exception in order to be admitted. These statements are offered to show that F and G committed the murder of Vicky.

G's Statement

Effect on Hearer

D will argue that G's statement asking whether H had "taken care of the assignment concerning Vicky" is not offered to show the truth of that statement, as it was a question, but instead to show its effect on H, who answered the question.

A statement offered to show the effect on the hearer is not hearsay and is admissible over a hearsay objection.

Here, as this question is offered to show the effect on H in answering, it will be admissible.

H's Statement

Although H merely made a gesture by drawing an index finger across his throat, such an action can qualify as hearsay if it is intended to communicate.

Here, H's conduct was done in order to answer G's question regarding whether or not H had "taken care of the assignment concerning Vicky." As this was intended to communicate that H had in fact gotten rid of Vicky, it will qualify as hearsay.

Statement Against Interest

Here, this statement is against H's penal interest as he would be subject to prosecution for murder if he killed Vicky. As H made this statement while at a coffee shop where other people like F were around, H would know that he could be subject to punishment for making it at the time it was made. It is unclear whether H is unavailable and the admissibility will depend on this.

Thus, this is likely admissible testimony.

Answer B

People v. Dean

1. Did the court properly allow the prosecution to call Whitney?

Spousal Testimonial Privilege

The California Evidence Code (CEC) contains a spousal privilege. The spousal privilege allows a defendant's spouse to refuse to take the witness stand and testify against his or her spouse. Although Dean's trial is a criminal trial, the CEC makes no distinction between criminal and civil trials--the spouse may refuse to testify against his or her spouse in either civil or criminal trials.

The spouse and defendant must be married during the time of trial. Here, although Whitney had moved out of the house prior to Dean's trial and said the "marriage was over," there is nothing to indicate that Whitney and Dean's marriage was legally dissolved. Thus, Whitney was married to Dean at the time of trial, and therefore can invoke the spousal testimonial privilege.

The spouse--not the defendant--is the holder of the privilege. Thus, even if Dean did not want Whitney to testify against him, Whitney could if she so chose, and so long as the matter she testified to was not otherwise privileged.

Under the CEC, the witness spouse may refuse to take the witness stand completely. Here, although Whitney initially took the stand, intending to testify against Dean, she could have refused to take the stand altogether. The issue is whether Whitney could later invoke the privilege after voluntarily waiving the spousal testimonial privilege.

The CEC does not dictate that a spouse has waived the spousal testimonial privilege once he or she takes the witness stand. Here, Whitney has testified to nothing yet. Thus, although she has taken the witness stand, she is still not otherwise

prohibited from invoking the spousal testimonial privilege. Thus, her testimony should not have been compelled.

However, the court did not err in allowing the prosecution to call Whitney to the witness stand because Whitney initially wanted to testify against Dean. Thus, error, if any, was on the court's compelling Whitney to testify, not on the court allowing the prosecution to call Whitney to the witness stand.

2. Did the court properly admit the testimony of Whitney, Ella, and Fred?

Whitney

Logical Relevance

To be admissible, evidence must be relevant. Under the CEC, evidence is relevant if it has any tendency to make the existence of some fact of consequence to the action more or less probable than the absence of such evidence. The CEC further requires that to be relevant, the fact must be in dispute.

Here, Whitney's testimony that she saw mud on Dean's shoes is relevant because it makes a disputed fact--whether Dean was hiding in the bushes outside Vicky's home that rainy night--more probable than the absence of the evidence.

Legal Relevance

Even if logically relevant, the court may exclude evidence if its probative value is substantially outweighed by the risk of unfair prejudice, confusing the issues, or misleading the jury. Here, the probative value of Whitney's testimony is relatively high. Because Whitney is Dean's wife, her testimony tending to inculpate Dean is especially probative. That Dean had mud on his shoes the night of the murder tends to show that Dean might have been hiding in the bushes that night. There is little risk of unfair prejudice because there is nothing to indicate that Whitney's testimony that she saw mud on Dean's shoes will cause the jury to have prejudice against Dean.

Spousal Testimonial Privilege

As discussed above, Whitney should have been able to invoke the spousal testimonial privilege because she is married to Dean at the time of trial and thus may refuse to testify against him. Although she took the stand--which California allows a spouse to refuse to do--Whitney still had the privilege to not testify against Dean.

Confidential Marital Communications Privilege

Whitney may attempt to alternatively invoke the confidential marital communications privilege. Any confidential communication between spouses is privileged and inadmissible. Here, however, Whitney testified as to an observation, not a communication. Whitney merely saw mud on Dean's shoes. Whitney did not testify as to any communication Dean made to her. Thus, the confidential marital communications privilege does not apply.

In conclusion, Whitney's testimony--although relevant--should have been excluded because of the spousal testimonial privilege.

Ella

Logical and Legal Relevance

Ella's testimony that Dean told Whitney "I just killed the gal who stole my biggest account" is extremely relevant. If Dean told Whitney this, it tends to make it more probable that Dean in fact did kill Vicky. The probative value is high, and there is little risk of unfair prejudice as a result of Dean's statement to Whitney.

Hearsay

Ella's testimony may be objected to on the grounds that it is hearsay. Hearsay is an out of court statement being offered to prove the truth of the matter contained therein. Here, Dean's statement is out of court because it was made in his home to his wife. If offered to prove that Dean did kill Vicky, it would be being offered for its truth. Thus, the statement is hearsay by definition.

Nonhearsay: Declarant's state of mind

Dean's statement may be offered for the nonhearsay purpose of showing his state of mind. It could be offered to show Dean's intent to kill, rather than the fact that he did kill Vicky. However, if offered only for this purpose, it would be highly prejudicial because it would be very difficult for a jury to not consider the statement as evidence that Dean actually killed Vicky. Thus, it should not likely be admissible solely for this purpose.

Admission of a party/opponent

Alternatively, Dean's statement to Whitney could be offered for its truth if it comes under a hearsay exception. The CEC provides an exception to the hearsay rule for admissions made by parties and offered by an opponent. Here, Dean's statement to Whitney is a statement made by Dean--a party--and offered by the prosecution--an opponent. Thus, although hearsay, Dean's statement may be admissible as an admission--an exception to the CEC's rule against hearsay.

Confidential Marital Communications

However, Dean may seek to exclude his statement to Whitney on the grounds that the statement was a confidential communication between spouses and thus is privileged. Both spouses are holders of the privilege. Here there is a twist because a third person is attempting to testify as to a confidential communication between spouses. Both Dean and Whitney did not know that Ella overheard their conversation. Thus, Dean and Whitney believed Dean's statement to be in confidence. Ella was standing 20 feet away and in the house next door when the statement was made. If Dean and Whitney's belief that the communication was confidential was reasonable, such communication was privileged. Here, it appears that Dean and Whitney's belief that their communication was in confidence was reasonable--notwithstanding the fact that Ella overheard the communication 20 feet away.

The purpose of the confidential marital communications privilege is to foster the confidence of the marital relationship, and to encourage open and honest

communication. Here, if Ella is permitted to testify as to Dean's statement if Dean and Whitney reasonably believed their communication was made in confidence, such an allowance would seem to go against the grain of the purpose of the confidential marital communications privilege. Spouses should not have to take every measure to ensure their communications are confidential so as to invoke the benefit of the confidential marital communications privilege. A reasonable belief that the communication is made in confidence should be sufficient. Here, the court should not allow Ella's testimony for this reason.

Logical and Legal Relevance

Fred's testimony that Hit implicitly admitted to killing Vicky is relevant because it makes it more probable that Dean did not kill Vicky. Assuming that the Vicky that Gus was talking about was the same Vicky who died the day before, such evidence would be extremely probative to show that Dean was not the killer, but Hit was.

Hearsay

Hearsay is an out-of-court statement. To be a statement, there must be some assertive words or conduct. Although Gus's question to hit was out of court, it was not a statement because it was not assertive. A question is not an assertion. Thus, Gus's question to Hit whether Hit had taken care of the assignment concerning Vicky was not hearsay.

The issue becomes whether Hit's drawing his index finger across his throat was assertive conduct. Taken in light of the surrounding circumstances, Hit's conduct seems to indicate that Hit acknowledged to Gus that he in fact killed Vicky. To be hearsay, the declarant need not utter actual words. Here, the judge would use his or her discretion in deciding whether Hit's conduct was assertive. The court should hold that the conduct was assertive when taken in context with Gus's immediately preceding question.

Because Hit's assertive conduct was made out of court, and if offered to prove the truth--that Hit did kill Vicky--it is hearsay by definition. Hearsay is inadmissible absent any exception.

Statement against Interest

Dean may argue that Hit's statement was a statement against interest. However, for a statement against interest to be admissible, it must be shown that the declarant is "unavailable" to testify. No such showing has been made, and therefore Hit's statement may not be admitted as a statement against interest.

Admission

Hit's statement cannot come in as an admission because Hit is not a party to the action.

Present Sense Impression/Contemporaneous Statement

Hit's statement may not be admitted under the present sense impression/contemporaneous statement exception because Hit's statement was not made either while killing Vicky or immediately thereafter. Also, Hit was not describing his conduct, he merely made a motion tending to indicate that he killed Vicky. Thus, this exception does not apply.

Confrontation Clause

The Sixth Amendment right to confrontation applies to the states, including California, and provides that criminal defendants shall have the right to be confronted with the witnesses against them. Here, because Dean is offering the out-of-court statement made by Hit, the Sixth Amendment right of confrontation does not apply.

Conclusion

Because Hit's conduct was assertive, given the surrounding circumstances, and because it is only relevant to prove the truth of his statement--that he killed Vicky, and thus inferentially, Dean did not kill Vicky--Hit's statement was hearsay. Because no

exception to the rule against hearsay applies, Hit's statement should not have been admitted.

Q4 Contracts

Peter responded to an advertisement placed by Della, a dentist, seeking a dental hygienist. After an interview, Della offered Peter the job and said she would either: (1) pay him $50,000 per year; or (2) pay him $40,000 per year and agree to convey to him a parcel of land, worth about $50,000, if he would agree to work for her for three consecutive years. Peter accepted the offer and said, “I’d like to go with the second option, but I would like a commitment for an additional three years after the first three.” Della said, “Good, I’d like you to start next week.”

After Peter started work, Della handed him a letter she had signed which stated only that he had agreed to work as a dental hygienist at a salary of $40,000 per year.

After Peter had worked for two years and nine months, Della decided that she would sell the parcel of land and not convey it to him. Even though she had always been satisfied with his work, she fired him.

What rights does Peter have and what remedies might he obtain as to employment and the parcel of land? Discuss.

Answer A

What rights does Peter have?

The first issue is what law should apply. The UCC applies if the contract is for sale of goods. The common law applies if in all other circumstances, including a contract for services or land. In this case, there is an employment contract that contemplates the payment of a salary and a land conveyance in exchange for services. Thus, the common law applies to this contract.

The second issue is whether there is a valid contract. A valid contract requires offer, acceptance, and consideration. An offer exists if the offeror offers the offeree a deal and signals that acceptance will conclude the deal. An acceptance occurs if the offeree agrees to the terms of the offeror and gives the offeree notice of his assent. Consideration exists if there is a bargained-for exchange and legal detriment (which involves perform [SIC] in a way that one is not legally required to perform). Acceptance only exists if the offeree consents to the exact terms of the offeror, also known as the mirror image rule. If the offeree attempts to change any terms of the offer, then there is an effective rejection and counteroffer. Della advertised for a dental hygienist. Advertisements are not usually considered offers and Della's advertisement did not indicate that anyone who responded would be hired. The need to conduct an interview suggests that Della's advertisement was an invitation to make an offer, not an actually offer. Della interviewed Peter and offered him a job. She gave him a choice of being paid $50,000 per year, or being paid $40,000 per year and the conveyance of a $50,000 parcel of land at the completion of three years of work. This might have been an offer because it signaled to Peter that the deal would be complete if he chose either option. However, it would more likely be considered preliminary negotiations since Peter could still choose which option he preferred. Peter said, "I'd like to go with the second option..." If there was an offer, and he had left his statement at this, then this would constitute acceptance because it gave Della notice that he was accepting her offer. However, Peter attempted to modify the terms of the deal by adding a commitment for

an additional three years after the first three years. Thus, Peter's attempted acceptance was ineffective because it altered the terms of Della's offer and does not meet the mirror image rule. Rather, Peter effectively made a counteroffer to Della (or an offer if Della's original options were considered preliminary negotiations). Della accepted Peter's counteroffer when she said, "Good, I'd like you to start next week." The exchange of six years of dental hygienist services for a $50,000 parcel of land and a $40,000 per year salary constitutes consideration. Because there was an offer, an acceptance, and consideration, there is a valid contract.

The third issue is whether the statute of frauds makes the service or land contract unenforceable. The statute of frauds requires some contracts to be in a writing signed by the party against whom enforcement is sought. Contracts for land and contracts that cannot be completed within a year are both included within the statute of frauds. Contracts for land must adequately identify the parties and the parcel of land to be conveyed. The contract between Della and Peter was for six years of employment. Peter could not complete his performance of six years of services within one year, thus this contract falls within the statute of frauds. The contract between Della and Peter also contemplated the conveyance of an interest in land. Della did sign a contract with Peter, but the contract only specified that Peter agreed to work as a dental hygienist for a salary of $40,000 per year. The conveyance of land was not considered within the signed contract, nor was the length of the term of employment. Thus, the contract Della signed cannot be used to overcome the statute of frauds. The employment contract for a term of years and the land conveyance are both unenforceable under the statute of frauds.

The fourth issue is whether Peter can overcome the Statute of Frauds defense via the doctrine of part performance or equitable estoppel. Part performance in a land conveyance requires that the party who seeks to enforce the contract must have engaged in partial performance, which is usually evidenced by possession or payment of the purchase price. Equitable estoppel requires that the party who seeks to enforce the contract show that there was a promise and that the party reasonably relied upon

that promise to their detriment. It will probably be difficult for Peter to show partial performance since he has not taken possession of the land or paid the full purchase price. He might be able to argue that he has "paid" a substantial portion of the purchase price since he worked for two years and nine months, which is the equivalent of 75% of the service he was to perform before receiving the land. However, equitable estoppel is probably a better argument for him to make. The fact that Della offered Peter two options suggests that $40,000 was less than the market rate for dental hygienists. Peter chose the option that gave him less yearly salary in reliance on Della's promise that he would be employed for six years and would receive a $50,000 parcel of land. He received less salary than he otherwise would have, so his reliance was detrimental. Peter may be able to overcome Della's Statute of Frauds defense under the doctrine of equitable estoppel.

The fifth issue is whether there was a breach of contract. A breach occurs when one party fails to perform as obligated under the express and implied conditions in the contract. Assuming that the court finds a valid and enforceable contract, then Della committed a breach when she fired Peter before the six years were complete. She also committed an anticipatory repudiation when she decided to sell the land instead of convey the land to him. She also potentially breached her implied duty of good faith by firing Peter when she was satisfied with his work.

What remedies might Peter obtain?

The first issue is whether Peter can receive expectation damages. The general measure of damages in a contracts case attempts to put the plaintiff into the position he would have been in if the contract had been fully performed. A plaintiff does have a duty to mitigate, which requires that he make a reasonable effort to find similar employment. He does not have to settle for lesser employment or move to a distant location to find employment. Assuming that the court finds there was an employment contract for six years, the court would award three years and three months worth of the $40,000 per year salary if Peter cannot find similar employment. If Peter can find similar

employment, the reward will be reduced based on whatever his new salary is. Assuming that the court finds there was a contract to convey land, Peter could sue for the value of the land, which was $50,000. If the court finds that there was an employment contract, but no contract to convey land, then Peter might be able to receive more than the $40,000 per year salary award if he can show that he took a reduced salary in reliance on the promise that he would receive a land conveyance.

The second issue is whether Peter can receive restitutionary damages. Restitutionary damages are only awarded when a benefit has been bestowed and it would unjustly enrich the other party if they are not required to pay for that benefit. A plaintiff cannot receive restitutionary remedies if they receive expectation damages. Restitutionary damages would probably not be Peter's best option. However, Peter might be able to receive the difference between his salary and the market rate salary for a dental hygienist if he can show that he took the lower salary in reliance on the promise to receive land.

The third issue is whether Peter can receive specific performance. Specific performance is awarded when there is a definite and certain contract, an inadequate legal remedy, enforcement of specific performance is feasible for the court, and there is mutuality. The party attempting to avoid specific performance can do so by raising various defenses, such as laches or unclean hands. Assuming Peter overcomes the statute of fraud objections, Peter will not be able to seek specific performance for the employment contract. Attempting to enforce an employment contract, which is a contract for personal services, is not feasible for the court. Personal service and employment contracts require individuals to work together in a cooperative environment; it is not feasible for the court to monitor the relationship between the parties. Peter probably will not be able to seek specific performance for the land contract. There was a definite and certain contract to convey a parcel of land worth $50,000, though there may be some issues with this element if it is not clear which parcel of land Della intended to convey. Land is considered unique, so a legal remedy of $50,000 would be inadequate. It would be feasible for the court to enforce the specific performance. Under the common law

doctrine of mutuality, both parties must have been able to request specific performance. In this case, Della could not have sought specific performance if Peter breached. However, under the modern theory, the requirement for mutuality is met if one party can sufficiently assure performance. The court would have to decide if the two years and nine months was enough to constitute full performance, but this is only 75% of the total performance required. Peter may be willing to work the remaining three months, but the court cannot require him to do it. Thus, there is no mutuality and Peter cannot successfully obtain specific performance.

Answer B

What Rights Does Peter Have as to Employment and the Parcel of Land

I. The Contract, if Valid, Is Governed By Common Law

The issue is what law governs the contract, if valid, between Peter (P) and Della (D). The UCC governs contracts involving the sale of goods. Contracts which are for services or are land contracts are governed by the common law. Here, P and D are contracting for employment and possibly land. This is a contract for services and land and therefore the contract is governed by common law principles.

II. There is Likely a Valid Contract Between Peter and Della

The issue is whether Peter and Della actually entered into a valid contract. For a contract to be valid, it must contain offer, acceptance, and consideration. An offer is an outward manifestation by the offeror that creates the power of acceptance in the offeree. An advertisement can be a valid offer is it is made to a particular person, outlines the specific details of the offer, and presents the recipient of the advertisement with instructions as to how acceptance can be made. Acceptance is an outward manifestation by the offeree that he accepts the terms of the offeror. Acceptance must mirror the terms of the offer. If acceptance does not mirror the terms of the offer or, in itself, alters the terms of the offer, it is a counteroffer and effectively rejects the original offer. However, a mere inquiry is not a counteroffer. Consideration is a bargained-for legal detriment. (i.e., A works for B in exchange for a salary).

Here, P responded to an advertisement from D, a dentist, who was seeking a dental hygienist. The advertisement was not a valid offer because there are no facts that it was sent directly to P, there are no facts that it contained the details of any potential employment contract, and there are not facts that it told P how he could accept. However, when D interviewed P, she presented him with a valid offer to be her hygienist for three years in exchange for either (1) working for $50,000 per year; or (2) working for $40,000 per year and she would agree to convey to him a parcel of land,

worth about $50,000. When P accepted, he said "I'd like to go with the second option, but I would like a commitment for an additional three years after the first three." This acceptance by P does not mirror the terms of the offer by D and therefore acts as both a rejection of the offer and a counteroffer. Della said, "Good, I'd like you to start next week."

Peter will argue that Della's comment of "Good, I'd like you to start next week," is her acceptance of his counteroffer. He will argue that the terms of the deal are that he works for Della for 6 years at $40,000 per year and is conveyed the parcel of land after the first three years. When P started to work and D handed him the letter stating only that he had agreed to work as a hygienist for $40,000 per year, P will argue that this letter is merely a documentation of the salary he is to receive and nothing more.

In conclusion, Peter's counteroffer is the controlling offer and D accepted it by saying, "Good, I'd like you to start next week." The consideration is that Peter work for 6 years at $40,000 and will receive the parcel of land at the completion of the first three years. The consideration is valid. There is likely a valid contract between P and D.

III. The Letter D Presented to P Is An Invalid Modification

The issue is whether the letter D presented to P is an invalid modification. Under the Common Law, a modification to a contract must be supported by consideration. The pre-existing duty rule prohibits the modification of any contractual duties which have been agreed to absent consideration because the party is attempting to modify something that he/she is currently obligated to do.

Here, D attempted to modify the existing when she presented P with a letter, which she signed, documenting P would work as a dental hygienist for $40,000 and no other elements of the deal between P and D were documented. There was no consideration paid by D to P to enforce this modification and it is invalid.

In conclusion, the modification is invalid because D is obligated to have P work for 6 years at $40,000 and convey a piece of land to him after 3 years of work. To reduce her obligations to only paying him $40,000 per year without consideration is in violation of the pre-existing duty rule.

IV. Della Can Assert the Defense of Statute of Frauds (SOF)

The issue is whether D can assert a SOF defense. The SOF requires that certain contracts be in writing. The categories are contracts regarding marriage, contracts which cannot be performed within one year, land sale contracts, executor agreements, guarantees or suretyships, and contracts for the sale of goods for over $500. A contract which cannot be performed within one year is determined at the time of the contract execution and is measured by whether there is any possibility performance can be completed within one year. The writing that will satisfy the SOF must contain the essential terms of the contract and be signed by the party to be charged.

Here, P's contract is for 6 years, or, at the least, 3 years, and is clearly not performable within one year. This contract is subject to the statute of frauds. The parties did not sign a written contract for P's services to D. Further, part of the deal is a land conveyance which is also subject to the SOF. Neither of those terms were ever written down and D can assert that the contract fails under the SOF. Peter will argue that the letter D gave to him after he started working is a writing confirming their contract because it says he gets paid $40,000 and it is signed by D. However, this is not the same contract to which they agreed.

In conclusion, it is likely that D can assert a valid SOF defense because the ` contract was not in a writing which comports with the requirements of the SOF.

V. P Can Assert The Defense of Estoppel and Likely Partial Performance to the SOF Requirements.

The issue is whether P can assert the defenses of estoppel or part performance to the SOF requirements. As stated above certain writings are subject to the SOF. There are four defenses to the enforcement of the SOF: (1) Partial or Full Performance, (2) Estoppel, (3) Judicial Acknowledgement of Contract, and (4) Merchant's Confirmation Memo. There has been no acknowledgement in a judicial proceeding and the merchant's confirmatory memo is only for UCC contracts with a merchant, so neither apply. However, Partial or Full Performance and Estoppel may apply.

Partial or Full Performance

A party may not comply with the requirements of the SOF if he partially or fully performs his contract and the other party accepts the benefits of the performance. Here, P worked for D for 2 years and 9 months. At the very least, D was under the impression that P was going to be working for her for 3 years, even though the final accepted offer was likely for 6. There are no facts which say she failed to pay him so she very likely was performing her obligations under the contract. She was accepting his benefit of being a hygienist in exchange for her payment. Therefore, under the doctrine of part performance, P has a meritorious defense to the requirments of the SOF.

Equitable Estoppel

A party may not comply with the requirements of the SOF if he can assert a defense of estoppel. Equitable estoppel occurs when a party says or does something that foreseeably creates action in another person, the other person relies on the party's previous statement or action, and it would be unjustly prejudicial to the relying party. Here, P has fully relied on Ds statement of acceptance to his counteroffer. He began working for her and has been working for her for almost 3 years. D has reason to know that he was working for her based on their discussions of the $40,000 and land conveyance. P may not have started working for D without the provisions agreed to in his counteroffer and therefore it would be unfairly prejudicial not to enforce his contract.

In conclusion, P has a likely defense of partial or full performance ot the SOF and may have a mertitorious defense of Estoppel.

VI. If A Valid Contract Exists, It is A Contract For Term and Not an At-Will Contract

The issue is whether the contract is a contract for term or an at-will contract. In a contract for term, an employee has a property right in the job and may not be terminated without cause. Conversely, an at-will contract allows the employer or employee to terminate employment for good cause, bad cause, or no cause.

Here, P will argue that this is a contract for terms because the terms of his counteroffer were that he worked for D for 6 years. Further, he will argue that even if her original job offer is controlling, that offer was for a 3 year term. Either way, it is not an at-will employment. Since it was not at will, she was not able to fire him because she had always been happy with his work. Della will argue that her letter modifying the contract has no language regarding term and therefore it is an at-will employment and she can fire him for any reason.

In conclusion, this is a contract for term and P may not be fired absent cause.

In conclusion, P and D have a valid contract for 6 years at $40,000 per year. Further, D is obligated by the contract to convey P the parcel of land upon completion of his 3rd year. Peter has a right to seek remedies for breach of contract.

What Remedies Can Peter Seek

VII. Peter May Seek Expectation Damages and Reliance Damages

The issue is whether Peter may seek expectation damages and reliance damages for his contract with Della. Legal remedies are available if the plaintiff can clearly estimate the damages incurred with specificity. Legal damages are in three categories, expectation, reliance, and restitution. Expectation damages place the

plaintiff in the position he would have been in had the breaching party performed the contract in full. Reliance damages place the plaintiff in the place he would have been had the contract not existed. Restitution damages reimburse the plaintiff for any benefit conferred on the defendant. A plaintiff always has the duty to mitigate damages and, in the employment context, the duty to to find other employment. The plaintiff is not required to find any job, but rather a job comparable to the job that has been taken. If a plaintiff cannot find replacement employment, a good faith effort must take place to find employment.

Here, P will argue that he should get his expectation, or benefit of the bargain damages, from the contract including any incidental and consequential damages that are reasonably foreseeable from D's breach.. He can easily estimate them because he was due 3 years and 3 months salary and the parcel of land. He had a right to those damages because he was under a contract for which he was improperly fired. These damages will place him in the position he would have been in had he not been fired and the contract been performed. However, he has a duty to find alternative employment and there are no facts which say he has looked for or obtained any further employment. Also, there are no facts that say he has acted in bad faith which would negate the award of damages. If and when he does, his salary from that employment can be applied against his damages from D. There are no facts indicating any incidental and consequential damages.

Also, if P spent any money in reliance on his contract with D, he may recover those costs that are reasonable and foreseeable. Any money that he spent in reliance on the contract with D is obtainable.

In conclusion, he can obtain expectation and reliance damages from D less his duty to mitigate by finding other, comparable employment.

VIII. Peter May Seek Specific Performance of the Land Contract, But Not the Services Contract

The issue is whether Peter can seek specific performance of the land contract. Specific performance is available when the contract has definite and certain terms, there is an inadequate legal remedy, the court can correctly adjudicate, there is mutuality between the parties and there are no defenses. Inadequate legal remedy applies when you are dealing with land or unique items. Mutuality has been relaxed and no longer requires that the parties must each be able to get specific performance. Just that the party is ready and willing to perform. Specific performance will not be applied to a services contract because it is difficult to enforce and can abridge certain constitutional provisions against servitude.

Here, the land at issue is unique and is a definite term of the contract. Money damages will not suffice. Peter contracted and performed for the piece of land. The judge can properly adjudicate the matter. However, Peter likely may not seek specific performance of the services contract.

In conclusion, P may seek specific performance of the land contract but not the services contract.

Q5 Wills

In 2004, Mae, a widow, executed a valid will, intentionally leaving out her daughter, Dot, and giving 50 per cent of her estate to her son, Sam, and 50 per cent to Church.

In 2008, after a serious disagreement with Sam, Mae announced that she was revoking her will, and then tore it in half in the presence of both Sam and Dot.

In 2010, after repeated requests by Sam, Mae handwrote and signed a document declaring that she was thereby reviving her will. She attached all of the torn pages of the will to the document. At the time she signed the document, she was entirely dependent on Sam for food and shelter and companionship, and had not been allowed by Sam to see or speak to anyone for months. By this time, Church had gone out of existence.

In 2011, Mae died. Her sole survivors are Dot and Sam.

What rights, if any, do Dot and Sam have in Mae's estate? Discuss.

Answer according to California law

Answer A

Sam's Rights

In 2004, Mae executed a valid will that left 50% of her estate to her son, Sam, and 50% of her estate to Church.

Revocation of 2004 Will

A will can be revoked by physical act. This requires that the testator tear, cancel, obliterate, or destroy the will with the contemporaneous intent to revoke it. Here, in 2008, Mae had a disagreement with Sam and announced that she was revoking her will as she tore the will in half, in the presence of both Sam and Dot. Because she announced that she was revoking the will, that shows that she had an intent to revoke it. Additionally, she got into a fight with Sam prior to this, and Sam was to take 50% of her estate under that will. That further evidences that she intended to revoke the will. She tore the will in half, which is a sufficient physical act. Thus, her actions in 2008 are sufficient to count as a revocation by physical act. At this point in 2008, because Mae revoked her only will, she does not have a testamentary instrument.

Revival in 2010

Holograph

A holographic will is one that is signed by the testator and all of the material terms are in the testator's handwriting. Material terms are the beneficiaries and the gifts. In 2010, Mae handwrote and signed a document that stated she was reviving her will. Although it is signed by Mae and in her handwriting, the material terms are not in her handwriting because they are referenced. Thus, this will only be a valid holograph if the 2004 will can be incorporated into the 2010 handwritten note because the 2004 will contains the material terms.

Incorporation of the 2004 Will

A document will be incorporated as part of the will if it was physically present at the time the will was executed and there was a simultaneous intent that the document be a part of the will. Here, it seems that the torn pieces of the 2004 will were physically present when Mae wrote the holograph because there are no facts suggesting she had to go anywhere to get it; rather the facts seem to suggest that she wrote the holograph and attached the torn pages in one sitting. Thus, it can be presumed that the prior will was physically present when she wrote the holograph.

Furthermore, Mae had intent to incorporate the prior will because she physically attached the torn pages of the will to the holograph document. This is sufficient to prove her intent to incorporate.

Because the prior will was physically present and was intended to be a part of the holograph, it will be revived in accordance with Mae's intent.

Incorporation by Reference

A writing can be incorporated by reference into a will if (1) there is a writing, (2) it existed at the time of the will's execution, (3) it is specifically referenced in the will, and (4) the testator had the intent to incorporate the writing.

Here, the 2004 will was in writing because it was valid at the time it was executed, so it must have been in writing to be valid. It existed at the time of the will's execution because Mae still had the torn pages. It is irrelevant that at that time it was not a valid testamentary document, so long as it physically existed. It was specifically referenced within the 2010 will because she stated that she wanted to revive her will, and she only had one prior will that had been revoked. Furthermore, she attached the torn pages to the 2010 will, so it is evident that she is talking about the 2004 will. Because the first three elements are satisfied, there is a presumption that Mae had the intent to incorporate the 2004 will into the 2010 holograph.

Independently Significant Fact

A fact is independently significant if it would have existed regardless of the testamentary document being executed. Here, the 2004 will would have existed regardless of the 2010 holograph because it was written prior to the 2010 holograph. Even if Mae had never written the 2010 will, the 2004 will would have existed, regardless of the fact that she revoked it. The torn pieces still remained. Thus, the 2004 will is independently significant.

Validity of 2010 Will: Undue Influence

Dot, who takes nothing under the revived will, will argue that the 2010 will was the product of undue influence, and is therefore invalid, leaving Mae without a testamentary instrument. There are three types of undue influence recognized in California: the prima facie case, case law undue influence, or statutory undue influence.

Prima Facie Case

Under the prima facie case, undue influence can be shown if the testator was susceptible to undue influence, if there was an opportunity to influence her, if there was action taken to cause undue influence, and there was an unnatural disposition of the estate because of the undue influence.

Here, Dot will argue that Mae was susceptible to undue influence by Sam because she was entirely dependent on Sam for food, shelter, and companionship. Thus, she was susceptible to doing what Sam wanted her to do. Dot will argue that Sam had the opportunity to influence Mae because she was so dependent on him, Mae felt that if she did not do what he wanted, she would have been left without food, shelter, or companionship. There was active participation by Sam because he had repeatedly requested that Mae revive the 2004 [will] and would not allow Mae to see or speak to anyone for months. Finally, Dot will argue that the gift in the 2004 will was unnatural because it did not provide for her, Dot, Mae's own daughter. Sam will argue, on the

other hand, that the gift revived by the 2010 will was not unnatural because it was a will that was validly executed in 2004. There was nothing unnatural about it in 2004, and there is nothing unnatural about it now. Furthermore, Mae intentionally left Dot out of the will in 2004, so it was not unnatural to be left out now. Finally, Sam will argue that Mae was not susceptible to any undue influence by him; rather he was just taking care of his aging mother.

Ultimately, the court will probably side with Sam, that there was not an unnatural disposition of Mae's property in the 2010 instrument because it was merely the revival of a valid gift that she had already devised, despite the fact that she later revoked it. Thus, the will will not be found invalid because of prima facie undue influence.

Case Law Undue Influence

Under case law undue influence, a gift or a will is invalid if there was a confidential relationship between the testator and the person accused of having undue influence, if there was active participation by the person causing the undue influence, and if there was an unnatural gift because of the undue influence. Here, there is a confidential relationship between Sam and Mae because Sam is Mae's son and he is solely responsible for taking care of her. Mae is entirely dependent on Sam, so there is a confidential relationship.

See above for arguments regarding active participation by Sam and the fact that the gift was not an unnatural disposition of property.

Because the revival of the 2004 will by the 2010 will was not an unnatural disposition of property, discussed above, there will be no undue influence.

Statutory Undue Influence

Under the California Probate Code, undue influence is presumed if the drafter of the will is also the beneficiary of the will. Here, Mae handwrote the 2010 holograph and attached the torn pages to that will herself. Thus, no one else drafted the will. The fact that she did so at the repeated requests of Sam does not change the fact that he did not draft the will leaving a gift to himself. Even if he did, there is an exception to this general rule that if the drafter is also a relative of the testator, there is not going to be a presumption of undue influence. Thus, there is no statutory undue influence.

Disposition re: Sam

If the court finds that there is no undue influence, the court will dispose of Mae's estate in accordance with the 2010 will, which incorporates the 2004 will. Under that document, Sam is entitled to 50% of Mae's estate, and Church is entitled to the other 50%.

Church: Lapse of Gift

Church was no longer in existence in 2010, when Mae executed her will. Thus, her gift of 50% of the estate will lapse because Church does not exist and is not there to take its gift.

Anti-Lapse?

California has an anti-lapse statute, which allows for the issue of a kindred beneficiary to take, despite the fact that he or she may have predeceased the testator. Here, however, Church is not kindred, or blood-related, to Mae, nor does it leave issue because it is an entity. Thus, anti-lapse will not apply to Church's gift of 50%.

Remaining 50%: Intestacy

Because the gift of 50% of Mae's estate to Church will lapse, the will does not provide for the distribution of that property. Thus, the remaining 50% of Mae's estate will pass through intestacy.

Mae was a widow when she died, so she did not leave a surviving spouse. She was survived solely by Dot and Sam, her children. Under the rules of intestacy, if a decedent dies without a will or without full disposition of property by a will, the property will go to the surviving issue, per capita. Under California Probate Code section 240, you go to the first generation with living issue and divide the estate equally among bloodlines with someone living. Here, Sam and Dot are both living, and they are in the first generation. Thus, they will each take 50% of the remaining estate - in other words, they will get 25% of Mae's estate each.

Dot's Rights

Dot was intentionally left out of the 2004 will, which later was revoked and then incorporated into the 2010 will. Thus, under Mae's will, Dot stands to take nothing (with the exception of her 25% intestate share due to the lapse of Church's gift).

Pretermitted Child

Dot will argue that she is a pretermitted child. A pretermitted child is one that was not born or known about at the time the testamentary instrument was executed. Pretermitted children are entitled to their intestate share of the entire estate. Thus, if Dot is pretermitted, she will be entitled to 50% of Mae's estate because Mae's estate would be split 50/50 between her two children in intestacy.

Here, Dot is not a pretermitted child because she was alive in 2004 when Mae executed the will. Furthermore, Mae intentionally left her out of the 2004 will and she revived that will, with the intent that it go back into effect. Therefore, Dot will not be construed as a pretermitted child.

Distribution of Mae's Estate

If Dot is able to persuade the court that there was undue influence by Sam, his gift will be invalidated because of the undue influence. If Sam's gift is invalid and Church's gift lapse, that would mean Mae's entire estate would be distributed through

intestacy. In this case, Dot and Sam, as the sole surviving children, would be entitled to 50% each.

However, as discussed above, the court is unlikely to find that undue influence will invalidate Sam's gift because it was not unnatural. Therefore, Sam will still be entitled to his 50% under the will. Because Church's gift lapsed, however, the remaining 50% will be distributed under intestacy, with 25% going to each Sam and Dot. Thus, the most likely distribution of Mae's estate results with Sam taking 75% of the estate, and Dot taking 25%.

Answer B

2004 - Valid Will

The facts here indicate that Mae executed a valid will in 2004 in which she intentionally omitted D, and split her estate 50/50 between S and the Church.

2008 - Revocation

A will can be revoked by physical act or subsequent testamentary documents. When revoking by physical act, testator, or someone under testator's direction must burn, tear, destroy, or cancel the will. The testator must have the intent to revoke at the same time. Here, in 2008, after a disagreement with S, M announced that she was revoking her will, thereby indicating an intent to revoke, and then she tore it in half, fulfilling the necessary physical act to revoke. Because she tore the entire will in half, there is an indication that she intended to revoke the entire will, not just a part of it.

As such, Mae effectively revoked her 2008 will.

2010 - Revival

A will can only be revived if it was revoked by a subsequent testamentary instrument, which was then later revoked by physical act or another testamentary instrument. Revival re-effectuates an earlier will. Here, Mae's 2004 will was revoked by physical act, not by testamentary instrument, so it cannot be revived by a document. Had this will been revoked by a later instrument, S could argue that the first will was revived because his mother executed a holographic codicil that explicitly stated that she intended the earlier will be back in effect, and it would have been effective as of the date of the codicil.

However, a will revoked by physical act cannot be revived.

2010 - Holographic Will

S could argue that in 2010, his mother executed a holographic will. A valid holographic will requires that all material terms of the will be in the testator's handwriting, and it be signed by her. Here, Mae wrote that she was reviving her will and she signed the

document. He could argue that even though this was not a valid revival, as discussed above, it was a new will because testamentary intent can be inferred from her statement that she wished to revive the earlier will, and she had signed and handwritten this new will. Therefore, Sam may be able to argue that this was a new, valid holographic will.

To establish the terms of the will, he could look to integration, and incorporation.

Integration

A writing that is present at the time of the execution of a will, and is intended to be a part of that will, is deemed to have been integrated into the will and is probated. An intent to make it a part of the will can be established by it being attached to the will. Here, S could argue that even though the previous will had been revoked, the pieces of it were attached to the holographic will that his mother executed, and therefore, it was integrated into the new will and should be probated. There is no requirement that the attached documents be valid on their own. Therefore, Sam may be successful in arguing that his mother's former will was integrated into the holographic will.

Incorporation by reference

A writing, whether valid or not, can also be incorporated by reference if it is in existence at the time of the execution of the will, it is identified in the will, and there is an intent to incorporate it. Sam could again argue that if his mother's will was not integrated, it was incorporated by reference because she states in the new will that she is reviving her former will, which indicates that she intended to incorporate it, and it is clearly referenced in the new will. He can also argue that even though it was in two pieces, it was still in existence at the time of the execution of this will. Thus, it was incorporated by reference.

Undue Influence

Courts are unwilling to probate wills or terms of a will that are procured by undue influence. Undue influence is when the testator's freewill is overcome. There are two types of undue influence that the court may find were at play when Mae wrote the

document attempting to revive her former will: prima facie undue influence and undue influence based on case law.

Prima facie

To establish a prima facie case of undue influence, a party contesting the will, which in this case could be D because she receives nothing under her mother's initial will, would have to show her mother's susceptibility to be influenced, her brother's opportunity to influence Mae, S's active participation in influence, and an unnatural result.

Susceptibility

Mae must have been in a vulnerable position in which her freewill could have been overcome. In this case, she was completely dependent on S for her basic necessities in life, such as food, shelter and companionship. Therefore, she was very likely susceptible to having her freewill overcome by Sam.

Opportunity

S must also have had the opportunity to overcome Mae's freewill. In this case, Sam did not allow Mae to see or speak to anyone for months, and his mother completely relied upon him. Therefore, because he was her only source of companionship, he had the opportunity to influence her.

Active participation

S must have actively influenced his mother. Here, he made repeated requests to her to revive her former will, and it was only after these repeated requests that she did so. Therefore, he actively participated.

An unnatural disposition

Proving an unnatural disposition may be difficult for D because the original will devised half of Mae's property to S and that's also what the new will would do. Furthermore, if Mae died intestate, he would still receive half of her property because

she only left behind two issues. However, because it is clear that Mae intended to tear up her old will, and that this second document was only the result of S's pressure on her, it may be possible for find undue influence.

Case law

Under the case law method of proving undue influence, there has to be a special relationship between the influencer and the testator, active participation and an unnatural result. Here, the special relationship can be established through the familial bond, as S was Mae's son, and she was completely dependent on him to take care of her. See above for the other two elements.

As a result, if the court were to find that there was undue influence, it would likely refuse to probate the second will because the entire thing was obtained by such an influence. On the other hand, because the disposition wasn't entirely unnatural, it may not find undue influence, in which case it would be a valid will that could be probated.

Gift to the Church

In order to obtain a gift under the will, one must be in existence at the time of testator's death. The church here was no longer in existence when Mae died. Under California's lapse provisions, the gift to the church would lapse and fall into the either the residuary clause of the testator's will, and if there wasn't one, then it would pass under intestacy. The gift cannot be saved under the antilapse provisions because only kindred who leave behind issue can benefit from that provision.

As such, if there was a valid will, the gift to the church would lapse, and as there is no residuary clause, it would pass under intestacy.

Dot's Rights

Omitted Child

Dot could claim that she was an omitted child because she was not provided for in any of Mae's wills. However, to be an omitted child, all testamentary documents must have

been executed prior to the birth of the child. Here, the facts clearly indicate that D was alive when Mae executed her will in 2004, and then also again in 2010 if that is deemed to be a valid will, and thus she was not an omitted child. Furthermore, Mae intentionally left D out.

Intestacy Share

D's intestacy share will depend on whether the holographic will by Mae is considered valid or invalid.

If the will is valid, 50% of her estate would pass under the will to S. The other 50% that was to go to the church would have lapsed, as would pass under intestate distribution as there is no document governing the disposition of that property.

Under the default rules for intestate distribution, when there is no surviving spouse, which there isn't here because Mae was a widow, distribution to issue is on a "per capita" basis. Each of Mae's children would get an equal share of the intestate property. As Mae has two children, and 50% of her estate is passing by intestacy, D would get 25% of the total estate.

If on the other hand, the will is invalid, then all of Mae's estate would pass by intestacy. Just as above, the property would be distributed equally between her two children, and D would therefore get 50% of the estate.

Sam's Rights

Sam's rights to distribution will depend on whether the will is deemed invalid because of his undue influence or because it was not a proper holographic will.

If the will is valid, S is entitled to receive 50% of Mae's estate under the will. The other 50% that would not pass to the church because it is no longer in existence would pass through intestacy because of a lack of a residuary clause. Under intestacy, as discussed above for D, Sam would receive 50% of the property that passes in such a

manner, which would result in a 25% share of the total estate. Overall, if the will is deemed valid, Sam would receive 75% of Mae's estate.

If the will is not valid, then all of Mae's property would pass under intestacy, and S would receive half just the same as D above. Therefore, he would get 50% of Mae's estate.

Overall

Overall, the rights of D and S depend on whether the court finds that Mae had a valid will at the time of her death. If there was a valid will, S would receive 75% of his mother's estate, and D would receive 25%. If there was no valid will, then each S and D would receive a 50% share.

Q6 Criminal Law and Procedure

Dan worked at a church. One day a woman came to the church, told Dan she wanted to donate some property to the church, and handed him an old book and a handgun.

Dan had originally intended to deliver both the book and the gun to the church's administrators, but he changed his mind and delivered only the book. He put the gun on the front seat of his car.

The next day, as he was driving, Dan was stopped by a police officer at a sobriety checkpoint at which officers stopped all cars and asked their drivers to exit briefly before going on their way. The police officer explained the procedure and asked, "Would you please exit the vehicle?"

Believing he had no choice, Dan said, "Okay."

After Dan got out of his car, the police officer observed the gun on the front seat and asked Dan if he was the owner. Dan answered, "No. I stole the gun. But I was planning to give it back."

Dan is charged with theft and moves to suppress the gun and his statement to the police officer under the Fourth Amendment to the United States Constitution and Miranda v. Arizona.

1. Is Dan likely to prevail on his motion? Discuss.

2. If Dan does not prevail on his motion, is he likely to be convicted at trial? Discuss.

Answer A

1. <u>Is Dan ("D") likely to prevail on his motion?</u>

A. On Fourth Amendment Grounds. The Fourth Amendment protects the citizenry from unreasonable searches and seizures by the government. Thus violations require government action. They also require that the search or seizure be unreasonable, something that may be an issue for D. A search is a violation of a reasonable expectation of property; a seizure is an instance in which a person does not feel "free to leave" based on governmental presence. Generally, for a search to be reasonable, there must be a warrant. A warrant is granted by a neutral judge and must be based on articulable facts shown in an affidavit and must be reasonable and particular in terms of scope and time. In this case, there was no warrant to search D's car or to seize D. Thus, the search and seizure is presumptively unreasonable, subject to certain exceptions. One important exception is the checkpoint search; another such exception is consent. As an initial matter, a person must have standing to challenge the search. Because Dan was driving his own car, he will have standing.

i) The Checkpoint Search: Warrantless, even suspicionless, road checkpoints have been upheld by the Supreme Court under certain circumstances. First, the search must be supported by the justification of highway safety - including prevention of DUI, etc. Second, the checkpoints must be administered in such a way that officer discretion is very limited. This means that an officer must go through a protocol driven method of stopping the cars - i.e., either every car, or one of every ten cars, etc. The officer may not stop whatever car he subjectively thinks looks criminal. Third, the search must be reasonable in scope - it must not exceed the degree necessary to check for whatever the search is aimed at.

Here, it does appear that the checkpoint search is aimed at a valid justification - a sobriety checkpoint. This has been expressly held as constitutional by the Supreme Court. However, there are some other issues. For one, all cars are being stopped. While this is not presumptively unreasonable, it will be an issue, as it basically allows a

policeman to stop and seize every single person driving down the expressway. Secondly, the police required D to step out of his car. Under Supreme Court precedent, police only have been allowed to stop people. If sobriety or another criminal violation seem likely, then the people can be asked to exit their car. Because of the stopping of every car, and the demand that the drivers exit the car, this may be found to be an unreasonably long stop than what is necessary to meet the highway safety justification.

Conclusion: There is a chance that this checkpoint too far exceeds permissible protocol based on Supreme Court precedent. However, it is a close call. I will consider this to be a reasonable and permissible warrantless search, though the court may be convinced otherwise.

ii) Consent to Search: A person may validly waive his right to be free from unreasonable search and seizure by giving consent. Because it is likely that the stop and seizure was permissible up until the time that D was removed from his car, his consent to get out of the car would completely remove any potential objection to the search and seizure. The question will be whether the consent was freely and voluntarily given. Courts have found that when police attempt to search a person's house on the basis of consent, they do not have to tell that person that he or she has the right to refuse consent. This does not remove the "voluntary" aspect of consent. Here, Dan subjectively thought that he had no choice, but he still consented to getting out of the car. Assuming that the court would apply the consent rule used in home searches to a car search, this consent should be found to be voluntarily given.

Conclusion: Thus, the search for the gun was likely reasonable based on consent, regardless of whether or not it was legitimate based on checkpoint rules for the cops to remove him from his car.

iii) The Plain-View Doctrine: It appears, either because the entire checkpoint process was constitutional, or because D gave his consent to be moved from the car after a constitutionally permissible checkpoint stop, that the stop and seizure was constitutional

at the time Dan got out of the car. Thus, the police were constitutionally on solid ground when Dan was out of the car. The plain-view doctrine allows police who are legitimately in a place and see something criminal in plain-view to use that plain-view finding in court. The justification is that a person does not have a reasonable expectation of privacy in something the person lets the public see. Here, the gun will qualify under the plain-view doctrine. The police need not rely on any Terry type frisks of automobiles, or the automobile exception, because they do not apply. The gun was in plain-view, and to the extent that the officer "searched" the car by looking in the window, the plain-view exception applies.

iv) CONCLUSION: The search and seizure was reasonable and the gun should be admissible. The checkpoint rule may validate the entire process, but even if it doesn't then the checkpoint rule was at least legitimate up until the time D was asked to exit the car. Because he consented, there is no violation of the 4th amendment. The gun is admissible based on the plain-view doctrine.

B. Will D prevail on 5th Amendment Miranda Grounds? The 5th Amendment protects the right against self-incrimination. Miranda v. Arizona, a case based on this right, holds that a person's statements made cannot be used against him in court if the Miranda warning is not given. However, Miranda applies only to custodial interrogations, and not when a person is not in custody or voluntarily offers information. Miranda warnings include the right to remain silent, the right to counsel, the knowledge that counsel will be provided to a person, and the knowledge that anything said while in custody may be used against that person in court.

i) No Miranda Warnings were given. Here, the cops gave no warnings. Thus, D's statement is protected if it was made during a custodial interrogation.

a. Custodial. Custodial situations are those in which a reasonable, innocent person does not feel free to terminate the encounter and leave at will. Here, D was out of his car being asked in the company of some police. It seems up to this point to have been

a pretty friendly encounter, with the cops not showing much force or intimidation. Still, it's hard to say whether someone would reasonably feel at this point justified and correct in telling the police that this interview has to stop, and that the person is just going to drive away; especially before the sobriety check is performed. Thus, it's a close call. However, as D is out of his car, speaking to police, and about to be subject to a sobriety test, I would conclude that this is a custodial situation as a reasonable person would not feel free to terminate the questioning and leave.

b. Interrogation: An interrogative question is one that is reasonably likely to elicit an incriminating response. This is a pretty close call as well. On one hand, the officers had no indication that the gun was criminally possessed, and thus a mere question about it may not be enough to reasonably expect an incriminating response. On the other hand, if the gun was criminally possessed, then a truthful response would be incriminating. However, because the officer questioned D about the gun without any suspicion at all of it being stolen, I would find this to be a non-interrogative question. I.e., if they knew that there was a stolen gun around, and then they asked, that would be more likely to be an incriminating response. Here, this just seems like the officers inquiring about a gun in the car without any suspicion whatsoever. Thus, Dan's statement should be admissible. It also appears that even if he had denied the ownership of the gun, the bit about him admitting to the crime was completely volunteered. I.e., the cops did not ask him whether he stole the gun. They asked him if he owned it. Thus, D's answer could have been "No." Instead, and completely unprompted, D volunteered that he stole the gun.

ii) CONCLUSION: This was likely a custodial situation. The situation probably not interrogative, but it may have been. Even if it was not an interrogative scenario, D's statement that "I stole the gun" was not in response to any questioning by the police, and is voluntary and admissible. If it is found to be an custodial interrogative situation, the only part of the statement that will be inadmissible will be the answer to the policeman's question: "No."

2. <u>Which theft crime will D be convicted of?</u>

A. Theft crimes are specific intent crimes. This means that the thief must specifically intend the proscribed conduct - i.e., the thief must have the mens rea to permanently deprive the true owner of the object possession. Theft crimes include larceny (trespassory taking and carrying away of the personal property of another with intent to permanently deprive); larceny by false pretenses (larceny, plus getting actual title to the property by intentional and legitimate fraud); larceny by trick (larceny, but obtaining mere possession of the property by trick or deception); and embezzlement (the fraudulent conversion of the personal property of another by one legally in possession of that property).

B. No larceny crime lies: This will be an embezzlement, if it's anything. The reason is because the larceny crimes all require an intent to steal the item at the moment of possession. Here, Dan did not form the intent to keep the gun until he had already been in legitimate and lawful possession - as a courier for the church, and holding it for the church. The continuing trespass doctrine will not apply, because that applies to scenarios where a person has borrowed something against the owner's intent, but doesn't plan to steal it until later. That person is never in lawful possession. Because Dan's specific intent mens rea was not formed at the moment of possession of the gun, no larceny crime will lie.

C. Embezzlement: Embezzlement is:

i) Fraudulent: I.e., wrongful. Here, D was supposed to deliver the gun to the church, but has kept the gun. Thus, he is in wrongful possession of the gun at the time the gun was found on him.

ii) Conversion: This means the intent to permanently deprive the owner (Church) of possession. This will be the major issue. Dan tells the cops he wanted to give the gun back; further we have no indication that he ever meant to keep the gun forever - maybe he just wanted to drive around with it for a little bit. Because this is a specific intent crime, the prosecution will have a tough job proving that Dan subjectively and

specifically intended to keep the gun forever when he decided to not turn it in. It is important to note that once he kept the gun with intent to steal it, the crime was complete - it doesn't matter if he later developed the intent to return it. The prosecution could point to the fact that he was driving around with it and didn't turn it in when he was supposed to, which may help; so will the statement that "I stole it." This will be the issue at trial, right now it looks only probably proven at best.

iii) Of the personal property of another: The woman gave the gun to the church. As such, the gun was the property of the church.

iv) By someone in legal possession: Dan worked for the church, and it was his job in this instance to deliver the gun to the church. Thus, he has legal possession of the gun when the woman gave it to him. She gave it to him thinking he was going to give it to the church, because he was an employee of the church. The church charged him with the duty of taking donations and delivering them to it. Thus, this possession was legal. It is akin to a bank manager stealing money that he or she is supposed to be counting.

D. CONCLUSION: Embezzlement may lie, but only if the prosecution can prove specific intent to steal the gun, which will be tough.

3. <u>General conclusion: Gun and statement ("I stole it.") admissible. Embezzlement if there is specific intent, which there likely is.</u>

Answer B

1. Motion to suppress

The fourth amendment prohibits unreasonable searches and seizures by the state. Miranda v. Arizona requires that warnings be given to an individual subject to "custodial interrogation" in order to protect the individual's right to be protected from self-incrimination. This is clearly state action, so the issues here are whether the gun was seized pursuant to an unreasonable search or seizure, or whether the statement was obtained in the context of custodial interrogation.

Exclusionary Rule and Fruit of the poisonous tree doctrine

The exclusionary rule requires that a court exclude evidence seized pursuant to an unlawful search or seizure. The fruit of the poisonous tree doctrine also provides that evidence that is obtained as a result of an lawful search must also be excluded, subject to certain exceptions. The exclusionary rule also requires the suppression of statements obtained in violation of Miranda, although the fruit of the poisonous tree doctrine does not apply to Miranda. Here, if the gun was seized during an unlawful search or seizure, or if the statement was obtained in violation of Miranda, this evidence must be suppressed.

Gun

Expectation of privacy

An individual has standing to challenge a search or seizure when they have a reasonable expectation of privacy in the place or property being searched. When an individual knowingly exposes something to the public, he no longer has standing to challenge a search of it. In this case, Dan placed the gun on the front seat of his car. It is not clear if his windows were tinted, or if someone could see easily into the car and see the gun. However, typically an individual has an expectation of privacy as to the inside and contents of their car, so Dan probably has standing to challenge the search. He certainly has standing to challenge any detention of his person, which would constitute a seizure if a reasonable person would not feel free to leave.

Routine checkpoint

Routine sobriety checkpoints are not considered seizures under the 4th amendment, so long as they are administered in a nondiscretionary manner and do not detain individuals for an unreasonable period of time. In this case, the officers at the checkpoint were stopping all cars, and were asking all drivers to briefly exit before going on their way. As a result, this checkpoint was not a seizure of Dan or his car, and did not implicate the 4th amendment.

Consent

In addition, a search or seizure is not unreasonable if an individual consents to the search. Valid consent must be knowingly and voluntarily given. Whether an individual validly consented is determined objectively, and the court considers whether a reasonable police officer would believe that the individual consented to the search or seizure. In this case, the police officer explained the procedure and asked if Dan would exit the vehicle. As a result, Dan appears to be informed about the procedure and his consent was knowing. His consent was also voluntary because he said okay, and stepped out of the car. A reasonable police officer would consider this to be valid consent.

Plain-View

The plain-view doctrine provides that where a police officer has a right to be in the place that he is, any objects in plain view may be validly searched or seized if there is probable cause to believe that the objects are products or instrumentalities of a crime. In this case, the officer had the right to be in the place that he was, as discussed above, because he had the right to stop Dan pursuant to the nature of the checkpoint and Dan's consent. At this time, the gun was in plain-view. The officer then asked Dan if the gun was his, and he responded that it was stolen. At that time, the police officer had not yet searched or seized the gun because he had not touched it or moved it in any way. However, when Dan confessed that it was stolen, probable cause arose for the officer to seize it, and the seizure was therefore lawful under the plain view doctrine.

Even if the statements were elicited in the context of a Miranda violation (to be discussed below), because the poisonous tree doctrine does not apply to Miranda, and because the gun was in plain view, the seizure of the gun was still lawful.

Dan's motion to suppress the gun is likely to fail.

Statement

A statement is obtained in violation of Miranda where an individual is in custody, and an officer is interrogating the individual without first providing the appropriate Miranda warnings. Here, it is clear that the officer did not provide Miranda warnings, so the question is whether Dan was in custody and whether the police officers question as to whether Dan owned the gun constituted interrogation.

Custody

An individual is in custody for the purposes of Miranda where a reasonable person in his position would not feel free to leave and end the detention. However, the supreme court has specifically held that routine traffic stops did not constitute custody for the purposes of Miranda. In this case, therefore, the routine security checkpoint would not be considered custody for Miranda purposes. It does not matter that Dan thought that he had no choice, because the test is objective, and not subjective. When the police officer asked Dan if he would consent, it is also possible that a reasonable person in Dan's position would have interpreted this question as indicating that he was free to not consent.

Because Dan was not in custody at the time that he made the statement, it was not illicit in violation of Miranda and is admissible.

Interrogation

A police officer is considered to be interrogating an individual where his questions are reasonably likely to illicit incriminating statements. Here, the officer asked Dan if he was the owner of the gun. This question does not seem designed to lead to an incriminating statement, only to determine who was the owner of the gun. In

responding to the question, Dan would have been expected to give a simple yes or no. In the event of a non, probably a statement about who it belonged to would be expected. From the perspective of the officer, it probably seemed unlikely that this question would illicit a confession to the theft of the gun.

Because Dan was not being interrogated at the time he made the statement, it was not obtained in violation of Miranda for this reason as well. Dan's motion to suppress the statement is likely to fail.

2. Likelihood of conviction

Elements of theft

Larceny, or theft, is the taking or concealing of the property of another with the intent to permanently deprive the owner or rightful possessor of that property of the property. The issue here is whether Dan took property that belonged to the church, and whether he intended to permanently deprive the church of the gun.

Taking

A taking of the property of another occurs where the defendant physically moves the property of another, or conceals it on his person. In this case, although Dan may have had a right to possess the gun at the time that the woman handed it to him, it belonged to the Church as soon as the woman handed it over and told Dan that she wanted the Church to have it. Although Dan may have intended to give the gun to the church, a taking of the gun occurred when he did not give it to the church and instead placed it in his car. When he turned over the book and mislead the church as to the donation, his right of possession did not continue to exist and his action met the first element of larceny.

Intent to permanently deprive

A defendant need not have had the intent to permanently deprive the owner or rightful possessor at the time that the taking of the property occurred. It is enough that the intent to permanently deprive arose after the taking. In this case, it is not clear if

Dan had the intent to permanently deprive. It would appear that he did not intend to ever give the gun to the church when he gave them only the book and placed the gun in his car. This is circumstantial evidence of an intent to permanently deprive and may be sufficient to meet the requirements for this element. On the other hand, he also told the officer that he was planning on giving it back. If he merely later changed his mind about the gun, this would be irrelevant, because if he had the requisite intent even this would be enough. However, this statement could also be circumstantial evidence indicating that he never had the required intent. This is a question for the jury to decide, depending on whether they believe the defendant's statements.

Mistake of law

Dan appears to believe that he "stole the gun." His beliefs about the illegality of his actions are immaterial however. His statement would be relevant only to determine whether he had an intent to permanently deprive. This is because belief that one completed an unlawful act that is actually lawful does not render the act unlawful.

Embezzlement

Embezzlement is a type of theft, and is the taking of a piece of property that the defendant had a right to possess at the time of the taking. Therefore, even if Dan had a right to possess the gun at the time, Dan could still be convicted of embezzlement, as opposed to basic theft. This conviction would turn on whether the jury found that placing the gun in the car was sufficient to indicate that Dan intended to convert the Church's property into his own and permanently deprive the church of it.

Because Dan took a gun that he did not have a right to possess, and because circumstantial evidence indicates he intended to permanently deprive the church of the gun, he is likely to be convicted at trial for theft.

Feb 2012

California
Bar
Examination

Essay Questions
and
Selected Answers

February 2012

ESSAY QUESTIONS AND SELECTED ANSWERS
FEBRUARY 2012
CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2012 California Bar Examination and two answers to each question that were written by actual applicants who passed the examination after one read.

The selected answers were assigned good grades and were transcribed for publication as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

ESSAY QUESTIONS 1, 2 and 3

California Bar Examination

Your answer should demonstrate your ability to analyze the facts in question, to tell the difference between material and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem. Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

Q1

Q1 Trusts

Sam, a widower, set up a valid, revocable *inter vivos* trust, naming himself as trustee, and providing that upon his death or incapacity his cousin, Tara, should be successor trustee. He did not name any additional trustee. He directed the trustee to distribute the income from the trust annually, in equal shares, to each of his three children, Ann, Beth, and Carol. He specified that, at the death of the last of the three named children, the trust was to terminate, and the remaining assets were to be distributed to his then living descendants, by representation.

When he established the trust, he also executed a valid will pouring over all his additional assets into the trust.

Two years later, Sam died. He was survived by Ann, Beth, and Carol. Within two months, Dave, age 25, began litigation to prove that he was also a child of Sam's, although Sam had never known of his existence.

For three years after Sam's death, Tara administered the trust as trustee. Because Ann had very serious medical problems and could not work, and because Beth and Carol had sufficient assets of their own, Tara distributed nearly all of the trust income to Ann and little to Beth and Carol.

After the court determined that Dave was in fact Sam's child, Dave claimed a share of the trust. Beth and Carol have filed suit against Tara, claiming breach of fiduciary duties. Tara has submitted her resignation, and Beth and Carol have sought termination of the trust so that all assets may now be distributed outright to the beneficiaries now living.

1) What interests, if any, does Dave have in the trust assets? Discuss. Answer according to California law.

2) Are Beth and Carol likely to be successful in terminating the trust? Discuss.

3) Are Beth and Carol likely to be successful in suing Tara? Discuss.

Q1

Answer A

1) Will Substitute

Where an inter vivos trust is created, and where the settlor gives a vested future possessory interest in the trust to a grantee, it will be considered a will substitute. Where the settlor has included a clause whereby all of the settlor's assets at the time of his death pour in to the trust for the benefit of the beneficiaries a pourover will is created. The Will requirements must be established to make this valid.

Here, Sam (S) created a valid inter vivos trust, with himself as Trustee and Tara (T) as the successor Trustee for the benefit of his three children Ann (A), Beth (B), and Carol (C). S also provided that at his death all of his other assets should be poured over into the trust for the benefit of A, B, and C.

Therefore, a valid pourover will was created, with each A, B, and C receiving equal shares of all of the assets.

Dave's (D) right as an omitted child

In general, a child may be disinherited if the child is left out of a will or other testamentary document created by a parent. However, where a child is unknown to the parent at the time the testamentary document is created, and the parent had no reason to know of the child, that unknown child will not be disinherited, and will be able to recover his intestate share of the parent's estate. A child's intestate share in a modern per stirpes system, which is the majority view taken, will be an equal share split at the first level of inheritance, in this case among the children.

Here Sam (S) set up the trust only 2 years ago. D was 25 years old at the time of S's death. Because S was born before the execution of the trust and pourover will, he would generally be treated as disinherited and unable to recover. Here, however, S

was unaware that D was alive or that D was his child at the time the testamentary documents were created. D would be considered an omitted child and have a right to his intestate share. Because A, B, and C were all alive, D would be entitled to 1/4 of S's estate. Because the trust contained all of the assets of S due to the pourover will, this will be where the assets are taken from. Notwithstanding the clause in the trust that requires the assets to be distributed to living descendants, by representation after A, B, and C die, D will not be required to wait for A, B, and C to die before recovering.

Therefore, D will be entitled as an omitted child to 1/4 of the Trust assets.

2) Termination by B and C

The power of termination depends on whether or not a trust is revocable or irrevocable. An irrevocable trust is created where the intent of the settlor is to make it as such. Here S expressly stated that the trust is to last until the death of the last of the three named children. The majority view is to find in favor of irrevocable trust, so it is likely that this language will be sufficient to establish an irrevocable trust.

Therefore, an irrevocable trust has been established, and the rules of termination, discussed below, will regard such.

Termination of irrevocable trust

Termination of an irrevocable trust can be done, either when the settlor and all of the beneficiaries agree while the settlor is still alive, or if all of the beneficiaries agree and it will not frustrate the purpose of the trust, or a merger where the trustee has become the sole beneficiary. An irrevocable trust is created when the express language of the settlor states as such.

Here, although T has not acted according to the will, and has distributed nearly all of the trust income to A and little to B and C, there must still be a mutual agreement between the beneficiaries to terminate that doesn't frustrate the purpose of the trust. The trust

specifically stated that the trust was to be terminated only at the death of the last of the three named children. Just because B and C are unhappy with the way the trust is being distributed does not give them the right to terminate the trust, either without the consent of A, or in the face of clearly stated terms of the trust made by the settlor.

Therefore, B and C will likely not be successful in terminating the trust, but as discussed below may have damages due from T.

3) Type of trust established

To a certain extent a trustee's ability to use discretion varies depending on the type of trust that is established. The greatest deference is given to the trustee in two situations, either a support trust or a discretionary trust. Both of these types of trusts, generally, must expressly state that this is the type of trust being established. The purpose of the trust, which is a necessary requirement of a valid trust should determine what type of trust is created.

Here, the T was instructed to distribute in equal shares annually. There was no express statement of purpose that the trust was being set up for distributions based on the discretion of T, nor based on the need for support of A, B, and C. One of these things would have to be established in order to create a special kind of trust that would give T additional discretionary power.

Therefore, the trust is an express trust, neither discretionary nor support, and T will be bound to the fiduciary duties of a trustee discussed below.

Fiduciary duties of trustee breached by T.

A trustee has a number of duties to the beneficiaries of the trust. Among those duties are a) a duty of care, b) a duty to distribute benefits in accordance with the trust, c) a duty to treat beneficiaries equally, d) and a duty to follow the settlor's instructions. Only in certain circumstances is the trustee allowed to use discretion in how to distribute the

income of the trust, namely a discretionary trust or a support trust. The trust duties to the beneficiary are triggered by a trustee accepting their position as such. Where a trustee has breached their fiduciary duties, they may be held personally liable, and/or may be removed from their position by the court. There are additional remedies not pertinent to this case.

Here, S was the original trustee of the trust and named T as the successor trustee. T either expressly, or at the least by conduct, accepted the position as trustee, and therefore was bound by the duties of a trustee to the beneficiaries of the trust.

Therefore, T owed the duties discussed below to A, B, and C, and any breach of such could result in personal liability and/or expulsion from the trustee position.

a) Duty of care

A trustee has the duty to act as a reasonably prudent person in her dealings as trustee. This includes investing reasonably, making reasonable distribution, and all other activities that a trustee conducts in her role as trustee.

Here, T was distributing nearly all of the trust income to A and very little to B and C. A, however, had a very serious medical problem and could not work, while B and C had sufficient assets of their own. The trust however expressly stated that distribution of the income from the trust annually should be in equal shares to each of A, B, and C.

Notwithstanding the express direction given to T as to distribution it is possible that T may have reasoned that S was not aware nor could he foresee the circumstances of A, B, and C and his real purpose was to ensure that the children were taken care of during their lives.

Therefore, T may have been reasonable in her actions as trustee, but it may be a close call because of the express direction given in the trust. T would likely have to use extrinsic evidence to show that she was acting in accordance with S's real purpose.

b) Duty to distribute in accordance with the trust

A trustee has a duty to distribute in accordance with directions given in the trust instrument. This duty is breached when the trustee acts in a way inconsistent with the specific instruction set forth by the settlor.

Here the trust expressly stated to distribute the trust in equal shares annually to A, B, and C. T, however, decided unilaterally to distribute the majority of the trust income to A and very little to B and C. This was clearly inconsistent with the directions given by S in the trust instrument.

Therefore, T breached her duty to act in accordance with the trust, and will be liable to B and C for the difference between what they were distributed and what they were entitled to under the trust.

c) Duty to treat beneficiaries equal

A trustee should give the same care and deference to each beneficiary of the trust, in accordance with the trust purpose.

Here, T gave sympathy to A because of her medical condition, and was less concerned with B and C because they had "sufficient assets of their own." It is not a fair and equal treatment to penalize a beneficiary because they have assets available to them outside of the trust. To hold that such action by a trustee is allowed, would be to disgorge the settlor of the trust of his ability to leave trust assets to whomever he might choose. A trust is not only set up for individuals who are in need (as discussed above this is not a support trust), but rather for the benefit of whomever the settlor feels he would like to distribute benefit to.

Therefore, T has not treated B and C the same as A and will be liable for a breach of duty, again with the remedies as described above.

d) Duty to follow settlor's instructions

A trustee has a duty to follow the instructions given to him be the settlor.

Here, the instruction was to distribute the shares equally to A, B, and C. T did not, as discussed above, do so.

Therefore, T breached his duty to follow instructions of the settlor.

Answer B

1) Dave's Interest in the Trust Assets

Pretermitted Children

Dave was not specifically provided for in the trust instrument set up by Sam. This is because the trust only mentioned Ann, Beth, and Carol. As such, Dave would normally not have any interests in the trust. However, a pretermitted child may be entitled to a stake in the trust if he can show that he is a pretermitted child. A pretermitted child is one who is born or discovered after the execution of a will. In this case, Dave was presumably not born after the execution of the trust and will as he was 25 years old at the time of Sam's death, and Sam executed the trust and will only two years before his death. However, [he] had never known of Dave's existence. Therefore, Dave is a pretermitted child of Sam's, and may be entitled to some of Sam's estate.

A pretermitted child is entitled to what would be his intestacy's share of the deceased's estate. A pretermitted will not be entitled to this share of the estate, however, if the deceased specifically excluded all children from his will, and the intent to do so is shown on the face of the document. That is not the case here, though, as Sam created the trust to distribute income to his three children that he knew about. Additionally, a pretermitted child will not be entitled to any interest in the estate if the deceased provides for the child in another manner, such as an inter vivos trust, that is intended to take the place of the child's intestatacy share. Again, this did not happen here because the inter vivos trust did not provide for Dave. Therefore, because Dave is a pretermitted child, and because none of the exceptions apply that would exclude him from having an interest in the deceased's estate, he is entitled to receive what would have been his intestate share of the estate.

Dave's intestate share of the estate would be equal to 25% of the estate. This is because when Sam died, he had four children and was a widower. Also, there is no mention that Sam had any living siblings or parents. All four of Sam's children survived him, and therefore if Sam had died intestate, each child would receive his share based on a per capita calculation. Therefore, each of Sam's four children would be entitled to 25% of his estate if he had died intestate. The calculation of what Dave is entitled to receive will include the value of the trust. This is because the estate is considered to include assets held by the deceased in a revocable inter vivos trust. Here, the trust that Sam created was revocable and inter vivos declaration in trust. Dave will be able to receive his interest in the estate by abating what was given to the other children. This abatement will occur by operation of law, and would mean that Ann, Beth, and Carol would each have their interest reduced from 1/3 of the estate to 25%.

2) Termination of the Trust

There are several manners in which a trust can be terminated. A trust will be terminated when a specific condition in the writing calls for the termination of the trust and is satisfied. In this case, the trust stated that it would terminate at the death of the last of the three named children. Here, all three of the named children are still alive, and therefore the trust will not terminate.

Further, a trust can be terminated when the stated purpose of the trust has been satisfied and all beneficiaries and trustees agree to end the trust. In this case, this option does not appear to be available. Although there was no stated purpose to the trust, it provided for equal payments to each of Sam's children. Therefore, the purpose of the trust appears to be to provide for Sam's children as long as they are living. This purpose is not satisfied as all three children are still living, and can still be provided for. Also, it is not clear that all the beneficiaries would agree to terminate the trust. Only Beth and Carol are suing to terminate the trust, and there is no indication that Ann or Dave would agree to the termination.

In addition, a trust may also be terminated when all beneficiaries agree to terminate the trust. As stated above, it is not clear that all beneficiaries would agree to terminate the trust because there is no indication that Ann or Dave would agree. Also, the trust has further beneficiaries besides the three named children. The trust provides that after the death of the last of the three named children, the remaining assets of the trust were to be distributed to Sam's then living descendants. This is a vested remainder subject to an open class. The class is vested because it is not subject to any conditions precedent, and it is created in an ascertainable group of people (Sam's living descendants). The interest does not violate the rule against perpetuities, which states that for an interest to be valid, it must vest within 21 years of some life in being at the creation of the interest. Here, the interest will vest when the last of the three named children dies. Therefore the interest must and will vest within 21 years of a life in being at the creation of the interest. Because this class has an interest in the trust, they are beneficiaries of the trust. If the trust is to be terminated due to consent of all the beneficiaries of the trust, they must also consent. There is nothing to indicate that they would consent to the termination of the trust, and therefore Beth and Carol will not be successful in terminating the trust.

Beth and Carol may additionally claim that the trust should be terminated because Tara, the sole trustee, resigned from her position, and because the trust itself does not name any additional trustees. However, this argument will be unsuccessful. Courts will not allow a private express trust to fail for lack of trustee. Instead, a court will merely appoint a new trustee. Here, even though the trust itself does not provide for any additional trustees, the court will appoint someone else to serve as trustee rather than letting it fail.

3) Fiduciary Duties of a Trustee

Beth and Carol will likely be successful in suing Tara, as she has breached several of her duties as the trustee. A trust creates a fiduciary type relationship with respect to property that is held by the trustee for the benefit of beneficiaries. The trustee

must satisfy those fiduciary duties, and if she fails to, may be personally liable for all losses or damages that result to the trust.

Duty of Loyalty

A trustee must satisfy the duty of loyalty by acting in good faith and in the best interests of the trust and beneficiaries. A trustee must not act for her own benefit. Further, a trustee must not favor certain beneficiaries over others. Here, Tara did nothing to show that she was acting for her own benefit. However, Tara was favoring Ann over the other beneficiaries. Tara was doing this because Ann had serious medical problems and could not work, and because Beth and Carol had sufficient assets of their own. Despite her good motives for acting such, though, Tara still violated her duty of loyalty. Her actions specifically favored Ann over the other two beneficiaries. Further, her actions violated the explicit instructions that were contained in the trust and required her to distribute the income from the trust annually and in equal shares to each of the children. Therefore, Beth and Clara could successfully show that Tara breached her fiduciary duty with respect to the trust.

Duty of Care

Additionally, a trustee must satisfy a duty of care by acting in good faith as a reasonably prudent person would with respect to the trust. Here, Tara failed to follow the explicit instructions contained in the trust that required she distribute the income in equal shares to each of the children by providing nearly all the income to Ann. This failure to follow explicit instructions shows that Tara was not acting as a reasonably prudent person would act with respect to the trust. Rather, a reasonably prudent person would follow the instructions contained in the trust. Therefore, Beth and Carol could show that Tara had also breached her fiduciary duty of care.

Other Duties

It is possible that Tara violated other fiduciary duties, such as the duty to invest, the duty to provide accountings to the beneficiaries, the duty to label trust funds, and the duty to keep trust funds separate from other funds. However, the facts do not indicate that Tara breached any other fiduciary duties she had with respect to the trust.

Remedies

Having violated her fiduciary duties, Tara may be personably liable to the beneficiaries. Beth and Carol could sue Tara for damages of the amount of income that they should have been receiving under the trust. In the alternative, Beth and Carol could sue to have a constructive trust created from the excess income that Ann received over what she was entitled to receive from the trust. In such a scenario, Ann would hold the excess income as a constructive trustee, and would be required to return it to Beth and Carol.

Q2 Constitution

City recently opened a new central bus station.

Within the central bus station, City has provided a large bulletin board that is available for free posting of documents. City requires that all free-posted documents be in both English and Spanish because City's population is about equally divided between English- and Spanish-speaking people.

City refused to allow the America for Americans Organization (AAO) to use the bulletin board because AAO sought to post a flyer describing itself in English only. The flyer stated that AAO's primary goal is the restriction of immigration. The flyer also advised of the time and place of meetings and solicited memberships at $10 each.

Does City's refusal to allow AAO to use the bulletin board violate the rights of AAO's members under the First Amendment to the U.S. Constitution? Discuss.

Answer A

Free Speech

Under the 1st Amendment as applied to the states via the 14th A, all persons have the right to free speech. While this right is not absolute, there are only certain instances when the government may infringe upon this right.

Strict Scrutiny

America for Americans Organization (AAO) will argue that strict scrutiny should apply. Normally when a government actor limits or regulates speech based on its content, it will have to survive strict scrutiny analysis. Under this, a law will only upheld if it is necessary to achieve a compelling government interest.

AAO will claim that the city is a government actor so the protections of the 1st A will apply. Further, they will say that the law regulates the content of their speech—that it must include parts in Spanish. The court will probably not agree because it is not regulating what they say, rather how they say it. Therefore, it will take it out of strict scrutiny analysis.

Time, Place, & Manner Restrictions

One way a government may validly regulate speech is by controlling the time, place, and manner of the speech. These regulations are put under less scrutiny because they are not limiting what the people can say but rather how and where they can say it.

Public Forum

A public form is a place that is traditionally open to the public and allows somewhat unrestricted speech. These include parks, sidewalks, open fields. The bus station bulletin boards are likely not considered a public forum.

Limited Public Forum

Limited public forums are not traditionally open to public speech, but the government opens them up to the public. Therefore, they receive the treatment of a public forum while open.

AAO will claim this is a limited forum because the boards, while not traditionally open to public speech, are open here to post documents for free. The court will likely agree.

While open to public speech, a limited public forum may only regulate the time, place, and manner of speech if:

1. Content neutral
2. Alternative channels of communication are available, and
3. Regulations are narrowly tailored to achieve a significant government interest.

1. Content Neutral

As mentioned, AAO will claim that the requirement that all posted documents be in both English and Spanish is a regulation based on the content of the speech. The city will claim it is content neutral because it doesn't matter exactly what you say, just how you say it. City will claim this regulates the manner of the speech.

AAO may counter by saying that since the organization has a primary goal of restricting immigration, the regulation goes to the content of their speech because they're speaking out and trying to make it clear that everyone in America should speak/read English. The court may agree with this point but will likely side with the city because the overall requirement that docs be in English and Spanish is not regulating content of the docs but rather the manner in which their speech is conveyed.

Therefore, the regulation is likely content neutral.

2. Alternative Channels

City will also likely show that AAO has other channels of communication available. They can post on other boards or directly hand out fliers. The English/Spanish requirement appears to only apply to this bus station's bulletin board.

3. Narrowly Tailored to Further Significant Interest

City will also argue that this final element is satisfied. They will say they have a significant interest in communicating with and including the Spanish speaking population, which make up about ½ of the people.

Because it is necessary to communicate with your residents, the court may agree with City that this is a significant interest. AAO may argue that City may have a significant interest in relaying government communications, but its interest shouldn't expand to private communications. Further, the burden it would impose on everyone to translate communications into Spanish would be immense, AAO will say.

Even if the court finds the interest in communicating significant, AAO will say this regulation is not narrowly tailored to it. They'll say they could achieve this in other , less restrictive ways, like making communications around heavily populated Spanish speaking areas be in both English/Spanish.

Narrowly tailored means a tight fit. However, because this is a central bus station, it is likely that many Spanish speaking people use it and therefore need the translation.

Therefore, so long as the court finds this regulation is content neutral and is narrowly tailored to a significant gov interest, it will likely be able to refuse to post AAO's flyer for not being in Spanish.

NonPublic Forum

The city may also try to argue this is a nonpublic forum, where speech has traditionally been able to be severely limited. Such places include military bases, airports, and gov buildings. The court has also found a bus advertising signs to be nonpublic.

City will argue this isn't like the inside of a bus where people cannot escape looking at the ads because this is at the station where they could just leave. Court will agree.

Gov can regulate speech in nonpublic forums [as] long as it is reasonable and viewpoint neutral.

Here, the law is likely reasonable due to the ½ Spanish speaking population. Also it is viewpoint neutral because it doesn't discrim on only one side of a viewpoint. It applies to all communications.

Commercial

City may also try to argue this is commercial speech so they can regulate more. That speech can be regulated if not false/misleading, directly advances substantial gov interest, and narrowly tailored into it.

However, even though it seeks membership, City denied it because not in Spanish too.

Q2

Answer B

Justiciability: In order for a matter to be justiciable there must be standing, the case must be ripe, and not moot. Here, AAO has not filed suit yet, however, it must have standing to raise any objections to the city's requirements.

Standing: standing requires that there be an injury in fact, causation and redressability. Here, AAO is injured as it cannot post its flyers in English only, without potential reprimand. Moreover, the city requirement directly causes its injury, and a court decision in favor of AAO would remedy it. However, an organization will not have standing unless 1) its members have individual standing 2) the interest is germane to the purpose of the organization, and 3) neither the remedy nor the claim would require individual member participation. Here, an individual member who would want to post only flyers in English would have standing, the interest is germane to the purpose of the organization as its primary goal is to restrict immigration and therefore, posting flyers in Spanish would be against its interest and finally, neither a claim or remedy by AAO would require individual member participation.

Ripeness: a court will not award pre-enforcement review for purposes of an advisory opinion. Here, the city has already implemented these requirements. It is unclear whether it is an actual ordinance, regulation or law, but assuming that there are reprimands for violating the city requirements, then the issue is ripe, as AAO would be violating the city requirements if it only posted the flyer in English.

Mootness: there must be a dispute at all times of the litigation. Here, if the city removed its requirement during the litigation the matter would be moot. However, because the city would be free to apply the restriction again whenever it wants there [sic] matter is not moot.

Government conduct: in order for there to be a constitutional violation, there must be government conduct. Here, the city is implementing the requirement; therefore there is government conduct.

First Amendment: the government may not restrict an individual's or organization's freedom of speech unless the speech is not protected or less protected.

Content-Based Restrictions: if a law restricts speech based on its content, whereby it is based on the subject matter or viewpoint of the speech, strict scrutiny review applies. The government must show that the law is necessary to achieve a compelling state interest and it must be the least restrictive means of accomplishing its purpose. Here, AAO will argue that the law is content-based, because it is only allowing flyers that are posted in Spanish and English, and therefore, it is restricting the AAO's message against immigration which would require only posting flyers in English, as posting flyers in Spanish would communicate to the Hispanic community, which is an immigrant population. This is a very far stretched argument. It does not appear that the restriction is based on the subject matter or viewpoint of the speech. AAO could post the same flyer in Spanish stating that its primary purpose is to restrict immigration and advise of the time and place of meetings. Therefore, this argument will fail.

Content-Neutral Restrictions: if a law is content-neutral, then the government must show that the law is substantially related to an important government purpose and is narrowly tailored. As discussed above, the restriction is not content-based, rather, it is content-neutral. The city will argue that the restriction is substantially related to the purpose of communicating to all individuals in its population. The city's population is about equally divided between English and Spanish speaking people, and therefore it is has an important purpose of making sure that messages posted on the board for free will be communicated to all its population. Moreover, the city has narrowly tailored the restriction by not requiring that people post the flyers in multiple languages, but only in two. A court will likely uphold the restriction.

Prior Restraint: if a law restricts speech prior to its communication there is a prior restraint and strict scrutiny applies. The law must be reasonably, narrowly tailored, and definite. Moreover, the government must seek a prompt injunction, and there must be a prompt determination of the validity of the law. Here, AAO will argue that this restriction is a prior restraint on speech. It will argue that because it is required to post flyers in two different languages and expend the money to have the English flyer translated into Spanish it is a prior restraint on speech. As discussed above, however, the restriction is not a prior restraint on speech. The restriction is allowing speech; however, it is requiring that it be posted in two different languages. This is not a prior restraint because it is not prohibiting speech.

Vagueness: a restriction is unconstitutional if it is vague and a reasonable person could not understand the type of speech that is being regulated. Here, the restriction is not vague; it is requiring that all free-posted documents be in both English and Spanish. Therefore, the restriction is valid.

Overbroad: the restriction is unconstitutional if it restricts more speech than is constitutionally allowed. Here, the restriction is not overbroad because it is only requiring free-posted documents to be in both English and Spanish; therefore, it is valid.

Symbolic Speech: the government may restrict symbolic speech when it is narrowly tailored to achieve an important state interest, and it is not directed at the suppression of speech. The burden of proof is on the government. Here, posting flyers will be deemed symbolic speech as they communicate a message. As discussed above, the government will argue that it has an important state interest because it want its entire population to understand the flyers that are posted. The restriction is narrowly tailored as it is only requiring the flyers to be in the languages that are dominant in the population, and the restriction is not directed at the suppression of speech. Rather, it provides the opportunity of communicating to the entire population. AAO will argue that the speech is directed at the suppression of speech, because it is directed at the suppression of AAO'S message against

immigration. However, this argument will likely fail as AAO can communicate this same message of its purpose in restricting immigration in Spanish; therefore, the restriction would not suppress AAO's message.

Public Forum: public forums are areas which the constitution requires that the government open to speech. These areas typically includes [sic] parks and sidewalks. Here, the restriction is taking place within the central bus station, wherein the city has provided a large bulletin board that is available for free posting of documents. Because the bulletin board is within the central bus station which is likely government owned this forum will not be deemed a public forum, as it is not a constitutionally required forum for the government to open up to speech. Nevertheless, if it were to be considered a public forum the following analysis would apply:

When there is a content-based restriction the government, strict scrutiny applies, and the government must show that the restriction is necessary to achieve a compelling state interest and it is the least restrictive means of accomplishing its interest. Here, as discussed above it is unlikely that the court will rule this restriction to be content-based, because it is not regulating the subject matter or viewpoint of the language.

When the restriction is content-neutral and is a time, place and manner restriction, the government has to show that the restriction is narrowly tailored to achieve an important state interest and leaves open alternative channels of communication. Here the city will argue that it is only regulating free-posted documents and it is only regulating the manner in which it is posted by requiring it to be in English and Spanish. The city will argue that it has an important purpose in making sure that all its population can understand the message on the board, and it is narrowly tailored to achieve that purpose by only requiring that the free-posted documents be in Spanish and English. Furthermore, it leaves open alternative methods of communications because it is not restricting any speech, but rather it is requiring more speech.

Designated/Limited Public Forum: this is a forum which the government is not required to open up to speech, but it has chosen to open up to speech regardless. The same analysis as the public forum applies as to designated public forums. Content-based speech must pass strict scrutiny, while in content-neutral speech the government has to show that the restriction is narrowly tailored to achieve an important state interest and leaves open alternative channels of communication.

It is likely that the bulletin board within the central bus station will be considered a designated public forum. The government is not required to place a bulletin board in the bus station for organizations and individuals to post flyers, nor is it required to open the central bus station to speech at all; nevertheless it has chosen to do so.

When there is a content-based restriction the government, strict scrutiny applies, and the government must show that the restriction is necessary to achieve a compelling state interest and it is the least restrictive means of accomplishing its interest. Here, as discussed above it is unlikely that the court will rule this restriction to be content-based, because it is not regulating the subject matter or viewpoint of the speech. AAO can get the same message across in both languages.

When the restriction is content-neutral and is a time, place and manner restriction, the government has to show that the restriction is narrowly tailored to achieve an important state interest and leaves open alternative channels of communication. Here the city will argue that it is only regulating free-posted documents and it is only regulating the manner in which it is posted by requiring it to be in English and Spanish. The city will argue that it has an important purpose in making sure that all its population can understand the message on the board, and it is narrowly tailored to achieve that purpose by only requiring that the free-posted documents be in Spanish and English. Furthermore, it leaves open alternative methods of communications because it is not restricting any speech, but rather it is requiring more speech.

Nonpublic forum: A nonpublic forum is a forum wherein the government may constitutionally restrict speech. These include military bases, sidewalks next to a post office, ad space on buses, and solicitation for money in airports. The restriction, however, must be viewpoint neutral and must pass the rational basis test. Here, AAO would have to argue that the restriction is not rationally related to a legitimate government interest.

The city will argue that the central bus station is a nonpublic forum and that the government must not open it to speech. Although the central bus station is likely to be deemed a nonpublic forum, the city has changed the status of the forum by providing a large bulletin board and making it available for people to post their flyers and messages. By doing so the city transformed the public forum to a nonpublic forum. However, the city may also argue that because AAO is soliciting money ($10 for its membership) that it is a nonpublic forum as it can restrict speech of solicitation for money in bus stations as it can in airport. However, this argument is unlikely to apply since AAO is not directly soliciting money by standing at the central bus station and asking for money, rather, only if individuals show up at the time and place of the meeting would it ask for membership fees. At that point, the government would be unable to regulated [sic] the speech. Nevertheless, assuming that the court would deem that this is a nonpublic forum, which it will not, the following analysis would apply.

AAO would argue that the law is not rationally related to a legitimate purpose. However, the city can easily counter this by arguing that its purpose is to have its entire population be able to read the flyers. Therefore, AAO's argument will fail. AAO will then argue that the restriction is not viewpoint neutral as it restricts only anti-immigration speech and not pro-immigration speech. This argument will again fail, as AAO can post the same message of anti-immigration in both languages and it would not deter its purpose. Therefore, AAO would not prevail under this argument.

Freedom of Association: the government may not punish individuals for joining any association unless the individuals knows of the 1) unlawful purpose of the association, 2) the individual actively participates, and 3) the individual intends to advance the illegal purpose. Here, AAO's primary goal is the restriction of immigration. This is not an unlawful purpose; therefore, the government may not punish anyone for their freedom to associate with the AAO. AAO will argue that it is violating its freedom of association by restricting its message. It will argue that the requirement is unconstitutional because the AAO is an intimate association and it would chill its expressive activities. However, this argument is unlikely to prevail as argued above, because AAO's message of anti-immigration can be communicated in multiple languages and would not violate its freedom of association rights.

Equal Protection/Substantive Due Process: AAO would also have potential argument under the equal protection and substantive due process clause of the 14th Amendment. The equal protection requires that the government afford its citizens and organization equal protections of the law. If the law does not discriminate against a suspect or quasi-suspect.

Q3

Q3 Evidence

Paul sued David in federal court for damages for injuries arising from an automobile accident.

At trial, in his case-in-chief, Paul testified that he was driving westbound, under the speed limit, in the right-hand lane of a highway having two westbound lanes. He further testified that his passenger, Vera, calmly told him she saw a black SUV behind them weaving recklessly through the traffic. He also testified that, about 30 seconds later, he saw David driving a black SUV, which appeared in the left lane and swerved in front of him. He testified that David's black SUV hit the front of his car, seriously injuring him and killing Vera. He rested his case.

In his case-in-chief, David testified that Paul was speeding, lost control of his car, and ran into him. David called Molly, who testified that, on the day of the accident, she had been driving on the highway, saw the aftermath of the accident, stopped to help, and spoke with Paul about the accident. She testified further that, as soon as Paul was taken away in an ambulance, she carefully wrote down notes of what Paul had said to her. She testified that she had no recollection of the conversation. David showed her a photocopy of her notes and she identified them as the ones she wrote down immediately after the accident. The photocopy of the notes was admitted into evidence. The photocopy of the notes stated that Paul told Molly that he was at fault because he was driving too fast and that he offered to pay medical expenses for anyone injured. David rested his case.

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

1. Vera's statement? Discuss.

2. The photocopy of Molly's notes? Discuss.

Answer according to the Federal Rules of Evidence.

Q3

Answer A

I. VERA'S STATEMENT

The first issue is whether or not Vera's statement to Paul claiming that the black SUV behind them was weaving recklessly through the traffic. Evidence is admissible if it is logically and legally relevant and not subject to any restrictions in the federal rules of evidence.

A. Relevance:

Logical Relevance: Evidence is logically relevant if it tends to prove any fact of consequence in the trial more or less probable. Here, Paul is suing David for injuries arising from an automobile accident. A central issue in this case will be who was at fault for the automobile accident that caused the injuries. The fact that David drives a black SUV and the fact that Vera observed a black SUV weaving recklessly through traffic tends to prove that David was driving recklessly and therefore was at fault for the accident. This evidence is logically relevant.

Legal Relevance: If evidence is logically relevant than [sic] it also must be legally relevant. Legal relevance is determined by whether the evidence is more prejudicial than probative. This requires a balancing test. Here, the evidence is probative because as mentioned it illustrates how one of the parties in this case was driving before the accident. David will argue that it is prejudicial because Vera called him "reckless" and that this statement might cause a jury to cast judgment on his driving. A judge will determine that the probative value outweighs any slight prejudice this evidence may include and is therefore legally relevant.

A court may also exclude evidence that is not legally relevant because it would waste time or confuse the jury. However, this evidence does not require any additional time to be spent to prove additional elements and is not confusing to a jury.

B. Lay Opinion:

David will argue that the statement should be inadmissible because it contains a lay opinion as to the nature in which he was driving his vehicle. Lay opinions are admissible evidence if they are (1) helpful to the jury and (2) do not require any special analysis. Here, if Paul is suing on a negligence theory, David might argue that Vera stating that he was driving recklessly is allowing the witness to testify as to an element of the cause of action. However, David will be successfully [sic] in arguing that Vera could easily see the car driving and that her expression that the car is driving recklessly is merely her opinion on how the driver was swerving through lanes. This evidence will be rendered inadmissible because it is a lay opinion.

C. Hearsay

Paul will argue that Vera's statement is inadmissible because it is hearsay. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. As a general rule, hearsay is inadmissible because the validity of out-of-court statements is questionable and unreliable. Hearsay is inadmissible unless a valid exception applies. David will argue that the following exceptions apply:

(1) **Present Sense Impression:** A present sense impression is when someone makes a statement about an event they are perceiving at the moment. Present sense impressions are exceptions to the hearsay rule, because they are presumed to be reliable. When someone makes a present sense impression, they have no motivation to lie or misstate what is actually occurring. The facts state that just 30 seconds after Vera made this statement that a black SUV hit Here [sic], Vera simply stated at the time of observing the black SUV that she saw that SUV weaving recklessly through traffic. Therefore, it will be admissible as a present sense impression.

(2) **Present State of Mind:** Another hearsay exception are statements made by individuals that express their current state of mind. Here, Paul will argue that when Vera made the comments about the SUV, she was expressing what she thought

and felt at the time. This statement would also be admissible under the Present State of Mind exception.

(3) **Excited Utterance**: Paul may argue that the excited utterance exception applies as well. An excited utterances [sic] is a statement made at the time of a shocking or exciting event that is made before the shock or excitement as [sic] worn off. Here, David will argue that the swerving of an SUV was not a shocking or exciting event. Further, the facts state that Vera calmly told Paul about the SUV which illustrates that she was not under the shock or excitement of any event. Therefore, the excited utterance exception does not apply.

(4) **Prior Statement:** Prior statements made by individuals that are unavailable to testify sometimes qualify as an exception to the hearsay rule. However, the federal rules of evidence require that the prior statement be made under oath in the course of some type of previous testimony. This statement was made in the car to Paul and is therefore not a valid exception under the prior statement rule.

(5) **Dying Declaration**: Paul may attempt to argue that Vera's statement qualifies under the Dying Declaration exception. This exception states that under some circumstances, statements made under the impression of impeding death are valid exceptions to the hearsay rule. However, the federal rules of evidence state that these statements are only admissible in criminal homicide cases. Moreover, the statement was not made with the knowledge of impending death because the car had not been hit yet and Vera did not know that she might be dying soon. Therefore, it would not qualify under this hearsay exception.

(6) **Federal Catchall Exception**: The federal rules of evidence also allow a catchall exception for statements that are made under circumstances of trustworthiness. Paul will argue that Vera did not have any motivation to lie or to make this information up because it happened at the time of the accident. He will also argue that because Vera is dead there is no other way for this evidence to be admitted for trial. The judge would likely not apply the federal catchall exception because the Present Sense Impression exception is a stronger argument, and you only need one valid exception to admit the evidence.

In conclusion, Vera's statement would be admissible evidence as a present sense impression.

II. PHOTOCOPY OF MOLLY'S NOTES

The issue here is whether or not the photocopy of Molly's notes that state that Paul told her he was at fault because he was driving too fast and that he offered to pay medical expenses can be admitted into evidence.

A. Capacity to Testify:

A witness may testify if she has personal knowledge of the event in question, she recalls the event in question, she has the ability to communication [sic] these perceptions, and she takes an oath to tell the truth. Here, Molly has personal knowledge of the facts perceived because she was there the day of the accident, saw what happened, and remembers that she took notes describing the day's events. While she does not recall the events at this moment, this can be satisfied in other ways that are discussed below. She has the ability to communicate and presumably took an oath prior to testimony.

B. Authentication of Document

Before any documents or other types of recordings are entered into evidence, they must be authenticated and the proper foundation must be laid. Here, Molly has testified that she was there on the day of the accident and they [sic] she remembers that she carefully wrote down notes of what Paul had said to her. Therefore, there is a foundation for the photocopy of the notes. Moreover, David showed Molly the copy of the notes while she was on the stand and she identified them as the ones that she took that day. This would suffice as authentication.

Documents being admitted into evidence are also subject to the Best Evidence Rule. The Best Evidence Rule states that if a document is going to be admitted into evidence, then the original must be produced or the party must account for why the original cannot be produced. The federal rules of evidence have accepted photocopies of documents as satisfying the best evidence rule.

Therefore, the document has been properly authenticated and a photocopy will suffice as a representation of the original.

C. Relevance

Logical Relevance: (See rule statement above.) Here, Paul's statements are logically relevant. They tend to prove whether or not Paul was at fault in the accident more probable than not. Whether or not Paul was at fault or not is a fact of consequence to this case since a central issue is who was at fault to the accident.

Legal Relevance: (See rule statement above.) These statements are more probative than prejudicial. There are not statements that might prejudice Paul because they are statements that Paul himself stated.

Offer to Pay Medical Expenses: However, there are some types of evidence that are not admissible for public policy reasons under the rule of legal significance. For example, evidence of insurance, subsequent remedial repairs, and offers to settle are inadmissible because as a society we want to promote people to carry insurance, rectify dangerous situations, and settle cases as not to clog the courts. Another such category is when one party offers to pay the medical expenses of the other party. Here, there are two statements that Paul made. The first is that he was at fault because he was driving too fast. The second is his offer to pay medical expenses for anyone injured. The ferenda rules of evidence will sever these two statements. Because the offer to pay medical expenses is inadmissible but the other statements made in connection with the offer are admissible.

D. Dual Hearsay:

(See rule statement above.) The issue with the photocopy of Molly's notes is that there are two levels of hearsay. In order for a document that contains two levels of hearsay to be admissible evidence, there must be valid exceptions for both statements.

a. First Level of Hearsay: Paul's Statements.

The first level of hearsay is Paul's statements that he made to Molly. These statements were made at the scene of the accident presumably and thus are out of court statements. David will argue that the following exceptions apply:

(1) Party Admission: An admission made by a party to the case is admissible because under the federal rules, it constitutes non-hearsay. Here, Paul admitted fault to the accident. He stated that he was driving too fast and explicitly said that he was at fault. Thus, this is a valid party admission and would be admitted as non-hearsay.

(2) Statement Against Interest: Another category of non-hearsay is when a party makes a statement against interest. Statements against interest are any statements that an individual makes that are against his pecuniary interest. Here, stating that one is at fault for an auto accident would be a statement against his interest. Therefore, this exception would apply.

b. Second Level of Hearsay: Molly's notes

The second level of hearsay is the notes that Molly wrote down on the paper. Molly wrote those notes on the day of the accident and not while in the courtroom. Therefore, the notes are Molly's out-of-court statements. David will argue that the evidence should be admitted because of the following two exceptions:

(1) Prior Recollection Recorded: Courts will admit prior recollection recorded if four elements are met. First, the witness must currently not be able to recall the facts that are in the writing. The facts state here that Molly testified that she has no recollection of the conversation. The second is that the writing be created by the witness or adopted by the witness. Here, Molly herself wrote down the notes. Third, the writing must have been made when her memory was still fresh. Here, Molly created the writing as soon as Paul was taken away in the ambulance; therefore, we can assume that her memory was still fresh. Fourth, the writing must have been made under reliable conditions. Here, there is no evidence of an alternative purpose that Molly created the writing except for the document [sic] the events as they occurred. If all of these elements are satisfied, the recollection may be read into evidence; however, the photocopy should not be admitted into evidence.

(2) Present Recollection Refreshed: A party can refresh a witness' memory with virtually any document. Therefore, if Molly did not recall the events, David could have shown Molly the document and allowed her to look over the writing. If this refreshed her memory, then she could testify as to her knowledge of the events. In this situation, the writing would normally not be entered into evidence unless the opposing party suggested that it be admitted. However, this does not apply because Molly was shown the document, but then did not review it or subsequently answer questions based off of her review.

In conclusion, the photocopy should not have been entered into evidence because even though there were valid hearsay exceptions applied, the appropriate way to admit the evidence would have been to read the evidence into the record as opposed to giving the jury the photocopy.

Answer B

The case between Paul in [sic] David is a civil case, which means there are a few different rules than when you are in a criminal case. This case is about injuries arising out of an automobile accident in which Paul is suing David. At issue is going to be who is at fault for the injuries and the accident.

1. Did the court err in admitting Vera's statement?

Vera's statement was made while she was a passenger in the car with Paul on the day of the accident. She stated in a calm manner that she saw a black SUV behind them weaving recklessly through the traffic.

Logical Relevance

All evidence must be relevant to be admissible. This includes tending to prove or disprove a fact that is of consequence. Even if evidence is relevant it may be inadmissible if it is not legally relevant.

Here, Vera's statement is being offered to prove the identity of a vehicle that she observed driving recklessly, which is the same vehicle that David drives. It is also relevant to prove that Paul had notice/was aware of the black SUV driving radically. Additionally, it is relevant to prove that David was at fault and was driving recklessly.

So although Vera's statement has logical relevance its probative value must be determined.

Legal Relevance

Evidence that is logically relevant may be excluded if it will create an unfair prejudice. The court has discretion as to whether or not to exclude the evidence. The test to determine whether the evidence should be excluded on a legal relevancy

ground is whether the unfair prejudicial effect substantially outweighs the probative value.

Here, the prejudicial effect will be that David will be determined to have driven recklessly by weaving in and out of traffic. However, this is highly probative and is what is at issue and being determined in the case, so Vera's statement will not be excluded on grounds of legal relevance.

Even relevant evidence that is otherwise admissible can be inadmissible when it is in violation of one of the federal rules of evidence.

One of the objections that David could make regarding the admissibility of this evidence, besides relevancy, would be hearsay.

Hearsay

Hearsay is a rule which prevents out-of-court statements from being admitted into evidence, if the statement is being offered for the trust of the matter asserted. The reason hearsay evidence is prohibited is because it was not subject to cross-examination and cannot be determined if the statement was fabricated or reliable. Since the information in Vera's statement about a black SUV driving recklessly would be helpful to a jury or trier of fact and is being offered to prove that the reckless driving of the SUV did in fact take place it is being offered for its truth and should be excluded unless a hearsay exception or exemption applies.

Hearsay Exceptions

Hearsay exceptions are statements that are made out of court and are admitted for their truth but we allow them in for other reasons. Here, Paul will try and argue that Vera's statement should get in under several different exceptions.

Present Sense Impression

A present since impression is an exception to hearsay because it is considered to have reliability given the fact that the statement is made while or immediately after

perceiving an event. There seems to be little time to fabricate a statement when it is made while you are perceiving it.

Here, Paul is going to argue that Vera made the statement while still in the car when she saw the black SUV weaving recklessly through traffic. She was currently perceiving the SUV driving in such a manner and made the statement while making the observation. It is of no matter that she made the statement calmly because this does not negate that she had just observed the SUV driving recklessly.

David might try and counter that Vera did not make the statement immediately when she observed the car driving recklessly, but there are no facts to support that she didn't make the statement while she was observing. Also statements are allowed to be made immediately after observation, because there is still the indication that there is not time to fabricate. Absent any facts showing that Vera waited any amount of time after observing the SUV driving recklessly and telling Paul this statement could come in under the present sense impression.

Excited Utterance

Excited utterance allows hearsay evidence to come in if the statement was made while under the stress or effect of an exciting or startling event. Here, Paul might try and claim that Vera commented on the SUV's reckless driving while she was still under the stress of the observation. However, David will have a valid argument against this contention because Vera calmly told Paul about the SUV and did not seem to be effected by it in a manner to justify an excited utterance.

Former Statement

Former statements can be admitted as long as the declaring is unavailable. Unavailability of a declaring can be because of death, not able to locate after reasonable attempts, and/or incapacity. Here, Vera is dead so she is unavailable. Former statements that are made under oath at a previous proceeding can be admitted for impeachment purposes and to prove the truth of the matter asserted. Here, Vera's statement was not made under oath at a formal proceeding and could

only be used for impeachment. However, since there is no one to impeach because Paul is offering his case and chief [sic] as a plaintiff, thus going first, this statement cannot be admitted as a former statement even though Vera is unavailable.

Dying Declaration

Dying declarations are allowed in criminal homicide cases as well [as] civil. Here, we are in a civil case so a dying declaration is allowed as long as the declaring is unavailable, they do not have to actually die, they made a statement regarding the cause of their death, and they made the statement under the belief that death was impeding or imminent. Here, there is no valid argument to support that Vera's statement was a dying declaration since she made the statement prior to Paul's car being struck by the black SUV and prior to her death. Even though Vera is now unavailable she did not make a statement thinking she was going to die or describing the cause of her death and this exception is not available for Paul to get Vera's statement admitted.

Personal Knowledge

Personal knowledge is required for a witness to be able to testify as to an event. While Paul did not personally observe the black SUV driving recklessly as Vera did, he did perceive Vera's statement with one of his 5 senses and thus has personal knowledge that the statement was made and the manner in which it was made.

Hearsay Exemptions

These statements are not hearsay because they are not admitted to prove the truth of the matter and are admitted for a different purpose. Here, Paul is going to argue that Vera's statement should come in as non-hearsay under several different grounds.

Effect on the hearer

Effect on the hearer is not being offered to prove the truth of the matter and thus is not hearsay. This is offered to show the effect the statement had on the person hearing the statement. Here, Paul could assert this statement is being offered to

show that Paul was aware of a black SUV that was driving recklessly. Since Paul's driving is also being put at issue by David this is important for Paul to prove that he was on alert of the black SUV driving recklessly that struck him 30 seconds after hearing the statement from Vera.

Conclusion

Because this statement could fall under the present sense impression exception and effect on the hearer exemption to hearsay this statement cannot be excluded on hearsay grounds and the court properly admitted Vera's statement.

2. Did the court err in admitting the photocopy of Molly's notes?

Logical/Legal Relevancy

Molly's notes are relevant to prove that Paul made a statement accepting fault and offering to pay medical bills. They are being offered by David for this matter and to prove that it is true as well. Although relevant to determine fault the evidence must also not be unfairly prejudicial.

Policy reasons to exclude relevant evidence

Certain evidence although relevant will be excluded because of public policy reasons. Courts want to encourage parties to fix wrongs, settle cases, and help each other out. Here, Paul will argue that the notes should be excluded because they were an offer to pay medical bills. Offers to pay medical bills cannot be offered to show fault of a party.

Although offers to pay medical bills of the injured [sic] is not allowed into evidence under the federal rules of evidence, the FRE severs statements made in connection with the offers and allows them into evidence. Here, Paul made the statement that he was driving too fast, was at fault, and offering to pay medical expenses of anyone injured.

The statements regarding Paul driving too fast and being at fault will not be excluded under this policy reason but may be excluded on other grounds (see discussion below).

Error in allowing an offer to pay medical expenses

So in regards to the court allowing in a photocopy of a document that included the offer to pay medical expenses there is an error because public policy seeks to keep these sorts of statements excluded.

The statement regarding Paul driving too fast and being at fault

The photocopy of Molly's notes being admitted constituted a recorded recollection and is actual evidence being admitted. All tangible, physical, non-testimonial evidence that is being admitted must be authenticated in order to be admitted.

Authentification

Here, Molly is on the stand claiming that she wrote the notes immediately after the accident and that the notes are hers. This is sufficient to authenticate the notes because Molly is claiming they are what David purports them to be and she is on the stand and capable of being questioned as to the notes' authenticity.

Refreshing Recollection

Anything can be used to refresh a witness's recollection. Here, David is attempting to use notes to refresh Molly's recollection. Witnesses must be shown whatever is attempting to refresh their recollection in order to see if the item is successful in helping them recall. Whatever is used to refresh a witness's recollection may be offered into evidence by the opposing party.

Here, it is not Paul offering the notes used to refresh Molly's recollection into evidence; it is David, which means he is attempting to offer the notes as a recorded recollection.

Paul may argue that Molly was not given the notes before claiming that her memory failed and thus the rules regarding admitting record recollection evidence were not followed. Generally a witness should be given the document to review silently and then if they still cannot remember the document may be admitted into evidence. Paul may have a valid argument here since the facts do not say that this was done. It appears from the facts that Molly before even reviewing the document said she couldn't remember, then it was moved into evidence.

Record Recollection

Documents offered into evidence that were used to refresh a witness's recollection are permitted so long as the witness's memory has failed to be refreshed, the witness is on the stand and able to be crossed and authenticate the document, the witness accurately prepared the document close in time to perceiving the events, and had personal knowledge of the thing to which they recorded information about.

Here, Molly did testify that she was unable to recall the conversation. She is on the stand and subject to cross and questioning. And she testified that she carefully wrote down the notes as soon as Paul was taken away in the ambulance; additionally she had personal knowledge of the conversation with Paul since she heard the conversation herself. Given these facts David would be able to properly admit the evidence as record recollection as long as no other restrictions exist permitting the admissibility of the evidence.

Best Evidence Rule

The Best evidence rule is a rule which calls for the document itself to be admitted when someone is on the stand trying to testify as to the contents of the document. Here, Molly is trying to recall a conversation and the notes contain information about the conversation. Since the notes are her own memory and not of legal significance the best evidence rule does not apply.

However, Paul will try and assert that there is a problem with the best evidence rule as well as authentification because the actual note itself was not admitted and a

photocopy was admitted. Paul will try and argue that unless David can show a justifiable reason why a photocopy of the note and not the actual note was admitted there is a problem/violation with the best evidence rule. David will successfully counter that argument by claiming that a photocopy, properly authenticated, is an acceptable document to satisfy the best evidence rule.

Hearsay/ Multiple Hearsay

See rule above and discussion above. Here we also have a case of multiple hearsay since there is a statement within a document both made/prepared out of court and being offered for the truth of the matter asserted. So both the statement and the document must meet their own separate hearsay exception or exemption. As discussed above the document itself can get in under the record recollection rule but there needs to be an exception for the actual statements.

Party Admission-

Party admissions are considered non-hearsay and are statements offered by a party opponent made by the other party. These statements do not have to be against interest necessarily but they must be made by one party and offered by the other. Here David is attempting to offer statements that Paul made, and although not required, are against his interest and regard his fault in the accident. This could be a valid ground for admitting the statements made by Paul.

Statement against interest

David may try and assert that the statements made by Paul can come in under a statement against interest exception to hearsay. However, this exception requires that the declaring be unavailable which is not the case here, since Paul is the plaintiff in the matter and is available in court.

Conclusion

The court was likely proper in admitting the evidence because the document can come in under the record recollection and the statement is admissible as a party admission.

FEBRUARY 2012
ESSAY QUESTIONS 4, 5 and 6

California Bar Examination
Answer all three questions.

Your answer should demonstrate your ability to analyze the facts in question, to tell the difference between material and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles; instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

Q4

Q4 Business Associations

Testco, Inc. conducts market surveys, and is solely owned by Amy, Ben, and Carl. Each paid $50 for one-third of Testco's no-par shares. Amy and Ben, respectively, are Testco's president and secretary and its only two directors. Carl holds no office and is not involved in any aspect of Testco's business. Amy and Ben are scrupulous about holding directors' meetings to conduct corporate business and to make monthly distributions to the shareholders of almost all cash on hand. As a result of the latter practice, Testco has little cash on hand and frequently finds itself in the position of negotiating extensions for payment of its debt.

While Ben was on vacation, Examco called Amy, asking to enter into a one-year contract with Testco. Amy said that if Examco would agree to a ten-year contract, Testco would grant its standard fifty-percent discount. Examco agreed, and Amy signed the contract in the following manner: "Testco, by Amy, President." When Ben returned, he said that he had thought for some time that Testco's standard fifty-percent discount was unwise, and convinced Amy to revoke the contract with Examco.

Examco wants to sue Testco, Amy, Ben, and Carl for damages. If found liable, Testco will not be able to pay.

On what theory or theories may Examco bring an action for recovery of damages against:

1. Testco? Discuss.

2. Amy, Ben, and Carl as individuals? Discuss.

Q4

Answer A

Examco v. Testco

Breach of Contract

If Testco is to be found liable to Examco, it will be on a breach of contract theory. Breach of contract occurs where there is a valid contract, a breach, and then damages as a result of the breach. A valid contract exists when there is an offer, acceptance, consideration, and no defenses to contract formation.

Here, Examco asked Amy to enter into a ten-year contract, which Amy then signed on behalf of Testco. Amy agreed that in consideration for the length of time of the contract, that she would give Examco a fifty percent discount. Thus there was a valid contract between both Examco and Amy on behalf of Testco.

A breach of the contract occurred when Amy anticipatorily repudiated the contract between the two companies. It is likely that Examco will receive damages as a result of not getting the benefit of their bargain with Testco; thus there is a valid action for breach of contract. However, Testco will only be bound to this contract if Amy had authority to enter into the agreement with Examco (see below).

Agency

Agency is where a principal with capacity manifests assent that an agent act on behalf of the principal for its benefit and subject to its control followed by the agent manifesting assent to do the same. Here, Amy as president of Testco was an agent of the company since she was appointed to the position of president (assent), working for the benefit of the company, and subject to the control of the board of directors. Thus

Amy was an agent of Testco and Testco will be liable on the contract with Examco if she had some form of authority to enter into the contract.

Amy's Authority

A principal is liable on the contracts entered into by their agent on their behalf so long as the agent has authority. Authority can come in three forms: actual authority, apparent authority, and ratification.

Actual Authority

Actual authority is the authority that the agent reasonably believes that they have based upon the manifestations of the principal. Actual authority can be express or implied.

Express Actual Authority

Express actual authority is the authority given from the four corners of the agency agreement.

Here, there is no agency agreement between Amy and Testco; however, there is probably some sort of express manifestation of assent in the bylaws or articles of incorporation of Testco. Usually in the corporate setting, when a contract such as this is entered into, the board of directors will usually vote to pass a resolution to give the president of the company the authority to enter into the contract. However, there was no such board resolution here since Amy did not consult with Ben prior to signing the contract. Since there are no facts going to express authority, a different form of authority must be found to bind Testco to the contract with Examco.

Implied Actual Authority

Implied actual authority is the authority that the agent reasonably believes that they have based upon necessity in order to carry out their express authority, customs of the position held by the agent, and by prior dealings with the principal.

Here, Amy, as president of Testco, would likely have implied actual authority to enter into the Examco contract by virtue of her position as president of the company. Presidents of corporation[s] customarily have the authority to enter into binding contracts with other companies. Additionally, it is necessary for a president to enter into contracts with other companies in order to make the corporation profitable. Making the corporation profitable is a duty of the president of the company and thus it is necessary that Amy entered into this contract in order to fulfill that duty.

Testco will argue that, although Amy was president and had authority to enter into smaller contracts, this contract was different in the fact that it went ten years into the future and that Amy was giving such a huge discount. Testco will argue that this sort of contract required express board resolution and thus Amy could not have reasonably believed to have authority to enter into it. However, the facts state that Amy gave the "standard fifty-percent discount;" thus it seems like this was a regular occurrence of the corporation to enter into contracts of this nature. As such there was implied actual authority.

Apparent Authority

In the event that the court finds that there was no actual authority, they could find apparent authority to bind Testco to the contract. Apparent authority is the authority that a third party reasonably believes that the agent possesses based upon the manifestations of the principal. One form of manifestation by the principal would be the position that the principal has placed the agent in is a position that is usually associate[d] with the grant of authority.

Here, Examco can successfully argue that Amy had apparent authority do [sic] to her title of president of Testco. When they were entering into the contract they dealt

directly with the president of the company. Additionally when the contract was signed, it was signed "Testco, by Amy, President". As such, it would have been reasonable for Examco to believe that Amy had apparent authority to enter into the contract.

Ratification

Another form of authority is ratification. Ratification occurs where after the agent has entered into a contract, the principal has knowledge of it and accepts its benefits. Here, when Amy told Ben about the contract, he told her to immediately revoke it. Thus there was no board resolution ratifying the contract with Examco and there will be no finding of authority based upon ratification.

Conclusion

Since there is at least the finding of apparent authority on behalf of Amy for Testco, Testco is bound to the contract with Examco and will be liable to them on a theory of breach of contract.

Examco v. Amy, Ben, and Carl as Individuals

Liability of Shareholders

Shareholders of a corporation are only personally liable for the cost of their shares of stock in the corporation. They are not personally liable for the corporation's debts, liabilities, or obligations. Thus, Amy, Ben, and Carl will not be liable to Examco personally unless the corporate veil can be pierced (see below).

Piercing the Corporate Veil

In order to recover from the personal assets of the shareholders of Testco, Examco will have to make a sufficient showing to pierce the corporate veil. The corporate veil is pierced based upon a variety of factors. These factors include whether

there was fraudulent conduct by the shareholders, whether the corporation is undercapitalized, whether the corporation is simply an alter ego of the shareholders, and whether the creditor of the corporation is an involuntary creditor.

Fraud

Fraud is the misrepresentation of a material fact known to be false with the intent to induce some action upon another where the other suffers damages. Here, the facts do not suggest that Amy made any misrepresentations when entering into the contract with Testco; thus a pierce of the corporate veil will not be achieved on the ground of fraud.

Alter-Ego

A corporation acting as the alter ego of the shareholders will be found where the shareholders forgo the usual formalities of corporate status. Here, Testco has officers and a board of directors; however, the facts state that Amy and Ben are "scrupulous" about holding director's meetings to conduct business. Thus it could be seen that they have foregone the formalities of a usual corporation. Thus this factor weighs in favor of a pierce of the veil.

Undercapitalization

Undercapitalization of a corporation occurs where the corporation does not keep enough surplus cash on hand in order to pay the foreseeable liabilities of the corporation. Here this factor weighs heavily on favor of piercing the veil since all of the extra cash on hand was distributed to the shareholders. It was foreseeable that eventually a contract would be breached or some mistake would be made causing liability on behalf of Testco. Thus since there was not enough cash on hand to pay the liability to Examco, the veil may be pierced.

Involuntary Creditor

An involuntary creditor is usually a tort victim or tort judgment holder. Here, Examco had every opportunity to inspect records and the financial security of Testco prior to entering into the contract. Thus they were not an involuntary creditor.

Carl's Liability

Usually a shareholder that is uninvolved with the daily operations of the company will not be held liable as a result of veil piercing. Here, Carl did not participate in any of the activities of Testco except to receive distributions from the company. Thus he may or may not be held liable to Examco.

Conclusion

The factors presented above weigh in favor of piercing the corporate veil; thus Examco may go after the shareholders of Testco, with the possible exception of Carl.

Q4

Answer B

The remedies that are available to Examco for Testco revocating their agreement depend on the legal status of the agreement and whether Amy had the authority under agency principles to bind Testco to the agreement if it can be legally enforced. The agreement concerns money which is proper consideration from Examco to Testco for providing its market survey services. There were negotiations between both parties regarding the price and discount that would be offered as well as the length of the contract. Both parties agreed on the 10 year terms and the 50% discount. Amy signed the contract. This is enough to create a legally enforceable contract if Amy had the authority to enter into contracts on behalf of the corporation — this is determined by principles of agency which I now analyze.

Amy as Agent of Testco

An agent is a person or entity that acts on behalf of another, the principal. For an agency relationship to exist there must be assent by the agent to the existence of the relationship and its duties, the agent must act for the benefit of the principal, and the principal must control the agent's actions on its behalf.

Here Amy is the President of the corporation. She has assented to the relationship by accepting this employment and the duties and privileges (e.g., salary, benefits) that come along with it. She acts for the benefit of the corporation in this capacity. This is because by virtue of her position in the management of the corporation as an officer she has a Duty of Care to the corporation and must act in good faith and as a reasonably prudent person would with his or her own business. Further, in addition to this Duty of Care she also has a Duty of Loyalty whereby she must act in the best interest of the corporation before all others including herself. These duties insure that Amy's actions should be for the benefit of the corporation in all actions she does on its behalf. Third, the corporation itself has control over Amy. This is because Amy is an employee of the corporation and serves at the will of the board of directors and at its direction. Her

employment can be terminated at any time by the board or shareholders (by majority vote at a meeting or special meeting).

Because the three prongs of agency have been satisfied, Amy is an agent of the corporation. As such, she may be able to bind the corporation to agreements depending on whether she has the appropriate authority to do so.

Actual Express Authority

Actual express authority is the authority that is expressly given to an agent by a principal for some particular task. This authority can be orally conveyed or it can be in writing. According to the equal dignity rule, if a writing would be required for the transaction or action at issue if the principal were to act directly for himself instead of through his agent, the principal is required to expressly give the agent express written authorization to undertake the action on the principal's behalf.

There is no factual information to suggest that Amy had either oral or written actual express authority to enter into contracts on behalf of the corporation. Further, even if the board or shareholders expressly passed a resolution stating that Amy had such authority, or that the President of the corporation has such authority, the resolution and authorization it granted must be in writing. This is due to the equal dignity rule. Because the contract that was actually signed by Amy called for her firm's services to be rendered over the course of 10 years, the Statute of Frauds requires a signed writing (because performance necessarily will take longer than one year by the terms of the contract). Amy herself signed such a writing. However, there is no evidence to suggest that the board gave her such written authorization.

Thus, Amy did not have actual express authority to enter into the contract on behalf of Testco on the basis of the factual information given. However, she may have had implied authority to do so.

Actual Implied Authority

Actual implied authority is that authority which is necessary for it to carry out its expressly authorized actions and in fact was implied from that authorization, or authority that comes with virtue of the position the agent has with respect to the principal and the duties associated with this position.

Here if Amy had received express authority from the board to manage all sales regarding Testco's service contracts, she would have the implied authority to enter into a contract with Examco at terms that she determined because such authority is necessary to manage all sales of service contracts. However, since there is no evidence of an express authorization this prong of implied authority will not suffice.

The second possibility that will give rise to implied authority is if the agent by virtue of his or [her] position and the duties associated with such a position has authority to enter into a contract. Here Amy has been appointed by the board of directors of Testco as its president. As such, she is the chief executive officer of the corporation and is responsible for overseeing all day-to-day operations of the corporation. By virtue of this position and the duty that comes with it — to manage the corporation — Amy has the implied authority to act on the corporation’s behalf in her management of the corporation.

Thus, when she signed the contract with Examco she was acting with the implied authority granted to her by virtue of her position as president charged with management of the company. On this basis, Testco can be held liable for a breach of contract.

Apparent Authority

Apparent authority is the authority that arises when a third party reasonably believes that the agent has such authority because the principal "cloaked" the agent with the appearance of such authority.

Here Amy is the president of the corporation. She holds herself out as such when she entered into the contract with Examco. By virtue of permitting Amy to negotiate such service agreements, which appears to be the case given Ben's objection to the usual 50% reduction, Testco was holding her out to third parties as having the authority to enter into such agreements. Further, Amy signed the contract with Examco as "Testco, by Amy, President." Acting in the cloak of authority given to her by Examco by virtue of her ability to negotiate sales service agreements with customers and by virtue of the apparent authority she has as Testco's president, she had the apparent authority to bind the corporation when contracting with a third party, here Examco, who reasonably believed she had such authority.

Thus, because Amy had the implied authority and apparent authority to enter into this contract on Testco's behalf and she did so, Testco is liable for breach of the contract by its revocation. Examco can seek damages directly against Testco.

2) The determination of whether there is liability for Amy, Ben, and Carl will depend on whether there is director liability for Amy and Ben in their capacities as directors and officers of the corporation. And for all three, Amy, Ben, and Carl based on whether the veil can be pierced for purposes of their limited liability.

Piercing the Veil

Directors, managers, and shareholders are generally not liable for their actions to a third party that is suing the corporation. That is true, unless the corporate veil that insulates them from liability can be pierced. Piercing of the corporate veil is an extraordinary remedy that is only awarded when the directors, officers, and shareholders do not provide for sufficient capital or insurance for the corporation's debts and where the corporation is but an alter ego of the shareholders. The latter can be established in part by the officers and managers not observing sufficient corporate formalities.

Undercapitalization

Directors are not permitted to make a dividend distribution that puts the corporation at risk for insolvency. In fact, the prohibition against this is so strong that the directors will be personally liable for such a distribution unless they believed the corporation was not at risk of insolvency based on the financial officer's report which they are allowed to reasonably rely upon.

Amy and Ben

Here Amy and Ben voted in favor of making monthly distributions that put little cash on hand and leading to the corporation needing to negotiate extensions for payment of its debt. This put the corporation at risk for insolvency because if a large judgment came through or one of its creditors was unwilling to renegotiate its payment terms. Amy and Ben as shareholders and directors did this to benefit themselves at the expense of the corporation. This violated their duty of loyalty to act in the best interests of the corporation above even their own. They did not do this because they held 2/3 of the shares and put the corporation at risk of insolvency merely to line their own pockets with distributions. This would also violate their duty of care to the corporation because they would not put themselves at such risk of insolvency in the management of their personal business. This undercapitalization will lead to Examco likely not being able to recover its damages for breach of its contract. It should be permitted to recover its expectation damage measure, the amount it reasonably expected to profit from the agreement at the time it was entered into.

Courts are more likely to pierce the veil for a tort action than they are for a contract dispute.

Here we have a contract dispute between a corporation and another corporation. It is due to the fact that Amy and Ben determined that the contract would not be profitable. While normally this would not be such an egregious breach, because it may lead to an overall benefit if the breach was efficient, here it is especially so because Amy and Ben

have undercapitalized the corporation and there are likely no assets which Examco can reach when it successfully sues. As such, the court should pierce the corporate veil to allow Examco to recover the impermissible cash distributions that Amy and Ben had been awarding themselves and would otherwise be available.

Carl

While Carl is also a shareholder and normally his 1/3 interest in the corporation would be sufficient to raise him to the status of a controlling shareholder, here he does not have such control. Amy and Ben are the only two officers, the only two directors, and when combined they hold a 2/3 interest in the corporation as shareholders. Carl is merely a passive investor that is not involved in any aspect of Testco's business. He merely invested $50 in no-par stock in a venture run by Amy and Ben. As such, while the veil should be pierced for Amy and Ben as to their shareholders' limited liability but should not be for Carl because he committed no improper acts and was merely a passive investor.

Limited Liability

Q5

Q5 Professional Responsibility

Attorney mailed a professional announcement to several local physicians, listing his name and address and his area of law practice as personal injury. Doctor received Attorney's announcement and recommended that her patient, Peter, call Attorney. Peter had become very ill; he thought the cause was breathing fumes from a chemical company near his home.

Attorney agreed to represent Peter in a lawsuit against the chemical company. At Attorney's request, Doctor agreed to testify as an expert witness on Peter's behalf at the trial. Attorney advanced Doctor expert witness fees of $200 an hour for her time attending depositions, preparing for trial, and testifying.

Attorney learned in discovery that numerous scientific studies had failed to find any medical risks from the chemical company's fumes. Doctor was nevertheless willing to testify, on the basis of her clinical experience, that the fumes had harmed Peter. Attorney did not know whether Doctor's testimony was true or false. He offered Doctor's testimony at trial, and Peter won a judgment.

After the trial, Attorney sent a $500 gift certificate to Doctor, with a note thanking her for recommending that Peter call him.

What, if any, ethical violations has Attorney committed? Discuss.

Answer according to California and ABA authorities.

Q5

Answer A

What, if any, ethical violations has Attorney committed?

The attorney may be liable for ethical violations for: 1) mailing a professional announcement to physicians in the area, 2) paying an expert witness fee, 3) allowing the doctor to testify, and 4) sending the doctor a gift.

Mailing a Professional Announcement to Physicians in the Area

Both the ABA and California prohibit in person, live solicitation to individuals who the attorney does not have a familial or professional relationship with. However, attorneys are allowed to send professional announcements, letters, cards, etc. to people in the area. Moreover, the document must have certain information contained in it, such as the attorney's name or if it is a firm, a name of one attorney in the firm. It must also have an address listed for the attorney and/or any other relatable contact information. However, the document must be accurate and fair, the attorney is not allowed to guarantee success rates or hold himself out as a specialist unless he is certified by the proper authorities in the state.

Here, the attorney is not soliciting in person and is rather sending professional announcements to physicians in the area. This is not prohibited by the ABA or California rules. Furthermore, the attorney has included his name and address as well as his practice of law. The announcement is not misleading and is the accurate reflection of the attorney's information. Moreover, it is of no consequence that the doctor referred her client to the attorney. The attorney and the doctor have not set up a referral service and are not sharing in any of the fee. The doctor simply referred her injured client to the attorney based on the announcement she received. Therefore, the attorney will not be in violation of any ethical rules for sending out professional announcements.

Paying an Expert Witness Fee

Both the ABA and California rules permit attorneys to compensate expert witnesses for their time exerted on the case. However, the compensation cannot be hinged on favorable testimony from the witness. The compensation must also be reasonable in light of factors such as the expert's familiarity with the subject, his experience in the field and other similar factors.

Here, the attorney is advancing the doctor an expert witness fee of $200 an hour for her time attending depositions, preparing for trial, and testifying. These are all ethical reasons for the attorney to compensate the expert witness for. There are no facts to indicate that the attorney is paying for favorable testimony or that the fee being paid is unreasonable. Therefore, the attorney has not violated any ethical rules by compensating his expert witness.

Allowing the Doctor to Testify

An attorney is allowed to call witnesses to testify on his client’s behalf. However, there are some exceptions to this rule. One major exception to this rule is if the attorney knows that the witness will perjure him or herself. This is also a place where the ABA and California rules differ.

ABA

Under the ABA, an attorney shall not call a witness to testify if the attorney knows the witness will commit perjury. However, if the witness is the defendant in a criminal case he has a constitutional right to testify on behalf of himself. The ABA states that if her client insists on testifying and perjuring herself the attorney must attempt to persuade her not to. If the client still insists on testifying, then the attorney should attempt to withdraw as counsel if the court will allow it depending on how damaging it will be to the client. Finally, if the attorney is unable to withdraw he must carefully weigh

the balance of his duty of confidentiality with his duty of candor to the court. If the client persists on testifying then the attorney may advise the court about the perjury.

California Rules

Under California, the rule regarding witnesses who are not the clients are the same. An attorney is prohibited from calling a witness who he knows will perjure himself. However, the California rules differ from the ABA regarding a client who wishes to testify on behalf of himself and who wishes to perjure himself as well. In California, an attorney must make the same effort to attempt to persuade the client to not perjure himself. Furthermore, the attorney must try to withdraw as counsel if the court permits it. The big distinction is that in California an attorney is allowed to let his client testify in narrative fashion regarding the false information. He also is not required to breach is [sic] duty of confidentiality and warn the court of the perjury.

In this Case

Here, the doctor who is testifying is not the client and therefore the attorney under both the ABA and California rules is not permitted to call the doctor if he knows he will perjure himself. The facts state that the attorney learned in discovery that numerous scientific studies had failed to find any medical risks from the chemical company's fumes. Nevertheless, the doctor was willing to testify, on the basis of her clinical experience, that the fumes had harmed Peter. Although the scientific studies failed to find any risks of the fumes, this does not mean that the doctor is necessarily lying. An attorney has a duty to represent his client zealously and just because there is some evidence that states the fumes may not be dangerous there are no facts to indicate that the doctor is lying. The doctor is testifying based on her clinical experience and is allowed to testify even if it contradicts some of the scientific studies. The only way the attorney will not be allowed to call the doctor as a witness is if he knows that she will be committing perjury when she goes on the stand. In light of all the facts, the attorney has not breached any ethical duties by allowing the doctor to testify.

Sending the Doctor a Gift

Both the ABA and the California rules prohibit sending gifts to witnesses who testify on their behalf. The attorney is only allowed to compensate the expert witness for her services in the case such as depositions, preparing for trial and testifying. Moreover, a gift to an expert witness may compromise the witness's ability to be fair and not to give favorable testimony in anticipation of a gift. If the gift was intended for the doctor as a thank you for testifying it will not be allowed.

Referral Fee

Also, an attorney is not allowed to send a gift to a person whether they are a witness or not for referring someone to him. This would be a kickback or a referral service fee. These are explicitly prohibited unless the attorney satisfies certain criteria such as: 1) getting informed consent from the client, 2) having in the contract how the referral is to be split up, and 3) the referral must not be exclusive between the attorney and the referring party.

Here, the attorney has sent a $500 gift certificate to the doctor with a note thanking her for recommending that Peter call him. This violates both the referral arrangement stated above and also violates the ethical rules for compensating an expert witness. Thus, the attorney will be in violation for sending the doctor the $500 gift certificate.

Conclusion

In light of all the facts, the attorney has not violated any rules by his conduct except sending the $500 gift certificate to the doctor, of which he will be found to be in violation of the ethical rules both under the ABA and California.

Q5

Answer B

Ethical violations committed by Attorney in the representation of Peter (P).

A. Attorney advertising

i The applicable rules

The issue is what limits there are on an attorney's right to send out advertising for her services. The Supreme Court has held that attorney advertising is protected by the First Amendment as commercial speech. While states may prohibit in-person and over-the-phone solicitation entirely, states may only proscribe attorney advertising sent by mail, as it was here if it is either false or misleading. States may impose other regulations as well. For example, in California, all attorney advertisements by mail must announce on the cover of the envelope and on the ad within that this is attorney advertising. It must name an attorney responsible for the ad, as well as the attorney's address. It must list the attorney's area of law practice, and may include information about past results if the attorney makes clear that such results are not typical and that they are not a prediction of future results. A copy of the advertisement must also be held for two years.

ii. Rules applied to A's conduct

In this case, Attorney (A) mailed an advertisement for his services to local physicians. His mailing has First Amendment protection. There is nothing to suggest that the ad was false or misleading. Also, while it is true that the ad will be presumed false/misleading if it is sent to a hospital or some other place where prospective clients may be under undue pressure or distress, there is no indication that A sent the mailing to clients; rather, he sent it to their physicians, who would in such a vulnerable condition [sic]. Thus, A does not have a false or misleading ad, and he will not be liable on that count.

Further, we are told that the ad listed his name and address. However, we are not told whether the advertisement stated on the envelope and on the letter that this was an advertisement. If not, A may have committed an ethical violation.

Therefore, it appears that the mailing does not violate any rules of professional conduct under either ABA or California authorities.

B. Solicitation of prospective clients

i. The applicable rules

As noted, the ABA and California rules of professional conduct prohibit attorneys from soliciting clients for pecuniary gain in person or over the phone. There is an exception where the client and the attorney have an established relationship, are family members, or the client is a corporation.

ii. Rules applied to A's conduct

While none of these exceptions apply in this case, the attorney has not committed any ethical violation because he did not solicit clients over the phone or in person. Rather, he sent a broad mailing. This type of advertising is acceptable and does not constitute a violation of the rules.

C. Paying an expert witness's fees

i. The applicable rules

Under ABA Professional Rules, an attorney may not make any advance payments to a client in anticipation of litigation. Nor may an attorney give loans to the client, even if the client promises to repay. The only exception under the ABA rules is that an attorney may advance the costs of litigation to a client in order to facilitate the client's commencement of a claim. However, under the California Rules of Professional

Conduct (CRPC), attorneys may make loans to clients in anticipation of litigation, as well as fronting any legal costs associated with bringing the claim.

Additionally, clients/attorneys pay compensate an expert witness for his testimony/work so long as the payment is not given in exchange for specific testimony, such as testimony that is favorable to the client's case.

ii. Rules applied to A's conduct

In this case, A has advanced to Doctor (D) an amount of money intended to compensate him for his work as an expert witness. Under the ABA Rules, this probably [does] not constitute a violation of the ethical rules. The costs of hiring an expert witness are high, and many prospective clients would be unable to hire one. However, without the ability to hire an expert witness, the client might not know if he has a colorable claim against the defendant. Thus, advancing the costs of hiring an expert, as A has done here, probably would not violate the ABA Ethical Rules. These are the costs of litigation, and are probably covered under the exception under these rules.

With respect to the CRPC, it is even more likely that advancing D's fees will not constitute an ethical violation. The CPRC makes clear that attorneys may make loans to a client so long as the client has an obligation to pay the attorney back. Here, when Peter (P) wins on his claim, he will have to either pay A for the costs of hiring D as a witness, or the costs will be taken out of any contingency fee awarded to A from P's judgment against the chemical company.

Thus, under both the ABA and California rules, advancing costs to D is not a violation of the ethical rules.

D. Offering D's testimony at trial

i. The applicable rules

There are two sets of conflicting ethical rules that make resolution of this issue somewhat complex. First, A has an obligation to represent his client zealously, in good faith, and to make all colorable claims that support his client's case. This means that A has an ethical obligation to make every argument on P's behalf that A thinks is supported by the record. He should do so only in good faith, but he must be a zealous advocate at all times.

In contrast, all attorneys also have a duty of candor to the court. This means that attorneys should not offer false evidence into the record. Where there is authority that is controlling and on point, the attorney must bring such authority to the court's attention, even if the authority is detrimental to the attorney's position. Attorneys must conduct themselves honestly in court, and may not make any malicious, unfounded claims that the attorney knows have no support in the record.

As noted, these two duties often conflict, and may put attorneys in a precarious position.

ii. The rules applied to A's conduct

In this case, A learned during discovery that numerous scientific studies had failed to find any medical risk from the defendant's fumes. Nevertheless, D, the expert witness who has treated P and was hired by A to prove A's case, believes otherwise. D is willing to testify, on the basis of her experience and knowledge, that the fumes had harmed P. A has offered D's testimony at trial without knowing whether it is true or false. The question is whether this is a violation of A's duty of candor to the court.

In answering this question, it is important to analyze what A knew and didn't know at the time he offered D's testimony into evidence. First, it should be noted that only the studies A found in discovery were able to find no link between the chemicals and P's injury. We are not told whether there may be other studies out there that support such a connection that A has yet to find. In fact, if the list of studies reviewed by A is not exhaustive, there very well may be a study out there that supports such a

connection. Second, it is not clear who funded these studies, or whether the authors had some sort of bias that might discredit their findings. Further, we are not told whether this is a field of science that has been closed to further research, or whether it is a relatively new field that is still developing. It is possible that the chemical in question is relatively new, and therefore its consequences are only recently being analyzed/discovered. There might be other scientists (like D) that are using new techniques to study the connection between the chemicals and injuries, but the results just haven't been published yet. In sum, we can conclude that A has very little information that should convince him, one way or another, that D's testimony is false. There are many open questions about the chemical and a possible link between the chemical and P's injuries.

As noted, attorneys have a duty to represent their clients zealously and to make all colorable claims. The facts tell us that A did not know whether D's testimony was false or true, and this makes sense because D was the expert in the field. While it is unethical for an attorney to offer testimony that she knows to be false, there is no ethical problem under either the ABA rules or the CRPC if the attorney merely has doubts. This is especially true in light of the attorney's obligation to her client. The attorney has an obligation to represent her client vigorously. Thus, it would likely be an ethical violation of A's duty to her client were she to not offer D's testimony into evidence. Since A did offer the testimony on P's behalf, and A did not knowingly offer any false evidence in the process, A did not violate any ethical rules with respect to offering D's testimony.

E. Sharing fees with non-attorneys

i. Applicable Rule

Under the ABA rules, an attorney may not share legal fees with a non-attorney. In California, the attorney may share a fee if the attorney discloses the fee-sharing arrangement to the client and the client consents.

ii. The rules applied

In this case, we are told that A contacted D, a non-attorney, with a mailing advertisement, seeking potential clients. At first, there was no arrangement to share any resulting fees with D. However, after A won a judgment for P, he sent D a $500 gift certificate (the certificate). This is arguably an offer from A to D to share the fees from P's case. A was compensated for his work representing P, and presumably the money that paid for the certificate came from these funds. Thus, A has arguably violated the ethical rule against sharing attorney's fees with a non-attorney. However, A will argue that he gave D the money not for D's work at trial, but for D's recommending P to A as a client. While this may free him from a violation under the "sharing-of-fees" rule, it will support an argument that he violated another ethical rule, as discussed immediately below.

Note that had A disclosed the arrangement to P ahead of time, and had P consented, this would not have been an ethical violation under California's ethical rules. However, because A failed to do so, his conduct is a violation of both the ABA and the California rules of professional conduct.

F. Paying for Referrals

i. Applicable Rule

Under the ABA ethical rules, attorneys may not offer money or services in exchange for getting referrals for prospective clients for pecuniary gain. However, in California, the attorney may pay for a referral if the attorney discloses the referral to the client at the outset of contacting the client, and the client consents to the representation despite having this knowledge.

ii. Rule Applied

The same facts discussed above in section "E" (compensation for referral) are applicable here. However, as noted above, it is also significant that A included a note with the certificate, thanking D for recommending that Peter call him. This sounds like a tit-for-tat situation, in which A is compensating D for making a referral. Thus, one would argue that A gave the certificate to D as compensation for referring P's case to A. Holding A liable under this rule is just another way of characterizing the gift certificate that was given to D after P won his case. In this scenario, the money was given to D for D's work efore the case began, rather than for D's work during the trial that contributed to P's judgment and A's resulting compensation (as suggested in section "E", supra). As mentioned above, A's note to D supports the argument that the certificate was intended to compensate D for making the referral, which is a direct violation of the ABA and California rules.

Under the California rules, an attorney may compensate [a] third party who referred a client so long as the compensation is disclosed to the client and the client consents to being represented by the attorney. Because A did not get P's consent before sending the certificate, A's conduct violated the ABA and California ethical rules.

Q6

Q6 Real Property

Donna was looking for a place to live. Perry owned a two-story home, with the second story available to lease.

Donna and Perry signed a two-year lease that provided, in part: “Lessee may assign the leased premises only with the prior written consent of Lessor.”

Upon moving in, Donna discovered that the water in her shower became very hot if Perry ran water downstairs. When Donna complained to Perry about the shower and asked him to make repairs, Perry refused, saying, “I’ll just make sure not to run the water when you are in the shower.”

Perry soon adopted a new diet featuring strong-smelling cheese. Donna told Perry that the smell of the cheese annoyed and nauseated her. Perry replied: “Too bad; that’s my diet now.”

After constantly smelling the cheese for three weeks, Donna decided to move out and to assign the lease to a friend who was a wealthy historian.

Donna sought Perry’s consent to assign the lease to her friend. Perry refused to consent, saying, “I’ve had bad experiences with historians, especially wealthy ones.” Thereafter, every time Donna took a shower, Perry deliberately ran the water downstairs.

After two weeks of worrying about taking a shower for fear of being scalded and with the odor of cheese still pervasive, Donna stopped paying rent, returned the key, and moved out. At that time, there were twenty-two months remaining on the lease.

Perry has sued Donna for breach of the lease, seeking damages for past due rent and for prospective rent through the end of the lease term.

What defenses may Donna reasonably raise and how are they likely to fare? Discuss.

Q6

Answer A

As set forth below, Donna can raise the following defenses (1) material breach of lease, (2) constructive eviction, (3) breach of the warranty of habitability, and (4) failure to mitigate damages. Donna is likely to succeed on all four defenses.

1. Material Breach of Lease.

Tenancy for Fixed Term.

A fixed term tenancy is a pre-agreed term by the landlord and tenant.

Here, Donna and Perry signed a "two-year lease." As such, the term of the lease is fixed at two years.

Therefore, Donna is obligated to pay rent for the full two years of the lease, unless otherwise excused.

Duty to Repair.

Generally, a tenant has a duty to keep the premises in good order and repair, unless otherwise agreed to by the parties. The landlord, however, has a duty to repair common areas of use.

Here, there was something wrong with the plumbing in Perry's home. Each time Donna took a shower, she was scalded if Perry was taking a shower at the same time. She notified Perry of the problem, but her [sic] refused to fix it — stating only that he would not take a shower while she did. The leased premises is [sic] part of Perry's home. It is not a separate apartment, did not have separate plumbing or other utilities. Even if Donna wanted to fix the problem herself, she would have not have the ability to do so since she did not lease or control the areas of the home that were the source of the

problem. Perry controlled these items. The plumbing was, in essence, a common area under Perry's control.

Therefore, Perry, as landlord, had the duty to repair the plumbing issue and breached his duty to Donna by failing to repair it.

Duty re Nuisance.

A landlord owes a duty of quiet enjoyment to his tenant, including the abatement of nuisances to the extent within his control. A nuisance is something that would be offensive to a person of ordinary sensibilities.

Here, Donna was "annoyed" and became "nauseated" at the smell of Perry's new diet of strong-smelling cheese. However, this appears to be something unique to Donna. She was perfectly willing to assign the lease to her friend the wealthy historian - who would have been subjected to the same smell. A friend would not do this to a friend, unless she knew that the problem with the smell was due to her being ultra-sensitive to that particular cheese. As such, this ultra sensitivity does not arise to the level of being a nuisance.

Therefore, Perry did not breach his duty to Donna by failing to stop eating the cheese.

On the other hand, however, Perry began intentionally annoying Donna. After their dispute regarding the cheese and the possible lease assignment, he began to deliberately turn on the water whenever Donna tried to take a shower. This meant that Donna was not able to take a shower for nearly two weeks. Most anyone of normal sensibilities would be annoyed by this behavior.

Therefore, Perry did breach his duty to Donna by deliberately running the water while she took a shower.

Duty to Pay Rent Despite Material Breach.

At common law, a tenant's duty to pay rent is not relieved by the landlord's material breach of lease. Modernly, a material breach of lease that goes to habitability relieves the tenant's obligation to pay rent.

Here, Perry breached the lease by failing to repair the plumbing. He further breached it by deliberately running the water each time she took a shower. Nevertheless, Donna still owed a duty to pay rent to Perry, despite the breach. Under modern statutes, however, Donna will likely be relieved of the obligation to pay rent because the breach went to her use, enjoyment, and habitability of the leased premises.

Conclusion re #1 Breach of Lease.

As such, Perry breached the lease by failing to repair the plumbing. Therefore, Donna can reasonably raise this as a defense and is likely to succeed.

2. Constructive Eviction.

A landlord owes a duty of quiet enjoyment to his tenant. In the event of (a) a substantial interference with the use and enjoyment of the premises, the tenant may (b) give notice to the landlord, and (c) leave the premises, thereby being excused from any further obligations under the lease.

Here, re (a) there was something wrong with the plumbing in Perry's home. Each time Donna took a shower, she was scalded if Perry was taking a shower at the same time. She notified Perry of the problem, but her [sic] refused to fix it — stating only that he would not take a shower while she did. What's more, Perry began intentionally annoying Donna. After their dispute regarding the cheese and the possible lease assignment, he began to deliberately turn on the water whenever Donna tried to take a shower. This meant that Donna was not able to take a shower for nearly two weeks. Most anyone of normal sensibilities would be annoyed by this behavior. Not being able

to take a shower in your own apartment is a substantial interference with the use and enjoyment of the apartment.

Therefore, element (a) is met.

Here, re (b) Donna had notified Perry about the problem. At first he said he would simply not run water while she took a shower. However, in the end, he did so deliberately. As such, Perry had notice of the plumbing problem.

Therefore, element (b) is met.

Here, re (c) after two weeks with no shower, she turned stopped paying rent, returned the key and moved out.

Therefore, element (c) is met.

As such, elements (a), (b), and (c) are met. Therefore, Donna is relieved of her obligations under the lease through Perry's constructive eviction.

Conclusion re #2 Constructive Eviction.

Therefore, Donna can reasonably raise a defense of constructive eviction and is likely to succeed with this defense.

3. Breach of Warranty of Habitability.

A landlord of residential property, which includes commercial in California, owes a duty to his tenant to keep the premises fit for normal habitation. This duty is breached when the landlord fails to fix a condition that impacts the habitability of the premises or violates building codes.

Here, Donna was being scalded each time she took a shower. This started out being an unintentional problem, but grew into an intentional problem when Perry used the defect to intentionally annoy Donna. In the end, Donna was unable to take a shower at all for fear of being burned or scalded. The plumbing issue is likely a building code violation as well. Building codes typically set standards for the temperature of water coming from hot water heaters to avoid burning and scalding, as was happening here. Nevertheless, Perry refused to fix it.

Here, regarding the cheese, Donna was "annoyed" and became "nauseated" at the smell of Perry's new diet of strong-smelling cheese. However, this appears to be something unique to Donna. It does not go to the building code or other habitability issues.

Therefore, Perry breached his warranty of habitability to Donna by failing to fix the plumbing.

Remedies for breach of warranty of habitability.

When a breach of the warranty of habitability occurs, a tenant has several option;, the tenant can (a) stay in the premises, deduct rent and repair the issue, (b) stay in the premises and abate rent until the issue is repaired, or (c) stop paying rent and move out.

Here, Donna chose option (c). She stopped paying rent, returned the keys and moved out. Therefore, she is relieved from any further obligation under the lease.

Conclusion re #3 Breach of Warranty of Habitability.

Therefore, Donna can reasonably raise a defense of breach of warranty of habitability and is likely to succeed with this defense.

4. Failure to Mitigate damages.

A landlord has a duty to mitigate his damages in the event of a breach by the tenant.

Here, Donna tried to find another solution for Perry. She wanted to move out and assign the lease to her wealthy historian friend. The lease required consent for this assignment, and Donna was seeking such consent. However, Perry decided he really did not want to live with a wealthy historian because of his prior bad experiences with them. Due to the nature of this [sic] leased premises, that it was a part of Perry's actual home that required the sharing of space, it is not necessarily unreasonable for Perry to be a little picky about this. Nevertheless, Perry did not even agree to meet with the wealthy historian. Being wealthy and [a] historian does not automatically place someone in an annoying class. Perry's prior experience was probably on a personal level with an individual and had nothing to do with him being a wealthy historian. Perry should have, at a minimum, met with the person, interviewed him, sought references, and otherwise done his due diligence before turning down the opportunity. By failing to do this, he failed to mitigate his damages.

Mitigation as limitation on damages.

A landlord has a duty to use reasonable efforts to re-let the premises. Damages will be reduced by an amount found [that] could have been reasonably avoided.

Here, no, after Donna has left the premises, Perry is under a continuing duty to mitigate his damages by using reasonable efforts to re-let the premises. He must advertise it and seek a reasonable replacement for Donna. Perry is not automatically entitled to full rent for the remaining 22 months without first trying to re let the premises. He already knows at least on [sic] prospective tenant — the wealthy historian — who would take Donna's place.

Therefore, Perry's award for damages, if any, will be reduced by the amount that is shown could have been avoided by mitigating his damages.

Conclusion re #4 Failure to Mitigate.

Therefore, Donna can reasonably raise a defense for failure to mitigate damages and is likely to succeed — at least in part — on this defense.

Overall Conclusion.

In conclusion, Donna can raise the following defenses: (1) material breach of lease, (2) constructive eviction, (3) breach of the warranty of habitability, and (4) failure to mitigate damages. Donna is likely to succeed on all four defenses.

Q6

Answer B

Statute of Frauds

A contract which cannot, by its terms, be completed or fully performed within one year must be in writing in order to be enforceable. Furthermore, a contract conveying an interest in land must be in writing in order to be enforceable. In order to satisfy the statute of frauds, a contract that comes within its purview must be signed by the party to be bound. Here, Donna and Perry have entered into an agreement to lease the second story of Perry's home for two years. Donna has "signed" the lease, meaning it must have been in writing, and she is the party to be bound. Therefore, the statute of frauds will not be an effective defense to enforcement of the contract against Donna.

Valid Assignment

If Donna validly assigned the lease to her friend, then she would only be secondarily liable based on privity of contract with the original leasor, Perry. The original lessor must seek payment from a valid assignee before seeking payment from the assignor.

Lack of Privity of Estate

If the assignment from Donna to her friend is valid, then privity of estate is destroyed between Perry and Donna. However, privity of estate is not required if there is privity of contract between the landlord and previous tenant. Therefore, the lack of privity of estate will not protect Donna from a lawsuit following a valid assignment because, as the original lessee, she still has privity of contract with Perry.

Restriction on Alienation/Assignment

Restrictions on alienation of property are disfavored. As a consequence, lease clauses restricting a tenant's right to assign or sublease will be strictly construed. For example, a prohibition on assignment absent consent will not prohibit sublease without consent and vice versa. Here, the lease prohibits assignment without consent and would not bar sublease. However, Donna sought to assign her interest to her friend. The language is not controlling. The difference between assignment and sublease is whether the whole remainder of the term is conveyed to the new tenant. If the whole remainder of the lease term is conveyed, then the transfer is an assignment. If only part of the remaining term is conveyed, then the transfer is a sublease. Here, Donna sought an assignment.

Landlord's Unreasonable Refusal to Consent to Assignment

Under the terms of the lease, an assignment requires the landlord's prior written consent. Donna sought Perry's consent and he refused because he had "bad experiences with historians, especially wealthy ones." Donna may argue that Perry's refusal was unreasonable and that the assignment should be valid.

In residential leases of a single family dwelling, a landlord's refusal of consent need not be reasonable so long as it is not based on an unlawful form of discrimination--such as race. In commercial leases or residential leases for large apartment complexes, most jurisdictions require the landlord's refusal to be objectively reasonable, but not so with small residential leases such as the second story of Perry's home. Perry discriminated on the basis of Donna's friend's occupation and wealth which are not unlawful bases. Therefore, Perry's refusal is permissible and Donna will not be permitted to avoid liability by assigning her lease to her friend.

Implied Warranty of Habitability

Every residential lease contains an implied warranty of habitability which requires the leased premises to be fit for basic human dwelling. Housing code violations and serious problems such as lack of heat in a cold winter, lack of running water, flooding, etc. would constitute violations of the implied warranty of habitability. A tenant has several

options when the implied warranty of habitability has been violated. After giving the landlord reasonable notice, the tenant may repair the problem and deduct the cost from rent payments, may repair the problem and sue for the cost in damages, may remain in possession and sue for damages, or may move out and avoid liability for the remaining rent. Here, Donna wishes to move out which she may do if the alleged violation is sufficiently serious.

Stinky Cheese

The smell of Perry's cheese, though annoying and nauseating, is problably not enough to make the leased premises unfit for basic human dwelling. If Donna's nausea is so severe that the smell constitutes a health risk to her, then her claim would be significantly strong, but that does not appear to be the case here.

Hot Shower

The hot shower water definitely constitutes a safety hazard, but may not, by itself, be enough to make the premises unfit for basic human dwelling. This is a close call. In conclusion, Donna will probably not be successful on a claim for violation of the implied warranty of habitability. She has a strong claim for constructive eviction anyway.

Constructive Eviction

If, by a landlord's act or omission, a tenant is constructively evicted from premises, then the tenant is relieved of any obligation to pay rent. In order to satisfy the requirements for a constructive eviction, there must be (1) substantial interference with the tenant's use and enjoyment of the leased premises, (2) reasonable notice and time to fix or repair, and (3) tenant must vacate within a reasonable amount of time.

(2) Substantial Interference

Meanness--"Too bad; that's my diet now"

As a landlord, Perry is very mean and refuses to express any concern for Donna's comfort. Just because a landlord is mean does not constitute substantial interference with a tenant's use or enjoyment of her property. Therefore, Perry's meanness will not be sufficient to satisfy the substantial interference requirement.

Landlord's Duty to Repair--Hot Shower

A landlord generally does not have a duty to repair defects in leased premises with several exceptions such as a duty to keep common areas reasonably safe and a duty to make safe furnished, short-term leased premises. If there is a risk of serious harm from a latent defect inside leased premises on a long-term lease, however, a landlord has a duty to repair the problem. The tenant must give the landlord notice of the problem. If the tenant gives notice and the landlord refuses or fails to repair the defect, then the landlord has violated his duty. Here, Donna faces a serious latent defect by virtue of the shower being so hot that it could seriously burn her. She notified Perry and Perry refused to repair. He took steps to avoid injury (at first) by "mak[ing] sure not to run the water when [Donna was] in the shower," but he did not repair the defect. This omission, in the presence of a duty to repair, may constitute a substantial interference provided that the risk of injury is sufficiently high.

Retaliation--Hot Shower

A landlord must not retaliate against tenant for complaints or requests made under the lease. Here, Donna merely sought Perry's consent to assign the lease to her friend. Perry refused and, thereafter, deliberately ran the water downstairs to make Donna's shower dangerously hot. This intentional, bad-faith retaliation for requesting to assign her lease to another constitutes substantial interference with Donna's use and enjoyment of the premises because it created a significant risk of injury to her.

Nuisance--Stinky Cheese

A private nuisance is any substantial interference with another person's use and enjoyment of property to which they have a right to possession. Whether an alleged nuisance constitutes substantial interference is an objective question. If the plaintiff is deemed ultra-sensitive, she will not recover because the interference is not objectively substantial even if it is substantial subjectively. Whether the stinky cheese is a substantial interference is a question of fact for the trier of fact at trial. Depending on the severity of the odor, a reasonable person may find that stinky cheese odor constitutes substantial interference. Therefore, Donna may satisfy the substantial interference requirement based on the stinky cheese as well as the retaliation.

(3) Notice

Donna gave Perry notice of the problems with the shower and the stinky cheese as evidenced by Perry's recognition of her complaints. Donna gave Perry a total of five weeks to resolve the problems about which she complained. Perry refused to resolve the issues. Therefore, the notice and time to repair requirements are satisfied.

(4) Vacate

Donna moved out of the premises and returned the keys in a timely manner.

Conclusion--Constructive Eviction Satisfied

Based on the foregoing, Donna has satisfied the requirements for constructive eviction and will not be liable for past due or future due rent for the remainder of the lease. She is not liable for past due rent because she stopped paying at or after the time the constructive eviction arose--namely, when Perry started retaliating after already refusing to repair the hot shower. She is not liable for future rent because she has been constructively evicted and moved out by that time.

Absence of Equitable Defenses

Perry may claim equitable defenses such as laches or unclean hands, but Donna moved out timely and did not have unclean hands. Rather she demonstrated good faith by giving notice and returning the keys and moving out in a peaceable fashion.

Duty to Mitigate/Avoidable Consequences

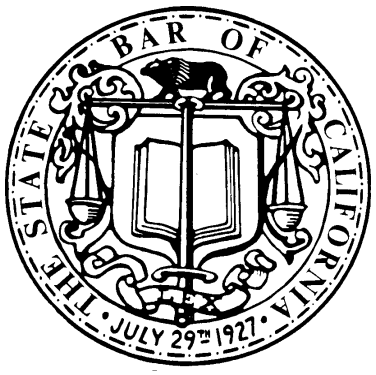
Even assuming that Donna moved out wrongfully, when a tenant wrongfully vacates premises, the landlord has three options (1) treat the tenant's vacation as a voluntary surrender and accept without demanding further rent, (2) re-let the premises [to] someone else as an act of mitigation and sue the tenant for the unpaid rent, (3) only in a minority of jurisdictions, ignore the tenant's act and sue for damages for past and future due rent. As a general/majority rule, and the rule reflected in the second option, a landlord must attempt to re-let premises in order to obtain damages that would otherwise be considered avoidable. Any damages that could reasonably have been avoided by mitigation will not be awarded to the landlord.

Here, Perry attempted to hold Donna liable for the entire twenty-two months remaining on the lease. None of those money damages are recoverable because Perry could reasonably have avoided those damages by leasing the premises to Donna's friend.

Conclusion

Donna has successful defenses based on constructive eviction and failure to mitigate damages.

Jul 2011



California
Bar
Examination

Essay Questions

and

Selected Answers

ESSAY QUESTIONS AND SELECTED ANSWERS
JULY 2011
CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2011 California Bar Examination and two answers to each question that were written by actual applicants who passed the examination after one read.

The selected answers were assigned good grades and were transcribed for publication as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

JULY 2011
ESSAY QUESTIONS

California Bar Examination

Your answer should demonstrate your ability to analyze the facts in question, to tell the difference between material and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem. Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

Q1 Criminal Law and Procedure

Vicky operates a successful retail computer sales business out of the garage of her house. Vicky told Dan that she intended to go on vacation some days later. Dan subsequently informed Eric of Vicky's intended vacation and of his plan to take all of her computers while she was away. Eric told Dan that he wanted nothing to do with taking the computers, but that Dan could borrow his pickup truck if Dan needed it to carry the computers away.

While Vicky was scheduled to be away on vacation, Dan borrowed Eric's pickup truck. Late that night, Dan drove the truck over to Vicky's house. When he arrived, he went into the garage by pushing a partially open side door all the way open. Vicky, who had returned home early from her vacation, was awakened by noise in her garage, opened the door connecting the garage to the house, and stepped into the garage. When she saw Dan loading computers into the back of the truck, she stepped between Dan and the truck and yelled, "Stop, thief!"

Dan pushed Vicky out of the way, ran to the truck, and drove off. He immediately went to Fred's house where he told Fred what had happened. In exchange for two of the computers, Fred allowed Dan to hide the truck behind Fred's house.

What crimes, if any, have Dan, Eric, and/or Fred committed? Discuss.

Answer A

I. Dan's Crimes

By plotting to break into Vicky's home to steal her computers and then actually doing so, Dan committed the crimes of burglary, larceny, robbery, and battery. He may have also conspired to commit burglary and/or larceny with Eric.

Burglary

At common law, burglary was defined as the unlawful breaking and entering of the dwelling house of another at night with the intent to commit a felony therein. Most modern jurisdictions have amended the elements to include burglary of any structure and have not limited it to nighttime burglaries.

Here, Dan committed burglary when he entered Vicky's home to steal the computers.

Breaking and Entering

Burglary requires that the burglar break and enter into the structure. "Breaking" constitutes any form of forcible entry, including pushing open a partially open door. "Entry" requires physical entry by any part of the burglar's body or a tool under his control.

Here, Dan pushed a partially open side door to V's garage fully open in order to gain entry. This is evidence of breaking. Further, Dan entered the garage, which is a part of Vicky's residence. Thus, the elements of breaking and entering are satisfied.

Structure of Another

Dan entered into Vicky's garage, both the location of her retail sales business and part of her home (her dwelling place). This is sufficient to constitute a protected structure for purposes of burglary, which belonged to another (Vicky). Therefore, this element is met.

With the Intent to Commit a Felony Therein

Burglary requires the intent to commit a felony (or a misdemeanor in some jurisdictions) inside the structure at the time of the breaking and entering.

In this case, Dan had the intent to commit larceny of Vicky's computers when he entered her garage. He had previously expressed this desire to Eric, and nothing in the facts suggests he changed is mind prior to entering. In fact, his actions of actually taking the computers demonstrates that the intent was present.

Therefore, Dan committed burglary.

Larceny

Larceny at common law was the trespassory taking and carrying away of the personal property of another with the intent to permanently deprive the victim of the property.

Trespassory

Trespass is the unpriviliged, nonconsensual invasion of another's protected space.

Here, Dan did not have the consent of Vicky to enter the garage at night and therefore his decision to do so was a trespass. While Dan might argue it was not trespassing because Vicky opened her business up to the public and her business was located in the garage, this argument will fail because he clearly did not have implied or actual authorization to force his way into the garage at night when Vicky was not operating her business and was in fact supposed to be on vacation.

Asportation

Asportation is the taking and carrying away of another's property. For larceny purposes, even slight movement of the property is sufficient.

In this case, Dan took computers from Vicky's garage, loaded them into his truck and drove off with them. Thus, he moved the computers and this element is satisfied.

Personal Property of Another

The computers were the tangible, moveable personal property of Vicky and her business. The computers did not belong to Dan and he had no claim of right to the computers. Therefore, this element is satisfied.

Intent to Permanently Deprive

At the time of the taking, the defendant in a larceny case must have the intent to permanently deprive the owner of the property.

Here, Dan had the intent to permanently deprive because he planned to steal the computers and presumably sell them for value. Nothing in the facts indicates a contrary intent on Dan's part, so this element is satisfied.

Therefore, Dan also committed larceny.

Robbery

Common-law robbery requires that the defendant take and carry away the personal property of another from their person or presence by force or threat of force, with the intent to permanently deprive.

The requirements that Dan took and carried away the computers belonging to Vicky with the intent to permanently deprive have been described above. The remaining elements follow.

Person or Presence

Robbery requires that the items be taken from the victim's person or presence, which has been broadly defined to include anything the victim is holding or, indoors, items from the same room that the victim was in at the time of the taking.

Here, Vicky was present in the garage when Dan loaded some of her computers into the truck. In fact, she stepped between Dan and the truck as he was attempting to flee with the computers, so it suggests that she was immediately present when her property was taken. Therefore, this element is likely satisfied because the computers were taken from within a very close proximity to Vicky. As such, they were taken from her immediate presence.

Force or Threat of Force

A robber must use physical force or threaten to use physical force to commit robbery.

Here, as he was attempting to flee, Dan physically pushed Vicky out of the way. Shoving another person is physical force, which Dan used to accomplish and complete his taking of Vicky's computers.

Dan will argue that he did not accomplish the taking by force because he already had the computers in his possession before Vicky confronted him. He will defend by saying that the force was only used to effectuate his escape, and not the robbery itself. However, because the robbery would not have succeeded but for the physical force to the victim, it's likely to satisfy the requirement of forcible robbery.

For those reasons, Dan also robbed Vicky.

Battery

Battery is the intentional unlawful application of physical force to another person. Battery is a general intent crime, meaning there is no requirement that the defendant intend to cause injury to the victim. He must only intend to commit the physical action that constitutes the force.

Here, Dan physically shoved Vicky out of the way as he was escaping. He intended to complete the shoving action because it allowed him to get Vicky out of his way and proceed to the truck. Therefore, Dan committed a battery.

Conspiracy to Commit Burglary/Larceny

Conspiracy is an inchoate offense that required at common law an agreement between two or more people to accomplish the same unlawful objective with the intent to complete that objective. Many jurisdictions require proof of an "overt act" to establish conspiracy. In a majority of states, only bilateral conspiracies are permissible, but a minority of states recognize the idea of a "unilateral conspiracy," where the defendant

believes he is conspiring with another "guilty mind" who in fact shares a different objective.

The prosecution may attempt to argue here that Dan conspired with Eric to rob Vicky because he discussed his plans with Eric in advance and Eric loaned Dan his truck for purposes of the robbery. However, as will be addressed below, it is not clear that Eric had the intent for the robbery to be completed. If Eric lacked the requisite intent to accomplish the robbery, then Dan can only be convicted of conspiracy in a jurisdiction that recognizes unilateral conspiracy.

II. Eric's Crimes

Conspiracy to Commit Burglary/Larceny

The issue is whether Eric had the intent to enter into an agreement with Dan for an illegal purpose (the burglary/larceny) and if Eric intended for the illegal object to transpire as planned. Here, the facts suggest that Eric lacked that intent, so he is likely not guilty of conspiracy.

The prosecution will argue that Eric's decision to loan his truck to Dan knowing that Dan intended to use it to burglarize Vicky's business is evidence that Eric conspired to commit that crime. However, Eric specifically told Dan that he wanted "nothing to do with taking the computers." Although the prudence of nonetheless letting Dan use his truck to commit the robbery is questionable, the facts do not prove that Eric intended to participate in the burglary or that he shared Dan's goal for the burglary to succeed. He may have been indifferent to the theft being committed or even favorable to the idea, but this is not persuasive evidence that he intended for Dan to succeed in the burglary. Since the prosecution will have the burden to show intent beyond a reasonable doubt, this is unlikely to be a persuasive argument.

Therefore, it's likely that neither Dan nor Eric could be convicted of conspiracy.

Accomplice Liability

An accomplice is someone who aids, abets, counsels or encourages the principal to commit a crime with the intent that the principal succeed. A majority of jurisdictions

hold accomplices liable for all reasonably foreseeable crimes that the principal committed.

Burglary and Larceny

Here, Eric was likely an accomplice to the burglary and larceny committed by Dan, and he should be convicted of those offenses. By offering to let Dan use his truck to carry away the computers after he stole them, Eric aided Dan by giving him a getaway vehicle. Without Eric's participation in loaning Dan his truck, it's not clear that Dan would have been able to commit the crimes. Therefore, if it was foreseeable that Dan would commit burglary and larceny, Eric is liable therefor.

In this case, Eric knew that Dan intended to enter Vicky's business and take her computers. Therefore, he was personally informed of Dan's intent to commit larceny and burglary. In fact, he specifically told Dan that he could use Eric's truck "if Dan needed it to carry the computers away." Therefore, Dan is liable as an accomplice to burglary and larceny.

Robbery

Eric will argue he is not an accomplice to the robbery of Vicky because it was unforeseeable that Vicky would be home and therefore that Dan would take anything from her person or presence. He will claim that he thought Vicky was on vacation, and that therefore, the most that Dan could be guilty of is burglary and/or larceny.

On balance, however, this argument is likely to fail. Eric had no personal knowledge of Vicky's travel plans, and by agreeing to lend Dan his truck for the purposes of escaping with Vicky's computers, he assumed the risk that Dan might have erred in determining Vicky's travel plans. Further, because the business was in Vicky's garage and therefore on her property, it would not be unforeseeable that someone might be either on Vicky's property for business purposes or that someone else besides Vicky was living there. As such, the presence of another person was reasonably foreseeable, and so was the robbery of the computers from that person's presence.

Eric is therefore guilty of robbery as an accomplice.

Battery

Similarly, Eric will argue that it was not reasonably foreseeable that Dan would commit battery against Vicky because he didn't even know that Vicky would be present. For the reasons discussed above, this argument will likely fail. Committing a home invasion always carries with it inherent risks that someone will be present, and breaking into a business carries similar concerns. It was foreseeable that Vicky or another person might be there during the burglary, and therefore, that Dan might use force against them in order to effectuate his escape.

As such, Eric is guilty as an accomplice to battery.

III. Fred's Crimes

Accessory After the Fact

Most jurisdictions will label an individual who aids, abets, counsels or encourages a criminal in avoiding apprehension to be an "accessory after the fact" if they did not play any role in the crimes before they happened. Such a defendant is an accomplice, but is generally only punished for his own behavior in obstructing justice rather than the crimes of the principal.

Here, Fred knew that the computers Dan brought to his home were stolen from Vicky by Dan. Nonetheless, in exchange for two of them, he agreed to let Dan hide his truck on Fred's property. This action aided Dan in covering up the crime and aiding detection. Hiding the getaway vehicle that Vicky had seen Dan driving away increased the chances that Dan would get away with the theft of her property, and therefore Fred acted as an accessory after the fact.

Receipt of Stolen Property

If the jurisdiction in this case recognizes knowing receipt of stolen property as a criminal offense, Fred is likely guilty of that crime as well.

Dan specifically informed Fred that the computers were stolen, but Fred agreed to take them in exchange for hiding Dan's truck. Therefore, the scienter requirement is

met here because Fred had firsthand knowledge of the computers' stolen status but agreed to take them into his possession.

Answer B

Dan's criminal liability:

Burglary:

Burglary is the breaking and entering at nighttime into the dwelling house of another with the intent to commit a felony therein.

Breaking and Entering:

A person must physically enter the dwelling house of another to commit a burglary. Here, Dan entered into the garage of Vicky's house by pushing a partially open side door all the way open. Although he did not literally break anything to enter into the garage because the door was already open, this element is still met. Only the slightest movement is required to "break" into the house. The door need not be locked either. Thus, by pushing the partially opened door to the garage open and subsequently entering the garage, Dan committed a breaking and entering.

At nighttime:

Although modern statutes have eliminated the requirement that a burglary be committed at night, the common law crime of burglary required that the burglary happen at night. Here, the facts indicate that Dan drove over to Vicky's house at nighttime. Thus, the common law element and any modern statutory elements are met.

Dwelling house of another:

The common law definition of burglary required that the breaking and entering be of the dwelling house of another, that is, where the person lived and slept. Modern statutes have expanded this element to include any structure such as an office building. Here, Dan broke into the garage of Vicky's house. Vicky did not sleep in her garage, but she did conduct her computer business out of her garage and frequently spent time in there. Additionally, the garage was connected to the house by the door that Vicky entered when she heard the noise. Thus, the garage is part of Vicky's dwelling house, and this

element is met under the common law definition of burglary. The element is also met under a modern statutory definition because a garage would be considered a structure.

Intent to commit a felony therein:

A person must have an intent to commit a felony inside the dwelling house at the time that they committed the breaking and entering. Here, when Dan learned that Vicky was going away on vacation, he informed Eric that he planned to take all of her computers. Thus, Dan intended to commit larceny, analyzed below, once he broke into Vicky's house. He had this intent at the time he pushed the partially open side door. Thus, Dan had the requisite intent to commit a felony once inside the garage, and his intent was simultaneous with his breaking and entering.

Because Dan broke and entered into Vicky's garage, at nighttime, with the intent to commit a larceny, he has committed burglary.

Larceny:

Larceny is the trespassory taking and carrying away of the personal property of another with the intent to permanently deprive.

Trespassory taking and carrying away:

A person must take the personal property from the possession of another and move the property, if only the slightest bit. Here, Dan loaded Vicky's computers into the back of the truck. The computers were in Vicky's possession because they were stored in her garage as part of her retail computer sales business. Thus, Dan has met the element of a trespassory taking and carry away

Personal Property of another:

Here, the computers belonged to Vicky as she ran a retail computer business out of her garage. Thus, this element is met.

Intent to Permanent Deprive:

A person must intend to permanently deprive the victim of the possession of the personal property or act knowing that there actions will result in a substantial risk of loss. Dan intent to take all of her computers, which he told Eric. Although the facts do not indicate what he was going to do with the computers once he took them, it is unlikely that he was going to return them to Vicky, especially after he pushed her out of the way and drove off with them. Thus, Dan acted with the intent to permanently deprive Vicky of the computers. Because all the element for larceny are met, Dan committed larceny when he took Vicky's computers.

Robbery:

Robbery is the trespassory taking and carrying away of the personal property of another by the use or threat of force from the person of another. Here, Dan took the computers from Vicky's garage and loaded them into his truck meeting the requirement of a trespassory taking and carrying away. The computers where Vicky's personal property, which she stored in her garage. Although Dan though Vicky was away when he entered the garage, Vicky heard him and stepping into the garage as Dan was loading the computers into the back of the truck. She stepped in between Dan and the truck, at which point Dan pushed her. Although the computers were not on Vicky's person, the computers were in the immediate area. When she yelled at Dan, he pushed her by using force. Therefore, Dan used force to take the computers from the area in Vicky's immediate control. Because of the use of force when he took Vicky's computer, he has committed robbery as well.

Battery:

Battery is the unlawful application of force on the person of another, committed with the intent to cause the application of force to another. Here, Dan pushed Vicky out of the way when she stepped in between him and the truck. This was the unlawful application of force on Vicky. He acted with the intent to push Vicky out of the way because he was trying to move her to escape. Thus, Dan committed a battery as well.

Eric's Criminal Liability:

Conspiracy:

A conspiracy is the agreement of two or more person for an unlawful objective, with the intent that the unlawful objective be obtained. Additionally, statutes now include that an overt act be committed in furtherance of the conspiracy. Here, Dan told Eric of his plan to take all of Vicky's computers while she was away on vacation. Eric told Dan that he wanted nothing to do with the theft although he let Dan borrow his truck knowing Dan would use the truck to take the computers away. Eric did not agree with Dan to commit the burglary of Vicky's home. He did not have the same unlawful as Dan. Although he handed Dan his keys, which would qualify as an overt act, he did not have the intent to burglarize Vicky's home and steal her computers. Thus, he did not enter an agreement with Dan for the unlawful purpose of stealing from Vicky. Eric is not liable for conspiracy.

Accomplice Liability:

An accomplice to a crime aids, encourages, counsels, or abets a person committing the crime, with the intent that the person commit the target crime. Here, Eric gave Dan his keys to his pickup truck so that Dan could use the truck to move the computers. This was aid to the principal, Dan, who actually committed the burglary because Dan was able to move the computers once he could use Eric's truck. Although Eric wanted nothing to do with Dan taking the computer away, he told Dan that he could borrow his truck if he needed it to carry the computers away. Thus, although Eric did not want to actually take part in the burglary, he acted knowing that burglary would take place. He knew that Dan would use the truck to burglarize Vicky's house. Eric had the requisite intent for accomplice liability. Because he both aided Dan in committing the crime against Vicky, and acted with the intent to aid Dan, Eric is liable as an accomplice.

Vicarious Liability for the Target Crime:

An accomplice is liable for the crimes committed by the principal if the principal's crimes were foreseeable. It was completely foreseeable that once Eric gave Dan the keys to his car, Dan would steal all of Vicky's computers and Dan would use Eric's truck to move them. Additionally, it was foreseeable that Vicky might be home even though she told Dan that she would be on vacation; it is possible that her vacation plans had to be cancelled, as it turned out. If Vicky or anyone else was in the house, it was foreseeable

that Dan would use some measure of force to take the computers. Thus, Eric is liable for Dan's crimes of burglary, larceny, robbery and battery because all of these crimes were foreseeable once Eric gave Dan his keys to his truck knowing Dan would try and steal the computers.

Fred's Criminal Liability:

Accessory after the fact:

Under the common law, accomplices were liable as accomplices in the first degree or in the second degree based on how they aided the principal and when their aid occurred. Modernly, a person who aids a felon in his escape is liable as an accessory after the fact. This is a separate crime, and an accessory is not liable for the principal's target crime. Here, Dan immediately went to Fred's house after he drove off from Vicky's house. He immediately told Fred what he had done. Thus, Fred knew that Dan was a felon and that he was trying to escape after he stole Vicky's computers. He aided Dan because he allowed Dan to hide the truck behind Fred's house. This would make it harder for the police to spot that truck that Vicky would report, and thus help Dan in his escape. Fred is liable as an accessory after the fact. Unlike Eric who acted as an accomplice, Fred's liability as an accessory does not mean that he is also liable for the separate crimes that Dan committed.

Receipt of Stolen Property:

Receipt of stolen property requires that the person receive, buy, or accept property knowing that the property was stolen. Here, Dan immediately told Fred what he had done once he arrived at Fred's house. Fred was aware that the computers belonged to Vicky, and that Dan had just unlawfully taken them from Vicky's garage. When Fred accepted two of the stolen computers in exchange for allowing Dan to hide his truck behind Fred's house, he accepted the property knowing that it was stolen from Vicky.
Thus, Fred is criminally liable for the crime of receipt of stolen property.

Q2 Civil Procedure

Doctor performed surgery on Perry's spine to insert a metal rod designed by Bolton, Inc. (Bolton). Shortly after the surgery, Perry developed severe back pain at the location where the rod was inserted. Within the applicable statute of limitations for a tort action for negligence, Perry sued Doctor in federal district court, alleging that she was negligent in using Bolton's rod for the kind of back condition from which he suffered. Personal jurisdiction, subject matter jurisdiction, and venue were proper.

During a deposition, Perry's attorney asked Doctor to state whether she had performed any other spine surgeries using Bolton's rods and, if so, whether any of those surgeries had resulted in complications. Doctor's attorney objected to the questions on the ground that the information requested had nothing to do with whether Doctor was negligent as to Perry, and Doctor refused to answer. After the attorneys properly met and conferred concerning Doctor's refusal, Perry's attorney filed a motion to compel Doctor to answer the questions.

Shortly after the statute of limitations had run, Perry learned through a newspaper article that Bolton had been sued by several patients who alleged that they suffered severe back pain after Bolton's rod was inserted into their spines during surgery. Perry immediately sought and obtained leave to amend his federal complaint to join and include a claim against Bolton, alleging that it had negligently designed the rod. Bolton immediately filed a motion to dismiss Perry's claim against it on the ground that the statute of limitations had already run.

Perry also learned that Doctor had lost a lawsuit brought by another patient with a back condition like his who had also alleged negligence by Doctor for inserting Bolton's rod into his spine. Perry filed a motion for summary judgment against Doctor on the basis of preclusion.

1. How should the court rule on Perry's motion to compel Doctor to answer? Discuss.

2. How should the court rule on Bolton's motion to dismiss Perry's claim on the ground that the statute of limitations had run? Discuss.

3. How should the court rule on Perry's motion for summary judgment? Discuss.

Answer A

Perry v. Doctor

1. Perry's Motion to Compel Doctor to Answer

Discovery provides fact-gathering tools for parties to obtain relevant evidence to the case. The scope of discovery is broad but not limitless. A party may only discover relevant evidence/information or facts reasonably calculated to lead to relevant evidence/information. However, a party may not discover privileged information. Therefore, the scope is broader than evidence admissibility as not only relevant evidence is discoverable, but also those that provide a good lead to relevant information. Deposition is one of these fact-gathering tools.

During a deposition, typically there is not judge present, but attorneys should still make proper objections for the future purpose of excluding any answers at trial. If an attorney does not make an objection during deposition to a question or an answer, it is considered waived and the same question cannot be objected to in the future. If the opposing attorney later wishes to admit the objected question and/or answer at trial, the judge will determine whether the attorney's objections at the deposition should be sustained or overruled. At the deposition, because there is no judge present to determine the objection, the witness must still answer because, as stated above, all relevant evidence or facts reasonable calculated to lead to relevant evidence/information is discoverable. One deposed does not have to answer a question unless the answer would reveal privileged information.

Here, Perry's attorney asked Doctor to state whether she had performed any other spine surgeries using Bolton's rods, and if so, whether any of those surgeries had resulted in complications. Doctor's attorney objected on the basis of relevance - asserting that the information requested had nothing to do with whether Doctor was negligent as to Perry, so Doctor refused to answer. The question asked is a relevant question because Perry is suing Doctor for negligence. In this case, Doctor performed surgery on Perry's spine to insert a metal rod designed by Bolton. Shortly after the surgery, Perry developed severe back pain where the rod was inserted. If Doctor has

performed similar surgeries with the same Bolton's rods in the past and those have also resulted in complications, that would be relevant to the question of Doctor's duty and breach of duty. For example, if Doctor had performed similar surgeries and had resulted in complications, then a reasonable doctor with similar skill, knowledge and experience as another doctor in the same field of profession may decide to no longer use Bolton's rods or to improve or change his technique so as to avoid future surgical complications. The answer to this question could reasonably lead to Perry's attorney finding other patients for relevant information and may also discover the techniques used during those surgeries. Thus, the information is relevant and reasonably calculated to lead to relevant information. Thus, this information is discoverable, and the Doctor must answer. Because the attorneys properly met and conferred concerning Doctor's refusal to answer and could not come to an agreement, the motion to compel was properly filed. The court should grant Perry's motion to compel Doctor to answer.

Doctor may argue that revealing such information would violate doctor-patient confidentiality, thus privileged information. However, the question simply asked whether Doctor had performed other spine surgeries using Bolton's rods, and whether any of those surgeries had resulted in complications. The answer only requires a yes or no answer. The answer would not require Doctor to reveal any patient's names or medical conditions. Thus, Doctor's argument would fail.

The court should grant Perry's motion to compel.

2. Motion to Dismiss Perry's Claim on the ground that Statute of Limitations had run

Assuming that this is a diversity of citizenship case in federal court (because negligence is typically not a federal question), the Federal court must apply the Erie doctrine where Federal Rules of Civil Procedure (FRCP) for procedure and apply state law for substantive law. Courts have established that in a diversity case, the state statute of limitations must be used as that is considered substantive law. Under FRCP, a party has 14 days to amend a complaint after original filing.

To amend a complaint after the statute of limitations had run, the complaint must relate back to the original complaint that was filed before the statute of limitations had

run. To relate back to the original complaint while adding a defendant on the amended complaint, 3 elements must be satisfied: 1) the claim arises out of the same transaction or occurrence as the original complaint, 2) the new party knew of the original action within 120 days of filing, and 3) the new party, but for the mistake, knew that they should have been named as the original party.

Here, the original complaint was filed in federal district court within the applicable statute of limitations for a tort action for negligence. Perry alleges that Doctor was negligent in using Bolton's rod for the kind of back condition from which he suffered.

Same transaction or occurrence

The amended complaint includes a claim that alleged that Bolton negligently designed the rod. Because Perry was suing Doctor for negligence for using Bolton's rod during surgery for Perry's kind of back condition, the new claim against Bolton arises out of the same occurrence because they both arose out of Doctor's surgery and inserting Bolton's rod. Thus, this element is satisfied.

New party knew of original action

It is unclear whether Bolton knew of the original action where Perry sued Doctor for negligence. If doctors are sued based on products they used on patients, it is not unusual that doctors would seek indemnification or contribution from the manufacturers of those products. Thus, if Doctor informed Bolton of Perry's lawsuit (or if Bolton somehow was aware of it) within 120 days of filing, then this element is satisfied. Otherwise, this element is not satisfied.

But for the mistake, Bolton knew they should have been named

There is no indication that Perry had originally wanted to file a claim against Bolton. Perry's original claim was that Doctor negligently used Bolton's rods for his type of injury, thus alleging that Bolton's rods were wrongly used. Perry did not allege that anything was actually wrong with the rod itself. Therefore, there appears to be no mistake regarding the identity of the defendant. In fact, there is no facts to suggest that Perry had even considered suing Bolton for negligence until Perry learned through a

newspaper article that Bolton had been sued by several patients who alleged that they suffered severe back pain after Bolton's rod was inserted into their spines during surgery. Clearly, Perry did not make a mistake as to the defendant when he filed the original claim prior to reading this newspaper. Only after reading the newspaper did he "immediately sought" to amend his complaint. The evidence shows that there is no mistake as to the identity of the defendant in Perry's suit.

Even if Bolton was aware of the suit, no indications on the claim would lead Bolton to believe that Doctor had originally meant to sue Bolton instead of Doctor. Therefore, this element is not satisfied.

The court should grant Bolton's motion to dismiss because the applicable statute of limitations had run and the amended complaint does not relate back.

3. Perry's Motion for Summary Judgment

Motion for summary judgment will be granted if the court determines there is no dispute of fact in the case. The court may look at evidence when making such a determination.

Claim Preclusion (res judicata)

To assert claim preclusion, 3 elements must be satisfied: 1) same claimaint vs. same defendant in both case #1 and #2, 2) case #1 ended in a valid final judgment on the merit (which means it did not end based on jurisdiction, venue or indispensable party), and 3) the claimant is asserting the same claim as case #1 (same claim usually means arises out of the same transaction or occurrence).

The first lawsuit was brought by another patient, not Perry. Thus, the first element requiring the same claimant and defendant fails because Perry was not the plaintiff in the first case, as he is in the second case. Although it appears that case #1 ended in valid final judgment on the merits, case #1 did not assert the same claim because it is not the same transaction or occurrence. The previous patient's claim arises under his individual surgery, and Perry's claim arises out of his own separate surgery. Thus, claim preclusion should not be asserted.

Issue preclusion (collateral estoppel)

To assert collateral estoppel, 5 elements must be satisfied: 1) case #1 ended in a valid final judgment on the merits, 2) the issue was actually litigated in case #1, 3) the issue was essential to the judgment (if the issue was decided differently, the case would have ended differently), 4) collateral estoppel is being used against one who was a party in case #1, and 5) collateral estoppel is being used by one who was a party in case #1 (satisfies mutuality requirement in those jurisdictions who require it), one who was not a party in case #1 but is a defendant in case #2 if plaintiff actually litigated the issue in case #1, and one who was not a party in case #1 but is a plaintiff in case #2 if it is fair. Collateral estoppel may be used by nonparties in case #1 because many jurisdictions have found that not complying the mutuality requirement does not violate due process.

Valid Final Judgment

No facts suggest that the first case did not end in final valid judgment on the merit. No facts state that case #1 ended based on jurisdiction, venue or indispensable party. Thus, if it did not end in one of these bases, then it ended in valid final judgment, and this element is satisfied.

Issue actually litigated

The facts state that "Doctor had lost a lawsuit brought by another patient... who also alleged negligence for inserting Bolton's rod into his spine." Therefore, it appears that the issue of negligence was actually litigated. If it was, this element is satisfied.

Issue essential to judgment

Because the previous patient brought an action based on negligence, the issue of negligence was likely essential, and if the court or jury in case #1 had found Doctor not to be negligent, then the outcome of case #1 would have been different. Thus, this element is satisfied.

Used against party in case #1

Perry is asserting issue preclusion against Doctor, who was the defendant in case #1 because in the previous case, Doctor was sued by another patient. Doctor is a current defendant in Perry's case and was a defendant in case #1. Thus, this element is satisfied.

Used by nonparty in case #1 but plaintiff in case #2

For Perry to assert issue preclusion, the use of issue preclusion must be fair. Here, Perry would argue that it is fair because the previous plaintiff/patient's injuries had a back condition like Perry's and Doctor inserted the same Bolton's rod into his spine, just like Doctor did with Perry. However, this argument would likely fail. Doctor would argue that although the previous patient in case #1 had a "back condition like" Perry's, medical conditions/injuries, especially back injuries, are almost never exactly the same. Its causes may be different and its symptoms may be different, which would call for different treatment. Thus, even if Perry and the previous patient had similar injuries, its causes, symptoms and other factors may require Doctor to use different technique or treatment. Or even if the same technique was used, each patient may react different based on the patient's physiology even without any negligence on the part of Doctor. Therefore, it would not be fair to preclude Doctor from litigating the issue of negligence in Perry's case based on Perry's injuries/condition, causes of Perry's injuries/medical condition, and techniques used during Perry's surgery. Because it would be unfair to preclude Doctor from litigating the issue of negligence in Perry's lawsuit, this element is not satisfied.

Thus, the court should deny Perry's motion for summary judgment.

Answer B

1- Motion to compel Doctor (D) to answer
Scope of discovery- relevance

During discovery, both parties to a lawsuit may engage in discovery through depositions, interrogatories, requests for production, requests for admissions, and other discovery devices any evidence that is relevant to the lawsuit. Relevance is a low standard and it just requires that the evidence sought to be discovered be likely to lead to the discovery of any admissible evidence relevant to a claim or defense in the subject case. Here, Perry (P) is bringing a lawsuit against D for negligence. Negligence is a tort action that requires the plaintiff to establish 1) duty, 2) breach, 3) actual causation, 4) proximate causation, and 5) damages.

Here, P is seeking discovery of whether D had performed any other spine surgeries using Bolton's rods, and if so, whether any of these surgeries resulted in complications. Although D is arguing that this information has nothing to do with whether D was negligent as to Perry, this evidence is relevant to the issues of duty and breach- which P will have to establish as part of his prima facie negligence lawsuit.

Although this information does not involve P, it is relevant to duty because it helps determine what standard of care D should be held to. A physician is typically held to the standard of care of an average member of his profession in good standing. Thus, D will be held to the standard of care of an average back surgeon in good standing. Here, if D in fact used Bolton's rods before and these surgery's resulted in complications, this would indicate that D should have warned P about these complications. An average back surgeon in good standing would warn his patients of complications that occurred when the doctor performed similar surgeries on other patients.

This information is also relevant to breach. In order to establish breach, a plaintiff has to establish that the defendant fell below the applicable standard of care. Here, if other spine surgeries using the same rod had led to complications, this would be relevant to whether D fell below his standard of care because either he did not inform P of these

complications (which he should of done) or because he in fact used this rod for the spine surgery knowing that it had a potential to lead to complications.

Thus, the evidence that P is seeking is relevant to his negligence theory and should have been discoverable.

Privilege/ work product

Relevant evidence is discoverable unless there the party against whom the discovery is sought can claim a privilege such as doctor-patient confidentiality or work product privilege. Here, D will have to answer P's request unless he can claim either of these privileges.

Although many jurisdictions, including CA, recognize the doctor-patient privilege, the federal courts do not. Here, P is suing D in federal district court thus the doctor-patient privilege does not apply and D will not be able to assert it to avoid his discovery obligations to P.

Work product privilege protects the work of the attorney and parties that is down in anticipation of litigation. Here, there is no indication that D's attorney complied a list of other spine surgeries in anticipation of this litigation, thus D will not be able to claim the work product privilege.

Conclusion

Because the evidence as to other spine surgery complications is relevant to P's negligence claim against D and not subject to any privilege, the court should grant P's motion to compel D to answer his deposition question.

2-Motion to dismiss on ground that statute of limitations (SOL) had run

Generally, a plaintiff must file his complaint with all claims and all defendants within the applicable SOL. There are 2 limited exceptions, outlined below, where there plaintiff may 1) add a new claim and 2) add a new defendant after the SOL has run. In these situations, the new claim/ new defendant will "relate back" to the original complaint and the date that this original complaint was filed. This way, if the original complaint was

filed within the applicable SOL, the plaintiff will be able to avoid the SOL problem with his new claim/ defendant.

Here, P filed a suit against doctor within the applicable SOL, thus whether P can add the claim against Bolton depends on whether it "relates back."

Relation back- Amendment of pleadings to add a claim

A plaintiff may amend his complaint to add a new claim after the SOL has run if the claim arises out of the same transaction or occurrence as his original claim against the original defendant. Here, P wants to add a claim against Bolton based on negligent design of the rod. P's original claim is against the doctor for negligence in using this rod. Thus, P's claim against Bolton arises out of the same transaction or occurrence as his original complaint- both the new claim against Bolton and the original claim against D arise out of the back surgery/ rod insertion that led to P's severe back pain. Thus, P will be able to amend his complaint to add this claim.

Relation back- Amendment of pleadings to add a defendant

A plaintiff may amend his complaint to add a new defendant after the SOL has run only in very limited circumstances. The plaintiff must establish 1) that his claim against this new defendant arises from the same transaction or occurrence as the original complaint, 2) that the new defendant knew about the original action within 120 days of its filing, and 3) that the defendant knew that, but for a mistake, he would have been originally named in the plaintiff's original complaint.

Here, P wants to include a claim against Bolton, alleging that it had negligently designed the rod that D placed in his back during the spin surgery. P's original claim is against the doctor for negligence in using this rod. Thus, P's claim against Bolton arises out of the same transaction or occurrence as his original complaint- both the new claim against Bolton and the original claim against D arise out of the back surgery/ rod insertion that led to P's severe back pain. Thus, this first element is satisfied.

Here, P will also have to establish that Bolton knew about his claim against D within 120 days of its filing. Here, there is no indication that Bolton received a copy of P's complaint

against D or had any notice that P brought a claim against D as a result of his surgery. Thus, unless P can establish that Bolton knew about the lawsuit, he will not be able to establish this element.

Here, P will also have to establish that Bolton knew that he made a mistake and that he would have originally named Bolton but for the mistake. Here, P will try to argue that Bolton had been sued by several other patients who alleged that they suffered severe back pain after Bolton's rod was inserted during spine surgery. Thus, P will argue that Bolton knew that P should have filed the lawsuit against it. However, P will not be able to establish this element. P did not make a mistake and negligently name the wrong defendant- rather, he named Doctor who is likely a proper defendant and then subsequently named Bolton after he learned more information. He did not even learn this information through discovery/ deposition of Doctor- he learned it by reading a newspaper article. This is not a situation where the plaintiff completely puts the wrong name in the applicable line of his complaint. P did not make a mistake at the time of his complaint and rather learned about a potential claim against Bolton too late. He will be barred by the SOL.

Conclusion

Here, P's new claim will relate back to his original complaint. However, his addition of Bolton as a new defendant will not relate back to the original complaint and P will not be able to add his claim against Bolton. Thus, the court should grant Bolton's motion to dismiss P's claim on the ground that the SOL had run.

3- Motion for summary judgment based on preclusion

A motion for summary judgment requires the moving party to establish 1) there is no genuine dispute of material fact and 2) he is entitled to judgment as a matter of law. Preclusion is a common ground for a motion for summary judgment because it involves the judgments of prior lawsuits so there is genuinely no dispute as to material fact (the outcome of these lawsuits).

Res judicata/ claim preclusion

Res judicata (RJ) bars a subsequent lawsuit (lets call it case 2) when there is a prior lawsuit (call it case 1) and 1) case 1 and case 2 involve the exact same parties (the exact same plaintiff and the exact same defendant), 2) case 1 ended in a final judgment on the merits, and 3) case 2 involves the same transaction or occurrence as case 1.

Here, P will not be able to assert RJ against Doctor. Here, case 1 is the lawsuit brought by another patient against Doctor. Case 1 involved a negligence action for inserting a Bolton rod into his back. Although P's lawsuit (case 2) is very similar, RJ will not apply because P was not a party to the prior case 1. RJ requires the exact same persons to be parties to both the first case and the second case. Although D was a party to the first case, P was not, thus he will not be able to assert RJ against D.

Collateral estoppel/ issue preclusion

Collateral estoppel (CE) bars a subsequent lawsuit (case 2) when 1) case 1 and case 2 involve the same issue, 2) this issue was actually litigated and decided in case 1, 3) this issue was essential to the judgment in case 1, 4) issue preclusion is being asserted in case 2 against a party who was a party in case 1, and 5) traditionally, is being asserted by a party who was a party in case 1 (mutual collateral estoppel) but modernly, does not to be asserted by a party who was a party in case 1 (non mutual collateral estoppel).

Here, case 1 (the lawsuit by the other patient) and case 2 (P's negligence suit against D) will likely involve similar issues. They are both negligence suits so they will both have issues such as 1) what was the defendant doctor's standard of care? 2) did the defendant breach this standard of care by installing a Bolton rod in his patient's spine, 3) did the insertation of the Bolton rod cause the patient to suffer subsequent back pain, etc. Thus, case 1 and case 2 will involve many of the same issues, and this first element will be satisfied.

Because Doctor lost the first negligence lawsuit, many of these issues will also have been litigated and decided, thus there are a number of issues which will have been actually litigated and decided in case 1, thus P will likely be able to satisfy the second element of CE.

Similarly, many of these issues would have been essential to the judgment in case 1. A plaintiff has the burden of establishing all of his prima facie negligence elements so each of these issues would have been essential to the first patient prevailing in his negligence suit against Doctor, thus this third element will likely be satisfied.

P is also asserting issue preclusion in case 2 against Doctor, who was a party in case 1. Thus, issue preclusion is being asserted against a party who was a party in case 1 and the fourth element is satisfied.

For the fifth element, traditionally, mutual collateral estoppel was required and CE could only be asserted by a party who was also a party to case 1. However, unlike the fourth element (which is required by due process), due process does not require the party who is asserting CE to be a party to case 1. Thus many jurisdictions allow nonmutual use of collateral estoppel. The standard that must be met depends on whether the party is asserting CE as a plaintiff or as a defendant. If the party is asserting it as a defendant (defensive collateral estoppel) the court will apply CE to bar further litigation of this issue as long as the plaintiff had a full and fair opportunity to litigate the issue in case 1. However, if the party is asserting it as a plaintiff (offensive collateral estoppel) the court will be more reluctant to apply CE and will look at a number of factors- 1) did the defendant have a full and fair opportunity to litigate the issue in case 1, 2) could this new plaintiff have joined case 1, 3) could the defendant have foreseen multiple lawsuits, and 4) are there any inconsistent judgments so that assertion of CE could be unfair to the defendant.

Here, P was not a party to case 1 however he still may be able to use nonmutual collateral estoppel since most courts have got rid of the mutuality requirement. P is a plaintiff and he is the one asserting CE against D. Thus, P is trying to make offensive use of CE. The court will look at a number of factors- whether Doctor had a full and fair opportunity to litigate the first lawsuit against the other patient. Whether Perry could have joined the first negligence lawsuit involving the Bolton rod- did P know of this claim at the time it was brought? Whether the doctor could have foreseen that there would be multiple lawsuits like this- here multiple patients had sued Bolton from back pain they suffered so D likely could have foreseen that plaintiffs would bring lawsuits against him

as well for use of the rod. And finally, whether there are inconsistent judgments against Doctor. Here, this appears to be the only other lawsuit against this particular doctor involving negligent use of the rod thus unless there are other lawsuits where the Doctor prevailed on this issues, there are unlikely to be inconsistent judgments.

Conclusion

The court should dismiss Perry's motion for summary judgment as to his claims of res judicata but likely should grant his motion as to his claims of collateral estoppel for a number of negligence issue (outlined above) depending on the factors (outlined above).

Q3 Contracts

Betty is a physician. One of her patients was an elderly man named Al. Betty treated Al for Alzheimer's disease, but since she believed he was destitute, she never charged him for her services.
One day Al said to Betty, "I want to pay you back for all you have done over the years. If you will care for me for the rest of my life, I will give you my office building. I'm frightened because I have no heirs and you are the only one who cares for me. I need to know now that I can depend on you." Betty doubted that Al owned any office building, but said nothing in response and just completed her examination of Al and gave him some medication.

Two years passed. Al's health worsened and Betty continued to treat him. Betty forgot about Al's statement regarding the office building.

One day Betty learned that Al was indeed the owner of the office building. Betty immediately wrote a note to Al stating, "I accept your offer and promise to provide you with medical services for the rest of your life." Betty signed the note, put it into a stamped envelope addressed to Al, and placed the envelope outside her front door to be picked up by her mail carrier when he arrived to deliver the next day's mail.

Al died in his sleep that night. The mail carrier picked up Betty's letter the following morning and it was delivered to Al's home a day later. The services rendered by Betty to Al over the last two years were worth several thousand dollars; the office building is worth millions of dollars.

Does Betty have an enforceable contract for the transfer of the office building? Discuss.

Answer A

Applicable law

The common law governs all types of contracts except those for the sale of goods. Here, the contract between Al and Betty was for services of medical care in exchange for an office building thus it will be governed by the common law.

Valid contract

A valid contract must have been formed by an offer, acceptance, be supported by consideration and no subject to any defenses. If Betty can show that these all existed she will have an enforceable contract. This is decided by the objective manifestations of the parties, thus Betty's subjective thoughts in believing that Al did not have the office building or in forgetting about the offer do not impact the formation of the contract.

Offer

An offer is a manifestation of intent to enter into a contract that is certain and definite and communicated to the offeree. Here, Al stated that he would give Betty his office building in exchange for her to continue to give him medical care until his death. This shows intent to be bound to the offer on those terms and was stated to Betty. Thus, his statement is an offer. On the other hand, the offeree did not think there was an offer because she did not think he owned a building and his statement was phrased in such a way as to suggest that he was merely expressing gratitude for Betty's work, by saying she was the only one who cared for him and that he did not have any other heirs. Overall, although couched in language that would not be an offer, there is a clear intent to give Betty his building in exchange for her caring for him for the rest of his life.

Bilateral or unilateral contract.

The issue is whether Al's offer was an offer to enter into a unilateral or bilateral contract. A unilateral contract is one that can only be accepted by performance. Here, Al said he would give Betty the office if she cared for him for the rest of his life. He was not seeking her promise to care for him for the rest of her life, but rather that she actually care for him for the rest of his life.

On the other hand, most contracts are construed as bilateral, that is are formed by the promises to perform. And here the offer could be accepted by Betty's promise to provide medical services.

Termination of an offer

An offer may be terminated. Here, there is no indication that Al terminated his offer in the two years after the conversation.

Lapse of time

An offer will terminate if it is not accepted after a reasonable period of time, if none is suggested by the contract. There is usually a reasonable time limit on offers. Here, Betty did not accept the offer until two years later when she learned that Al actually owned the building. It should be argued that the offer has lapsed. However, since it was an offer to care for him for the rest of his life, two years may not be an unreasonable period of time, depending on his age and need for care.

Death

Death of the offeree will terminate the offer. Here, Al died before receiving the acceptance. However, Betty may have accepted the offer before her death, see acceptance, and thus his death would not be an issue, since death only terminates an offer, not necessarily a contract.

Irrevocable offer for unilateral K

Betty will argue that the offer was unrevocable because she had started performance of the unilateral contract by continuing to care for Al through the next two years.

Acceptance

Acceptance is the unequivocal manifestation of assent to the offer by one with power of acceptance. Here, the offer was made to Betty so she had power of acceptance. There are several arguments Betty will make to show acceptance.

Silence

Here, Betty was silent when the offer was first made. Thus she made no manifestation of assent. However, she did continue to treat him for the remainder of his life and thus her silence could be deemed acceptance since she continued to perform the contract by providing medical care.

Mailing Acceptance

Normally an acceptance is effective upon mailing. Here, the effectiveness of Betty's actions depend on whether properly addressing and stamping the envelope and putting it outside is an effective mailing of the acceptance. On one hand, she completed all actions required for mailing and putting it outside her door to be picked up by a mailman is no different than walking to the post office and dropping it in the mailbox. All that remains is the actual mailing of the envelope. On the other hand, when one goes to a post office or hands mail to the mailman one cannot thereafter get that mail back. Betty could easily have gone outside and retrieved the envelope from her own mailbox at any time before the mailman arrived and thus the letter was not posted. Overall, it is likely that this is not proper dispatch of the mail since she could so easily retrieve it. As such it was not an effective acceptance until the mailman picked up the letter the next morning. As discussed above, once Al had died the acceptance could no longer be effective since the offer was terminated. Thus she did not accept the offer by mailing.

Acceptance by Performance of a unilateral Contract

Betty will also argue that she accepted the contract by performing the terms of the unilateral contract. She continued to provide Al with medical care until his death. Thus upon Al's death she had fully performed and had the makings of an enforceable contract.

Consideration

A valid contract must have consideration. Consideration is the bargained for exchange of something of legal value. Here, Al is offering Betty his office building in exchange for

her medical care, these are both of legal value or detriment because they are giving up an office building and Betty is giving up payment for her services.

Bargained for exchange: The promise must induce the detriment and the detriment induce the promise. Here, Al's offer to give the building was to induce Betty to give him medical care. However, Betty did not think he had the building and continued to give him medical care anyhow for two years before "accepting" the offer. This suggests that she was not induced to give medical care for the rest of his life by the promise of the building.

Past Consideration

Al's heirs should also argue that Al's promise was really for past consideration. That is the work Betty had done before. This is evidenced by Al's statement I want to pay you for all the "work you have done over the years." Consideration is not present where the work has already been done. However, this argument will fail because Al not only offers for the previous work done by Betty but also by the remaining work that he will do.

Illusory

The heirs should argue that the promise is illusory because Betty may only have to do work for Al for one day or even one hour. However, this argument will fail because she will be bound to compete the medical work until he dies, which could be in twenty years or in 2 minutes.

Overall, it does not seem like there is consideration since the promise of the building did not induce the medical work.

Promissory Estoppel

Betty will argue that while there is no consideration she should be able to enforce under a promissory estoppel doctrine. There, a person must have relied upon a promise, to their detriment, and done so justifiably. Betty will argue that in providing free medical care to Al for two years she was relying on his promise. However, she had forgotten about the statement regarding the building and thus her actions were not a result of reliance on the promise, but rather her own good work.

Defenses

Assuming there is consideration there are several defenses to contract formation that can be raised and prevent the enforcement of the contract.

Statute of frauds

The statute of frauds requires that certain contracts be in writing in order to be enforceable. The sale of land is one such contract. Here, although Al is not obtaining the typical purchase money in his conveyance he is nonetheless receiving a service of value in exchange for his land. Thus, it could properly be considered a sale of land. Additionally Betty could argue that it is a contract that cannot be performed in under a year, however this will fail since Al could die at any time and the contract would be performed.

Additionally, since this is a contract to give something at death it could be considered an executory contract, but this does not fit either since it is not relating to the executor giving a promise to pay the debts of the estate.

The statute of frauds is satisfied by a writing signed by the party to be charged or by part performance or detrimental reliance. Here, Al orally offered the building to Betty and thus there is no writing that evidences the contract. The letter from Betty to Al wil not satisfy the writing requirements because although it contains the material terms (building for medical care) as required to satisfy the statute of frauds it does not contain the signature of the party to be charged, here, Al.

Further, the statute is not satisfied by the performance because in the sale of land this is satisfied by two of three things: possession, improvement or payment. Here, Betty's "payment" of medical services would satisfy one, but she did not take possession and did not make any improvements to the land thus it would not be removed from the statute of frauds.

A contract that cannot be performed in under a year would be satisfied by full performance, as here where Betty provided care until Al's death, but as discussed

above this has no merit since this was not a contract that could not be performed in under a year.

Finally, there is no detrimental reliance on the contract since she forgot about while giving care for the two years until she found out he actually owned the building. She was not relying on the contract. Thus she will not remove the contract from the statute of frauds through detrimental reliance.

Betty could argue that this agreement is not within the statute of frauds since it is not for the conveyance of property for money. She will likely fail as the substance of the agreement is the office building for an amount of service.

Incapacity

A contract is voidable at the option of a person who does not have the capacity to contract. Here, the facts state that Al has Alzheimer's disease. Thus he may not have been able to understand the contract or enter into it. If Al did not understand what he was doing when he offered the building due to his mental disease and could not properly contract a contract will not be enforced. Here, Betty was his doctor and should have known that he was incapable of contracting. She knew he had a mental disease and thus even if he showed no outward signs of incapacity at the time he entered into the contract, she was aware. However, incapacity does not depend on the awareness of the other party. A party that does not have capacity due to mental disease cannot be found to have entered into an enforceable contract regardless of whether the other party knows of this.

Undue influence

A contract will be voidable if it is a result of undue influence. Here, Betty was in a position of power - giving him medical care. Al was clearly frightened by the prospect of not having medical care in the future as evidence by his statements that he needed to be able to depend on her. This suggests that the contract for the building is a result of her power over him as a physician and not freely contracting to give her the building. The fact that she had previously provided medical care buttresses the argument since Al had come to rely on her and she could use her influence to her advantage. However,

this argument is likely to fail since she did not say anything in response to his offer and simply continued her exam and gave him the medication he needed.

Conclusion

Betty probably does not have an enforceable contract for the transfer of the building because it is not supported by consideration or a consideration substitute and it is barred by the statute of frauds.

Answer B

Applicable Law

This is a contract for Betty's personal services as a physician. Therefore, the common law applies.

Contract Formation

To form a contract, there must be offer, acceptance, and consideration. Betty will argue a contract exists based on theories that (a) an implied contract was created when Betty accepted the offer as implied by her conduct; (b) an express contract was created when Betty sent the letter; and (c) a contract was formed when Al made the offer in payment for past services. Each theory will be examined below. Also, a number of defenses exist, which are discussed at the end.

Implied Contract

Betty will argue that Al made an offer, and her acceptance can be implied by her conduct.

Offer

An offer is a manifestation of a present intent to enter into a contract. It must be definite and clear, and it must be communicated to the offeree. Here, Al offered to enter into a contract when he offered to give her the office building in exchange for continued care. His statement shows that he intended, at that moment, to enter into this relationship with Betty. His statement was unambiguous and on precise terms, hence it was definite and clear. Al said it to Betty, thus it was communicated to the intended offeree. Therefore, Al's statement is a valid offer.

Acceptance

An acceptance must be an unambiguous communication from the offeree to the offeror showing acceptance of the offer on its terms. The acceptance can be through words or conduct, and is judged by an objective standard. Here, Betty will argue that her conduct should reasonably be understood to show acceptance, because right after Al offered to

give her a building in exchange for treatment, Betty completed her examination and gave him medication. Therefore, Betty will argue that her conduct shows an unambiguous intent to be bound by the offer's terms.

However, in the context of their past dealings, Betty's conduct does not show an intention to accept the offer. Betty had long treated Al without charge. After Al made the offer, Betty said nothing and proceeded with business as usual. If this had been their first meeting, then her subsequent performance (by treating Al) would be indicative of an acceptance of the offer. However, given their past dealings, Betty's subsequent performance was perfectly in line with what would be expected if she rejected the offer. In other words, it could be argued that Betty did not intend to be obligated to Al for the rest of his life, and her conduct was merely consistent with how she had acted in the past.

Therefore, Betty's conduct was ambiguous, in that it is unclear whether she intended to accept the offer, or reject the offer and continue their relationship as it existed before the offer. Thus, Betty most likely did not accept the offer by her conduct.

Acceptance by silence

Courts have sometimes found acceptance by silence, if the parties' past dealings would create a reasonable expectation that silence equals acceptance. However, the rule will not apply here. Betty and Al do not have a history of previous contracts. Betty's treatment of Al has been purely gratuitous, therefore there is no history of prior dealings on which to base an expectation of the form of acceptance. Thus, Betty will not be able to establish silence by acceptance.

Consideration

Consideration is the bargained-for exchange of legal detriments. Each party must suffer a detriment, and the detriments must induce each other. Here, Betty will argue that she suffered a detriment in the obligation to care for Al for the rest of his life, and Al suffered a detriment by giving up his office building.

However, the detriments must induce each other. Here, Al was induced into giving his office to Betty in exchange for medical care. However, Betty was not induced into providing services to Al for his office building. In fact, Betty "doubted" whether Al even owned an office building. She even forgot about Al's statement, which by itself does not have legal significance, but it does serve as evidence that the office was not something Betty considered important. Most people, even rich Doctors, would not forget that they are due an office building, if they really expected to receive one.

Furthermore, once Betty learned about the office building, she responded immediately and enthusiastically with an acceptance letter. This shows that Betty did not provide her earlier services in exchange for Al's promise to give her an office building. It also shows that she did not believe she had accepted the offer with her prior conduct. Therefore, even if a court were to imply that Betty's conduct constituted an acceptance, there arguably would not be mutually-induced consideration.

Express Contract

Betty will argue that Al made an offer that she expressly accepted with her written letter.

Offer

Al's statement is a valid offer. See above.

Acceptance

See rule above. Betty will argue that she expressly accepted the offer with her letter. The letter was unambiguous. It will be a valid acceptance.

Consideration

See rule above. Al suffers a detriment (giving up his office building) in a mutually-induced exchange for Betty's promise to care for him the rest of his life. Even if that life were short, it would still be valid consideration, because courts do not generally question the sufficiency of the amount of consideration. Courts may choose not to enforce some contracts with an imbalance of consideration on duress or unconscionability grounds, discussed below.

Expiration

Unless stated otherwise, an offer stays open for a reasonable amount of time. Here, Betty attempted to accept Al's offer after 2 years. It was so long that she had even forgotten about Al's offer. Two years is most likely longer than a reasonable amount of time. Therefore, the offer expired, and Betty's attempt to accept it will not be valid.

Revocation

Offers are revoked on the death of the offeror, even if the offeree is not aware of that death. Here, Al died at night after Betty placed the letter in her mailbox, but before the mail carrier picked up Betty's letter. Therefore, Betty's letter will only be valid if it fits in the mailbox rule and thus accepted the offer before Al died. Note, even though Al's life was only for a few hours after acceptance, consideration is still valid for the reasons discussed above.

Mailbox Rule

If sent by mail, acceptances are valid when sent. A letter will be sent when it is placed in the mailbox or location where the mail is collected. Here, Betty's mail was usually picked up from a location outside her front door. Therefore, Betty's acceptance was valid once she placed the letter outside her front door, and thus the mailbox rule applies. Betty accepted Al's offer, and a contract was formed.

Contract formed by past services

Betty could argue that Al's statement was an offer to pay for past services rendered. Betty had treated him for years for free. She will argue his statement is an offer to pay the moral debt he owes to her.

Consideration

See rule above. Here, Al is offering to give his office to Betty, but there is no bargained-for exchange. Betty provided her past medical services gratuitously, and she was not induced by to do so by Al's subsequent promise to give her an office building. Therefore, there is no consideration to support this contract.

Past Moral Obligations

Courts will enforce offers to pay for past moral obligations. Typically, this is the situation where a debtor offers to pay his unenforceable debts. Here, Al does not owe Betty any debt. While she offered him free medical care, that did not create a moral obligation to pay. Indeed, many doctors are motivated by a dedication to their patients, as evidenced by their socratic oath. Therefore, Betty's motives were likely altruistic, and thus were gifts. Al's promise to pay her back for all she has done cannot be construed as an offer to pay for past debt.

Defenses

Statutes of Frauds

A contract for the sale or transfer of land cannot be enforced without a writing, signed by the party to be enforced against, evidencing the existence of a contract, i.e. showing the material terms. Here, Al's offer to Betty was an oral attempt to transfer ownership of land. The only signed writing appears to be Betty's letter. While it shows the material terms, and is signed by Betty, it was not signed by Al. Therefore, even if Betty formed a contract with Al, it cannot be enforced against him.

Duress

Al's estate could argue that the contract was formed under duress. Here, they can point to Al's statement that he has no heirs or anyone who cares for him. He needs someone to help him, and he appears to be in a state of loneliness and fear. Therefore, the estate could make an argument that Al was pressured into forming a contract out of duress, and he had no real choice but to form the contract.

However, this argument would most likely be rejected, since Al was the one who made the offer, and Betty gave no sign that she would withhold medical care if Al did not give her an office building.

Unconscionability

Similarly, Al's estate could argue that the deal was unconscionable, in that Betty took advantage of her superior position to extract a payment out of Al. Al's dependence on her created an element of unfair bargaining power, which Betty used to her advantage. It was improper for a doctor to make such a contract with a dying patient.

However, this argument will be rejected. The facts show no evidence that Betty in any way exerted pressure on Al. Indeed, Al's statement appears to be spontaneous.

Capacity

Al's estate can argue that Al lacked the capacity to enter into a contract. Al was an Alzheimer's patient. He most likely did not have the mental faculties necessary to enter into a contract.

Betty will counter that the statement was perfectly clear, and that it was made during one of Al's moments of lucidity. Therefore, at that moment, he did have the capacity to enter into a contract.

Q4 Professional Responsibility

Austin had been a practicing physician before he became a lawyer. Although he no longer practices medicine, he serves on a local medical association committee that works to further the rights of physicians to be compensated fairly by health insurance providers. The committee develops recommendations, but its members do not personally engage in public advocacy. Austin is a close friend of several of the other physicians on the committee, though as a lawyer he has never represented any of them.

In his law practice, Austin represents BHC Company, a health insurance provider. BHC has been sued in a class action by hundreds of physicians, including some of Austin's friends, for unreasonable delay, and denial and reduction of reimbursements for medical services. Austin initially advised BHC that he was not confident it had a defense to the lawsuit. After further research, however, Austin discovered that a stated policy of the health care law is the containment of health care costs. He advised BHC that he could plausibly argue that reimbursements to physicians may legally be limited to avoid a dramatic increase in the health insurance premiums of patients. He explained that he would argue for a modification of existing decisional law to allow such a result based on public policy.

When Bertha, counsel for the class of physicians, heard the defense Austin planned to assert in the lawsuit, she wrote him a letter stating that if he presented that defense she would report him to the state bar for engaging in a conflict of interest.

1. What, if any, ethical violations has Austin committed as an attorney? Discuss.

2. What, if any, ethical violations has Bertha committed? Discuss.

Answer according to California law and ABA authorities.

Answer A

1. AUSTIN'S ETHICAL VIOLATIONS AS AN ATTORNEY

Duty of Competence

An attorney owes to a client the duty of competence. Under the ABA Rules, an attorney must possess the legal knowledge, skill, thoroughness, and preparation of an average member of the profession. Under the California Rules, an attorney must have the requisite diligence; learning and skill; and mental, emotional, and physical ability of an average member of the profession.

Here, the facts do not state Austin's particular area of legal practice. However, there is nothing in the facts to suggest that Austin is not competent in the present matter. Thus, Austin has not violated his duty of competence.

Duty of Confidentiality

An attorney owes to his client a duty of confidentiality, whereby the attorney may not disclose the client's confidential communications made during the representation either during or after the termination of the representation.

Here, the facts indicate that Austin has not represented any of the physicians in the medical association committee, nor has he represented any of his physician friends (to the extent that they are not part of the association committee). Thus, it does not appear as though Austin has obtained any confidential information from any prior representation of any of the parties involved in this action.

As such, it does not appear that Austin, as of yet, has violated any duty of confidentiality.

Duty of Loyalty

A lawyer owes to his client an ethical duty of loyalty. Pursuant to this duty, the lawyer owes to his client a duty of utmost trust and confidence. A lawyer may violate his duty of loyalty to his client if he has a concurrent or former conflict of interest with the client.

Concurrent Conflict

Under ABA Model Rule 1.7, an attorney must not represent a client where the attorney represents another client whose interests are directly adverse to the prospective client, or where there is a significant risk that the attorney's services will be materially limited due to the attorney's present or former personal relationships or interests or due to the attorney's representation of a former client. An exception to this rule exists where the attorney (1) reasonably believes that he can competently and diligently represent the client in the face of any such conflict; (2) the conflict does not require the attorney to advance a claim for the client in issue against another client in the same proceeding; (3) the representation is not prohibited by law; and (4) the clients give informed, written consent. The California Rules of Professional Conduct (CRPC) differ in three ways: (1) they apply to both present and potential conflicts; (2) they do not have a "reasonable belief" standard as under the ABA Rules; and (3) the attorney needs only give written disclosure to the client---as opposed to informed, written consent---where the conflict relates to the attorney's personal interests (actual conflicts between clients require informed, written consent). Finally, an attorney must obtain the client's informed written consent and comply with the above exceptions each time a potential conflict arises.

Austin's Service on a Local Medical Association

As a general rule, an attorney's mere service on a corporate board of directors or a local association does not in and of itself violate any ethical rules. However, such membership is highly discouraged due to the high risk such membership poses in terms of creating conflicts of interest in future client representation.

Thus, while Austin's membership in the association is not a per se ethical violation, it may cause a concurrent conflict to arise with respect to his representation of BHC, as described below.

Austin's Representation of BHC Company (BHC)

Here, Austin is presently representing BHC in defending a class action by hundreds of physicians, including some of Austin's friends, for unreasonable delay and denial and reduction of reimbursements for medical services. This poses a potential conflict of

interest between his representation of BHC and Austin's membership on the local medical association committee, as well as Austin's prior occupation as an attorney and close friendship with many physicians on the committee. The issue then becomes whether Austin's personal relationships and interests here create such a conflict as to pose a significant risk of material limitation on his services.

That Austin serves on a committee that specifically works to further the rights of physicians with respect to fair compensation by health care providers is in direct conflict with his defense of BHC in a matter involving delay and denial of reimbursements for medical services. Thus, Austin's personal interests do appear to pose a significant risk of materially limiting his representation of BHC, as it could be very difficult for Austin to put aside his personal beliefs and convictions in order to aid BHC's defense. This is further supported by the fact that the association my publicly ostracize Austin's representation of a perceived "enemy." Thus, Austin must meet the exceptions enumerated above.

Reasonable Belief (ABA)

There are no facts directly revealing Austin's reasonable belief that his personal interests will not impede his diligent and competent representation of BHC. In fact, Austin's initial advice to BHC prior to any research was that he was not confident that BHC had a defense. The facts are unclear as to Austin's motivation behind this statement, but to the extent that the statement was based on his personal beliefs rather than a disinterested professional legal opinion, this statement likely makes Austin liable for discipline.

After further research, however, Austin appears to have formed a reasonable belief that he could plausibly argue that reimbursements to physicians may legally be limited to avoid a dramatic increase in the health insurance premiums of patients. He further expressed his belief that he could make an argument for a modication of existing decisional law to allow such a result based on public policy. This may reflect Austin's reasonable belief that he could in fact represent BHC competently and diligently. Thus, the "reasonable relief" requirement under the ABA rules could likely be met.

Assertion of Claim Against Another Client/Not Prohibited by Law

Because the facts indicate (as discussed in more depth below) that Austin has not represented any of the physicians in the committee previously, nor does he presently represent any of them now, Austin's representation of BHC will not require him to assert a claim on BHC's behalf against any of his present clients. Further, there is no indication that Austin's representation of BHC is contrary to any law.

Informed Consent

As stated above, under the ABA Rules, an attorney must obtain the client's informed, written consent from his client to proceed in the face of a personal conflict that poses a significant risk of materially limiting his services to another client. Under the CRPCs, the attorney needs only make written disclosure of the conflict.

Here, Austin likely fails to meet his ethical duty under both the ABA and California Rules. There are no facts indicating that Austin either obtained BHC's informed, written consent nor gave BHC written disclosure of his personal relationship with his physician friends, his prior occupation as a physician, or his membership in the medical association committee. Indeed, there are no facts that Austin made such disclosures at all, even orally.

Thus, because Austin neither obtained BHC's informed, written consent to proceed with the representation nor gave BHC written disclosure of his personal conflicts, Austin is subject to discipline under both the ABA and the California Rules.

Former Conflict

Under the ABA Rules, an attorney who has represented a former client may not thereafter represent another client in the same or a substantially related matter where the representation of the current client would be materially adverse to the former client, unless the attorney obtains the former client's informed, written consent. The California Rule is substantially the same.

Here, although Austin serves on the local medical association committee that works to further the rights of physicians to be compensated by health insurance providers, the facts indicate that Austin has never represented any of the other physicians in the committee.

Thus, for the purposes of the former conflict rule, because none of the physicians are former clients of Austin's, Austin has not violated his ethical duty of loyalty to BHC for purposes of the former conflict rule.

Duty of Candor to the Court

Under the ABA Rules, Federal Rule of Civil Procedure 11, and the California Rules, an attorney may not bring a claim that is not warranted under existing law or that is meant to harass or delay.

Here, Austin's initial belief that BHC did not have a valid defense may reflect Austin's belief that BHC did not have a valid claim that Austin could assert in good faith. However, the facts later indicate that after further research, he believed he could make an argument for a modication of existing decisional law to allow such a result based on public policy. Under the ABA Rules and the California Rules, an attorney is permitted to bring an action for a good faith proposal to modify existing law. Here, the facts do not indicate that Austin's belief that he could make an argument for a modification of existing decisional law was in bad faith or was intended to harass or delay.

Thus, Austin should not be subject to discipline for bringing an action to argue for a modification of present law.

2. BERTHA'S ETHICAL VIOLATIONS

Reporting Ethical Violations

Under the ABA Rules, an attorney must report another attorney's ethical violation to the state bar. Under the California rules, reporting ethical violations is only permissive (not mandatory), unless an attorney knows of the other attorney's misconduct and the attorney fails to report the conduct to prevent such conduct from occurring or continuing.

Here, Bertha has become aware of Austin's engaging in a conflict of interest. As such, under the ABA Rules, Bertha is required to report Austin's ethical violation to the state bar. In California, Bertha ordinarily would not be required to report Austin's violation, but she could if she were so inclined. Here, however, it appears that Austin intends to proceed with his representation of BHC in the face of a conflict. Thus, Bertha will likely be required to report Austin's continued violation of an ethical rule.

Threats to Obtain an Advantage in a Civil Case

Under the ABA Rules, an attorney may threaten criminal or disciplinary action against an attorney, so long as the charges are sufficiently related to the civil action. Under the California Rules, an attorney may not threaten criminal, administrative, or disciplinary action to gain an advantage in a criminal case.

Here, as discussed above, Bertha is likely under a duty under both the ABA and California Rules to report Austin's violation. Further, Bertha's letter to Austin is manifestly a threat, as she stated that she would report him if he presented a specific defense in the case. Under the ABA Rules, Bertha's threat to Austin likely does not violate an ethical duty, as the threat is reasonably related to the litigation, i.e., Austin's conflict of interest in this particular case. Under the California Rules, however, while Bertha may---and likely must---report Austin's conduct to the California State Bar, Bertha is nevertheless absolutely prohibited from using that fact as a threat to gain an advantage in this case.

Thus, while Bertha is likely not subject to discipline under the ABA Rules, she is subject to discipline under the California Rules.

Answer B

1. Austin's Potential Ethical Violations

Duty of Loyalty

A lawyer has a duty of loyalty to his client. The lawyer must ensure that no personal interest or duty to a third party materially impairs his ability to loyally represent the client. Here, Austin's client is BHC Company, a health insurance provider. By the nature of its business, BHC is interested in minimizing the amount it pays to physicians, because the more that BHC compensates physicians, the less able it will be to successfully compete in the market for health insurance providers. Furthermore, BHC has an obvious interest in winning its law suit for both financial and reputational reasons.

Conflict of Interest Posed by Austin's Committee Membership

Austin has a personal interest outside of his legal practice in that he is a member of a local medical association committee that works to further the rights of physicians to be compensated fairly by health insurance providers. As a former doctor, Austin seems to be passionate about this cause.

The fact that BHC has a diametrically opposite interest, which is to pay as little as possible to physicians, creates a conflict of interest. How can Austin be loyal to BHC when he is absolutely opposed to BHC's cause? Thus, in the face of this conflict Austin must decide whether it is reasonably objectively possible to represent BHC without materially impairing its interests, and if it is possible Austin must disclose and get BHC's written consent.

Is the Conflict Consentable?

The conflict is only consentable if Austin objectively and reasonably believes he can adequately represent BHC. Austin may believe this, saying he can compartmentalize his life outside the firm from his life as a lawyer. He may also argue that as a committee member he is working to change the health care laws, while as a lawyer he is working to ensure that his client complies with the law but is not forced to

pay beyond what the law requires. If Austin is successful in changing the law in his role as a committee member it may not hurt BHC because costs for all health insurance providers will rise equally so BHC will not be put at a competitive disadvantage.

On the basis of these arguments, the conflict posed by Austin's committee role is probably consentable provided that Austin discloses to BHC and gets its written consent. Austin may also have a duty to inform the committee that BHC is a client because that may appear deceptive to the fellow committee members if Austin does not disclose. However, in so disclosing Austin must make sure he has BHC's prior consent in order not to violate the duty of confidentiality (discussed further below).

Conflict of Interest Posed by Austin's Friendships

Austin is a close friend of several of the plaintiff's in the class action suit that he is defending on behalf of BHC. Friendship is a personal interest of the lawyer that could potentially be materially adverse to the lawyer's duty of loyalty to the client. Thus, Austin must decide whether he can objectively reasonably believes he can adequately represent BHC in the face of this conflict.

Once again, Austin will state that he can compartmentalize between his work life and his outside interests. However, Austin may be faced by the reality that his close friends will not accept this compartmentalization and will begin to distrust him. If Austin is faced with losing some of his closest friends, will he really be able to continue zealously representing BHC as his duty of diligence requires him to? Lawyers are often required to speak impassionately against the other side and BHC may want to employ a take-no-prisoners strategy in the litigation; perhaps by impugning the work done by the plaintiffs including Austin's friends. For example, Austin may be called on to cross examine a friend in front of the jury to make the point that the friend overcharges for low quality medical services.

Based on these considerations, Austin can not objectively reasonably believe his representation of BHC will be adequate, and disclosure and consent will not be enough. Therefore, Austin should withdraw from the representation.

Duty of Confidentiality

A lawyer has a duty of confidentiality to the client, and may not discuss any information relating to the representation. Here, it is difficult to believe that Austin could meaningfully participate on his committee without discussing information relating to the representation of BHC. Therefore, Austin has very likely violated his duty of confidentiality.

Duty of Candor and Truthfullness to the Court

As part of his duty to the court, Austin must disclose adverse legal authority and may not make frivilous arguments. Here, Austin wants to make an argument to modify existing court decisions based on public policy grounds. This is a good faith argument to overturn precedent based on a legal argument not previously made, and therefore Austin may ethically go forward with the argument even if he is not confident the court will accept it. Indeed, as part of his duties of competence and diligence Austin must make such arguments if he thinks they have a reasonable prospect of success, as long as he is careful to fully inform the court of previous decisions that control within the jurisdiction and go against his argument.

2. Bertha's Possible Ethical Violations

Duty to Report

Under the ABA model code, but not California rules, an attorney has an ongoing duty to report any ethical violation of another lawyer. Thus, by not reporting Austin's ethical violations immediately, Bertha has violated the ABA code.

It is important for Bertha to report because it is unfair to the court and to the clients on each side of the case if one client's lawyer has a conflict of interest, because it creates the possibility of a mistrial or other delays.

Duty of Fairness

A lawyer has a duty of fairness to both the court and to her adversary. Here, Bertha is flagrantly violating this duty by using the threat of reporting an ethical violation to stop a lawyer from presenting a valid defense. This is essentially blackmail; Bertha is telling Austin to throw his case or risk being reported for an ethical violation. This is

grossly unfair to the court, to Austin, and to BHC. Therefore under both the ABA code and the California rules, such behavior is prohibited. While it is permissible, and indeed required under the ABA, to report ethical violations, using the threat of reporting ethical violations as a bargaining chip is prohibitted and constitutes a serious ethical violation.

Q5 Real Property

Prior to 1975, Andy owned Blackacre in fee simple absolute. In 1975, Andy by written deed conveyed Blackacre to Beth and Chris "jointly with right of survivorship." The deed provides: "If Blackacre, or any portion of Blackacre, is transferred to a third party, either individually or jointly, by Beth or Chris, Andy shall have the right to immediately re-enter and repossess Blackacre."

In 1976, without the knowledge of Chris, Beth conveyed her interest in Blackacre to Frank.

In 1977, Beth and Frank died in a car accident. Frank did not leave a will and his only living relative at the time of his death was his cousin Mona.

In 1978, Chris and Andy learned that Beth had conveyed her interest in Blackacre to Frank. When Mona approached Chris a day later to discuss her interest in Blackacre, Chris told her that he was the sole owner of Blackacre and she had no interest in Blackacre. Chris posted "No Trespassing" signs on Blackacre. He also paid all of the expenses, insurance, and taxes on Blackacre. Andy and Mona have never taken any action against Chris' possession of Blackacre.

1. What right, title, or interest in Blackacre, if any, did Andy initially convey to Beth, Chris, and himself? Discuss.

2. What right, title, or interest in Blackacre, if any, are held by Andy, Chris, and Mona? Discuss.

Answer A

1. WHAT RIGHT, TITLE OR INTEREST IN BLACKACRE DID ANDY INITIALLY CONVEY TO BETH, CHRIS, AND HIMSELF?

Andy owned Blackacre in fee simple absolute, which indicates absolute ownership and means he had the full right to convey Blackacre.

Joint tenancy

In 1975, Andy by written deed conveyed Blackacre to Beth and Chris "jointly with right of survivorship."

A conveyance of land requires that the deed be lawfully executed and delivered. A conveyance to multiple parties can create a tenancy situation. A conveyance creates a joint tenancy when the four unities are present: possession, interest, time and title. The unity of possession means the joint tenants have the equal right to possession; interest means they have an equal ownership interest in the land; time means they received their ownership interest at the same time; and title means they received their ownership interest via the same instrument (such as a deed).

When a joint tenancy is created, it carries a right of survivorship (ROS), which usually must be expressed in the conveyance itself. The ROS means that when one joint tenant dies, the other succeeds to her entire interest in the land. In a situation involving two joint tenants, this means the surviving joint tenant would succeed to the entire ownership interest in the property. However, a joint tenancy can be severed by a sale, partition, or mortgage (in title theory jurisdictions). The severance of a joint tenancy typically results in a tenancy in common.

Here, Andy created a joint tenancy between Beth and Chris. This is because the deed expressly contained the words "jointly with a right of survivorship," and the four unities were present: Beth and Chris each have a 1/2 interest in Blackacre, right to possess the whole, and received their interest at the same time (1975) and by the same instrument (the deed from Andy).

Thus, there was a joint tenancy between Beth and Chris.

Fee Simple Subject to Condition Subsequent

However, the deed also contained another provision which potentially affects the parties' rights in Blackacre: the deed provided "If Blackacre, or any portion of Blackacre is transferred to a third party, either individually or jointly by Beth or Chris, Andy shall have the right to immediately re-enter and repossess Blackacre."

Through this language, Andy purported to create a fee simple subject to a condition subsequent (FSCS). A FSCS is an ownership interest in land whereby the present possessor owns the land until a specified condition occurs, whereby the grantor then has the option of exercising his right of reentry and re-taking possession of the land. To create a FSCS, the grantor must use express conditional language in the conveyance and reserves a right of reentry, using words such as "but if" and "the grantor shall have the right to re-enter." In other words, the express conditional language must indicate that the interest conveyed is subject to the grantor's right of reentry if the specified condition occurs subsequent to the conveyance.

Here, the specified condition is the transfer of Blackacre or any portion thereof, either individually or jointly by Beth and Chris. Andy carved out the right of reentry by stating "Andy shall have the right to immediately re-enter and repossess Blackacre." Thus, Andy purported to create an arrangement where he could cut off Beth and Chris' rights in Blackacre, reenter the land and possess it, if any portion of the land was transferred. This constitutes a FSCS.

Thus, under Andy's purported conveyance, Beth and Chris would be joint tenants with respect to their interest in Blackacre: a fee simple subject to a condition subsequent.

Restraint on Alienation

However, Andy's purported conveyance is problematic because it is a restraint on alienation. A restraint on alienation occurs when the grantor attempts to restrict the alienability (e.g. transferability) of the land. A grantor may impose certain conditions in connection with his conveyance of the land, such as restrictions on what purpose the land may be used for. However, when the grantor attempts to impede the grantee's

ability to transfer the land to others, the courts will classify that as a restraint on alienation.

The law will uphold reasonable restraints on alienation, but not unreasonable restraints on alienation because of the public policy favoring the free transferability of land. When there is an unreasonable restraint on alienation, the court will simply strike the restraint from the conveyance and declare that the grantee holds the property without the restraint. A restraint is generally reasonable if the restriction lasts only for a specified period of time, such as a restriction during the grantor's life. It is generally unreasonable if the restriction continues indefinitely and applies even to the grantee's heirs and assigns.

Here, there is a restraint on alienation: the conveyance completely restricts Beth and Chris' rights to transfer the property because it provides that Blackacre or any portion thereof may not be transferred. This is probably an unreasonable restraint on alienation because there is no time limit to this restriction - Beth and Chris are indefinitely prohibited from transferring Blackacre; presumably, even their heirs/devisees could not transfer the land. Moreover, the prohibition is not for a reasonable time, such as for a set period of years.

Andy may argue the restraint is reasonable because it does not expressly apply to Beth and Chris' "heirs and assigns" -- he may argue that this restriction does not apply indefinitely, but rather only during the period of Beth and Chris' lifetime. He may argue their heirs and assigns are free to transfer the land. He may also argue that the creation of a joint tenancy restricts their ability to transfer anyway because doing so will sever the joint tenancy. However, these are weak arguments. The restraint is still probably unreasonable because it is a total restriction during the tenants' lifetimes, which is a significant amount of time. Beth and Chris may not even transfer a portion of Blackacre. While they would lose joint tenant status by a transfer, they still have the option of doing so in the absence of the restraint. Thus, the restraint is unreasonable.

Accordingly, the court would likely strike the condition Andy included in the deed. This would mean that Beth and Chris hold Blackacre in fee simple as joint tenants.

Conclusion: initial conveyance

Thus, the initial conveyance means Beth and Chris held Blackacre in fee simple as joint tenants.

2. WHAT RIGHT, TITLE OR INTEREST IN BLACKACRE ARE HELD BY ANDY, CHRIS, AND MONA?

1976: Beth's conveyance - severance of joint tenancy

In 1976, Beth conveyed her interest to Frank.

A joint tenant may sell her interest, but as indicated above, the sale of her interest severs the joint tenancy because it destroys the unity of time/title. When a joint tenancy is severed, the new tenants hold as tenants in common (TIC) with each other. TIC have no right of survivorship, which means that upon death, their interests in the property pass to their devisees/heirs through a will/intestate succession.

Here, Beth's sale to Frank severed the joint tenancy because it destroyed the unities: Frank and Chris do not have their interests conveyed by the same instrument and at the same time. So Frank became a TIC with Chris, and Beth no longer had any ownership interest. As of 1976, Frank and Chris both had a 1/2 interest in Blackacre. This is the case even though Chris did not know about the sale to Frank--the sale severed the joint tenancy nonetheless.

1977: Beth and Frank's death

In 1977, Beth and Frank died. Beth no longer had any interest in Blackacre. Frank's 1/2 interest as a TIC with Chris would pass via will or intestacy. Because Frank did not have a will, his interest would have to pass through intestate succession. Frank's only living relative was his cousin Mona, so she would be his heir under the principles of intestate succession. Thus, Mona would get Frank's 1/2 interest in Blackacre via intestate succession, and continue to hold Blackacre as a TIC with Chris.

Thus, as of 1977, Mona and Chris each had a 1/2 interest in Blackacre as TIC; Andy had no interest in Blackacre.

1978: Chris' ouster

In 1978, Chris learned about Mona. The issue is whether he deprived her of her ownership interest in Blackacre through his actions.

Chris and Mona were co-tenants (and specifically TIC) which means each had certain rights and duties. Each tenant has a right to possess the entire premises, so one tenant in exclusive possession has no duty to pay rent to the other. Moreover, the tenants are jointly responsible for paying ordinary expenses associated with the property, such as property taxes and maintenance expenses.

Moreover, because each tenant has the right to exclusive possession of the property, a tenant in exclusive possession cannot claim ownership of the entire property through adverse possession unless he commits an ouster. An ouster is when one tenant expressly excludes the other from possession of the premises, by preventing the tenant from possessing the premises and/or through words/conduct indicating they have no right to possess the premises.

Here, Chris probably committed ouster of Mona. As a co-tenant, she was entitled to possession of the premises, but Chris would not let her have possession. Chris told her he was the sole owner of Blackacre and she had no interest in Blackacre, which constitutes an expression that she had no right to possess Blackacre. Moreover, Chris put "no trespassing signs" on Blackacre, and also paid all of the expenses, insurance and taxes on Blackacre (he never sought compensation from Mona). Thus, his exclusive possession of Blackacre was notwith Mona's consent--even though she did not take any action against Chris' possession of Blackacre, that does not indicate that Chris and she consented to this arrangement whereby he would have exclusive possession. Rather, he clearly indicated that she could not possess the premises, thus committing an ouster and entitling him to claim adverse possession if he meets the elements discussed below.

Adverse possession

A person in possession of land may have the possession ripen into title through the application of adverse possession (AP). A tenant must meet several elements to show they have acquired title through AP: continuous possession of the land for the statutory period, open and notorious possession, exclusive possession, actual possession, and hostile possession.

Continuous:

The possession must be continuous throughout the statutory period. It is unclear what is the statutory period in this jurisdiction, but Chris has possessed the property for such a long time that it is likely he has met the statutory period. Since his ouster occurred in 1978, it has been 32 years that he has possessed the property. The statute of limitations usually ranges from 10-20 years, so he likely has met the element of continuous possession.

Open and notorious:

The possessor must possess the property as the true owner would--in other words, his possession must be open and notorious such that a reasonable inspection of the property would reveal the possession. Here, Chris took ample actions to make his possession open and notorious; not only did he live on Blackacre, but he also posted no trespassing signs, paid the upkeep, and informed Mona that she had no interest in Blackacre. Thus, his possession would put a true owner on notice.

Exclusive:

Chris' possession was exclusive because he alone lived on Blackacre.

Actual:

Chris actually possessed the whole of Blackacre because he presumably lived on it.

Hostile:

Finally, the possession was hostile (i.e. without the true owner's consent) because Chris committed ouster, as described above.

Thus, Chris can probably meet the elements of adverse possession and claim title to Blackacre entirely (he already had 1/2 interest in Blackacre, and acquired the other 1/2 of Mona's interest through AP). Andy and Mona have never taken action against Chris' possession of Blackacre, so they did not defeat his claims and he likely owns it all via adverse possession. Note that he would have to file an action to quiet title before he could convey Blackacre to a third party.

Conclusion:

Thus, the final rights, title and interest in Blackacre are as follows: Chris owns all of Blackacre; Andy and Mona own nothing.

[Alternative analysis re restraint on alienation]

If the restraint on alienation analyzed above in Andy's original deed was valid, and Andy did in fact have a right to re-enter and repossess Blackacre, the final outcome would be the same because Andy never exercised that right of re-entry, and Chris succeeded to ownership of the whole property by adverse possession. (Of course this might be problematic because Andy could argue that the "hostility" element of AP was met because he allowed Chris to possess the property because he did not try to exercise his right of reentry). Nonetheless, the better analysis is that the restraint on alienation was invalid.

Answer B

1. Andy's Initial Conveyance of Blackacre / What interest was Conveyed?

Joint Tenancy Discussion

Andy (A) conveyed Blackacre by written deed, thereby satisfying the Statute of Frauds, to Beth (B) and Chris (C). The language of the deed was to B and C "jointly with right of survivorship." On this language alone, B and C have a joint tenancy.

Joint tenancies are created when two or more people receive land under circumstances such that the four unities, possession, interest, time, and title, are met. Here, both B and C took possession at the same time (from A's grant), they have the same interest (they both own an undivided one-half interest in Blackacre), they have the same right to possess the whole, and the title they have in Blackacre will be the same (although exactly what title they own will be discussed further here).

Additionally, to create a valid joint tenancy, express language concerning the right of survivorship should be used. The right of survivorship means that when one joint tenant dies, he or she may not pass their share via will or intestacy; it passes automatically to the remaining joint tenant or tenants. Express language is required, because this automatic passing on an interest bypassing the probate system, which is generally "frowned up." Thus, courts will infer a tenancy in common (to be discussed further below) if express language is not used. Here, express language was used, as A conveyed to B and C "jointly with right of survivorship." As such, the requirement for a valid joint tenancy were met.

Attempt at Fee Simple Subject to Condition Subsequent

A's deed to B and C also contained language that "if Blackacre, or any portion of Blackacre, is transferred to a 3rd party, either individually or jointly, by Beth or Chris, Andy shall have the right to immediately re-enter and repossess Blackacre."

Here, A was attempting to create a fee simple subject to a condition subsequent. Unlike a fee simple absolute, where the recipient has full ownership and control of the land indefinitely, and which is alienable, descendably, and devisable, a fee simple

subject to a condition subsequent means that the takers ownership is conditioned upon a certain occurrence either being met or avoided. A fee simple subject to a condition subsequent is similar to a fee simple determinable in that both reserve an interest in the grantor, here A. However, a fee simple determinable uses express durational language (To A, for so long as....) where as a fee simple subject to a condition subsequent conveys the interest in full, but then conditions it upon a certain occurrence or non-occurrence. Another important distinction is that a fee simple determinable creates a possibility of reverter in the grantor, which means that the grantor's right vests automatically as soon as the occurrence takes place (without any action needed on the part of the grantor) while a fee simple subject to a condition subsequent creates a right of re-entry, which does not occur automatically and requires that the grantor affirmatively exercise his or her right to retake the land if the condition is met. Here, A attempted to create a fee simple subject to a condition subsequent, retaining a right of re-entry in himself. He did not use durational language, but instead conveyed to B and C as joint tenants, but then he added a condition. He also used the words "right to immediately re-enter" which indicate a right of re-entry rather than a possibility of reverter.

Restraint on Alienability

Though A attempted to reserve for himself a right of re-entry, the condition on the land amounts to a total restraint on alienation. A restrain on alienation is when a grantor attempts to make it so that the grantee cannot sell the land. The right to sell land, however, is one of the rights inherent in property ownership, such that restraints on alienation are not viewed favorably. Reasonable restraints of alienation may be tolerated. For example, a condition that the grantee cannot sell the land for 15 years, until a cloud on the title will be resolved, may be tolerated. Similarly, other restraints are possible, such as those that affect the appearance of the land, or the purpose for which the land is used. Total restraints on alienation, on the other land, will be stricken as void. Here, the condition that A attempted to include will amount to a total restraint on alienation, as it stated that B and C could not transfer Blackacre or any portion of it, and it was an indefinite condition. Therefore, the condition will be considered to be void, and it will be stricken from the deed.

Conclusion

Because this was a fee simple subject to a condition subsequent, the effect of the stricken clause will be that B and C have a fee simple absolute (discussed above). A's future interest will be eliminated. Thus, A initially conveyed to B and C a joint tenancy with right of survivorship in fee simple absolute.

2. Rights, Titles, and Interests in Blackacre of Andy, Chris, and Mona

Andy's Interest

As discussed above, Andy's interest in Blackacre terminated when he included a total restraint on alienation in his deed to B and C. Because the condition will be stricken, there is no stated occurrence that can cause A to be able to validly exercise his "right to immediately re-enter and repossess Blackacre" though that was his intent and desire. Because his right to re-entry is impossible, it too will be stricken and A has no remaining interest in Blackacre.

Mona's Interest

In order to discuss what interest Mona has in Blackacre, it is necessary to first discuss Beth's conveyance to Frank and Frank's subsequent death.

Beth's conveyance to Frank

B conveyed her interest in Blackacre to Frank without the knowledge of C. When one joint tenant conveys his or her interest in the joint tenancy, the result is that the joint tenancy is severed. The reasoning is that the grantee who receives the conveyance will not share the four unities with the remaining tenant, thus they cannot be joint tenants with respect to one another. However, this does not mean that B cannot convey her interest in Blackacre - she can - it simply means that the person she conveys to will be a tenant in common with her former joint tenant.

A tenancy in common is when two or more people each own an undivided interest in land. An undivided interest means that each has the right to possess the

whole. The four unities are not required, so that one tenant in common may own a larger interest in the land, but each will still have the right to possess the whole.

Here, when B conveyed to Frank, the joint tenancy was severed as between B and C, and C and Frank became tenants in common, each with an undivided one half share in Blackacre. There will be no remaining right to survivorship, as tenants in common do not have this right. The fact that B did not give notice to C of her conveyance is irrelevant - joint tenants do not need the consent of one another to convey their individual interests in the land.

Frank's Death

Frank died in a car accident after he received his interest in Blackacre. He did not leave a will, meaning that he died intestate. The facts indicate that his only living relative was his cousin Mona, which means that Mona will receive all of Frank's real and personal property via intestacy.

Mona's Interest

Mona thus received Frank's undivided one-half interest in Blackacre via intestacy, and became a tenant in common with C. This means that at the time of Frank's death, Mona HAD the right to possess Blackacre with C. However, as will be discussed further below, Mona may have lost this interest via adverse possession. More facts are needed as to the passage of time since Chris told Mona that she had no interest in Blackacre and posted "no trespassing" signs, thereby ousting Mona and initiating a hostile possession of Blackacre. If the statutory length of time has passed, Mona will have lost her interest in Blackacre, because (as discussed below) the other requirement for adverse possession will have been met. If, however, the requisite amount of time has not passed, Mona can exercise her undivided one half interest in Blackacre and remain a tenant in common with Chris. She would be advised to bring an action to quiet title in order to do this.

Chris's Interest

As discussed above, C was initially a joint tenant with B, and then became a tenant in common with Frank when B conveyed to him. Subsequently, he became a tenant in common with Mona when she inherited Frank's interest via intestacy.

C, though, may now possess all of Blackacre in fee simple absolute via adverse possession. When C told Mona that she had no interest in Blackacre, he effectively ousted her, basically meaning affirmatively kicked her off the property, thereby starting the adverse possession clock running. The requirement of adverse possession are a continuous, adverse, open, and hostile possession for the required statutory period of time. Here, C's possession was continuous for however long it's been since he ousted Mona - the facts do not indicate that C ever stopped possession Blackacre. His possession is open - he lives there and posted a No Trespassing sign for all to see. It is hostile and adverse, because it is not with Mona's consent. For this prong, it doesn't matter if C thinks that he is entitled to full ownership or not as subjective good or bad faith is irrelevant. The fact that C paid the insurance and taxes is not required by a majority of jurisdictions, but it certainly does not pose a problem for C that he did pay them, as indicated in the facts. Therefore, as long as the statutory time period is met, C will possess all of Blackacre via adverse possession.

Finally, it should be noted that although C may have acquired title via adverse possession, it will not be marketable. In order to convey the land in fee simple to someone else, and not just convey his one half interest, C will have to bring an action to quiet title against Mona.

Q6 Community Property

In 2003, Wendy and Hank were engaged to be married. They discovered that the $10,000 monthly income Wendy derived from a trust fund would terminate upon her marriage or upon her reaching the age of 25, whichever came first. Therefore, they decided to postpone their wedding until Wendy's 25th birthday, in 2006, and instead began to live together.

Also in 2003, Wendy and Hank agreed that Wendy would pursue a master's degree in education and that Hank would quit his job and stay home, taking care of the household chores. Wendy opened a checking account in both of their names, into which she deposited her $10,000 monthly trust income. Wendy used funds in the checking account to pay living expenses for Hank and herself. Wendy also used funds in the checking account to buy a new car. She put title to the car in both of their names.

In 2006, Wendy and Hank married. Wendy's $10,000 monthly trust income terminated. Afterwards, Wendy began teaching at a local college.

In 2008, Wendy learned that her compensation was less than that of her male counterparts and made a claim against the college.

In 2009, Wendy separated from Hank and filed an action for dissolution of marriage. Shortly afterwards, she settled her claim against the college in return for additional salary in the amount of $10,000 per year for the next three years.

Unbeknownst to Wendy, Hank had run up a gambling debt to a casino during their marriage. At the time of their separation, Hank owed the casino $50,000.

Upon dissolution of marriage, what are Wendy's and Hank's rights and liabilities with respect to:

1. The car? Discuss.

2. The $30,000 in additional salary under the settlement? Discuss.

3. The $50,000 owed to the casino? Discuss.

Answer according to California law.

Answer A

California is a community property state. The community property system applies to people who are legally married or registered as domestic partners. All property acquired before or after marriage or separation and all property acquired by gift, bequeath, devise, or descent is presumptivelt the acquiring spouse's separate property (SP). All other property acquired during marriage is presumptively community property (CP). This question involved the dissolution of a marriage. Upon dissolution, each spouse is entitled to all of their separate property and community property should be divided equally between them.

The Car

CP Principles do not apply

Unmarried cohabitants are not included under the CP system, even if they are engaged and plan to marry. However, under Marvin, cohabitants may have some rights under contract theories where there are agreements between the parties regarding income and expenses.

Here, H and W were engaged and postponed their wedding until she turned 25 so W would continue to receive payments under her trust fund. They then moved in together. As unmarried cohabitants, they are outside the CP system even though they were engaged and had planned to married. There must be a valid marriage for any property to be CP. However, they may have contract rights under Marvin.

Contract Formed between H and W

An enforceable contract may be found between cohabitants when there is an agreement supported by consideration of each party and the consideration is more than sexual services.

H will argue that there was an enforceable agreement between him and W. H will show the joint bank account that the trust funds were deposited and the use of the trust funds to pay living expenses as evidence of this agreement. H may also argue that the agreement constitutes a valid contract as his household duties were consideration for

W's contribution of her income to support the couple so that W could attend school and earn her master's degree. This argument would likely be effective in most courts as it seems to be established under the facts that there was a meeting of the minds and the consideration on both sides was valid.

Interests in the Car under a valid agreement

Where there is a valid agreement between cohabitants, they may be able to acquire property interests under its terms.

W purchased the car while she and H were cohabitating before marriage. W paid for the car with her trust income, which is undisputably her SP as she has not yet married. The car was title in both H and W's names and the funds used were from a joint bank account. While certain title presumptions would control under CP system, here the interests in the car are governed by principles of contract and equity. H will argue that he has an interest in the car because he and W agreed that she would attend school and he would stay home and they would live off of her trust income until it expired when she turned 25. Further, the car was purchased with funds from a joint bank account to which H would have had a right to withdraw, showing an intent that the funds benefit both H and W. Further, W put the car in both names, confirming her intent that there be a joint interest. Therefore, H should be given an equitable interest in the car. W will argue that while they agree to use her income to support themselves, she never intended to agree to give H any interest in the car that would exist beyond their relationship and only put his name on the title for convenience while they were living together. At dissolution, then, the car should be treated as a gift and not as something to which H as an interest. However, because there is clear evidence of an agreement regarding the use of the trust income to support H and W in exchange for H's household duties and it was W who opened a joint checking account and deposited the trust funds there and then put the car in H and W's name, H will likely be found to have some interest in the car, likely one-half of its now depreciated value as the agreement and form of title indicate a desire to share equally, despite the fact that the purchase funds are traceable to W's SP.

The $30,000 Salary Under the Settlement

Termination of the Marital Economic Community

The marital economic community is formed at marriage and determinates upon permanent separation, which occurs when the parties live separate and apart and at least one spouse does not intend to return to the marriage.

W separated from H in 2009 and filed for dissolution of marriage. This evidences an intent not to return to the marriage and thus constitutes permanent separation and terminates the marital economic community.

What to the proceeds of the settlement replace?

Any labor performed by a married person is considered community labor and any salary earned during marriage is CP. However, salary earned following permanent separation is SP. Courts have found that when funds received following permanent separation are intended to replace wages that were earned during marriage, those funds are CP because they are traceable to community labor.

Here, W began working at a local college in 2006, after marriage to H. All salary earned prior to separation is therefore CP. In 2008 she discovered she was being paid less than male colleagues and filed suit. In 2009 and post-separation, she settled for $10,000 additional salary for the next three years. H will argue that the settlement is CP because it is intended to replace the salary that W should have been paid and was earning during marriage. W will argue that because the funds are going to be distributed as post-separation salary, they are her SP. Here, replacement analysis favors H and will result in the CP characterization as the settlement related to a claim for wages that should have been paid during marriage, as the claim was filed during marriage, and therefore are intended to replace CP earnings.

Distribution of Settlement Funds

In cases of personal injury settlement, courts have classified the settlement proceeds for injuries occurring during marriage as CP but strongly favor awarding such funds to the injured spouse upon dissolution in a rare exception to the presumption that CP should be divided equally.

W will likely try an analogize to these cases, arguing that the discrimination was an injury during marriage and even if the proceeds are CP she is entitled to them upon dissolution as they are compensation for her injuries. This argument will likely be unsuccessful. Personal injury funds are awarded because they typically compensate for the injured spouse's present and future suffering and medical expenses and as such should be given to the injured spouse both because he or she will have an continued increase need and because the injury was personal to the spouse. Further, even with personal injury damages, the award will be divided to the extent equity requires, including when there has been loss to the community. Here, the loss compensated was entirely the community's as W was underpaid for her community labor and thus did not receive the salary she should have, which would have been entirely CP. Therefore, H and W will each have a one-half interest in the proceeds at dissolution.

Rights of H and W to the settlement

The settlement is CP and so H and W each have a right to one-half the amount, or $15,000. This amount could be paid to H now by giving him a CP share in an amount that accounts for his $15,000 or by imposing a remedial trust on the funds such that H and W are each entitled to one-half of the payments over the next three years.

H's Gambling Debt

Liability During Marriage

During marriage, debts acquired before or during marriage are community debts and any CP and the acquiring spouse's SP will be liable for the debt. Therefore, whether H acquired the debt entirely during marriage or not, the CP would have been liable during marriage.

Liability Upon Dissolution

At dissolution, the community property is divided and thus no longer exists. While CP is divided equally, courts have more discretion in the division of liabilities acquired during marriage. Where one spouse has acquired a debt and the debt was not for the benefit of the community, it would likely be assigned to the debtor spouse upon dissolution.

H ran up a gambling debt of $50,000. This was without W's knowledge and not for the benefit of the community and therefore upon dissolution, a court would likely assign the remaining debt to H as that would be the equitable result and is within the court's discretion.

If a Creditor Makes a Claim post-separation and prior to property distribution

While separation terminates the marital economic community, it does not automatically terminate the CP estate. If a creditor makes a claim while the CP estate is still in existence, then the CP estate can be reached prior to the CP being distributed. In cases of contract debt, the creditor may opt to recover from the CP or the debtor spouse's SP.

In this case, even though W was not aware of the debt at the time of separation, the CP estate would still be liable. The casino could opt, at any time before property distribution, to seek recovery from CP or H's SP. However, any of W's SP would not be reachable to satisfy H's debt.

Answer B

California is a community property state. All property acquired during marriage, other than separate property, is presumed to be community property. All property acquired before marriage or during marriage by gift or inheritance is presumed to be separate property. Further, all property acquired during marriage with the use of separate property funds is presumed to be separate property.

To determine the character of property upon divorce, the court will look to the source of the funds used to acquire the property. A mere change in form of the property will not change its character. Further the courts will also look to the actions of the parties which may have an effect on the character of the property and any presumptions that apply. Upon divorce, the court will divide all community property equally, unless the interest of justice require otherwise.

With these principles in mind, we can turn to the property in issue.

1) The Car?

No marriage- Separate property funds used to acquire

Here the car was acquired before marriage. In 2003 Wendy and Hank were engaged to be married. They discovered that the $10,000 monthly income Wendy derived from a trust fund would terminate upon her marriage or upon her reaching the age of 25, whichever came first. Therefore they decided to postpone their wedding until Wendy's 25th birthday, in 2006, and instead began living together. Also, Wendy in 2003 opened a checking account in both of their names, into which she deposited her $10,000 (which would be considered her separate property as there is no marriage) into an account in both of their names. Wendy also used the funds to buy a new car.

Thus at this point, their relationship would not be governed by community property law.

Hank will assert that he is entitled to a portion of the car because Wendy opened a checking account in both of their names, into which she deposited her $10,000 monthly trust income. Thus, Hank will assert that she made a gift of the trust property,

which before marriage, and even after marriage would have been considered separate property (as trust income is usually characterized as a gift or inheritance). However, Hank would have to satisfy the requirements of a contract under California's view on meritricious relationships.

Meritricous Relationship

California does not recognize common law marriage, but will recognize one that was contracted in another state that does recognize a common law marriage. Because there is no marriage at this point, any funds used would be separate property. Thus, as there is no community, any agreements the parties have as to any property would be governed by contract law, unless the main thrust of the contract is sexual relations. Here because instead of marrying one another and terminating the trust income payments, Hank and Wendy decided to move in together, there is no valid marriage and any agreements they have as to property would be governed by contract law.

Title to the car in both of their names

Accordingly, here Hank will assert that they had an agreement as to the car that it was to be in both of their names and thus he has a right to distribution of the car as partially his property. This would require that Hank prove that there was a contract between the two, as community property principles would not apply in this situation as, at this point there is no marriage.

Wendy will assert that she owns the car as her own separate property. She will assert that she used her funds prior to marriage, and thus the court should trace back the source of the property to her earnings prior to marriage. However, as noted above, if Hank is able to show that they had an agreement as to property acquired during the time pending their marriage and he is able to show that taking title in joint names evidences this agreement, he will be able to assert an interest in the car based on contract law. Further he will point to the fact that he quit his job in reliance upon their agreement to take title jointly to her trust income and thus there was valid consideration.

Further he will attempt to assert that the consideration for the contract was not sexual relations, rather it was the agreement that she would pursue an education, while

he would take care of the household chores. If Hank is successful, the car would be distributed pursuant to a contract between the parties, likely here equally as title was taken in both of their names.

Lucas- Anti Lucas

Alternatively Wendy will assert that Lucas decision and Anti Lucas apply here. Under Lucas, when a spouse expends separate property to take title jointly, a presumption arises that for the purposes of divorce, it is treated as community property. Under Lucas, all separate property expended for the acquisition of property in joint form would be presumed a gift. However California enacted Anti Lucas statutes to overturn this decision and entitle the separate property to be reimbursed in the form of an interest free loan. Thus she will assert that because title was taken in both of their names, the Anti Lucas statutes apply and she should be entitled to her down payment for the property in the form of interest free loan. However, because there is no community, this is not applicable here.

Wendy's use of trust income to pay living expenses for Hank and herself

It should be noted that Wendy's use of separate property, her trust income prior to marriage, for the living expense for Hank and herself will not entitle her to any reimbursement, unless they had an agreement to the contrary. It is presumed that when one party uses separate property for the expenses of another party, that it was intended as a gift. Thus, unless Wendy can show an agreement to the contrary, she will not be entitled to reimbursement for such expenditures.

2) The $30,000 in additional salary under the settlement?

Cause of actions that arise during marriage

A cause of action that arises during marriage is deemed to be a community property asset, subject to division upon divorce. Here in 2006, Wendy and Hank married. Thus the community commenced and all community property principles will attach to the relationship.

Wendy's $10,000 monthly trust income terminated. Afterwards, Wendy began teaching at a local college. In 2008, Wendy learned that her compensation was less than that of her male counterparts and made a claim against the college.

Consequently, because the cause of action arose during marriage, likely the court will find that any subsequent award is deemed community property.

Wendy will assert that because shortly after her separation, she settled her claim against the college in return for additional salary in the amount of $10,000 per year for the next three years, she will claim that this settlement was meant not as a settlement for past wages but as wage replacement for future years.

Wage replacement

Wendy will claim the settlement is meant as a form of wage replacement for the future years. Wage replacement under community property law are characterized upon receipt. Thus if received during marriage, will be deemed community property, however if received after marriage, will be deemed the working spouse's separate property. Here, Wendy will assert that as such, the $10,000 should be deemed her separate property. She will argue that wage replacements are characterized at the time they are received rather than at the time the cause of action arose. Thus she will assert that because she will receive the $10,000 after marriage, they should properly be deemed wage replacements characterized upon receipt.

Community property right to settlement

However, Hank will likely prevail in his assertion that the payments are for past services that occurred during marriage. All time labor and skill expended during a marriage is considered a valuable community property asset. Further all wages earned during marriage are considered community property. Here Hank will point to the fact that Wendy in 2008, learned that her compensation was less than that of her male counterparts and made a claim against the college. The following year, Wendy and the college settlement for an additional $10,000 per year for the next three years. Because this settlement was likely due because of the fact that during the marriage she was

earning less than her male counterparts, the intent of the college was to compensate her for her labor expended in the past.

Thus because Hank will successfully assert that the settlement was entered into to pay Wendy for past services, namely her years of employment at the college from 2006 to 2009, he will be entitled to a community property interest in the $30,000. Thus each will likely be awarded $15,000.

Education expenses

It should also be noted that if the community pays down the loans incurred to gain an education and that spouses earning capacity has been enhanced, the community will be entitled to reimbursement for such expenses made from community funds even if the education was gained prior to marriage, unless 1) the community has already substantially benefitted from the education, 2) the other spouse has gained a community funded education and 3) if it lessens the need for spousal support upon dissolution. Here there are no facts to indicate whether the education that Wendy received was at all funded by the community during marriage. However, in the case that the community did pay part of her education, she will assert the exceptions.

Community has already substantially benefitted

There is a presumption that arises if the education was gained 10 years before the end of a marriage, the community has already substantially benefitted and is not entitled to reimbursement. Here this is exception is inapplicable because Wendy earned the education in 2003, they married in 2006, and the community ended in 2008.

Other spouses Community funded education

There are no facts to indicate that Hank has received an education.

Lessen the need for spousal support

Wendy will likely assert that although she gained the education prior to marriage, it lessened her need for spousal support upon dissolution. She will assert that she was living off of a trust which expired in 2006, thus her education enabled her to gain

employment which lessened the need for spousal support. Thus she will claim that H is not entitled to reimbursement.

3) The $50,000 owed to the casino?

Debts during marriage

All parties during the marriage have equal right to manage and control the community. Thus each spouse is allowed to incur debt and borrow money. Such debt incurred during marriage is generally presumed to be community property. However, debt acquired during the marriage will likely be awarded to the debt incurring spouse. The non debt acquiring spouse's separate property will not be liable on the debt incurred by the other spouse. Here Unbeknownst to Wendy, Hank had run up a gambling debt to a casino during their marriage. At the time of their separation, Hank owed the casino $50,000.

Thus this debt during marriage would properly be characterized as community property debt. However, upon dissolution, the court will likely award the debt to the debt incurring spouse.

Necessaries

There is an exception to the general rule that one spouse's separate property will be unavailable to the other spouse's creditors. This exception applies for all debt incurred during marriage and even during the separation if the debt is incurred for a necessary. A necessary is one that is a requirement of life, such as medical care and food and water. Here because the debt was incurred by Hank for gambling at a casino, likely this exception would not apply. Debt incurred at a casino is not a necessary of life and as such Wendy's separate property will not be available to the casino.

Interest of justice require different allocation

The court may however, in the interest of justice require that different debt allocation be made upon divorce. The rationale is that at this point, the interest is in protecting the creditors. Thus the court may look to see which spouse is in a better position to repay the debt and may allocate the debt to such a spouse. Here the facts

indicate that Wendy was working for a college and actually earning a salary. However, Hank and Wendy agreed that Hank would quit his job and stay home taking care of the household chores. Thus if Hank is unable to repay the debt, it may be that the court will assign the debt to Wendy to assure that the Casino is repaid.

Feb 2011

California
Bar
Examination

Essay Questions
And
Selected Answers

February 2011

THE STATE BAR OF CALIFORNIA
OFFICE OF ADMISSIONS
180 HOWARD STREET • SAN FRANCISCO CALIFORNIA 94105 1639 • (415) 538 - 2303
1149 SOUTH HILL STREET • LOS ANGELES CALIFORNIA 90015-2299 • (213) 765 – 1500

ESSAY QUESTIONS AND SELECTED ANSWERS
FEBRUARY 2011
CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2011 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

ESSAY QUESTIONS 1, 2, AND 3

California Bar Examination

Answer all three questions. Time allotted: three hours

Your answer should demonstrate your ability to analyze the facts in question, to tell the difference between material and immaterial facts, and to discern the points of law and facts upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

Q1 Wills

In 2004, Tess, a widow, executed a valid will leaving her estate to her children, Abel, Bernice, and Cassie *per stirpes*.

In 2009, Tess, Abel, and Bernice quarreled and Tess decided to draft a new will. She went to an office supply store, got a preprinted will form, and filled in the following in her own handwriting:

> Because my son Abel and daughter Bernice have been unkind to me, I specifically disinherit them. I give and bequeath all my property to University.

Tess signed and dated the form. No one was present when she signed and dated the form and hence no one signed as a witness to her signature. At the time, she was addicted to prescription pain killers and was an alcoholic.

In 2010, Cassie adopted David as her son. Soon thereafter, Cassie died, survived by David.

In 2011, Tess died, leaving an estate worth $1,000,000.

Tess's 2009 will has been offered for probate.

(1) What arguments can Abel and Bernice reasonably make in objecting to the validity of Tess's 2009 will? Discuss.

(2) Does David have any claim to a share of Tess's estate? Discuss.

Answer according to California law.

Answer A

(1) What arguments can Abel and Bernice reasonably make in objecting to the validity of Tess's 2009 will?

A. Was the first will revoked?

Abel and Bernice can first object that Tess's 2004 will wasn't revoked by the subsequent will drafted in 2009. A will can be revoked either expressly or impliedly. Express revocation requires the testator to use language that makes his intent clear that the original will is revoked by a later will. A will can be impliedly revoked if the second will contradicts with the first will and the second will bequeaths substantially all of testator's property. Here, unlike in the first will where Tess left Abel and Bernice part of her estate, Tess specifically disinherited Abel and Bernice. A testator can disinherit those who would take if testator died intestate (here, her children) by expressly using language that she intends to disinherit them in her will. Because the second will contradicts the first will and bequeaths all Tess's property to a different person (University), the will was validly revoked by implication and the second will can be probated if it is proved valid. It is clear Tess intended the second will executed in 2009 to revoke the 2004 will and not be a codicil because she specifically contradicts a provision stated in her first will (to Abel, Bernice, and Cassie per stirpes) and then Tess in her later will left all of her property instead to University.

B. Objection that 2009 will is not a valid will

(1) Was this a valid attested will?

California does not allow oral wills. Therefore, a valid attested will must be (1) Written, (2) Signed by Testator, (3) in the presence of 2 witnesses who have to sign before testator's death, but not necessarily in his presence. Also, [if] testator doesn't

sign in the two witnesses' presence, it can be valid if he later acknowledges the signature on the will as his with witnesses present, who sign then or before T's death. Even if there are no witnesses, as long as (1) and (2) (writing and signed by T) are satisfied, extrinsic evidence or testimony can be offered that proves that T either in writing or orally expressed his intent that this writing be his will. This has to be proved through clear and convincing evidence. Here, Tess's will is likely not a valid attested will. Even though the will was in writing and signed by Tess, there were no witnesses to her signature. For this will to be considered valid, there would need to be clear and convincing evidence that Tess intended this to be her will or that later Tess acknowledged the signature as hers and witnesses sign. Since those facts are not included here, Tess's will is not a valid attested will.

(2) Valid holographic will?

Tess's will will likely be considered a valid holographic will. A holographic will doesn't have to be fully in the testator's handwriting, but all material provisions must be solely in the T's handwriting. Material provisions include the beneficiaries who will take must be named and specify the gifts they will receive. A holographic will must also be signed by T to be valid. Here, Tess's 2009 will includes all material provisions. Tess specifically names University as the beneficiary and specifically names the gift they will take - "all my property". Tess signed the will, satisfying the signature requirement. The holographic will is also dated, which is not required but helps a court when a will is offered for probate to know the order in which wills were executed. Even though the will was printed on a preprinted will form, this is not of consequence. Therefore, since Tess named a specified beneficiary (University) and specifically named what property they would take (all) in her own handwriting, and signed the will, all material provisions required of a holographic will exist and Tess's 2009 will would be considered a valid holographic will in California. For the reasons listed above, Tess's 2004 will was revoked, and her 2009 will should be probated, if it is found that Tess had the capacity at the time of execution of the 2009 will (discussed below).

C. Did Tess lack capacity when the 2009 will was executed?

A testator who executes a will must have capacity when the will is executed for the will to be considered valid and to be offered for probate. Capacity requires several things: (1) T must be at least 18, (2) T must understand the natural objects of her bounty, (3) must understand the nature and value of property, and (4) T must understand she is making a will. Here, Tess's capacity could be questioned because she was both addicted to prescription painkillers and was an alcoholic at the time she executed the will. A person could be considered to lack capacity normally but have times of being lucid. If the will is executed during a lucid period, then T will be considered to have met the capacity requirement. (1) The first element required for capacity here can likely be assumed. It seems Tess is over the age of 18 since she was already widowed and had three children, and presumably died of natural causes not many years after her 2004 will. (2) It appears that T understood the natural objects of her bounty (her children). This is possible because she specifically refers to her children who she knew would take either under her 2004 will or by intestate succession - Abel and Bernice. She made a point to disinherit them, and at least knew some of the natural objects of her bounty. Though, because Tess didn't list Cassie (who would also be a natural object of her bounty), it is possible she didn't understand all the natural objects of her bounty. (3) It is not clear that Tess understood the nature and value of her property. She only stated "all my property". She didn't specifically list any property but only made a blanket statement referring to the whole of her property. It is not clear that she understood the disposition of her property. (4) It is clear that Tess understood she was making a will. Her language specifically "disinherited" two of her children and then she "bequeathed" her property to University. Tess also wrote these statements on a preprinted will form that she went to an office supply store to buy. It appears that because Tess used certain language and wrote her bequests on a will form, she understood that she was making a will. Because Tess didn't even refer to Cassie (which questions whether she understood the natural objects of her bounty) and because Tess only bequeathed "all" her property instead of listing out certain

dispositions, it is possible that Abel and Bernice could prove that Tess lacked the capacity to make the 2009 will.

(2) Does David have any claim to a share of Tess's estate?

A. Capacity

It is possible that David has a claim to Tess's estate. Adopted children inherit from their parents just as if they were natural born children, so David will be able to take any gift that his mother Cassie would've been able to take had she been living. If it is found that Tess lacked the capacity to execute the 2009 will (for the reasons listed above), and the 2004 will was never validly executed, then David could take his mother's share that was devised under the 2004 will. Since Tess wanted her estate distributed to Abel, Bernice and Cassie per stirpes, that means that the estate is divided equally at the first level where there is issue left (whether anyone is living on that level or not). Here, if Tess's estate was divided per stirpes, Abel, Bernice and Cassie's issue - David - would all inherit equal shares - 1/3 of the estate.

B. Pretermitted child

If the 2009 will is found to be valid, then David could argue that Cassie was a pretermitted child, but this argument is likely to fail. A pretermitted child will be provided for if they were born/adopted after a will was executed, were not provided for in the will, and (1) were not provided for outside of the will, (2) all the estate wasn't left to their other parent, or (3) they weren't expressly disinherited. Here, because Cassie was already living when Tess's will was executed, she cannot claim as a pretermitted child, even though she wasn't expressly disinherited. David would not be able to argue under the pretermitted child statute, even though he was adopted after the will, because he is the grandchild and not child of T. Therefore, Cassie nor David would be considered a pretermitted child and David does not have a claim under as a pretermitted child.

Answer B

1. Arguments Abel and Bernice can make objecting to the validity of Tess's 2009 Will:

Revocation of the 2004 Will

In 2004, Tess executed a valid will leaving her estate to Abel, Bernice, and Cassie. The issue is whether Tess's 2009 will revoked the 2004 will. A will may be revoked by a subsequent will (1) if the subsequent will is validly executed; and (2) if the testator simultaneously had the intent to revoke the prior will. Revocation may be express (e.g., "I revoke all prior wills and codicils"), or implied (a) to the extent that the wills are inconsistent; or (b) if the subsequent will makes a complete disposition of the testator's entire estate, then the prior will is revoked in its entirety.

Here, [Tess] did not expressly revoke the 2004 will in her 2009 will, because the 2009 will did not mention the prior will. However, Tess stated in her 2009 will that she "specifically disinherit[s]" her son Abel and Bernice. This statement is inconsistent with the 2004 will's disposition of Tess's entire estate to her children Abel, Bernice, and Cassie, so the 2004 will would be implicitly revoked as to its devises to Abel and Bernice, provided that it is validly executed or a valid holographic will. Moreover, Tess's 2009 will stated that she bequeaths "all my property to University," which is a complete disposition of her estate. As such, a court would likely find the 2004 will to be revoked in its entirety, if the 2009 will is valid.

The issue, therefore, is whether the 2009 will is a validly executed attested will, or a valid holographic will.

Validly Attested Will

Abel and Bernice will argue that the 2009 will failed to comply with the required formalities for a validly executed attested will. To be valid, an attested will must be: 1) in writing; 2) signed by the testator, or by another person in the testator's presence and at her direction; 3) the testator's signing or acknowledgement of the will must occur in the

joint presence of at least two witnesses; 4) the two witnesses must sign the will within the testator's lifetime (though not necessarily in the testator's presence, or in the presence of each other); and 5) the two witnesses must have understood at the time that they were witnessing the testator sign her will.

Here, Tess's 2009 will was in writing (on the preprinted will form), and she signed and dated the document. However, there were no witnesses to Tess's signing of the will, and no witnesses signed the document. Thus, Tess's 2009 will failed to comply with the formalities required of a validly attested will.

Clear and Convincing Evidence Exception After 2009

After Jan. 1, 2009, a will which complies with the signature and writing requirements, but fails to comply with the witnessing requirements, may nonetheless be admitted to probate if the proponent of the will is able to produce clear and convincing evidence that the testator intended the document to be her will. Here, University (the party who stands to benefit from the 2009 will being valid) will argue that, since Tess's 2009 will was executed after this new rule went into effect, and since she signed and wrote portions of the will in her own handwriting, there is sufficient evidence to admit the will into probate.

This argument will probably fail. Abel and Bernice will argue that, as discussed infra, the fact that Tess was on painkillers and was an alcoholic at the time she signed the 2009 will weighs strongly against finding that there was clear and convincing evidence of her intent. Moreover, Abel and Bernice will argue that the clear and convincing evidence exception is usually only successfully employed when a testator attempts to comply with the witnessing requirements, but fails due to a technicality such as the two witnesses not being jointly present at the same time, or failing to sign the document within the testator's lifetime. Here, Tess had no witnesses present whatsoever. Moreover, Tess created the will on a preprinted will form, rather than going through the more formal procedure of having an attorney draft up a customized will. They will also point out that the will illogically does not mention Cassie. All of these

circumstances will likely persuade the court not to apply the clear and convincing evidence exception in this case. As such, the 2009 will will not be admitted to probate as a validly attested will.

Holographic Will

University will argue that, even if the 2009 will is not validly attested, it qualifies as a valid holographic will. A holographic will is valid if (1) the material terms (including all beneficiaries and bequests) are in the testator's own handwriting; and (2) the testator signs the will. A holographic will can indeed revoke a prior attested will (that was typed).

Here, all material terms in the 2009 will were in Tess's own handwriting. This included specifically disinheriting Abel and Bernice, and bequeathing "all my property to University." Tess additionally signed and dated the will. (A holographic will need not be dated, but an undated holographic will would be invalid to the extent that it conflicted with other wills. Since this will was dated, that is not a problem.)

Abel and Bernice will argue that not all material terms were included in Tess's handwriting because she failed to mention Cassie in the 2009 will. This argument will likely fail. Tess's statement in her own handwriting that "I give and bequeath all my property to University" is a complete disposition of her estate. Specifically mentioning Cassie was not necessary. As such, a court would likely admit the 2009 will to probate as a valid holographic will, provided that they find there was sufficient evidence of testamentary intent.

Capacity

Abel and Bernice will argue that Tess lacked capacity at the time she executed the 2009 will. To have capacity to execute a will, a testator must: 1) be over 18 years old; 2) know the extent of her property; 3) know the natural objects of her bounty (e.g., heirs); and 4) understand the nature of the act of executing a will.

Tess was presumably at least 18 years old in 2009, seeing as she was a widow and had three children. Abel and Bernice will argue that Tess lacked capacity because she was addicted to prescription painkillers and was an alcoholic. However, this evidence will likely be insufficient under these facts. All testators are presumed to have capacity, and the burden will be on Abel and Bernice to present evidence that Tess lacked capacity at the precise time she executed the 2009 will. Merely showing that she was addicted to painkillers and was an alcoholic will not be enough. They would need to prove that she was high or drunk at the time she executed the document. Given that she had the capacity to go to an office supply store, purchase a preprinted will form, and write legibly in her own handwriting, it is likely that she knew the nature and extent of her property. She also specifically referenced the natural objects of her bounty (Abel and Bernice), although they will point to the fact that she left Cassie out of the will as evidence that Tess was not completely aware at the time. However, Tess did mention that Abel and Bernice "have been unkind to me," which logically might be a reference to the fact that they quarreled recently. Ultimately, the fact that Tess left out Cassie will likely not be sufficient to prove that she lacked capacity at the time she executed the will. She clearly understood the nature of the act of executing a will; otherwise she would not have been able to purchase the will form and execute it without help.
Accordingly, Abel and Bernice's capacity defense will fail.

Insane Delusion

Even if a testator had capacity at the time she executed a will, affected parts of a will will be invalid if (1) the testator had a false belief; (2) which was the product of a sick mind; (3) there was no evidence supporting the belief; and (4) it affected the will.

Here, there is no evidence that Tess had any false beliefs about her quarrel with Abel and Bernice. Accordingly, this defense will fail.

Conclusion

Because Tess's 2009 will is a validly executed holographic will, and because Abel and Bernice's capacity and insane delusion defenses will fail, Abel and Bernice likely will fail in objecting to the validity of the 2009 will.

Final Note re Dependent Relative Revocation

Under the doctrine of dependent relative revocation, a will which the testator revokes in anticipation that a subsequent will would be valid may nonetheless be admitted to probate if the prior will turns out to be invalid. However, this doctrine would not apply here in any instance, because the 2004 will was not revoked by physical act. If the 2009 will was invalid, then the 2004 will would have never been revoked. As such, the doctrine of dependent relative revocation would not need to be invoked to save the 2004 will, because the 2004 will would have never been revoked by the 2009 will in the first place.

2. David's Claim:

Adopted Children / Intestacy

David is an adopted child of Cassie, who is Tess's son. When a child is adopted, it severs any right to inherit from their blood parents, and the adopted child is treated the same as a blood child of the adopting parent for purposes of wills and intestacy. Here, Cassie died in 2010, survived by David. If Cassie died intestate (i.e., without a will), and if David is her only son, David would inherit Cassie's entire estate. The question, therefore, is whether Cassie would have inherited any of the $1,000,000 in Tess's estate.

Per Stirpes

If Cassie were to inherit under the 2004 will, she would receive a "per stirpes" split of the $1,000,000, which would be one third (an equal division between all three of Cassie's children), for about $333,333. [David] would inherit this amount as the only

heir of Cassie. However, we must first determine if Cassie would take anything after the 2009 will.

Pretermitted Heir

David might try to claim that Cassie was a pretermitted heir. A child which is born after the testator executed all testamentary instruments (wills, codicils, and trusts), but is not provided for in any of them, may nonetheless receive her intestate share. This doctrine will not apply here because Cassie was already alive when both the 2004 and 2009 wills were executed by Tess.

Revocation of 2004 Will

Because Cassie is not a pretermitted heir, whether David can take will depend on whether the 2009 will is valid, and whether the 2004 will was revoked by the 2009 will. As discussed above, the 2009 will is likely a valid holographic will, and because the 2009 will made a complete disposition of Tess's estate ("all my property to University"), a court is likely to find that the 2004 will was implicitly revoked in its entirety. If the court adopts this view, Cassie would not inherit under the 2009 or 2004 wills, and David accordingly would be entitled to no share of Tess's estate.

Assuming the 2009 Will is Invalid

Assuming, arguendo, that the 2009 will is invalid, then David would argue that he is entitled to a 1/3 share of Tess's estate because (a) Cassie would have inherited 1/3 under the 2004 will, and (b) David is Cassie's only heir. The issue, under these circumstances, would be whether the fact that Cassie predeceased Tess caused her bequest to Cassie under the 2004 will to lapse.

Lapse

Under the common law rule of lapse, if a beneficiary of a testator's will predeceased the testator, any bequests to the beneficiary would lapse (i.e., fail), and would fall into the residuary of the will (the block of remaining property after all specific,

general, and demonstrative devises). Here, because Cassie predeceased Tess, her bequest would lapse under the common law rule, and David would take nothing.

Antilapse Statute

However, California, like most states, has adopted an antilapse statute. Under the statute, a bequest will not lapse if (1) if is to the testator's kindred, or kindred of a former spouse; and (2) the beneficiary leaves issue. Here, Cassie is Tess's kindred because she was Tess's daughter. Moreover, Cassie left David as issue. Accordingly, her bequest would not lapse under the antilapse statute, and Cassie's bequest of 1/3 of Tess's estate (under the 2004 will) would pass to her issue, David.

Conclusion

The 2009 will is likely a valid holographic will which revoked the 2004 will in its entirety. As such, Cassie's estate would be entitled to nothing under the 2009 will, and David would take nothing. However, if the court finds that the 2009 will was invalid, then Cassie's estate would take 1/3 of the $1,000,000 in Tess's estate under the 2004 will, which would pass to David via intestacy.

Q2 Constitution

Out of a sense of patriotism, Charles enlisted in the United States Army. Charles had risen to the rank of Captain.

Shortly after that promotion, after serious reflection, Charles began to rethink his previous religious, philosophical, and political views. He modified the religious preference he listed on his Army records from “Christian” to “Belief in a Superior Principle of Noninterference with Others Who Have Not Harmed You.” Charles concluded that his belief did not prohibit his assignment to duty in Country A, but it did preclude his assignment to duty in Country B.

Federal law requires military personnel to accept any assignment to duty, but when Charles was assigned to duty in Country B, he declined to go, and was charged with refusing to deploy. Since the charges were brought, Charles has frequently criticized American involvement in Country B.

Charles wishes to raise a defense against the refusal to deploy charge based solely on (1) the Free Exercise Clause and (2) the Establishment Clause of the First Amendment to the United States Constitution.

What is the likelihood of Charles prevailing? Discuss.

Answer A

The First Amendment prohibits the federal government from interfering with the free exercise of religion, and it also prohibits the federal government from establishing a religion. In general, because the First Amendment protections are so important, laws are subject to strict scrutiny, which means they must be necessary to achieve a compelling state interest. Additionally, there must be no less restrictive alternative.

(1) FREE EXERCISE OF RELIGION

MUST THE RELIGION PROTECTED BE A RECOGNIZED RELIGION?

As indicated above, the federal government cannot enact laws that interfere with the free exercise of religion. A necessary threshold question, therefore, is which religions are protected by the First Amendment Free Exercise Clause. The Supreme Court has indicated that the religion need not be a generally accepted or recognized religion, so long as the individual who practices the religion has a genuine belief in the religion.

In this case, Charles' new religion, "Belief in a Superior Principle of Noninterference with Others Who Have Not Harmed You," is not a generally accepted or recognized religion. However, no facts indicate that Charles does not have a genuine belief in this religion. As indicated in the facts, he had rethought his views, which gives credence to the fact that Charles genuinely considered and believes in his new religion.

Accordingly, Charles' new religion qualifies as one which is subject to First Amendment limitations.

FREE EXERCISE OF RELIGION V. LAWS OF GENERAL APPLICABILITY

The Supreme Court has indicated that a law will be struck down as violative of a person's free exercise of religion only in the event that the law was enacted with the

purpose of interfering with the person's religion, and the law in fact does so interfere. Thus, laws of general applicability will not be struck down under the Free Exercise Clause. A good example of this is where the U.S. Government prevents mind-altering substances (i.e., drugs). In Native American religions, the Native Americans use peyote, a mind-altering substance, in the exercise of its religion. However, because the Supreme Court determined the law against drugs was one of general applicability and not directed at inhibiting Native Americans from practicing their religion, the law was upheld. Notably, two exceptions have been found: 1) The Amish do not have to send their children to school until age 16; and 2) people may still receive unemployment benefits if they quit a job due to religious beliefs. Neither exception is applicable here.

Rather, in this case, as is similar to the Native American peyote example, it appears the federal law is one of general applicability. Specifically, federal law requires military personnel to "accept any assignment to duty." Therefore, because the law was not enacted with the intent to interfere with religion [sic].

The law may, however, actually interfere with Charles' exercise of religion. Because he must accept any assignment to duty, and because he was charged with refusing to deploy, he therefore cannot exercise his religion which necessitates he refuse assignment to Country B. However, as indicated above, because the law was not enacted with the purpose of interfering with Charles' religion, it is one of general applicability and will be upheld.

NECESSARY TO ACHIEVE A COMPELLING STATE INTEREST

Even if the federal law to "accept any assignment to duty" was enacted with the intent to interfere with religion, it may still pass muster under the Free Exercise Clause if it is necessary to achieve a compelling state interest. Of note, under this strict scrutiny standard, the burden is on the government to so prove the law passes muster.

Here, the law is necessary, as the U.S. military must maintain order with respect to its troops. There are hundreds of thousands of people in the U.S. military, and for

efficiency and administrative purposes alone, it would not make sense to allow individual military personnel to "pick and choose" where they are assigned. Indeed, the U.S. might have to forego a presence in dangerous areas if such was the case, as some military personnel may decline to go to war-torn parts of the world. Moreover, it is important that the military retain obedience from its troops and reduce tension, given the gravity of their missions and likelihood that American troops may be killed. Indeed, once Charles was assigned to duty in Country B, he frequently criticized American involvement in Country B, thereby disrupting efficiency and perhaps causing others to lose faith in the mission. Accordingly, the law is necessary.

There is also a compelling state interest - the protection and defense of the United States. Because national security and defense is such a profound interest to the United States, it qualifies as "compelling."

Moreover, there does not appear to be any less restrictive alternative. For example, the law could not allow some military personnel to accept some duties and reject others, while maintaining that others must accept any assignment (as such a law would be subject to equal protection claims).

Accordingly, because the law is necessary to achieve a compelling state interest, as maintaining order in troops in order to accomplish national security and defense, the law is valid. The government meets its burden in so proving.

Thus, given all of the above, Charles cannot successfully raise a defense based solely on the Free Exercise Clause.

(2) ESTABLISHMENT CLAUSE

As indicated above, the First Amendment prohibits the federal government from establishing a religion.

APPROVING ONE SECT OF RELIGION OVER ANOTHER

In the rare event that the U.S. government might establish one sect of religion over another, said law would be subject to strict scrutiny, as described above. Here, it does not appear that the federal government is approving one sect over another, as one must accept assignment to duty regardless of religious sect.

Therefore, the government is not approving one sect of religion over another.

LEMON TEST

The basic test the Supreme Court uses in determining whether the federal government has established a religion is the Lemon test, which is comprised of three inquiries: 1) was the law enacted for a secular purpose; 2) does the primary effect neither inhibit or advance religion; and 3) is there no excessive entanglement by the government? If all three inquiries can be answered affirmatively, the law passes the Lemon test, and accordingly, the Establishment Clause is not violated.

A) SECULAR PURPOSE?

As indicated above, the first inquiry is whether the law was enacted for a secular purpose. Here, the law that military personnel must accept any assignment to duty does not reference religion whatsoever. Moreover, it appears the purpose of the law was to maintain order and faith in the military missions, and not to establish a religion.

Accordingly, there is a secular purpose behind the law.

B) PRIMARY EFFECT?

It must be decided whether the primary effect is to advance or inhibit religion. The effect of the law is that a person in the military will have to accept assignment regardless of his religious preferences, and without taking said preferences into account. Thus, it cannot be said that the law advances or inhibits religion, as the fact that one has a religious leaning toward a particular assignment in a particular country is inconsequential as to whether the person is eventually assigned to a particular country.

Rather, the primary effect of the law is to maintain order and administrative military efficiency.

Accordingly, the primary effect of the law neither advances or inhibits religion.

C) EXCESSIVE GOVERNMENT ENTANGLEMENT WITH RELIGION?

In order for a law to be valid under the Lemon test, there must not be excessive government entanglement with religion.

This inquiry may be Charles' best argument that the law should fail the Lemon test. Specifically, he can argue that the Army records list a religious preference. Accordingly, because he listed his religious preference, the military was on notice that his beliefs under his religion may conflict with assignment into particular countries.

However, the government can argue that any preference that Charles indicated has little to do with where he is eventually assigned to duty. Rather, military personnel are assigned where they are needed; where ongoing conflicts arise; etc. Thus, the law that a person must accept any assignment to duty, even if the military knows your religious preference/beliefs, does not excessively entangle with religion.

Accordingly, there is no excessive government entanglement with religion.

Thus, because the Lemon test is not satisfied, a court will likely find that the Establishment Clause has not been violated.

Charles will not succeed under either the Free Exercise Clause or the Establishment Clause.

Answer B

1. Free Exercise Clause

Under the First Amendment's Free Exercise Clause, the federal government may not prohibit the free exercise of any religion.

Are Charles's beliefs religious?

The first question is whether Charles's nontraditional belief system is religious. A religion need not be a popular or generally recognized system of belief, like Christianity, but it must be religious rather than political or philosophical in nature. There is no single test for determining whether a belief system is religious, but courts look to factors such as whether the system has indicia of traditional religious beliefs like dealing with questions about the existence and nature of a higher power, life after death, holidays, rituals, and moral teachings for living one's day-to-day life.

Here, Charles's belief system seems to lack any of these traditional indicia of religious beliefs. The single belief that his religion espouses is one of noninterference, but that gives only limited guidance on how to live one's day-to-day life. There is no indication of beliefs in a god or gods, views on life after death, holidays, or rituals. Moreover, the fact that Charles's beliefs here are tied closely to the situation in particular countries (rather than, for example, a belief in nonaggression to all) and that Charles has been criticizing U.S. policy on this basis suggests that the beliefs are more political than religious.

A court likely would conclude that Charles's belief system is only political or philosophical, not religious, and therefore his Free Exercise Clause claim will fail on this basis alone.

Genuineness

Religious beliefs also must be genuinely held to qualify for First Amendment protection. Here, there does not seem to be any question that Charles genuinely believes in his principle of noninterference, and thus this requirement would be met.

Religious accommodation

The Free Exercise Clause generally does not require accommodation of religious beliefs. The government may require a person to comply with neutral laws of general applicability even if doing so violates that person's genuinely held religious beliefs.

Here, the federal law requiring military personnel to accept any assignment is a neutral law of general applicability. It does not target only the religious or single out one religion for disfavored treatment, and there is no indication that it was adopted specifically to disadvantage religious persons. To the contrary, it probably was adopted for purely secular reasons, to prevent soldiers from undermining military planning by refusing to serve when deployed.

Even if it were not a neutral law of general applicability, the statute would be lawful if it satisfied strict scrutiny -- that it was necessary to achieve a compelling governmental interest and the least restrictive means of doing so. Although strict scrutiny is a demanding standard and the burden of proof is on the government, this law has a good chance of surviving this standard. The federal government has a compelling interest in military readiness and discipline among the troops; indeed, raising an army is one of the federal government's most important functions. The law is necessary to achieve that interest because if soldiers could refuse deployments, it would become difficult if not impossible to plan troop movements adequately and to keep units that trained together intact for battlefield activities. Even allowing a few religious exemptions could severely complicate these efforts if, for example, the objecting soldier had a unique role. And here the fact that Charles is a Captain rather than a low-level soldier suggests that there would be disruption in the chain of command if the unit were deployed without him. Therefore, the law should survive strict scrutiny even if that were the standard.

(I should note that Charles might have a claim under the Religious Freedom Restoration Act, which subjects all Free Exercise Claims to strict scrutiny. Although the law was struck down as applied to States, most courts continue to find it valid as applied to the

federal government. This is beyond the scope of the question, but as explained above Charles likely loses even under strict scrutiny.)

Therefore, the government can require Charles to comply with this law even if doing so violates his religious beliefs. Charles is likely to lose on this basis alone as well.

Military exception

Finally, another barrier to Charles's claim is the fact that he voluntarily enrolled in the army. Soldiers give up many of their constitutional rights, to the extent that they are inconsistent with important military functions. And as noted above the military has a strong interest in enforcing its requirement that soldiers accept all assignments. While conscientious objectors -- those who are religiously or philosophically opposed to all use of military force -- have traditionally been exempted from military service entirely, those who object to some but not all wars have never been exempted. And because Charles enrolled voluntarily rather than through the draft, his claim to an exemption would be particularly weak.

Conclusion

Charles will not prevail on his Free Exercise Clause claim.

2. Establishment Clause

The Establishment Clause prohibits the federal government from establishing an official religion or preferring religion over irreligion. A federal statute passes muster under this clause if it (1) has a secular purpose, (2) does not have the primary effect of promoting religion, and (3) does not excessively entangle the government in religious or ecclesiastical matters.

Secular purpose

As noted above, the federal statue has a valid secular purpose of promoting military readiness and troop discipline. Because this has nothing to do with religion, Charles will not prevail under this test.

Secular effect

The primary effect of this statute also does not seem to be promoting religion. The primary effect is to keep military units intact no matter where they are deployed. Religious and irreligious soldiers are treated the same way regardless of their belief. In fact, if the rule was to the contrary and religious soldiers could refuse particular deployments, that would at least raise serious Establishment Clause questions about whether the government was promoting particular religious beliefs (although most religious-accommodation statutes have been upheld against Establishment Clause challenges). Therefore, Charles is likely to lose under this test too.

Excessive entanglement

There is no real risk of entanglement between the government and religion under the statute. The statute does not require the government to make any quintessentially religious determinations because it applies equally to all regardless of religion or belief. Again, the rule Charles seeks would raise more difficult questions than this one does if it required the government to decide whether a person had a genuine religious belief precluding a particular deployment. Therefore, Charles will lose under this test too.

Conclusion

Charles will not prevail on his Establishment Clause challenge.

Q3 Real Property

Leo owned three consecutive lots on Main Street. At one end, Lot 1 contained an office building, The Towers, leased to various tenants; in the middle, Lot 2 was a lot posted for use solely by the tenants and guests of the other two lots for parking; at the other end, Lot 3 contained a restaurant, The Grill, operated by Leo.

In 2008, Leo leased The Grill to Thelma for 15 years at rent of $1,000 per month under a written lease providing in relevant part: “Tenant shall operate only a restaurant on the premises. Landlord shall not operate a restaurant within 5 miles of the premises during the term of the lease. Tenant and his or her guests shall have the right to use Lot 2 for parking.”

In March 2009, Thelma assigned the lease to The Grill to Andrew after he had reviewed it. The lease did not contain any provision restricting assignment. Although Leo did not express consent to the assignment, he nevertheless accepted monthly rental payments from Andrew.

In April 2010, Leo sold Lot 1 and Lot 2 to Barbara after she had inspected both lots. Barbara immediately recorded the deeds. Leo retained ownership of Lot 3.

In June 2010, Leo informed Andrew that, within a month, he intended to open a restaurant across the street from The Grill.

Also in June 2010, Barbara announced plans to close the parking lot on Lot 2 and to construct an office building there. There is no other lot available for parking within three blocks of The Grill.

1. Andrew has filed a lawsuit against Leo, claiming that he breached the provision of the lease stating, “Landlord shall not operate a restaurant within 5 miles of the premises during the term of the lease.” How is the court likely to rule on Andrew’s claim? Discuss.

2. Andrew has filed a lawsuit against Barbara, claiming that she breached the provision of the lease stating, “Tenant and his or her guests shall have the right to use Lot 2 for parking.” How is the court likely to rule on Andrew’s claim? Discuss.

Answer A

1. ANDREW (A) V. LEO (L)

Applicable Law

Service contracts, including leases, are governed by the common law. These contracts involve a lease of land, which is a service. As such, the common law will govern these transactions.

Validity of Lease from L to T - Statute of Frauds

The Statute of Frauds prevents the introduction of a contracts for services that takes more than one year to complete, unless the statute of frauds has been satisfied by a writing, performance, or a judicial assention. In this case, the lease between L and T [was] for a sum of 15 years, but it was in writing and presumably signed by both parties. Therefore, the Statue of Frauds has been satisfied. Therefore, there was a valid lease from L to A.

Assignment from T to A

An assignment occurs when a person who is in rightful possession of property transfers all of her rights to another person. An assignment will be presumed valid, unless there is a no-assignment provision in the lease which is valid and has not been waived. Once rights have been assigned, the original assigning party, the assignor, remains in privity of contract with the lessor and the new assignee is not in privity of estate. As such, both the assignor and the assignee may assert their rights against the landlord, and the landlord may similarly assert his rights against both assignor and assignee.

In this case, A will easily be able to show that T assigned the lease to him since she transferred all of her rights in The Grill to him. Additionally, the original lease between L and A did not contain a 'no assignment' provision. T transferred all of her rights in Lot 3 to A for the balance of 14 years on her lease, which falls within the statute of frauds. Accordingly, A and T's assignment needs to be in writing. Because A and L both

“reviewed” the assignment, it is likely that the assignment was indeed in writing and is therefore valid under the Statute of Frauds.

Therefore, the assignment will be deemed valid.

Equitable Servitude

An equitable servitude (ES) is a promise in relation to land that does not necessarily burden one party's land, but it will concern the land of the other party. The benefit of an ES will be deemed to run with the benefitted land if the following are found: (i) generally, a writing; (ii) intent of the parties that the benefit run; (iii) touch and concern of the land; and (iv) notice. The recovery of an equitable servitude is equitable relief, rather than damages.

In the present action, the lease between T and L contained a promise by L not to open a restaurant within 5 miles of Lot 3, which contained The Grill that T leased. That lease was then validly assigned to A. In order for A to enforce the contract provision against L, he will need to show that the promise was an equitable servitude that was intended to “run with the benefitted estate”, in this case Lot 3.

Writing

Generally, a writing is required for an ES to run with the benefitted land. In this case, there was a writing between L and T, which included the covenant. Additionally, the assignment from T to A was also in writing, as discussed above. Therefore, this requirement is met.

Intent

However, L will argue that he did not intend for the ES to run with the land, since it is not evidenced "to successors or assigns" in the lease. However, because there was a valid assignment and because it is very likely that a 15-year lease will be assigned at some point, A will argue that the fact that a non-assignment provision did not appear in the lease is sufficient to show intent to run. Additionally, A will argue that because L

accepted monthly rental payments from him, that he was well aware that the lease had been assigned and had made no efforts to refuse the assignment or show his intent not to let the ES run with Lot 3.

Touch and Concern

The ES must also directly affect the benefitted party's use of the land. Here, A will argue that the ES concerns his ability to use Lot 3 as a restaurant, which was the purpose of his taking over the lease. L will argue that the provision only refers to restaurants and only inhibits A's ability to run the restaurant, which may be located on land, but does not directly affect the land. However, because A took the land as a restaurant and it is likely that he took it as a restaurant, the fact that the provision goes to preventing L from opening a restaurant within 5 miles directly affects his use of Lot 3. Therefore, the ES does touch and concern the land.

Notice

Finally, the parties must have had notice. L will argue that the assignment between T and A did not contain the provision restricting assignment, and therefore the benefited land did not have notice. However, notice can be gotten by looking to the record and inspecting the previous documents in the chain of leases. As such, A did have valid notice by looking to the lease between L and T. Additionally, L will be deemed to have notice because he was a party to the first lease between him and T. Therefore, this element is met.

Conclusion

It is most likely that A will want to seek equitable relief in the form of an injunction, to enforce the provision preventing L from opening a restaurant within 5 miles of Lot 3. For the reasons stated above, A will likely be able to show that the ES was validly formed and runs with Lot 3. Accordingly, the court will likely order an injunction against L to enforce the ES and prevent him from opening a restaurant within 5 miles.

Covenants to Run with Burdened Land

A may also argue that the provision is a covenant. A covenant is a contractual provision in a writing whereby one promises not to do something in relation to land. It is very similar to an ES, described above. However, money damages can be awarded, which A won't want.

2. ANDREW V. BARBARA (B)

Easements

An easement is a non-possessory interest in the use of someone else's land. An easement appurtenant involves the two properties, a dominant (the benefitted land) and a survient (the burdened land) tenement. An easement is created a number of ways, including by grant (which is a writing), prescription, implication, and necessity. It can be terminated, generally by release or abandonment, which takes a physical act. An easement will pass to a burdened estate so long as the new owner has notice of the easement, which is found by record (looking to previous conveyances), inquiry (looking to the land), and actual notice (being informed of the easement).

In this case, there was a provision in the original lease between L and T that allowed T and her clients to use the parking lot that was located in Lot 2, next door [to] T's leased premises. Because there were two lots, one burdened (lot 2), and the other benefitted (Lot 3), this is an easement appurtenant. Additionally, because the easement was granted in the writing between L and T, this was a valid easement by "grant". L then sold his property to B, who took the property and recorded the deeds. B will argue that because she was not informed of the easement by L and because her deeds did not include the provisions from L to A, since that was simply a lease and B's deeds were actually recorded conveyance documents, that she did not have notice. However, she did inspect both lots, Lot 1 and Lot 2, before purchasing them. In this regard, she most likely noticed that there were many people walking from Lot 2, where they parked their cars, to Lot 3 where they dined at The Grill. Additionally, she would have noticed that there were most likely more cars present in Lot 2 than would normally be for Lot 1

alone. This should have led her to inquire as to whether an easement or agreement existed to allow Lot 3 to use the Lot 2 parking lot. As such, the Court will likely find that B had inquiry notice of the easement and the easement will pass with the burdened Lot 2.

Therefore, B had inquiry notice of the easement and A will most likely be successful in enforcing the easement against her.

Answer B

Thelma=T
Leo=L
Andrew=A
Barbara=B

1) Restrictive Covenant/Equitable Servitude

A covenant is a promise to do or not do something on or near one's land. Here L promised in his lease to T that "landlord shall not open a restaurant with 5 miles of the premises during the terms of the lease." Since it is a promise not to do something near his land, it is a covenant.

Equitable Servitude

Whether a covenant is a restrictive covenant or an equitable servitude depends on the types of damage that the plaintiff seeks. If A is seeking money damages, then it is a restrictive covenant. If he is seeking injunctive relief, then it is an equitable servitude. Here, A is suing to prevent L from opening a restaurant, which he said he would do in one month. Since he is seeking injunctive relief, it is an equitable servitude.

Here, the issue is whether the benefit and burdens of the equitable servitude run to A, who is a successor to the original tenant, T. For the benefit to run, the original agreement 1) must have been in writing, 2) parties intended the benefit to run to future successors, 3) the agreement touches and concerns the land, and 4) the parties had notice.

Here, the original equitable servitude was from a written lease signed by L and T in 2009. Therefore, the writing requirement is satisfied.

Here, L could argue that there was no intent by the original parties that the benefit would run to future successors because there is nothing said in the lease about the

benefit running to future successors. However, A could argue that because it said that the agreement would last "for the term of the lease" and the term was 15 years, it was intended that the benefit would be valid for the entire period of the 15 years. There was no clause restricting assignment and under the common law a tenant is free to assign her rights under the lease unless the lease or the landlord objects. Because the benefit was to last 15 years and T was free to assign her rights to another, it can be said that the parties intended that the benefit would run to future successors of the lease.

Touches and concerns the land means that whether the agreement affects the parties as landowners, not just community members. Here the agreement affects the tenant because the Grill is a restaurant and the previous owner of the restaurant opening up a new restaurant within five miles of the old restaurant brings along competition and hurts the tenant. It affects the landlord as a landowner because it prohibits him [from] doing something on his land.

Here A had notice of the agreement because it was in the lease and he reviewed it. L could argue that he did not have notice that the agreement was going to be able to [be] used to T's assignee, L. A could argue that L did have notice because he accepted rental payments from A, which presumably were checks written by A and should have then alerted L that A has taken over for T.

Restrictive Covenant

If L brought a claim for money damages, then it would have to be analyzed as a restrictive covenant. All the elements are the same except the original parties must have had horizontal privity and the assignor-assignee would have had to have vertical privity. Vertical privity is any nonhostile nexus. Here T (assignor) and A (assignee) have an assignment relationship which qualifies as nonhostile vertical privity. Horizontal privity means that the original parties must have had a relationship apart from the covenant. Here, T and L were landlord-tenant apart from the covenant. Therefore, horizontal privity is established. A would also prevail under a restrictive covenant theory.

2) Easement

An easement is the nonpossesory property interest to use another's land for one's benefit. Using another's land for the use and enjoyment of one's land is an easement appurtenant.

Here, the agreement that tenants should have the right to use lot 2 for parking is an easement because it gives the tenants a nonpossesory property interest to use lot two for their benefit. It is an easement appurtenant because it is for the using [of] another's land for the use and enjoyment of one's land. Lot 3 is the dominant tenement and lot 2 is the servient tenement.

Here, an express easement was created because it is written in a lease between T who was the tenant for lot 3, dominant tenement, and L who was the owner of lot 2, the servient tenement.

The benefit to an easement appurtenant runs with the land passes automatically with the transfer of the dominant tenement. Here, T, the original leasee of lot 3, assigned her rights under the lease to A. When an assignment of a lease happens, the new assignee and the landlord are in privity of estate and can enforce covenants that run with the estate/estate. Here, A, the assignee, would be able to enforce the easement because it runs with the land.

The burden of an easement appurtenant also passes automatically with the transfer of the servient tenement. Here, the servient tenement, lot 2, was sold by L to B. Therefore, the burden of the easement passes to B. However, the burden would not pass if B was a bona fide purchaser without notice (BFP). A BFP is someone who pays valuable consideration for the land and takes the land without notice of the burden. Here, B did pay valuable consideration for the land by buying it. However, she is not a BFP if she had notice of the easement.

One form of notice is record notice. A buyer is on record notice of what a record search of the grantor-grantee index would reveal. However, in this case L did not sell the land to T but instead leased it. Therefore, the lease containing the easement would not be found through a record search.

Another form of notice is inquiry notice. A buyer has a duty to inspect the land she buys and is on inquiry notice of reasonable inquiries that she should have made. Here, lot 2 was a parking lot of tenants of lot 3 before B bought it and it would have been obvious if she went there and saw that there were cars parked there. She should have asked L why there were cars there. Therefore, she is on inquiry notice of what L would have told her, which is that there is an easement on lot 2.

Easement by implication

Even if the easement from the lease is not enforced, it could be argued that when L sold the land to B he created an easement by implication. This requires a prior use that was reasonable [and] necessary to the owners of the dominant tenement and that this was reasonable [and] apparent when the land was bought. Here, when B bought the land it was apparent that lot 2 was being used as a parking lot. Also, it is reasonable [and] necessary for owners of the dominant tenement because other than lot 2 there is no parking available within three blocks of lot 3.

FEBRU

ESSAY QUESTIONS 4, 5, AND 6

California Bar Examination

Answer all three questions. Time allotted: three hours

Your answer should demonstrate your ability to analyze the facts in question, to tell the difference between material and immaterial facts, and to discern the points of law and facts upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

Q4 Torts

Gayle is 16 years old and attends high school in School District.

One day, Gayle's teacher was relaxing in the teacher's lounge during the first ten minutes of class time, as he usually did, leaving the students unsupervised. School District had long been aware of the teacher's practice, but had done nothing about it.

That day, in the teacher's absence, Gayle walked out of class and out of school. She got into her car and drove to the house of an adult friend, Frances. Gayle had promised Frances that, for $10, she would help her move some paintings.

Arriving at Frances' house, Gayle carelessly parked her car several feet from the curb and entered the house. She came out later, carrying paintings to her car. In a patrol vehicle, Paula, a police officer, spotted Gayle's car. Frances caught sight of the patrol vehicle and told Gayle, "Quick, move your car to the curb."

Gayle jumped into her car just as Paula was walking towards it. Suddenly, without looking, Gayle swung her car toward the curb, hitting and severely injuring Paula.

After Paula was transported to a hospital, she was visited by her husband, Harry. Shocked at Paula's condition, Harry collapsed and suffered a broken arm in the fall.

1. Under what theory or theories, if any, might Paula bring an action for damages against (a) Gayle, (b) Frances, and (c) School District, and how is she likely to fare? Discuss.

2. Under what theory or theories, if any, might Harry bring an action for damages against any defendant, and how is he likely to fare? Discuss.

Answer A

1. What theories may Paula bring [in] an action for damages against the following defendants:

(a) Paula v. Gayle

Negligence
In a negligence case, the plaintiff must show that the defendant owed a duty of care to the plaintiff. They also must show that the defendant's conduct breached the standard of care owed to the plaintiff and the breach was the actual and proximate cause of the injury to the plaintiff. The plaintiff must be able to show damages to recover in a negligence case.

Duty of Care
The defendant owes a duty of care to all foreseeable plaintiffs. Under the Cardozo view, foreseeable plaintiffs are those who are within the zone of danger. Under the Andrews view, the test is broader, and considers all plaintiffs to be foreseeable plaintiffs. In this case, Paul was a foreseeable plaintiff under the Cardozo view because as a driver on the street she was within the zone of danger of other cars on the street, including Gayle's parked car that was far away from the curb and onto the street. Similarly, Paula would be a foreseeable plaintiff under the Andrews view because all plaintiffs are foreseeable.

Police Officer Exception
Members of certain professions, like police officers and firefighters, cannot recover for injuries that are inherent in the risk of their job. Gayle may argue that as a police officer with a patrol vehicle, the risk of being hit by someone's car is inherent to the job. Paula will argue that being hit by a car is a general risk that everyone on the street takes, and is not a special risk that comes along with being a police officer. If Paula is successful

in rebutting the exception, she must prove that Gayle acted below the standard of care expected.

Standard of Care

The standard of care determines the particular duty of care the defendant owed to the plaintiff so it can be determined whether the defendant breached the duty or complied with the duty. Generally, in a negligence action, the plaintiff must exercise the level of care of a reasonably prudent person in the plaintiff's position. Since Gayle is a child, she will argue that the child standard should be used. Under the child standard of care, the child must exercise the level of care of a child of similar age, intelligence, education, and experience. Paula will argue that the adult standard should be applied because Gayle was engaging in an adult activity. Because driving a car is an adult activity, Paula is correct and the court will hold Gayle to the standard of a reasonably prudent person in her position.

Breach

Paula must show that Gayle breached a duty owed to her by acting below the standard of care. Paula will argue that Gayle breached a duty to her by parking far away from the curb, and suddenly, without looking, swinging her car to the curb. This is wrongful because a reasonably prudent driver always looks both ways before they move their car on the street, to look for other vehicles. Moreover, Gayle knew Paula was in the vicinity since Frances told Gayle that a police officer was around and suggested she move her car. Thus, this element is met.

Causation

The breach must be the actual and proximate cause of the plaintiff's damages for the defendant to be held liable.

Actual Cause

An act is the actual cause of an injury when it is the but for cause. If the injury would not have occurred, but for the defendant's act, the actual causation element is satisfied.

Paula will argue that but for Gayle jumping into the car and swinging it toward the curb without looking, Paula would not have been hit by Gayle's car, and would not have been injured. The court will agree. It should be noted that Frances' act of yelling at Gayle to move her car was not a superseding force that cuts off Gayle's liability because it occurred before Gayle's negligent act. Thus, this element is also met.

Proximate Cause

The defendant also must prove that the act was the proximate cause. To be the proximate cause, the act must have been foreseeable at the time the act was committed. Here, this was a direct cause case. As soon as Gayle swung her car toward the curb, Paula was hit and injured. There was no superseding intervening act that would cut off Gayle's liability. Thus, Gayle's breach was the actual and proximate cause of Paula's injury and if Paula can prove damages, she will recover.

Damages

The plaintiff must prove her damages. Under the "eggshell" plaintiff rule, the defendant must take the plaintiff as she finds them and is liable for the recovery no matter how surprisingly great it is considering the particular plaintiff. Here, Paula was injured from Gayle's car.

Compensatory Damages

The purpose of compensatory damages is to put plaintiff in the position she would have been in had the injury not have occurred. Paula may recover general damages for her injuries as well as the cost of the treatment of the injuries at the hospital. If she lost earnings, she may recover special damages subject to the certainty, avoidable, and mitigation principles.

Defenses

There are no applicable defenses because there is no indication Paula was contributorily negligent, assumed the risk, or comparatively negligent in a jurisdiction that recognizes these respective principles.

Conclusion

Gayle is liable for negligence against Paula and Paula may recover the damages noted above.

(b) Paula v. Frances

Negligence

Paula will have to prove the same elements above to hold Frances liable for negligence.

Duty/Standard of Care

Paula was a foreseeable plaintiff under the Cardozo view because Paula was within the zone of danger as a driver on the street. When Frances told Gayle to move her car, it was foreseeable that Paula was within the zone of danger. Paula is also a foreseeable plaintiff under the Andrews view because all plaintiffs are foreseeable using this standard. Since Frances is an adult, she must exercise the level of care that a reasonably prudent person in her position would. Paula will argue that Frances owed a duty of care to Paula because Frances, as an adult, should have supervised Gayle and made sure she never carelessly parked her car far from the curb, and made sure she was careful when trying to move her car to the curb. She may also argue that Frances had a duty to make sure that Gayle was not skipping school.

Frances will argue there is no duty to act affirmatively. Frances, as an adult friend, is not responsible for Gayle's actions, and therefore had no duty to supervise her. The only time a duty to act affirmatively arises is when there is a close relationship (usually a familial one), when the defendant puts the plaintiff in peril, when the defendant undertakes to rescue the plaintiff or when there is a duty imposed by law or by statute. A duty also arises when an employer is vicariously liable for employees.

Vicarious Liability

Paula will argue that because Gayle promised to pay Frances $10 for moving her paintings, Gayle was an employee of Frances, making Gayle vicariously liable for

Gayle's torts. Vicarious liability attaches to an employer, when the employee commits a tort while performing an act in the scope of their employment. In this case, Gayle was loading paintings into her car when Frances told Gayle to move her car so the police would not see the car parked illegally. Because Gayle was performing an act in the scope of her employment with Frances, Frances may be held vicariously liable for the negligent torts of Gayle.

Breach

Paula will argue that Frances breached a duty by allowing her employee to park in the middle of the street and telling her to move her vehicle to avoid the police. She will say this is wrongful because someone could have been injured by Gayle moving her car so quickly toward the curb. However, Gayle had no duty to review the way her employee parked her car before she arrived at Frances' house to do the job.

Still, because Frances is vicariously liable for the torts of her employee, she will be liable for Paula's injuries and damages in the same manner that Gayle will be liable, as indicated above. Because Frances did not independently breach a duty owed to Paula, it is unnecessary to continue with the causation and damages analysis since she will only be liable for Gayle's negligence which was analyzed above.

(c) Paula v. School District

Negligence

Duty/Standard of Care

The same rules above apply here. Paula was a foreseeable plaintiff under the Andrews view because all plaintiffs are foreseeable. Under the Cardozo view, it is less clear whether Paula was in the zone of danger. Paula will argue that she was in the zone of danger because Gayle left school in a car and Paula was a driver on the road. School District may argue Paula was not in the zone of danger because Paula was not on school property, or anywhere near the property. Moreover, Gayle is 16 years old and

presumably has a license to drive a vehicle. Thus, there is no clear indication that the School should have a duty to protect third parties from a licensed driver. However, because students are in custody of schools during school hours, it is foreseeable that children who are not in school at the time they are supposed to be will injure a third party. Thus, School District likely owed a duty to Paula under both the Andrews and Cardozo views.

School District owed the duty of care of other reasonably prudent school districts.

Vicarious Liability

Because the school district itself did not commit a tort, Paula will have to hold it liable on a theory of vicarious liability. As mentioned above, an employer is liable for the torts of its employees during the scope of their employment. Gayle's teacher was on school hours, relaxing in the lounge. Class had already started, thus she was in the scope of her employment when she left the students unsupervised and School District will be vicariously liable.

Breach

Paula will argue that School District breached the duty of care owed to Paula when it knowingly allowed Gayle's teacher to leave Gayle's class unsupervised. This is wrongful because children in high school need to be supervised. School District will argue that Gayle is 16 and is almost an adult; thus it was not wrongful to leave her unsupervised for only ten minutes. Although this is a close call, because schools are responsible for students during school hours in the same manner that a parent is responsible for a child during other hours, Gayle's teacher, and the school district through vicarious liability, probably breached a duty.

Actual Cause/Proximate Cause

School District was the but for cause because but for the negligent supervision, Gayle would not have been allowed to leave the property. School District will argue the teacher was not the proximate cause because Gayle's actions of hitting the teacher in

the car was a superseding intervening act. Because it was not foreseeable that a student would leave school and drive negligently into a police officer, School District will not be liable and Paula cannot recover damages.

Defenses

There are no defenses for the same reason noted above.

2. Harry's Theories

Negligent Infliction of Emotional Distress

To make a claim for negligent infliction of emotional distress, Harry must show that the defendant was negligent, and that he was part of a near miss situation, or a bystander on the scene who witnessed a close family member's injury. He also has to show some manifestation of a physical injury.

Gayle and Frances were negligent. Harry was not in a near miss situation himself, and he was not a bystander present on the scene. Although he suffered a physical injury, it is not enough to make out a case for bystander emotional distress because he did not collapse until he saw Paula in the hospital, which was not the scene of the accident.

Answer B

Paula v. Gayle

Negligence

Paula has a good cause of action for a negligence claim against Gayle. To make out a prima facie negligence case, Paula must show that Gayle (1) owed a duty to Paula, (2) breached that duty, (3) the breach was both the cause-in-fact and proximate cause of Paula's injuries, and (4) that Paula sustained damages.

Duty

Under the Cardozo standard, plaintiffs owe a duty of due care to all foreseeable victims of their conduct. Under the broader Andrews standard, plaintiffs owe a duty of due care to everyone else in the world. The law defines "due care" as that of a reasonably prudent person. However, since Gayle is only 16, she will argue that she be held to a lesser standard: that of a reasonably prudent person of like age and experience. Paula will contend, however, that since Gayle was engaged in an adult-oriented activity, that of driving an automobile, that the law should make no exception for Gayle's age. Courts have consistently held that children engaged in adult activities must perform those activities with the care of a reasonable person, so Gayle will not be able to lower her standard of care to take her age into consideration.

Breach

A duty is considered breached when the defendant's conduct falls below the standard of care. Here, Gayle swung her car towards the curb "suddenly" and "without looking," conduct which clearly falls below the standard of care. Automobiles are inherently dangerous and heavy, and proper vision and care are required. Moreover, since Frances caught sight of the patrol vehicle and told Frances, "Quick, move your car to the curb," it likely put Gayle on notice that someone was coming, making her sudden and quick movement of the car without looking that much more unreasonable. Paula will probably have no problem proving this element.

Another theory of breach would be that Gayle breached when she "carelessly" parked too far away from the curb, as a reasonable person would have parked next to the curb.

Causation

Courts have traditionally divided the causation element into two parts: (1) cause in fact and (2) proximate cause. Under the cause in fact, the traditional test is whether the harm would have occurred "but for" defendant's breach. Under proximate cause, the harm will be said to proximately cause the injury if the harm is a foreseeable result of the breach. Here, Paula will be able to establish both cause-in-fact and proximate cause. If not for the fact that Gayle quickly turned her car into Paula, it would not have "hit and severely injured" her. As for the proximate cause, the very reason prudent care is required while driving a car is because they are extraordinarily heavy and can cause severe damage to people and property they come into contact with. This makes the danger of hitting someone clearly a foreseeable result of driving negligently. Paula will satisfy both elements of causation.

On the second breach theory, that Gayle parked too far from the curb, the proximate cause prong will be harder to satisfy. It is true that, had she parked closer to the curb, Paula would not have had to get out of her car, and therefore the "but for" cause is met. But not parking near a curb is not reasonably prudent because you do not leave space for other cars on the road, and generally accidentally hitting someone is not something thought of as a foreseeable risk of parking too far from the curb. However, since Paula satisfies both elements under the first theory, she will probably stick with that one, and jettison the second theory of breach.

Damages

In a negligence action, the plaintiff must prove damages. The damages need not be economic, but must be real. Here, Paula will once again have no problem making out a case for damages because she was "severely injured" and taken to a hospital.

Defenses

Comparative Negligence

Gayle will try to argue that Paula was comparatively negligent because Paula saw the car near the curb and could likely have seen Gayle walking towards the car. After all, she would be hard to miss carrying some paintings. Gayle would also point out that since Frances called out "Quick, move your car to the curb," that Paula had notice that the car was about to be quickly moved to the curb. Therefore, by standing within a reasonable distance from a car that Paula knew was about to be quickly moved, Paula was also negligent. Paula will reason that as a police officer she has a duty

Fireman's Rule

Under the fireman's rule, firefighters and police officers who engage in dangerous activities in connection with their jobs are barred from bringing suits for injuries sustained from those activities. The rationale is that the nature of the job is such that the police assume the risk of their jobs. Under this theory, Paula will not be able to recover for damages incurred if she was acting in connection with her job. Since she was coming to the curb to talk to Gayle about her car being illegally parked, it is clear that she was doing something in connection with her job. On this theory, Paula will probably be barred from recovery.

Battery

Paula may be able to make out a battery action against Gayle, but it will be more difficult. Battery is defined as the (1) intentional, (2) harmful or offensive contact (3) with Plaintiff's person.

Intentional

Contact is intentional if the conduct is voluntary and there is a substantial certainty that the contact will occur. This is the most difficult for Paula to prove. There is nothing in the facts to indicate that Gayle acted voluntarily, or that she had any intention of hitting Paula. While her conduct was likely negligent and maybe even reckless, it does not contain the requisite intent. So while elements 2 and 3 will easily be met--hitting

someone with a car is indisputably harmful, and the car hit Paula directly--the first element will not be proven, and the battery action will fail as a result.

Paula v. Frances

Agency

In order for Frances to be liable for Gayle's negligence, there needs to be an agency relationship between Frances and Gayle. This may be established under the doctrine of Respondeat Superior.

Under the doctrine of Respondeat Superior, employers are liable for the torts of their employees, so long as the conduct was within the scope of employment. So Paula must first prove that Gayle was an employee of Frances. If so, Paula must then establish that Gayle was acting within the scope of her employment when she injured Paula. If it is found that Gayle was merely an independent contractor, Paula must prove that either the duty was non-delegable or that [sic].

Employee versus Independent Contractor

The major test to determine whether someone is an employee or an independent contractor is whether the employer had a right to control the method and manner of the work. Factors that the court looks to include the degree of control, whether the pay was hourly or by piece, whether the employer furnished the tools and other items, whether the job was for the benefit of the employer's business, and the length of the working relationship.

Here, the job was done at Frances' house, was for a seemingly short duration, and does not appear to have much supervision. Moreover, the fact that Gayle received a one-lump sum of 10 dollars for the work suggests that it was not an employee relationship, but rather an informal, independent contractor type relationship. There is nothing to suggest a long-term commitment, and the movement of paintings is the type of job that needs to be done only once in a great while. Additionally, there was no benefit to

Frances' business objectives because the paintings were being moved from Frances' home. This is in fact a prototypical independent contractor relationship.

Scope of Employment

Assuming Gayle is considered Paula's employee, [sic].

Negligence

Paula might also be able to make out a negligence action against Frances' own negligence. For the negligence framework, see above.

Duty

See above.

Since Frances is an adult, she owes that of a reasonable person. Clearly she saw that Paula was approaching the car, otherwise she would not have shouted to Gayle to quickly move her car. Therefore, Paula was a foreseeable victim.

Breach

See above.

The theory would be that Frances breached the duty of reasonable care by instructing a sixteen year-old to "quickly" move her car to avoid being cited for a minor traffic ticket. A reasonably prudent person would not have instructed an impressionable minor to move such heavy machinery "quickly."

Causation

See above.

As for cause-in-fact, Frances will argue that even in the absence of her instruction, Gayle would have likely moved her car quickly and hit Paula. Paula will counter that Gayle was in fact acting under Frances' instructions and would not have moved the car quickly unless Frances did not tell her. Since Gayle "jumped" into her car right after being told to move it quickly, it is more probable than not that Gayle was acting at the direction of Frances, and therefore Frances' instruction was the "cause in fact" of

Paula's injury. However, Frances probably has the better argument on the issue of "proximate cause." While instructing someone to move their car quickly might not be the most prudent thing to do, it is likely not foreseeable that the mere suggestion that someone act in haste will result in a haste so overwhelmingly that it would cause injury to someone who, at the time of your instruction, was in their own car. Paula will argue that when police officers see something suspicious or in violation of the law, it is reasonable to expect them to get out of their cars. However, while true, this is probably not enough to overcome the foreseeability on the part of Frances.

Damages

See above.

Defenses

Frances will avail herself of the same defenses that Gayle did.

Paula v. School District

Agency

Paula will argue that the school district is acting as the agent.

Negligence

Paula once again will have a negligence claim against the School district. Her claim will be based on the school district's own negligence in allowing their students to roam freely.

Duty

See above. Here, however, it is unlikely that Paula is a foreseeable plaintiff. The chain of events leading from Gayle's ditching school to Paula's injury is extraordinarily remote, and has several intervening forces.

Breach

See above. Paula will claim that the district breached their duty by knowing that the teacher relaxed in the teacher's lounge during the first ten minutes of class time, and permitting him to do so. The reasonably prudent school district would make sure the teachers are supervising the children so they do not leave or otherwise misbehave.

Causation

See above. Here, Paula will claim that, but for the teacher's negligence in leaving the students unsupervised--and but for the school's negligence in allowing the teacher to do so--the injury would not have occurred. Once again, however, Paula has the problem of proximate cause. While the school district understands that schools have to protect their students, and the students could have dangerous propensities if permitted to leave school grounds, the situation here is pretty remote from those duties. However, if the jury finds that the student is likely to commit some harm while ditching school, Paula could be a foreseeable victim of that harm.

Damages

See above.

Defenses

The district will avail themselves of the same defenses that Gayle and Frances did, above.

Respondeat Superior

Paula may also have the claim that the school is negligent due to the teacher's negligence. Since the teacher was an employee of the school district (see respondeat superior discussion, above), the district is vicariously liable for his conduct. The teacher here is likely an employee of the school because the manner of his work is substantially controlled by the district. Moreover, since he was on school property and during school hours, the harm will be said to be within the scope of his employment. The rest of the analysis is substantially the same as the school district's own negligence, above.

Harry v. Gayle

Negligent Infliction of Emotional Distress

Harry can possibly bring a negligent infliction of emotional distress action against Gayle. Under this theory, Gayle is liable for (1) negligent conduct (2) in plaintiff's presence, and (3) plaintiff suffers subsequent physical symptoms.

Negligent Conduct

See above.

In Plaintiff's Presence

This is where Harry will have trouble. Since Harry did not see the accident, and only later saw Paula in the hospital he was not in the presence of the negligence, nor was he in the zone of physical danger.

Physical Symptoms

Under Negligent Infliction of Emotional Distress, plaintiff has to suffer subsequent physical manifestations of the distress. Here, since Harry collapsed at the sight of Paula's condition, breaking his arm, he should be able to prove subsequent physical manifestations. And since the broken arm was a result of the collapse, under the eggshell-skull principle, he would be able to recover for all damages.

However, since he cannot prove he was in the plaintiff's presence, he will not be able to recover.

Harry v. Frances / Harry v. School District

Harry can claim Negligent Infliction of Emotional Distress under the theories of respondeat superior and vicarious liability, the analysis of which will be identical to the analysis above, and will lose once again due to his lack of presence.

Therefore, Harry will be unlikely to succeed against any of the parties for his damages.

Q5 Business Associations / Professional Responsibility

Bob owns 51 percent of the shares of Corp., a California corporation. Cate owns 30 percent. Others own the remaining shares.

Bob and Cate have entered into a shareholder agreement stating they would vote their shares together on all matters, and that, if they fail to agree, Dave will arbitrate their dispute and Dave's decision will be binding. Bob and Cate also executed perpetual irrevocable proxies granting Dave the power to vote their shares in accordance with the terms of the shareholder agreement. Attorney Al handled Corp.'s incorporation and drafted the shareholder agreement and the proxies.

Bob and Cate have been able to elect the entire board of directors every year. The board currently consists of Bob, Cate, and Bob's wife, Wanda. Bob and Wanda decided, as directors, to sell substantially all of Corp.'s assets to Bob's sister, Sally. Cate thinks the price is too low. Bob claims he no longer regards their shareholder agreement as binding. He has gone to Al for advice in the matter, and Al has agreed to provide it.

At the shareholders' meeting at which the matter is to be put to a vote, Bob announces he is voting his shares in favor of the sale. Dave says that since Bob and Cate disagree, he is voting the shares against the sale.

1. Is the shareholder agreement between Bob and Cate enforceable? Discuss.

2. Are the perpetual proxies executed by Bob and Cate enforceable? Discuss.

3. Would any sale of Corp.'s assets to Sally be voidable? Discuss.

4. What ethical violations, if any, has Al committed? Discuss. Answer according to California and ABA authorities.

Answer A

1. Shareholder agreement between Bob (B) and Cate (C)

A shareholder's agreement is an agreement whereby shareholders agree to combine their votes for voting matters related to their rights as shareholders. The agreement is less formal than a voting trust and requires simply that the shareholders agree to the course of action. Where a voting trust is required to notify the Secretary of the Corp. the shareholder agreement need not be recorded by the Secretary. In addition, where a voting trust is only good for 10 years, a shareholder agreement has no durational requirement.

In this case, B and C have entered into a shareholder agreement stating they would vote their shares in agreement or else submit to Dave to arbitrate any disputes. Dave's decision would be binding. While B and C have entered into a valid shareholder agreement, as they can agree to arbitration to settle disputes, it is necessary to look at Dave in this instance.

It is not clear what, if any, relation Dave has to the corporation. If Dave is familiar with the corporation, then there would be no issues with him arbitrating disputes. If he is a true "outsider" he may not have the knowledge and ability to make the informed decisions in the corp's best interest. In this case, B and C would violate their fiduciary duties to the corp. and the agreement would be ineffective.

2. Perpetual Proxies

A proxy is an agreement between shareholders to have one vote on their behalf. The corp. must be notified and a proxy is valid for 11 months, unless otherwise agreed. An irrevocable proxy requires that the proxy be labeled irrevocable and must be coupled with an interest.

In this case, the proxies are perpetual and irrevocable. As stated above, an irrevocable proxy must be labeled such and be coupled with an interest. It is not clear here what, if any, interest Dave received as part of the proxy agreement, or if the proxies were

labeled irrevocable. If neither requirement was met, the irrevocable proxies would be unenforceable.

If both conditions were satisfied, it would be necessary to determine if the corp. was notified. In addition, proxies typically last for only 11 months. Because the facts state this is perpetual, it is likely that the courts would find this unenforceable.

3. Sale of Corp. Assets

Directors have a duty to manage a corporation. Directors also have fiduciary duties of Care and Loyalty in managing the corporation. Directors may be insulated from violating the duty of care by the Business Judgment Rule.

Duty of Care

Directors have a duty to manage a corporation as a reasonably prudent person would in handling his/her own affairs. Directors must act in the best interest of the corporation.

Here, it is not clear from the facts if Bob and Wanda, as directors, are acting in good faith as reasonably prudent persons would in their own affairs.

Business Judgment Rule

Directors are protected from liability under the Business Judgment Rule when they act in the corp.'s best interest and make a reasonable, innocent mistake.

Here, because it is not clear if Bob and Wanda acted in good faith, it is not possible to determine if this is a simple mistake.

Duty of Loyalty

A director has a duty of loyalty to his corporation, which means that without full disclosure and independent ratification, a director cannot engage in a self-dealing transaction or usurp a corporate opportunity.

In this case, Bob and Wanda, as directors, have voted to sell substantially all assets to Sally, who is Bob's sister. A self-dealing transaction is one that benefits the director or his family members. In order for the transaction to be valid, there must be independent ratification, as defined above. It would be impossible to obtain independent ratification as 2 out of the 3 Directors will not be independent. Both Bob and Wanda, Bob's wife, stand to benefit from the self-dealing transaction, and it does not appear that there was full disclosure, so independent ratification is impossible.

Controlling Shareholders

Controlling shareholders have fiduciary duties to other shareholders in a corporation. As defined above, the controlling shareholder has a duty of loyalty and care as fiduciary duties.

As described above, Bob will have violated his fiduciary duty of loyalty to the corp. by engaging in a self-dealing transaction. In addition, courts have held controlling shareholders liable for looting a corporation in the event the corp. is substantially sold to a 3rd party and that party loots the company. It is not clear here what Sally will do.

Fundamental Change

A corporation must hold a special meeting when a fundamental change is proposed for that corporation. A fundamental change would include selling substantially all assets to another corporation. Therefore, the corporation would be required to have a special meeting.

A special meeting requires that a special notice be mailed to shareholders. This notice must include the reason for the special meeting, date and time, and place. It is important because no other business can be discussed at a special meeting that was not included in the notice. In addition, holding the meeting is important because it gives rise to appraisal and dissenter rights whereby the corporation would be required to repurchase a dissenter's shares.

Because Bob violated his fiduciary duties as a director and controlling shareholder, and because the corp. was undergoing a fundamental change without a properly scheduled special meeting, any sale to Sally would be voidable.

4. Ethical Violations

A. Duty of Loyalty

Al owes a duty of loyalty to the corporation. Al has drafted the incorporation of the corp. and has drafted agreements on behalf of the corporation. Therefore, Al's client is the corporation.

Al has a potential conflict in that he represented the corporation and then drafted the shareholder agreement and proxy on behalf of 2 shareholders. This is permissible under ABA rules and CA rules whereby an attorney can represent multiple parties if he reasonably believes that he can provide necessary legal services without impact. The attorney must also get this consent in writing.

Al has another potential conflict by representing Bob at a later time. As stated above, an attorney can represent multiple parties if he reasonably believes that representation of both will not impact either party. He must get consent in writing. Al would have violated his duty of loyalty if he did not get consent in writing.

This potential conflict would become an actual conflict when Bob has gone to Al for advice and Al agreed to provide it. Al previously represented Bob and Cate in drafting a shareholder agreement and proxies. CA Rules of Ethics strictly prohibits an attorney from representing a client when that client is being represented by the same attorney. Only when the matter ends can the attorney represent another client whose interest is adverse to a current client.

Al will have violated his duty of loyalty.

Duty of Confidentiality

An attorney has a duty to keep all communications with a client confidential. When an attorney represents 2 parties, and one party then approaches the attorney for representation on a similar matter, the attorney will not be able to represent the client because he has confidential information from both clients.

Here, Al arguably represents both parties, as he has drafted a shareholder agreement and proxy for both Bob and Cate. Al should advise both parties to obtain separate Legal Counsel instead of continuing to represent them, as by doing so, he may disclose confidential information received by Cate in representing Bob.

Duty of Competence

An attorney should have the skill and training to be able to competently represent a client. If not the attorney should be able to receive such training in a reasonable time.

In this case, as described above, it is not clear if the proxies were drafted correctly; therefore Al may have breached his duty of competence.

Answer B

SHAREHOLDER AGREEMENT

Shareholder agreements in which shareholders agree to vote their shares together are valid, although historically they were not permitted and voting trusts were required. They must be in writing and signed by both parties. Shareholder agreements are governed by regular contract principles, and are not revocable unless as a contract they would be revocable. A valid contract requires mutual assent and consideration. Bilateral contracts are contracts in which the parties exchange promises, and the promises can constitute consideration for the contract.

In this case, the shareholder agreement appears to be in writing, and signed by the parties. It was prepared by an attorney, Al, and so presumably has been validly drafted. In this case, the shareholder agreement is a mutual agreement for Bob and Cate to vote stocks together. It appears that there has been valid mutual assent to the contract, including offer and acceptance. Because the parties have exchanged promises to vote together, it is a bilateral contract. As a result, the contract is supported by consideration based on the exchange of mutual promises to vote together or have disputes decided by arbitration. Thus, Bob would be unable to revoke the shareholder agreement at will, and Cate could sue for damages or for specific enforcement of the agreement.

PERPETUAL PROXIES

PROXY GENERALLY - A proxy agreement must be in (1) writing, (2) signed by the party whose shares are affected, (3) addressed and delivered to the corporation's secretary, (4) clearly state they are delegating the authority to vote.

In this case, it appears that the requirements for a valid proxy agreement have been met. The agreement appears to be in writing, the problem notes it was executed so presumably is signed, it clearly states the procedures for the proxy, indicating that the

shares will be voted in line with the shareholder agreement. Although the facts do not indicate whether the proxy was filed with the corporation, because Al the attorney assisted, presumably the requirement was met.

IRREVOCABLE PROXY - A proxy is normally for a duration of 11 months, and will be revocable at will. To be irrevocable, a proxy must be (1) supported by an interest and (2) clearly state it is irrevocable.

In this case, it appears that the proxy agreement did state that it was irrevocable, and thus the agreement has met the second requirement. However, there is no indication that the agreement was supported by any interest. Normally, the interest must be some exchange for value or, for example, a situation where the record date holder sells his shares to the owner and executes a proxy, and thus the new owner's purchase creates an interest. In this case, there is no interest to support the agreement. Cate may argue that the exchange of promises provides consideration for the proxy in the form of the mutual promises, as was the case for the shareholder agreement, and therefore that the mutual promise is a sufficient interest to meet the element and make the proxy irrevocable. However, the exchange of promises is not a sufficient interest to support a proxy as being irrevocable because the promisor has no interest in the shares to which she is making a promise, and therefore this element has not been met. As a result, Bob is free to revoke the proxy agreement at will.

While the proxy agreement would be revocable because it is not supported by an interest, the shareholder voting agreement would not be. As a result, Cate could sue Bob to enforce the agreement and then Dave would have the power as the arbitrator to vote the shares under the agreement as he saw fit.

WOULD SALE OF CORP BE VOIDABLE

FUNDAMENTAL CORPORATE CHANGE - A fundamental corporate change includes a (1) merger, (2) consolidation, (3) amendment of the articles of incorporation, or (4) a

sale of all or substantially all of the business assets. A fundamental corporate change must be approved by a majority of all shareholders at a special noticed meeting in which notice of the change was given before the meeting. Additionally, the corporation must give dissenters rights of appraisal if the transaction is approved.

In this case, the sale of substantially all of Corp.'s assets is a fundamental change and thus must be approved by a majority of all shareholders in Corp.

DECISION OF DIRECTORS - All decisions of directors must either (1) be approved at a board meeting or (2) be approved by unanimous written agreement of the board. At a board meeting the majority of all directors must be present to have a quorum. A resolution will be adopted if a majority of the directors present approve. Before a fundamental corporate change is brought before a special meeting of shareholders, it must be approved by the board of directors.

In this case, the facts indicate that Bob and Wendy agreed to the sale, but that Cate disagreed. It is unclear if they met at a board meeting and the majority of directors, Bob and Wendy, approved. This would be a requirement that if not met, could lead to a rescinding of the transaction or allow Cate and other shareholders to sue Bob and Wendy for losses suffered as a result of the transaction.

DUTY OF LOYALTY OF DIRECTORS - A Director has a fiduciary duty of loyalty to a corporation to not engage in self-dealing or usurp business opportunities. Self-dealing includes transactions in which the director has a conflict of interest.

In this case, Bob is a member of the board of Corp, and thus has a duty to not engage in self-dealing.

CONFLICT OF INTEREST TRANSACTION - A conflict of interest transaction is one in which the director or his close relative is (1) a party to the transaction, (2) has a financial interest so closely linked to the transaction that would reasonably be expected to affect

her judgment, or (3) is a director, officer, employee or agent of the other party to the transaction and the transaction is of such importance that it would normally be brought before the board. If a Director enters into a transaction in which he has a conflict of interest without approval, that transaction can be rescinded and the director can be held liable for any losses to the shareholders.

In this case, Bob is engaging in a sale of Corp's assets to Sally, Bob's sister. Thus Bob, a director, is engaged in a transaction in which a close relative, his sister Sally, is a party to the transaction, and therefore Bob would have a conflict of interest in the transaction. Thus, unless Bob has the transaction approved, it could be rescinded. Furthermore, because Wanda is also a director, and Sally is also a close relative of hers, her husband Bob's sister, she would also have a conflict of interest.

CONFLICT APPROVAL - A conflict of interest transaction will be considered approved if (1) after full disclosure a majority of the disinterested directors, if more than one, approve; (2) after full disclosure a majority of disinterested shareholders approve; and (3) if it is fair under the circumstances.

DISINTERESTED SHAREHOLDERS - In this case, it is unclear if Bob fully disclosed. Even if he did, the transaction would not be considered to be approved by shareholders if Bob used his 51% of shares to approve the sale because he is not disinterested due to his conflict of interest created by his sister, Sally, being the purchaser. Thus, a majority of the outstanding, the remaining 49% would need to approve. Because Cate owns 30% of the shares, she could essentially block the transaction because she owns more than 50% of the disinterested shares. Thus approval by disinterested shareholders would not be possible.

DISINTERESTED DIRECTORS - Similarly, both Wanda and Bob are considered to have a conflict of interest. Therefore the only disinterested director is Cate. Cate would not approve the transaction and furthermore, for a transaction to be approved by the majority of disinterested directors there must be more than one disinterested director.

Thus, the directors could not approve the transaction because 2 of the 3, Bob and Wanda, are not disinterested.

FAIR - As a result, the only way the transaction could be upheld is if under the circumstances at the time it was entered into it was fair. In this case, Cate claims that the price is too low, but there is no indication if this is really the case. If Bob could show that the price was fair, and thus the transaction was fair then the conflict of interest transaction would be upheld despite the lack of approval from disinterested shareholders and directors.

ACTING AS SHAREHOLDER NOT DIRECTOR - Bob may argue that in voting to approve the sale he is acting as a shareholder, and not as a director and thus does not owe the same duties to the corporation. However, this argument will fail because (1) a director has a duty of loyalty to the corporation even when selling his own shares, and (2) Bob may also have a duty as controlling shareholder.

DUTY OF CONTROLLING SHAREHOLDER - While a shareholder is normally not liable beyond the value of their shares, a controlling shareholder may be liable towards other shareholders if she uses her power in a way to disadvantage the minority shareholders. This is because a controlling shareholder has a fiduciary duty to minority shareholders to not use their controlling share to the minorities' disadvantage.

In this case, because Bob owns 51% of the shares, he is a controlling shareholder. He has a fiduciary duty to not use his controlling share to gain unfair advantage over the minority shareholders. This would likely include selling substantially all of Corp.'s resources to his own sister, Sally, if the price was not fair. Thus, even if Bob is successful in arguing that he is not under a duty as a director when trading on his shares, as a controlling shareholder he would still be liable for breaching his fiduciary duty.

AL'S VIOLATIONS

DRAFTING ARTICLES AND SHAREHOLDER AGREEMENTS - When an attorney represents a corporation, he represents the organization itself and not the directors or officers. While an attorney may also represent the directors and officers separately, these representations are governed by normal rules of conflict of interest. A lawyer may represent two clients so long as he reasonably believes he can do so and that there is no conflict of interest between them. If there is a conflict of interest he must (1) reasonably believe he can adequately represent each of them, (2) disclose the conflict, under the Cal RPC such disclosure must be in writing, and (3) must get the clients' consent in writing. While potential conflicts of interest can be waived, actual conflicts normally may not be waived by the parties because a reasonable attorney would not believe they could represent clients with an actual conflict.

In this case, there is no conflict of interest, potential or otherwise, between Corp and its shareholders. Therefore, Al did not violate any rules by drafting the agreement.

ADVISING BOB -

CONFLICT BETWEEN BOB AND CATE-

CURRENT CLIENTS- As noted previously a lawyer may not represent one client who has a conflict of interest with another client unless (1) the lawyer reasonably believes he can adequately represent each of them, (2) the lawyer discloses the conflict, under the Cal RPC such disclosure must be in writing, and (3) the client consents in writing. While potential conflicts of interest can be waived, actual conflicts normally may not be waived by the parties because a reasonable attorney would not believe they could represent clients with an actual conflict.

In this case, it is unclear who Al represented in the drafting of the shareholder agreement and whether or not he continues to represent Cate. If Al does represent Cate

then agreeing to represent Bob in this matter constitutes a current conflict between clients, and Al would have to provide written disclosure and receive written consent. However, even if he did he would not be able to maintain representation because a reasonable lawyer would not believe he could adequately represent both Cate and Bob because their conflict is not just potential, it is an actual conflict.

FORMER CLIENTS- A lawyer may not represent a current client (1) in a matter that is the same or substantially the same as a matter he represented a former client, and (2) the current client's interests are adverse to the former client unless he gets written consent from the former client.

In this case, if Al represented Cate in drafting the shareholder agreement and proxy agreement then he would likely be in violation of this rule. Cate is a former client, and the matter now in dispute is whether the very agreements Al drafted for Cate are valid, and thus it is the same matter. Furthermore, Bob's position, that the agreements are not binding, is directly in conflict with Cate's interest. As a result Al could not represent Bob without Cate's approval because doing so would be in violation of his duty of loyalty to a former client.

Al could also be disqualified if he had gained confidential information in representing Cate, though that is unlikely here, considering he was drafting a shareholder agreement.

Q6 Evidence / Contracts

Green's Grocery Outlet ("Green's") sponsors a lawful weekly lottery. For one dollar, a player picks six numbers. All persons who select the six winning numbers drawn at random share equally in the prize pool.

Each week, for the past two years, Andrew has played the same numbers—3, 8, 10, 12, 13, and 23—which represent the birth dates of his children.

On June 1, Andrew purchased his weekly lottery ticket. Barney, a clerk employed by Green's, asked, "The usual numbers, Andrew?" Andrew replied, "Of course."

Barney entered the numbers on the computer that generates the lottery ticket and gave the ticket to Andrew. Without examining the ticket, Andrew placed it in his pocket. Unbeknownst to either Andrew or Barney, Barney had accidentally entered the number "7" on the computer rather than the number "8."

The winning lottery numbers that week were Andrew's "usual" numbers. Much to his horror, Andrew discovered Barney's error when he showed his wife the "winning" ticket. Andrew filed suit against Green's seeking to reform his lottery ticket by changing the "7" to an "8." Green's cross-complained seeking rescission.

1. At trial, Green's objects to Andrew's testimony about (a) Barney's question, (b) Andrew's answer, and (c) Andrew's attempt to explain what the phrase "the usual numbers" means. Should the court admit the testimony? Discuss. Answer according to California law.

2. How should the court rule on each party's claim for relief? Discuss.

Answer A

1. How will the court rule on Green's objection to

a) Barney's question "The Usual Numbers, Andrew"

Relevant

All evidence must be logically and legally relevant.

Logical: Under California Rules of Evidence, evidence is relevant if it tends to prove or disprove a disputed fact. In this case, Green is disputing the fact that there is a contract or the terms of the contract. Therefore, Andrew's testimony regarding Barney's statement tends to prove that Andrew bought the ticket from Barney and that the terms were for the usual numbers. Andrew can show this is logically relevant.

Legal: To be legally relevant the probative value should outweigh the prejudicial effect. The probative value in this case is that this tends to show Andrew bought the ticket and that he had a usual set of numbers. While this may be prejudicial, the probative value is high and outweighs the prejudice because it establishes the facts of the situation.

Hearsay

Green will object that the evidence is inadmissible hearsay. Hearsay is an out-of-court statement made by a declarant used to prove the truth of the matter asserted.

Out-of-Court Statement by a declarant

In this case Barney's question was made out-of-court and by Barney, therefore meeting this element.

Truth of the Matter Asserted

The statements presented to prove what the statement is asserting. In this case Green will argue that Andrew is introducing Barney's statement to show that Barney knew about the usual numbers and that Andrew asked for the usual numbers.

Act of Independent Legal Significances

Andrew will argue he is not introducing to prove the truth of the matter asserted, but rather to show that there was a contract created when Andrew got the ticket. At this point this statement does not provide a contract.

Knowledge of facts stated

Andrew may also be using it to prove that he always purchased the same numbers and that Barney knew about his practice or habit. It is likely that Andrew can show this is not hearsay, but being used to show Barney had the knowledge of his usual numbers.

Even if this is being introduced for the truth of the matter asserted Andrew can see if it falls under an exception to the hearsay rule.

Party-opponent admission

Admissions by a party-opponent are an exception to the hearsay rule. Vicarious admissions by an agent are only attributed to the principal if the statement was made in the scope of the agency and the principal would be liable.

In this case Green will argue Barney made a mistake, but Barney was doing his job within the scope of the agency and principals are liable for the mistake of their agents.

Andrew can show this was a party-opponent admission.

Conclusion:

Barney's question is admissible evidence and the court should admit Andrew's testimony on this issue.

a) Andrew's answer

Relevant (see rule above)

Logical: (See previous rule.) Green may argue that the creation of a contract is not in dispute and Andrew's testimony only tends to prove the existence of a contract. Andrew will argue the testimony also refers to the question Barney asked and that he wanted his usual numbers. Andrew can likely show this is logically relevant because it tends to prove a disputed fact.

Legally: See previous rule: This is similar to the previous piece of evidence and tends to establish the facts of the incident and therefore the probative value outweighs the prejudicial effect.

Hearsay

Green will object that this testimony is hearsay. See previous rule. Green will assert that this is an out-of-court statement by Andrew to prove that he assented to the purchase of the lottery ticket which is the contents of his statement.

Independent Legal Significance

Andrew can show in this case as previously discussed that his statement created a contract and is therefore not being used to prove the truth of the matter asserted, but rather to prove the formation of a contract. Andrew's assent in this case does form a contract and is therefore not hearsay.

Party-opponent Exception (See previous rule)

In this case the statement is by Andrew and not a party-opponent because Andrew is testifying and Andrew is not the opponent against Andrew himself. So this exception does not apply.

Conclusion

Andrew's testimony about his own statement should be ruled admissible because it is not hearsay and is relevant.

b) Andrew's explanation of "usual numbers"

Relevant:

Logical: This is the issue in dispute. Therefore Andrew's testimony is highly relevant.

Legal: In this instance, this testimony is highly prejudicial to Green and therefore might be excluded. However it is also the main issue of the case and its probative value outweighs its prejudicial effect.

Character Evidence

Evidence of a person's character cannot be used to show they acted in conformity therewith on a particular occasion.

In this case Green will argue that the introduction of this evidence is trying to show Andrew acted similarly as he had on other occasions.

Habit

Evidence that shows specific instances of conduct to prove that they have a regular habit are allowed. Andrew will argue that in this case he is establishing a habit he has had every week for the past 2 years. Andrew can likely show this is habit evidence and not character.

Parol Evidence

Green may argue that the evidence violates the parol evidence rule because it is evidence prior to formation of an integrated contract to contradict the terms of that contract.

Andrew will likely be able to introduce this because he is trying to show a mistake and not to contradict the terms of an integrated contract. In this case there was a mistake Barney made and Andrew is trying to prove the mistake.

Conclusion

The court should rule that this evidence is admissible.

2. How should the court rule on each party's claim for relief?

Reform

The court will grant reformation of a contract when each party knew what the terms were and they both had the same mutual mistake.

Green will argue that Andrew had the opportunity to look at the ticket and negligently failed to do so and therefore assumed the risk of the ticket being wrong. Andrew will argue the prior course of dealing with Barney and Green establishes that lottery ticket was supposed to contain a seven instead of an eight.

Recission

The court will assert recission when there is evidence the contract was not valid or lacked assent on a material term.

Green will make the same argument that there was no meeting of the minds and as such the contract should be rescinded. Andrew will argue that this was just a transcription error and does not rise to a level warranting recission of the contract.

Conclusion

The court should reform the contract because there is evidence that the mistake was mutual, but the mistake was a transcription rather than the objective belief of the parties. Both Barney and Andrew thought that the ticket should contain one number eight and not seven. The court should reform the contact.

Answer B

(1) Green's (G) objections to Andrew's (A) Testimony

(a) A's testimony re Barney's (B's) question

Green will object to A's testimony re B's question as irrelevant and inadmissible as hearsay.

Under California law, evidence is relevant if it has any tendency to make a disputed fact of consequence to the action more or less likely to be true. In this case, A is suing Green for breach of contract, and there is a dispute between the parties as to the terms of that contract (i.e., the lottery numbers A picked). As a result, A's testimony about B's question is relevant because it goes to whether A & B agreed about the numbers that should be on A's lottery ticket, and if so, what A & B agreed to, both of which are disputed facts in this case.

Under California law, a relevant statement may nonetheless be excluded if it is substantially more prejudicial than probative, a waste of time, or likely to confuse the jury. The probative value of B's question here outweighs any potential prejudice or confusion.

Under California law, hearsay is an out-of-court statement offered for the truth of the matter asserted. In this case, B's question to A is an out-of-court statement because it was made before the suit on the day that A bought the lottery ticket in question. But A will argue, persuasively, that he is not offering B's question for the truth of the matter asserted. A will argue that he is offering B's statement to establish a verbal act -- the fact that B asked A the question, "The usual numbers, Andrew?" As such, the statement is being offered for a non-hearsay purpose because it is not being offered to prove the truth of the matter that Andrew asked for the usual numbers.

A could also argue that B's question should be admitted for the truth of the matter because B's question shows B's then-existing mental condition, an exception to the hearsay rule. A will argue, persuasively, that B's questions shows that B knew that A wanted A's usual numbers.

A could also argue that B's question is offered for the effect it had on A, the listener, another non-hearsay purpose. Under this argument, A is offering B's question to show that A inferred from B's statement that B knew A's usual numbers.

A could also argue that B's statement is admissible hearsay in California because it is an admission of a party. Green will argue that B is not a party to the case, but A can persuasively respond that Green should be bound by B's statements because B was acting within the scope of his employment when he made them, i.e., part of B's job is to sell lottery tickets to customers.

(b) A's testimony re A's answer

B will argue that A's answer is irrelevant and inadmissible hearsay.

A will argue that his answer is relevant because it goes to the disputed facts of whether A & B agreed to the numbers in A's lottery ticket, and what those numbers were. Moreover, A will argue that his answer has great probative value because [it] is directly related to a key disputed fact in the case, i.e., what numbers A & B agreed to put in A's lottery ticket. A's answer is relevant for those reasons.

B will argue that A's statement was made out of court -- on June 1 -- and is being offered to prove the truth of the matter asserted, that A asked for his usual numbers.

A will also argue, persuasively, that his answer is not offered for hearsay purpose because he is not offering it for the truth of the matter asserted. Rather, it is being offered as a verbal act -- agreement to the offer from B. Alternatively, A could argue

that A's answer is being offered for the non-hearsay purpose of showing the effect on the listener B, i.e., that B understood that A wanted his usual numbers.

A's answer will be admissible on these grounds.

(c) Andrew's attempt to explain what "the usual numbers" means

B will argue that A is attempting to offer parol evidence regarding the terms of the contract in violation of the parol evidence rule.

The parol evidence rule excludes evidence extrinsic to a contract where that contract is considered a final, or integrated writing. There are exceptions to the parol evidence rule, including to show a clerical error.

Here Green will argue that any testimony regarding what "the usual numbers" means is extrinsic evidence because the lottery ticket is the contract, and there is no evidence within the ticket regarding what A's usual numbers are.

A will argue, persuasively, that parol evidence should be admitted in this case to prove that B made a clerical error in entering A's numbers into the computer that generated A's ticket, the contract. A's testimony on this point will be allowed under the clerical error exception to the parol evidence rule.

(2) The parties' claims for relief

Reformation

Reformation is an equitable remedy that is available where one party can show, among other things, a unilateral mistake of material fact that caused A irreparable harm.

In this case, A will argue that he is entitled to reformation because he suffered irreparable harm as a result of B's unilateral mistake -- a clerical error in entering his

usual lottery numbers. A will argue that Green should be bound by B's error because B is Green's agent and was acting within the scope of his employment at the time of B's mistake. And A will argue that he was irreparably harmed by B's mistake because but for B's mistake he would have won the lottery, and that A's harm was foreseeable because only a ticket that has all the winning numbers will win the lottery, and it is foreseeable that a clerical error in entering one number could cause a party to lose a lottery he otherwise would have won.

Green will argue that A is not irreparably harmed, because Green can refund A the price of the lottery ticket, and that there was no mistake because the numbers A paid for are the numbers that are clearly printed on his lottery ticket. Moreover, Green will argue that A does not have clean hands, because he could have and should have confirmed that the right numbers were on his ticket, and that by failing to do so, A waived his right to complain after the fact that he got the wrong numbers.

Rescission

Green will argue for rescission because there was no meeting of the minds as to a material term of the contract. Rescission is an equitable remedy available where one party can show, among other things, mutual mistake of fact. Here Green will argue that there was a mutual mistake of fact as to what numbers A wanted on his lottery ticket, and that therefore there was no meeting of the minds required to form a valid contract. Green will argue that B thought A wanted the number 7 on his ticket, and A wanted the number 8 on his ticket, and that the numbers on the ticket were material elements of the contract between Green and A. As a result, there was no meeting of the minds as to a material term of the contract, and the contract should be rescinded.

A will argue that there was a meeting of the minds based on the question and answer between B and A -- "The usual numbers, Andrew?" "Of course." A will argue that B's question shows that B knew A's usual numbers and offered A a ticket with those numbers. A will argue that A accepted B's offer of those numbers, and that there was

consideration in A's payment of the price of the lottery ticket and Green's promise to pay A the winnings if the numbers of A's ticket matched the winning numbers.

This is a close question, but in this case, because all of the testimony discussed above is admissible and support's A's position, a court would likely find that A is entitled to reformation and B cannot rescind the contract. A wins the lottery.

Jul 2010

California
Bar
Examination

Essay Questions
And
Selected Answers

THE STATE BAR OF CALIFORNIA
OFFICE OF ADMISSIONS
180 HOWARD STREET • SAN FRANCISCO CALIFORNIA 94105 1639 • (415) 538 - 2303
1149 SOUTH HILL STREET • LOS ANGELES CALIFORNIA 90015-2299 • (213) 765 – 1500

ESSAY QUESTIONS AND SELECTED ANSWERS
JULY 2010
CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2010 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

JULY 2010
ESSAY QUESTIONS 1, 2, AND 3

California Bar Examination

Answer all three questions. Time allotted: three hours

Your answer should demonstrate your ability to analyze the facts in question, to tell the difference between material and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

Q1 Torts

Homeowner kept a handgun on his bedside table in order to protect himself against intruders. A statute provides that "all firearms must be stored in a secure container that is fully enclosed and locked." Burglar broke into Homeowner's house while Homeowner was out and stole the handgun.

Burglar subsequently used the handgun in an attack on Patron in a parking lot belonging to Cinema. Patron had just exited Cinema around midnight after viewing a late movie. During the attack, Burglar approached Patron and demanded that she hand over her purse. Patron refused. Burglar drew the handgun, pointed it at Patron, and stated, "You made me mad, so now I'm going to shoot you."

Patron fainted out of shock and suffered a concussion. Burglar took her purse and fled, but was later apprehended by the police. Cinema had been aware of several previous attacks on its customers in the parking lot at night during the past several years, but provided no lighting or security guard.

Under what theory or theories, if any, might Patron bring an action for damages against Homeowner, Burglar, or Cinema? Discuss.

Answer A

Patron (P) v. Homeowner (H)

The issue is under what theories P might bring an action against H.

Negligence

Negligence is an action where a plaintiff asserts that a defendant breached a duty and caused damages. In order to prevail on a claim of negligence, the plaintiff must prove (1) Duty; (2) Breach; (3) Actual Causation; (4) Proximate Causation; and (5) Damages.

(1) Duty

Duty determines the level of care a defendant must exercise. Everyone owes a general duty to avoid harming others. In certain circumstances, an individual owes a higher duty of care. Under the Cardozo majority test, the duty is owed to those in the "zone of danger," meaning, those in the vicinity who may be harmed by the action. Under the Andrews minority test, the duty is owed to all foreseeable plaintiffs.

Applying the Cardozo test, H will claim that he did not have a duty to P, because she was not in his home when the event occurred. Under the Andrews test, P will claim that H did owe a duty because it was foreseeable someone could use the firearm to go out and shoot someone, or injure someone, or put someone into fear, as B did in this case. Depending on where H lives, and whether it is a community where burglaries often occur, P may succeed in showing it was foreseeable that a burglar could come in and take the handgun.

The court will likely agree with P, because it was foreseeable the gun could be used on a person, so H owed a duty to P.

Standard of Care

The next issue is what the standard of care is, meaning how H must exercise his duty.

The court determines the appropriate standard of care. While the standard of care might be adjusted based on such things as physical conditions or professional

occupations, the court does not consider mental or emotional individual characteristics in setting the standard of care.

In this case, P will claim that H owed a duty of a reasonable person in his circumstances, meaning the reasonable care of a handgun owner. H may claim that he owes less of a duty because for some reason he is particularly afraid of people breaking into his home. However, this argument will fail, because the court does not consider mental or emotional individual characteristics in setting the duty of care. It does not appear that there are any particular physical characteristics of H that alter this standard of care, or that he was a professional or a child, in which case the standard of care would be higher or lower.

Therefore, the standard of care is a reasonable handgun owner.

It should be noted that though H is a landowner, the issues of landowner liability do not apply to H in this case, because the injury was not to a person on his land (B), but rather to another person (P).

Negligence per Se

P may further attempt to invoke the doctrine of negligence per se. Negligence per se is a doctrine that allows the court to substitute the standard of care with the words of a statute. Where the defendant has violated the statute, that is sufficient to prove breach of duty. The plaintiff must still prove the three other elements of negligence, actual causation, proximate causation, and damages. In order for negligence per se to apply, the plaintiff must prove that (1) her harm was the type of harm the statute was designed to protect and (2) she was in the class of persons the statute was designed to protect.

In this case, P will try to apply the statute that provides that “all firearms must be stored in a secure container that is fully enclosed and locked.” She will claim that this is the standard of care.

As for the first requirement, P will argue that her harm is the type the statute was designed to protect, because it was designed to protect people from being injured by handguns. She was injured by a handgun. The court will likely agree.

However, as for the second requirement, H will argue that P was not in the class of persons, because the requirement that the guns be stored in a secure container seems to protect children in the home. It does not seem to protect people who will be harmed by guns that are stolen, because if that were the case, the requirement might be that guns be kept in a "hidden" location, or that they must be kept in rooms with locked doors, but not necessarily in "secure containers." P will argue that the statute is broader, and legislative intent may show that it was designed to protect all people who might be injured by guns. The court will likely agree with P and that she was in the class. Therefore, the standard of care will be the statute and H will have breached. P must still prove the other elements of negligence.

However, if the court finds that the statute does not protect P, P will need to prove Breach.

(2) Breach

Breach determines whether the defendant met the standard of care, as established above. The standard of care in this case is the care of a reasonable handgun owner.

P will claim that H breached this duty because he kept a handgun on his dresser by his bed, and a reasonable handgun owner would be aware of the risks of doing that and put it somewhere more secure. He would also comply with the statute. H may claim that it was reasonable to keep it there because it was for self-defense, but P will claim he could have kept it under the bed or at least with some sort of a safety lock on it so that someone who came in and stole it would not be able to use it. Additionally, she will claim he should have put it away while he was "out," so that it could not be stolen. This may depend on whether B had a home alarm system.

The court will likely agree there was a breach.

(3) Actual Causation

Causation is satisfied if the defendant's act was the "but-for" cause of the plaintiff's harm. Where more than one thing contributes, the causation is satisfied if the defendant's act was a "substantial factor."

In this case, P will argue that H's act was the but-for cause because if he had not kept the gun out, B would not have gotten it and would not have brought on her damages. H will claim that a burglar is likely to find a gun in someone's house, so even if he had not had it in his, B would have found a gun somewhere else and the harm would have occurred anyway.

The court is likely to find H's argument tenuous, and find that H's breach was the but-for cause.

(4) Proximate Causation

The next issue is whether H's breach was the proximate cause. This is likely to be H's strongest argument. Proximate cause determines whether it was foreseeable that the harm would occur and whether it would be fair to hold H liable.

In this case, H will argue that it was not foreseeable that someone would break in, steal the gun, and use it to commit a tort against someone else. Typically, the court finds that criminal acts of third parties are "superseding intervening causes," meaning that they break the chain of causation. Therefore, H will argue B's burglary and criminal assault should break the chain. P will argue that it was foreseeable this harm would occur, as discussed above, because people often steal guns when they break into homes. Where a homeowner had notice that he was in a dangerous neighborhood, it is more likely proximate cause will be found. Additionally, it would be relevant whether H's home had ever been broken into before.

H will also claim the chain of causation was broken because P was leaving a midnight movie in a dangerous neighborhood, so that made it more likely she would be attacked. This argument will likely fail, because people often see late movies without getting assaulted at gunpoint. H will also claim that P was not injured because of his leaving

the gun out, but rather because she “made [B] mad,” and he was going to shoot her for that reason. If she had handed over the purse, he would not have taken out the gun.

Therefore, the court will likely agree with H and find no proximate cause.

(5) Damages

However, if P were to succeed in showing proximate cause, she would also need to show damages. In this case, she will claim that the damages were the shock she suffered, the concussion, and perhaps any emotional damages.

Damages must be foreseeable, certain, unavoidable, and caused directly by the defendant’s action. The forseeability of P’s harm is discussed above, and H may argue it was not foreseeable she would faint but rather that she would be shot. The damages from the concussion and medical bills are certain, but future damages like time away from work and emotional distress may be less certain. P could have mitigated the damages by not seeing a movie at that hour. Causation is discussed above.

Conclusion

Therefore, the court will likely find that there was no negligence on the part of H because there was no proximate causation.

Defenses

If negligence is found, H may assert defenses.

Contributory Negligence

Contributory Negligence is mostly abolished. However, if the jurisdiction retains it, the defendant argues that the plaintiff should receive no recovery because his [sic] negligence contributed to the harm. H would argue that P owed a duty to exercise care for her own safety, and failed to do so because she saw a movie late at night, was approached by a burglar who demanded her purse, and failed to give it to him. This was the but-for cause of her harm and also a foreseeable result of her failing to give over the purse. However, a court would likely find that a reasonable person would not necessarily give over their purse, because she might think that a security guard could

come help her or that the burglar was not armed. This would depend on whether P knew it was an area where attacks had happened before and if she saw the gun in B's pocket before he drew it.

On these facts, P was likely not negligent, so there was no contributory negligence.

Comparative Negligence

Comparative negligence reduces the plaintiff's recovery by the percentage of her negligence. Modified comparative negligence only allows the plaintiff to collect if her negligence was less than the defendant's.

For the reasons above, P was not negligent.

Assumption of Risk

This defense requires the assumption of a known risk. This would depend on whether P knew it was a dangerous area. It will also depend on whether she knew that B might be armed. It is unclear whether she knew these facts.

P v. Burglar (B)

P may bring various actions against B. It is important first to note that B may be guilty of several criminal acts, but they are not causes upon which P may bring an action for damages.

Assault

Assault is the (1) intentional (2) placing a plaintiff in fear of an imminent battery plus (3) causation and (4) damages.

Intent

Intent is desire or substantial certainty to cause a result. In this case, P will argue that B intended to place P in fear, because he said "I'm going to shoot you." He might have done it intending to frighten her into giving over the purse, but at least should have known it would cause fear.

Fear of an imminent battery

Battery is a harmful unconsented touching. P will argue that B's action put her in fear of this, because she saw the gun and through she was going to get shot. She was "shocked." Assault requires that the plaintiff be aware of the danger, and in this case P was. Therefore, this element is met.

Causation

P will argue that B's action caused the fear, and the court will agree.

Damages

As discussed above, P will claim that her damages are her concussion, her emotional distress, any medical bills, and perhaps time off work. As discussed above, these must be foreseeable, unavoidable, certain, and caused. There was nothing P could do to mitigate because she could not control fainting, and the harm was caused by B's act, so the requirements of unavoidability and causation are met.

In terms of certainty, it will be more difficult for P to prove her future time off work. Additionally, B may claim that it was not foreseeable she would faint and get a concussion. However, the defendant must take the plaintiff as he finds her, and, therefore, he is responsible for any damages that might occur, regardless of a plaintiff's extreme sensitivity. Therefore, P will succeed in proving damages, and may recover these damages from B provided that the court finds they are certain enough.

Conclusion

P will succeed in proving assault.

<u>Battery</u>

Battery is an unconsented harmful or offensive touching, harmful or offensive to a reasonable person. In this case, there was no touching, so this does not apply. P's hitting the ground does not count as a touching, because though B caused it, it was not direct enough.

Intentional Infliction of Emotional Distress

Intentional Infliction of emotional distress requires (1) extreme or outrageous conduct (2) intentionally or recklessly caused (3) that in fact causes extreme emotional distress.

Extreme Conduct

P will argue that B's saying "You made me mad so now I'm going to shoot you" is extreme and outrageous. It would be outrageous to an average person, because they might think they were going to die. They might think about their children or live lives, and be very disturbed. Therefore, this is met.

Intent

B need not have intended to cause extreme emotional distress, he just need have recklessly done so. Recklessness is extreme indifference and beyond gross negligence. A person would clearly know this action would cause extreme emotional distress.

Emotional Distress

P will claim this is met because she fainted, and the court will likely agree. It may be bolstered by psychiatrist testimony.

Conclusion

Therefore, P will succeed in proving this tort.

Negligent Infliction of Emotional Distress

This occurs where a defendant negligently inflicts emotional distress, and it causes physical damages. Because B's act was likely intentional, this will not apply. However, if it were found to be negligent instead, this would apply because P suffered physical manifestations – fainting.

Conversion/Trespass to Chattel

Conversion is an intentional and extreme interference with a plaintiff's property.

B intended to take the purse.

P will argue this applies because B stole her purse and took it away, which had many valuable in it. B will argue this was not extreme because she was able to get the purse back when he was apprehended by the police, so it was instead Trespass to Chattel, which is a minor interference with a plaintiff's property right. This may depend on whether all of P's belongs were in the purse at the time she got it back. She may argue that a purse is particularly important to a woman, so even taking it for a brief period is conversion. The court will likely determine this based on whether P got it back intact, or if it was permanently damaged. If the police did not return it, the suit will be conversion.

False Imprisonment

False imprisonment is intentionally holding a plaintiff captive, or preventing her from escaping. This occurs where there is no reasonable means of escape. P will argue that for the brief time she was held at gunpoint, she was falsely imprisoned. A plaintiff need be held for only a second. He need not physically tie her up; merely holding at gunpoint is sufficient.

B may argue that P provoked him and "made him mad," but this is no defense to this intentional tort.

Therefore, P will likely succeed on this charge.

Negligence

Negligence does not apply because, as discussed above, B's act was intentional.

Defenses

It is unlikely that any defenses will apply. D may try to claim self-defense, but there is absolutely no evidence that P attacked him in any way.

P v. Cinema (C)

P may have a suit against Cinema for negligence. There are 5 elements to negligence, as discussed above.

(1) Duty

Duty is defined above. As discussed above, some people owe higher duties, and one such category is landowners. Landowners owe a duty to protect people on their premises. While the modern trend is a duty of reasonable care under the circumstances, under traditional rules, duty depends on what kind of an individual is on the land.

No duty is owed to an undiscovered trespasser. A slightly higher duty is owed to a known trespasser, and a higher duty to a person on the land for social purposes. The highest duty is owed to someone known as an "invitee," who is on the land for profit. In this case, the court will find that P was an invitee, because she was there to see a movie, and therefore for a business purpose. The parking lot belonged to Cinema, so C was the landowner and owed a duty to P as an invitee.

A landowner owes a duty to an invitee to inspect for dangerous circumstances and make them safe or warn the invitees.

Additionally, applying either [the] Cardozo or Andrews test, P was in the zone of danger (the parking lot) and she was a foreseeable plaintiff.

(2) Breach

Breach is defined above.

In this case, P will argue that C's failure to protect its customers was a breach. P will argue that C should have installed lighting, security guards, or some sort of a fence to protect the premises. It could have also warned patrons, so that if P had known, she could have been more on her guard walking through the lot. She might not have refused to give over her purse.

Therefore, there was a breach.

(3) Actual Causation

C will claim its action was not the but-for cause, because the burglary and P's fainting might have occurred even if C had put in a security system. However, the court will likely find that if C had taken some sort of security measure, it would have indeed prevented this event.

(4) Proximate Causation

This is defined above.

B will claim the chain of causation is broken by the criminal act of a third party. However, this does not protect a landowner from liability where the risk was known to the landowner. In this case, C was "aware" of "several" previous attacks in the parking lot in past years. C may claim that they were spread out over many years. C may also introduce evidence that the neighborhood has become more safe recently, or that there is a greater crackdown by the police so it had less reason to worry. But absent this sort of evidence, P will argue that if there were "several" attacks, C should have done something more to protect. It was foreseeable there could be another attack, particularly because C shows movies at midnight, when crime is more likely to occur.

B's stealing the gun will not affect this, because it happened before the attack. It is foreseeable that a burglar would have a gun, regardless of how he obtained it. It is also foreseeable that a victim could faint and get a concussion, because people are frequently afraid of guns.

The court will likely agree with P, and find proximate causation because it was foreseeable. The court will also find it fair to hold C responsible, because it was in the best position to avoid the danger and prevent this from happening. Customers rely on their businesses to protect them. P could analogize to common carriers and claim that businesses should also owe a duty of care, because customers put themselves in their hands for protection.

(5) Damages

The damages analysis is the same as above, and it will be determined by the court on the same bases.

Defenses

The defenses of contributory and comparative negligence and assumption of risk do not apply, as discussed above.

Answer B

Patron v. Homeowner

Negligence: Keeping the Handgun on Bedside Table

Patron will contend that Homeowner was negligent in failing to keep his handgun in a secure locked container as directed by the statute. In order to prevail in an action for negligence, Patron must prove that Homeowner owed him a duty, that he breached the duty, that his breach caused Patron's injury, and that he suffered damages.

Duty

Under the Cardozo view, a duty is owed only to foreseeable plaintiffs. Under the Andrews view, a duty is owed to the whole world. In this case, Patron will argue that it was foreseeable that a thief could steal an unsecured handgun and use it to perpetuate crime such as a robbery.

Negligence per se: Violation of Statute

When a statute proscribes certain behavior, the violation of that statute establishes a breach in the standard of care when the harm is of the kind that the statute is designed to prevent, and the plaintiff is among the class of people the statute is designed to protect. Here, Homeowner will argue that the statute is intended to prevent small children from gaining access to dangerous guns and hurting themselves or others. However, Patron can persuasively counter that it was also designed to prevent thieves or criminals from obtaining weapons that they would then use to perpetuate crime. The legislative history of the statute might shed some light on the purposes of the law. If its purpose includes preventing criminals from stealing unsecured weapons, then Patron, a crime victim, would be within the class the statute was designed to protect, and Homeowner's breach would establish per se negligence.

A reasonable Person would have Secured the Gun

Alternatively, Patron can argue that even without the statute, Homeowner was negligent in leaving the gun in a place where it was easily accessible to any burglars. He would argue that a reasonable person would foresee that the gun would be noticeable and would be stolen by a burglar. He will also argue that the mere

presence of the gun, which Homeowner kept to ward off intruders, indicates that Homeowner did in fact foresee the possibility of violent criminals entering his home.

Breach

Homeowner kept the gun on his bedside table. There is no indication that the gun was kept in a locked drawer, but rather out on his table. Therefore he violated the statute.

Causation

But-for Cause: Homeowner's act of leaving the gun on the table was the but-for cause of Burglar's assault on Patron. If he kept the gun in a locked container, Burglar would not have had access to it.

Proximate Cause: Homeowner will argue that Burglar's intervening criminal acts of breaking into his house, and then robbing Patron, were superseding causes of Patron's injury. However, an intervening act by a criminal will not interrupt the causal chain if it is foreseeable. As discussed above, it was foreseeable that a criminal could break into the house and use the gun on another unsuspecting victim. Therefore, Homeowner's argument will fail.

Damages

Patron suffered shock and a concussion as a result of Burglar's robbing him [sic]. Therefore, if Burglar's act is a foreseeable result of Homeowner's negligence in failing to secure his handgun, Homeowner can be liable for Patron's injury.

Patron v. Burglar

Burglar confronted Patron in the parking lot and demanded her purse. When Patron refused, Burglar pointed the gun at Patron and threatened her. Patron fainted, suffering a concussion, and Burglar took her purse and fled.

Assault

The prima facie case for assault is met when the defendant (1) performs an act that places the plaintiff in reasonable apprehension of imminent harmful or offensive

contact with his person, (2) the defendant had the intent to place the plaintiff in apprehension, and (3) causation. There must be some physical conduct, not mere words, to constitute assault.

Here, Burglar drew his handgun and stated "You made me mad, so now I'm going to shoot you." His words, combined with pointing the gun at Patron, created in Patron an apprehension that Burglar was going to immediately shoot her. Further, Burglar had the intent to make Patron believe he was going to shoot her. This act caused Patron to faint and suffer a concussion. Therefore, Burglar can be liable for assault.

Battery

Battery consists of (1) harmful or offensive contact with the plaintiff's person, (2) intent by the defendant to cause the touching, (3) causation.

Here, Burglar intentionally took the purse from Paton's person after she fainted. Taking an object from someone's person satisfies the offensive touching element. Further, the fact that Patron may have been unconscious when Burglar seized her purse does not negate the offensiveness of the touching he caused. Therefore, he can be liable for burglary.

Trespass to Chattels

Trespass to chattels occurs when the defendant (1) interferes with the plaintiff's possession of her chattel, (2) had the intent of performing the act that interferes with possession, (3) causes the interference, and (4) plaintiff suffers damages.

Here, Burglar grabbed Patron's purse and ran away with it, interfering with her right to possess it. He did so intentionally. The police later apprehended Burglar. If he still had the purse and it was returned to Patron, she may recover for any damages that resulted from her temporary loss of possession.

Conversion

Conversion occurs when the defendant (1) interferes with the plaintiff's possession of her chattel, and the interference is so extensive as to warrant payment for the full

value of the chattel, (2) has the intent of performing the act that interferes with possession, (3) causes the interference. When defendant's act amounts to an exercise of dominion and control over the chattel, conversion is more likely to be found.

Here, Burglar seized the purse with the intent to completely and permanently deprive Patron of possession. If Burglar's later apprehension by the police restored the purse to Patron's possession, she may not be able to obtain the full value. If, however, Burglar disposed of the purse before he was apprehended, Patron can recover the full Value of the purse and its contents at the time Burglar seized it.

Intentional Infliction of Emotional Distress

Intentional infliction of emotional distress occurs when the defendant (1) engages in extreme and outrageous conduct (2) with the intent to cause severe emotional distress, or is reckless as to the likelihood of causing severe distress, (3) causation, and (4) damages: severe emotional distress.

Burglar's conduct in pointing a gun at Patron, demanding her purse, and stating that he was going to shoot her is conduct "beyond all bounds of decency in a civilized society." Theft and threats to inflict serious bodily injury are extreme and intolerable. Burglar clearly intended to cause Patron emotional distress, as he likely hoped his threat and menacing her with the gun would convince her to hand over the purse. Patron fainted out of shock and suffered a concussion. She is likely to suffer emotional distress including fear of being out at night by herself following this robbery. Therefore, she can prevail under this theory.

Negligent Infliction of Emotional Distress

Patron could also prevail under a negligence theory because she suffered physical harm (shock and concussion) as a result of her emotional stress from her encounter with Burglar. However, because Burglar's conduct was at least reckless with respect to her emotional distress, she will not need to rely on a negligence theory.

In sum, Patron can recover for her physical injuries, emotional distress, and the deprivation of her purse.

Patron v. Cinema

Duty to make Safe for Invitees

Patron was robbed in a parking lot belonging to Cinema, just as she was exiting the Cinema around midnight after viewing a late movie. She will argue that Cinema breached the duty of care owed to her as an invitee by failing to provide lighting or a security guard in the parking lot.

A person who comes onto the land for the economic benefit of the landowner, or as part of the general public is invited onto the premises, is an invitee. Patron was an invitee because she entered Cinema's property, which was open to the public, and paid to see a movie. Cinema's duty to invitees is to make safe or warn of any latent dangers, manmade or natural, that are known or discoverable with reasonable inspection.

Cinema knew that there had been several previous attacks on customers in the parking lot in previous years, yet failed to provide any lighting or a security guard. Because the threat was known to Cinema, there was a duty to make a reasonable effort to enhance security.

Negligence

Cinema can also be liable under a negligence theory (see above). A duty of care is owed to all foreseeable plaintiffs, and Patron was a foreseeable victim of crime because she was exiting the cinema after midnight in an area where there was a known risk of assault. A reasonable theater owner would have provided either a security guard or bright lighting to discourage crime. Providing lights is [a] fairly low cost and would significantly improve safety. Therefore, Cinema's failure to do so was a breach of duty.

The lack of lights or a guard was a but-for cause of the attack because Burglar would not have been emboldened to attack Patron if there was a security guard present or if bright lighting would increase his risk of apprehension.

Proximate Cause: Cinema will argue that Burglar's intentional tortious and criminal act was a supervening cause of Patron's injury. However, as discussed above, a defendant can be liable where his negligence increases the risk of subsequent criminal acts. Here, the failure to provide lighting or a guard, despite the known attacks on other patrons, was a substantial cause of the burglary.

Joint and Several Liability

In a jurisdiction permitting joint and several liability, a plaintiff can recover the full amount of any damages proximately caused by the combined tortious acts of two or more defendants, whether acting independently or in concert, that result in a single indivisible harm. If this jurisdiction follows joint and several liability, Patron can recover from any of the defendants, and they can seek contribution from one another.

Q2 Professional Responsibility

There was recently a major release of hazardous substances from a waste disposal site in County. Owen is the current owner of the site. Fred is a former owner of the site. Hap is the producer of the hazardous substances disposed of at the site.

As a result of the hazardous substance release, County has identified the site as a priority cleanup target, and has notified Owen, Fred, and Hap that they are the responsible parties who must either clean up or pay to clean up the site. County advised each responsible party of his degree of culpability. In the event each responsible party does not pay his share of the cleanup costs, County is entitled to impose joint and several liability on each of them.

In an effort to facilitate the resolution of County's demand, Owen, the wealthiest responsible party, arranged for Fred, Hap, and himself to meet with Anne, his tax lawyer. At the meeting, Owen offered to pay the attorney fees of all three of them in exchange for their agreement to be represented by Anne. Fred and Hap accepted Owen's offer and Anne distributed identical retainer agreements to each of them, which they signed.

What ethical violations, if any, has Anne committed? Discuss.

Answer A

Anne's Ethical Violations

Duty of Loyalty

An attorney must not represent a client when there is a concurrent conflict of interest. A concurrent conflict occurs when the interests of one client are directly adverse to those of another or the representation of one client will be materially limited because of the interests of the attorney, a third party, another client or a former client. An attorney can nevertheless take on representation if she reasonably believes that she can competently and diligently represent the interests of all effected clients, discloses the conflict and gets informed written consent from the clients. The CA rules do not apply the "reasonably believes standard" and require written disclosure in situations where the conflict involves a former client.

Potential Conflict

Here, Anne is the longtime tax attorney of Owner (O). She agrees to represent O, Fred (F) and Hap (H) is a case where they are each being required by the County to clean up a hazardous substance spill. Anne has agreed to represent them as her joint clients against County. The County has made it clear that if each party does not pay his share, County will impose joint and several liability one each of them. This means that County can recover the full amount of the costs from either of them. Here, O is wealthier than F and H. We are not aware how wealthy F and H are. Due to County's decision to pursue joint and several liability in case each person does not pay, there is a potential conflict of interest. If either of the parties turns out to be insolvent or does not pay his share, the others are exposed to liability for the full amount, which likely will be a lot. Also, each party has been notified of his culpability. It might be that the parties each have an argument for why they are not at fault and for why another party is more at fault. For example, F is the former owner of the site and may want to argue that he does not have any responsibility for the spill. H produces the hazardous material that is dumped on the site. Thus, H might argue that he is not responsible for the release because O as the owner of the site has responsibility to prevent a release.

Thus, Anne must have realized that there was a potential conflict of interest between the parties and [it] must [be] determined whether she reasonably believed she could effectively represent O, F and H as her joint clients. Here, Anne might reasonably believe that she can do so because their interests are all aligned against County. However, because of each party's different involvement and responsibility for the spill, as well as the County's decision to pursue its claims under the theory of joint and several liability in case one party does not pay, Anne should have realized that she could not make arguments on behalf of each client without taking a position adverse to the others. However, if she reasonably believed that the conflict was consentable, she should have disclosed the conflict [to] the parties, preferably in writing, and received their informed written consent to proceed. Anne must have been careful not to disclose any confidential information about O and his finances since Anne had such information as O's tax attorney. If she could fully disclose the conflict without revealing O's confidential information, and the clients each gave their informed, written consent, then Anne could have proceeded to represent all three of them. However, the conflict would be unconsentable if Anne did not believe she could effectively represent them all. For the reasons discussed above, Anne might have believed that this conflict was not consentable and thus could not have advised the clients to consent.

Also, there is a potential conflict stemming from the fact that O is Anne's former client. [Anne] must not take on representation of a client in a matter that is the same as or substantially related to a matter in which she represented a former client if the former client's confidential information might be relevant. Furthermore, Anne cannot use any confidential information against O in this matter without O's consent. Since O has arranged for Anne to represent O, H and F, O has consented to the representation. However, Anne must be careful not to reveal any confidential information about O without O's consent during the course of her representation.

The fact that O is Anne's current client creates a conflict. Anne may feel a greater sense of loyalty to O to protect his interests because O is already her client and she likely wants to keep O as her client in her tax practice. Thus, Anne might not be able to effectively and fairly represent the interests of F and H. She must also disclose this conflict to F and H and only proceed if it is reasonable to do so and F and H provide

their informed consent. Given that this lawsuit is not related to Anne's tax practice, Anne might reasonably believe that she can fairly represent the clients' interests as joint clients, especially because they are all defending against County. However, given her loyalty to O, perhaps this conflict is also not consentable. It would be useful to know just how long O has been Anne's client. In any case, if the additional facts make it such that a reasonable attorney would not advise F and H to consent to Anne representing all three clients, the consent of F and H will not be effective.

Actual Conflict

An actual conflict can develop in the course of representation. If it does, Anne must revisit the process discussed above, disclose the conflict and only proceed if she has written, informed consent from the parties to proceed. If Anne proceeded with the representation despite the conflicts discussed above, she must be aware of any actual conflicts that might arise. For example, if any of the three parties decides to argue in his own defense that culpability lies with another one of the parties, Anne must realize that continuing with representation is no longer reasonable. At that point, she must disclose the conflict (subject to any limitations due to her duty of confidentiality) and advise the clients to seek independent counsel. Depending on how much confidential information she has at that point, she may be able to continue representing one of them. In this case, that party would likely be O because she already has confidential information about O due [to] previously representing O for tax purposes. However, if she learns confidential information from the parties and an actual conflict arises, she may have to withdraw completely and advise each of them to seek independent counsel in this matter.

Duty of Competence

A lawyer has a duty to competently represent her clients. She must use the skill, knowledge, thoroughness and preparation reasonably necessary for effective representation. Here, we are told that Anne is a longtime tax attorney. The case she is hired to work on involves a major release of hazardous substances from a waste disposal site and cleanup required by County. As a longtime tax attorney, she likely does not have much experience in this particular area of the law. The case relates to matters outside of the scope of a tax attorney's area of practice. However, Anne may

take on representation if she can become competent in the areas of the case by researching and preparing herself in the pertinent field. If she can do so without causing any harm to the clients or causing an undue delay, she may represent them in the matter. Also, she can associate with another attorney who has more experience in the specific area. If Anne takes these measures to prepare herself or associate with another competent attorney, she will not have violated this duty. However, if she proceeds to represent the clients in this matter without becoming competent in this particular area, she will have breached her duty of competence.

Duty of Confidentiality

Under the ABA, an attorney has a duty not to disclose confidential information related to the representation of that client. It does not matter from whom or how the information was acquired. In CA, this duty of confidentiality is recognized in the attorney's oath. There are exceptions for disclosing confidential information: 1) express consent, 2) implied consent, 3) disclosure ordered by court, 4) disclosure to prevent a crime or fraud likely to result in substantial financial loss when the attorney's services have been used to commit the crime or fraud, and 5) disclosure if the attorney reasonably believes it's necessary to prevent certain death or substantial bodily injury. CA does not recognize the exception for crimes and fraud and limits the disclosure to prevent death or bodily injury to situations where the act to be prevented is a crime.

During the course of representation, Anne must take care not to disclose the confidential information from one client to another without their consent, unless one of the other exceptions discussed above applies. Also, if Anne discovers an actual conflict of interest during the course of representation, she must take care to protect such confidences when making any disclosures related to resolving the conflict of interests. If Anne does not properly protect the confidential information from her clients, she will have breached this duty.

Attorney-client privilege

This privilege is an exclusionary rule of evidence. The plaintiff can refuse to testify and prevent his attorney from testifying as to confidential communications between them and their agents during the course of representation. The communications must have

been intended by the client to have been confidential and must have been made for the purpose of legal services. Under the ABA, this privilege lasts even after the client dies. Under the CA rules, the privilege ends when the client's estate is finalized after his death. There are exceptions to this privilege; the attorney may testify 1) to prevent a future crime or fraud when the client has used the attorney's services to commit the crime or fraud, 2) when there is litigation related to a breach of duties between the client and attorney and 3) when joint clients are later involved in civil litigation. CA also allows disclosure to prevent a crime that is likely to result in death or substantial bodily injury. The client holds this privilege and may waive it.

Under this privilege, Anne may not testify as to confidential communications between herself and the three clients unless the clients waive it. If the crime/fraud exception applies or the CA exception for death or bodily injury applies, then Anne can testify as to the confidential communications. Also, if the joint clients are later involved in civil litigation against one another, the clients will not be able to assert this privilege. Anne should make it clear to O, H and F that she may have to testify against them if they are later involved as adversaries in a civil case.

Fiduciary Duties of Attorney

Under the ABA, fees must be reasonable under the CA rules, fees must not be unconscionable. Thus, Anne must make sure that her fees meet these standards based on the amount of time and skill she will use and the level of difficulty in the case. Also, under CA rules, a fee arrangement must be in writing if it is for over $1000 unless the client waives the right to get a writing, there is an emergency, the attorney is performing routine services for an existing client, or the client is a corporation. Thus, the fee arrangement must be in writing to meet the CA requirements if it is for more than $1000 and the clients do not waive their right to a writing.

Receiving Payment from One Person for Representing Another

An attorney may receive payment from one person to represent another so long as 1) the client being represented is aware of this arrangement and provides written, informed consent, 2) the attorney's judgment and the effectiveness of representation will not be affected because of the interests of the person paying for the services, and 3) the

client's confidential information is protected. Here, O is the wealthiest of O, H and F. O offers to pay the attorney's fees for all three of them. Thus, F and H must be made aware of the arrangement. Also, Anne must ensure that her representation of H and F is not affected by the fact that O is paying for her fees. Because O is also a client in the case, the fact that he is paying the fees might interfere with Anne's judgment. Anne might feel a greater sense of loyalty and duty to O not only because O is her current client but also because O is paying for her fees. Thus, she might choose to pursue O's interests at the expense of the others. Thus, Anne may violate her duties of loyalty to F and H if she lets the fact that O is paying her fees influence her judgment. Also, as discussed above, Anne must protect the confidential information of all three clients. If she fails to, she will have violated this ethical duty.

Anne should have disclosed this conflict when she disclosed potential conflicts to all three clients and obtained their informed, written consent. F and H must have been made aware of this situation before agreeing to be represented by Anne and accepting O's offer for O to pay the attorney's fees. If Anne failed to inform the clients when they agreed to the joint representation, Anne has violated her duty to loyalty.

Duty to Communicate – Settlement

Anne also has a duty to communicate to her clients all material developments in the case and to keep them informed. Thus, Anne must communicate material information to all three clients and not rely on one of them to communicate it to the others. If she does [not] she will be found to have violated this duty.

The client has the power to decide whether to settle. Here, if there is a settlement offer by the County or any resolution that affects all three clients, Anne must communicate it to each of them individually, make sure that they understand it and only proceed with their consent. Anne cannot rely on the consent of only one client to proceed. Furthermore, she must clearly explain the terms of any settlement to each client and how it affects each of them.

Answer B

Duty of Competence

A lawyer has a duty to the clients to provide competent representation. Competence is defined as the still, thoroughness, and preparation reasonably needed to provide adequate representation in a case. Whether an attorney is competent is dependent on the complexity of the case, the availability of other lawyers in the region to take the case, the circumstances the case was brought to the attorney, the ability of the attorney to research and become acquainted with the case without undue expense to the clients, and the ability of the attorney to consult with local counsel. Here, Anne may have violated this duty. The nature of this case is a complex environmental case arising under state and federal law, CERCLA liability. However, the facts state that Anne's area of expertise is tax. Environmental law requires significant technical training and experience and knowledge of the federal statutes and state statutes. There is no evidence Anne has practiced in this area in the past. Further, there is no evidence that other attorneys in the region are not competent to practice in this area of law. Further, there is no evidence to establish that Anne has attempted to consult with a local expert on environmental law in order to provide competent representation to the clients. Finally, no evidence establishes that Anne has done any research to become familiar with this area of the law. Therefore, under the circumstances she has probably violated her duty of competence by taking a case in an area of the law in which she is extremely unfamiliar.

Conflicts of Interest

Both the ABA and California Model Rules limit an attorney's representation of clients with conflicting interests. Under the ABA rules, an attorney may not represent a client if representation would be directly adverse to a client or there is a significant risk his representation of one client would be materially impaired by his duty to himself or another client, unless the attorney reasonably believes he can provide competent and diligent representation, does not involve a claim by one client against another in the same case, and is not prohibited by law. Under the ABA rules, an attorney only needs to get informed consent in a situation where an actual conflict exists. Anne may argue

that under the ABA rules no informed consent was necessary here because all the parties had the interest in avoiding liability from the county and therefore all of the interests were aligned at the time. Further, she will argue that this offense is a strict liability offense so none of the parties can absolve liability by placing the blame on another party.

However, it may be argued that the parties did have conflicting positions. As parties who were to be jointly and severally liable and had the right of contribution under the act, all parties wanted to shift the blame to the other party and recover from the prior landowners. Generally, environmental statutes allow the nonactive party to seek contribution from the active party; here Hap is the active party. Therefore because each side is trying to place the blame on the other party, it is likely that there is a current conflict of interest. If there is a current conflict of interest, the attorney must reasonably believe she can provide diligent and competent representation to all clients and must give full informed consent, confirmed in writing. The ABA suggests that an attorney notify the clients on the risks of the duty of loyalty, confidentiality, and the lack of privilege if a suit were to arise between the clients. There are two problems here. First it would be tough to argue that Anne reasonably believed she can provide competent and diligent representation to all clients. Given that all the clients are attempting to push liability on each other and will want to recover contribution from each other in the case, it is likely that a reasonable attorney would not believe that they would be able to provide competent and diligent representation. This is not simply a case where the parties are trying to avoid liability, but it also involves relative contribution if the county is to recover from one client. Further, given her continuing business with Owen, it would be tough for her to argue she could provide equal representation to F and H.

Under the ABA, it will also be unconscionable to receive this consent if Anne's duty of confidentiality to Owen prevents her from making a full disclosure of the potential conflicts of interest to the parties. There is no evidence that her duty to Owen will prevent her from fully disclosing the risks and circumstances of joint rep to the other clients because she represented Owen on a totally unrelated matter and the details of that matter are not necessary for full informed consent of the clients.

Further, Anne failed to get the informed consent of any of the clients confirmed in writing. She only distributed retainer agreements but did get the informed consent of any of the clients in a case of actual conflict between the clients. Therefore she has violated her duty for concurrent conflicts of interest under the ABA rules.

She also violated this duty under the California rules. California has similar requirements but extends the conflicts to potential conflicts as well as actual conflicts, requires disclosure of the risks of the conflicts, and the attorney only needs to believe in good faith that she can provide competent representation, not the reasonable attorney standard adopted under the ABA rules. Anne may be able to argue that she honestly believed that she could provide competent and diligent representation to all the clients and may be able to prevail here, which she would not under the ABA rules, which require an attorney's reasonable belief. However, under the CA rules, Anne failed to give full disclosure to the clients of the risks provided by joint representation and failed to get their written consent to these conflicts. Therefore Anne violated the ethical rules relating to joint representation under CA law also.

Therefore, Anne should withdraw from representing all three because she has received confidential information from H and F.

Fee Payor Interests

Anne violated her duties under both the California and ABA authorities by having Owen pay the fees for all three defendants. Under the ABA rules, an attorney may not have a party pay all of the fees for a group of clients unless the attorney reasonably believes it will not interfere with her professional judgment, confidential communications will not be shared with the party, and the nonpaying clients give informed consent. California has similar requirements but also requires that the informed consent be in writing. Here, Anne may run into a few problems. First, it may be argued that by having one of the joint clients paying the interest of all three clients in a joint liability context may interfere with her professional judgment. However, in offering to pay the fees Owen did not require that Anne exercise her judgment in a certain way or proceed in a certain way under the case. Therefore, the payment probably did not interfere with her professional judgment. Next, the payment probably did not interfere with the duty of confidentiality

to the other clients because the fee payor, Owen, did not request that confidential information be given to the other clients. Under the ABA rules, H and F need to give informed consent. There is no evidence of this. Although they both knew that Owen was paying, Anne never disclosed to them the risks of the fee payor interest. For that reason, informed consent was never given. In addition, under California law, informed consent must be given by F and H in writing. Since informed consent, even orally, was never given, Anne violated her duties under the ABA and California authorities.

Duty of Confidentiality

As a past attorney for Owen, Anne has a duty to Owen not to reveal information learned in the course of her past representations of Owen without the consent of Owen, where consent is implicitly given, or where another exception exists. Here, there is no evidence that Anne has revealed any information learned in the course of her past representations of Owen on tax matters. Further, it is unlikely she even came across this information. Therefore a violation of her duty of confidentiality has [not] been violated in this instance, unless she revealed this information. There is no evidence here that she had revealed any of this information but she needs to be sure she does not reveal any of this without the informed consent of Owen.

Further, Anne has a duty of confidentiality to all current clients, Owen, F, and H. In representation she may not reveal information learned in the representation of the other clients unless the clients give informed consent confirmed in writing or an exception exists. Before revealing any information and before jointly representing the clients, Anne should have the clients waive their right for the information to be kept confidential. If this is not done either before rep or during rep, she will probably be forced to withdraw because her duty of loyalty to the other clients requires her to do so.

Duty to Keep Reasonably Informed

Anne [as an] attorney has a duty to keep all clients reasonably informed as to the status of their litigation. Here, this may conflict with Anne's duty of confidentiality to the other clients. If Anne learns of a matter central to her representation of the group, her duty of loyalty to a certain client may conflict with the duty to keep the other clients reasonably informed. As stated above, Anne should inform the clients ahead of time of this duty

and require them to waive their duty of confidentiality so she can fulfill her duty to keep all clients reasonably informed. If a client refuses to waive the duty of confidentiality, she should withdraw from representing all clients.

Duty Not to Use Information of past Clients to Disadvantage

Similar to the duty of confidentiality, an attorney may not use any information to the disadvantage of past clients unless the information is public or the client has given informed consent confirmed in writing. Here, Anne should be sure not to use any information learned in the representation of Owen to the disadvantage of Owen, even if the information is not itself revealed. This is particularly tough situation for Anne if she does come across a situation where some information used in the past representations may be used to the disadvantage of Owen; she will need to be sure not to reveal this information or get Owen's informed consent.

Fee Agreement

The ABA rules do not require a noncontingent fee arrangement to be in writing, although they highly suggest doing so. Further, the ABA rules require the attorney to notify the client within a reasonable time of representation of the fee arrangement.

The California rules that all fee arrangements, including noncontingent fee arrangements, be in writing, unless the services are for less than $1,000, it is a corporate client, the client has received the services in the past, or it is otherwise impracticable to do so. Here, none of the exceptions are met, unless Anne plans on charging less than 1k. Further, the payor, Owen, is an individual, not a corporation. She should give a written disclosure of this arrangement.

Duty of Loyalty

Anne has a duty of loyalty to all clients, which includes the duty to put the interests of your client before all others. In a joint rep situation this is tough to do, but it is required that all clients get treated fairly. Here, Owen is a past client of Anne and Anne hopes for future representation of Owen on his tax matters. Therefore, it will be tough for her to treat all clients equally. She should withdraw from rep for this reason.

Q3 Evidence

David and Vic were farmers with adjoining property. They had been fighting for several years about water rights.

In May, Vic and his wife, Wanda, were sitting in the kitchen when Vic received a telephone call. During the call, Vic became quite angry. As soon as he hung up, he said the following to Wanda: "That rat, David, just called and told me that he was going to make me sorry! He used some sort of machine to disguise his voice, but I know it was him!"

In June, Wanda and Vic passed a truck driven by David, who made an obscene gesture as they drove by. Vic immediately stopped and yelled that if David wanted a fight, then that was what he was going to get. Both men jumped out of their trucks. After an exchange of blows, David began strangling Vic. Vic collapsed and died from a massive heart attack. David was charged with manslaughter in California Superior Court.

At David's trial, the prosecution called Wanda, who testified about Vic's description of the May telephone call.

During cross-examination of Wanda, the defense introduced into evidence a certified copy of a felony perjury conviction Vic had suffered in 2007.

The prosecution then introduced into evidence a certified copy of a misdemeanor simple assault conviction David had suffered in 2006.

During the defense's case, David claimed that he acted in self-defense. He testified that he knew about two other fights involving Vic. In the first, which took place four years before his death, Vic broke a man's arm with a tire iron. In the other, which occurred two years before his death, Vic threatened a woman with a gun. David testified that he had heard about the first incident before June, but that he had not heard about the second incident until after his trial had commenced.

Assuming that all appropriate objections were timely made, should the California Superior Court have admitted:

1. Wanda's testimony about Vic's statement regarding the May phone call? Discuss.
2. The certified copy of Vic's 2007 felony perjury conviction? Discuss.
3. The certified copy of David's 2006 misdemeanor simple assault conviction? Discuss.
4. David's testimony about the first fight involving Vic breaking another man's arm with a tire iron? Discuss.
5. David's testimony about the second fight involving Vic threatening a woman with a gun? Discuss.

Answer according to California law.

Answer A

1. Wanda's testimony about Vic's statement concerning the May Phone call:

Logical and Legal Relevance

For evidence to be admissible it must be relevant which, under California law, is any evidence that has any tendency to make any fact of consequence, that is at issue, more or less probable than it would be without such evidence. In this case, Wanda's testimony concerning the phone call is relevant, in that it goes to show that David's intent to hurt Vic in some way prior to the June fight, a fact that is at issue, since David is claiming he acted in self-defense when he killed Vic.

Under Proposition 8 of the California Constitution (hereafter Prop. 8), any evidence that is relevant may be admitted in a criminal case. However, Prop. 8 makes an exception for balancing under California Evidence Code (hereafter CEC) 352, which gives a court discretion in excluding relevant evidence if its probative value is substantially outweighed by a risk of unfair prejudice, confusion of issues, or misleading the jury. In this case, the evidence has significant probative value, as it tends to show that David had a preexisting intent to hurt Vic and thus makes it more likely than not that he, not Vic, was the initial aggressor in the June fight that led to Vic's death. There is no indication that such evidence poses a risk of unfair prejudice, confusion of issues, or misleading the jury, and as a result, the evidence would not be barred by CEC 352.

Personal Knowledge

A witness may only testify as to those matters to which she has personal knowledge, in that she must have perceived the matter in some manner, such as by hearing or observing it. In this case, Wanda personally heard Vic's statement concerning the phone call, and as a result, she has sufficient personal knowledge to testify.

Authentication

All evidence must be authenticated, in that it must be proven to be what it purports to be. In this case, the authenticity of the phone call – namely, whether David was the person who actually made the call – comes into question, given that Vic stated David

was using some machine to disguise his voice. To authenticate a phone call, the person hearing it must be shown to have some familiarity with the speaker's voice, which can be gained either from prior interactions before the trial or subsequent to the trial. In this case, David and Vic had been fighting for several years about water rights, and thus it would be likely that Vic was familiar with the sound of David's voice. As a result, he would be qualified to make an identification of David's voice over the phone. As a result, Vic's statement concerning the phone call would be properly authenticated for purposes of trial.

Hearsay

A statement is hearsay if it is made out-of-court and being offered to prove the truth of the matter asserted. In this case, Wanda's statement contains two pieces of hearsay: 1) Vic's statement made to her, and 2) David's statements to Vic over the phone. Both are being offered to prove the truth of the matter asserted, in that Vic's statement is being offered to show that David called him and Vic knew it was him despite the voice distortion, and David's statement is being offered to show that David was planning to make Vic sorry.

In general, hearsay is inadmissible. However, the CEC does contain numerous exceptions to this general rule of hearsay inadmissibility that may allow these statements in. In a situation where a statement contains two levels of hearsay, such as here, both levels of hearsay must fall within an exception in order to be admissible.

Prop. 8 would not be sufficient to admit the evidence, as Prop. 8 contains an exception which requires hearsay rules to be satisfied before admitting relevant evidence.

David's Statement to Vic:

Admission of a Party-opponent:

If the statement is made by one party to the case and is offered into evidence against him by the opposing party, it is an exception to the hearsay rule and is admissible. In this case, the person who made the statement is David, the party-opponent, and it is being offered against him by the prosecution. Thus, it would be admissible under the exception for statements of a party-opponent.

Statement Against Interest:

A statement may also be admitted if it is mad by one party against their penal or pecuniary interest, and such party is unavailable. Here, David is available to testify, and there is no indication that he made the statement knowing that it was against his penal interest to do so; thus, the statement would not qualify under this exception.

Then-existing State of Mind:

A statement may be admissible to show the party's then-existing state of mind at the time the statement was made. In this case, Wanda can argue that the statement shows David's existing state of mind at the time, namely, that he was going to make Vic sorry and intended to act on his statement. If the court finds this to be accurate, the statement would be admissible.

Vic's Statement to David:

Contemporaneous Statement:

A hearsay statement is admissible if it is made describing or explaining certain conduct of the declarant while the declarant is engaged in such conduct. In this case, while the statement does describe Vic's conduct, namely, that he was just on the phone with David, Vic made the statement about the phone call only after he had hung up, not while he was actively listening to David. Thus, the statement was not contemporaneous with Vic's action and would not be admissible under this exception.

Excited Utterance:

A hearsay statement is also admissible if it describes an exciting or startling event or condition and is made while the person is still under the stress of excitement from an event or condition. In this case, the facts indicate that Vic became quite angry during the call, thus indicating the call itself was a startling event or condition. In addition, given David's particular statements to Vic during the call, namely, that he meant to make Vic sorry, a court most likely would find this to be a startling event or condition. Vic's statements about the call were made to Wanda as soon as he hung up, thus indicating that he was still under the stress of the phone call – furthermore, the statements are followed by exclamation points, implying that he was still agitated from it.

Therefore, the statement would qualify as an excited utterance, and would be admissible.

Thus, in conclusion, the court did not err in admitting Wanda's statement.

2. Certified Copy of Vic's 2007 Felony Perjury Conviction:

Logical and Legal Relevance

The evidence of Vic's conviction is logically relevant to the case, as it goes to show Vic's character for truthfulness, and thus would be used to impeach his statements to Wanda above concerning the telephone call, indicating that David did not make the call or have the intent to hurt Vic. Further, David's preexisting intent to hurt Vic is in dispute, since David is claiming he acted in self-defense and was not the initial aggressor. Thus, the evidence is logically relevant.

The prosecution could argue that the evidence is inadmissible under CEC 352, on the grounds that it would mislead the jury by making them think that Vic's character for truthfulness is relevant to whether he started the fight or not. However, it is unlikely a court would find that a reasonable jury would make this inference, given that the conviction was for perjury, not for a crime of violence, and it is being offered during the cross-examination of Wanda, thus indicating that it is meant to attack Wanda's testimony, not Vic's character for violence as a whole. Furthermore, the evidence has substantial probative value, as it tends to show that Vic is not truthful, and was therefore lying about the phone call from David – thus making David's self-defense argument more probable. Therefore, the evidence would not be barred by CEC 352.

Character Evidence

Character Evidence is any evidence offered to show that a person acted in conformity with character on a particular occasion, and is generally inadmissible. Here, the evidence of Vic's prior conviction is being offered to show Vic's action in conformity with character – namely, his character for lying – and thus would ordinarily be inadmissible. However, evidence of a witness's or declarant's character for truthfulness can be

offered for the purposes of impeachment to attack the witness's or declarant's credibility on the stand. Therefore, the evidence would not be inadmissible character evidence.

Impeachment

Any party is permitted to impeach a witness in order to diminish his or her credibility for speaking the truth. In addition, a declarant, or out-of-court speaker, may be impeached in the same manner that a testifying witness may be impeached. Here, as the evidence goes to show Vic's – the declarant in Wanda's testimony – character for truthfulness, it would be permitted into evidence.

Under California law, the court has the discretion to allow in evidence of prior felony convictions for the purposes of impeaching if such convictions are for crimes of moral turpitude. In this case, the conviction is for perjury, or lying on the stand, which is a crime of moral turpitude, and thus the court would have the discretion to admit it for purposes of impeachment. In addition, prior convictions can be admitted in the evidence either through cross-examination or extrinsic evidence. Here, the conviction was introduced during cross-examination, but by means of extrinsic evidence – namely, the certified copy of the conviction, and therefore is a permissible means of impeachment.

Hearsay

The conviction is hearsay, in that it is an out-of-court statement offered to prove the truth of the matter asserted, namely, that Vic was convicted for felony perjury in 2007. However, a judgment of a prior felony conviction is an exception to the general hearsay rule, and would thus be admissible.

In conclusion, the court did not err in admitting the conviction.

3. Certified Copy of David's 2008 Assault Conviction:

Logical and Legal Relevance

The evidence is logically relevant for two purposes – first, it goes to show that David had a character for violence, and thus acted in conformity with such character during

the June fight, thus negating his claim of self-defense. In addition, the evidence can be used to impeach David's credibility on the grounds that his prior conviction speaks to his ability for truthfulness.

However, the evidence would be subject to CEC 352, particularly, the possibility of unfair prejudice. In this case, the evidence is being used to show action in conformity with character, which is an impermissible character inference and would unfairly prejudice David. In addition, as will be demonstrated, the use for impeachment is impermissible. As there is no other probative value attached to the statement, it would be inadmissible under CEC 352 for being unduly prejudicial.

Character Evidence

As stated, character evidence is any evidence offered to show that a person acted in conformity with his character on a particular occasion. In a criminal case, such evidence cannot be offered by the prosecution unless the defendant "opens the door;" in other words, the defendant must put his character at issue, and the prosecution can only then rebut with character evidence. In this case, David had not yet opened the door to his character – while he did plead self-defense, it was only after the prosecution offered his assault conviction into evidence, not before. Therefore, the prosecution could not admit such evidence prior to David's opening the door, and the evidence should have been ruled inadmissible.

Proposition 8 would not be applicable, as it contains an exception for the rules concerning character evidence.

Impeachment

Under California law, a witness can only be impeached with a misdemeanor conviction if it is one of moral turpitude – otherwise, it is inadmissible. In this case, the conviction was for simple assault, which is not a crime of moral turpitude. As a result, it would be admissible.

Thus, the court erred in admitting the prior felony conviction.

4. David's Testimony about the First Fight:

Logical and Legal Relevance

The evidence is logically relevant, in that it goes towards David's self-defense claim by showing Vic's character for violence and thus indicating that Vic acted in conformity with character on this particular occasion – which is a fact at issue, since the prosecution claims that David was the initial aggressor, while David claims that Vic started the fight.

The evidence is also substantially probative, as it tends to show that Vic started the fight and thus makes David's self-defense claim more likely than it would be without the evidence. However, it does carry a risk of unfair prejudice, in that it involves a character inference concerning Vic's character for violence. However, as described below, the character evidence is permissible under the circumstances, and thus the evidence would not be inadmissible under CEC 352.

Character Evidence

David's introduction of Vic's breaking a man's arm with a tire iron is character evidence, as it is being used to show that Vic had a character for violence and acted in conformity with such character during the June fight. However, under the CEC, a criminal defendant can bring in evidence of the victim's character for violence if he claims self-defense and wishes to show that the victim was the initial aggressor. As this is David's purpose in bringing this evidence, since he is claiming self-defense and is brining in the evidence to show Vic's initiation of the fight, the evidence would be admissible.

Character evidence can take the form of either reputation evidence, opinion evidence, or specific acts. Under the CEC, a defendant is permitted to use any of these methods in bringing in evidence of the victim's bad character for violence during the direct examination. Here, David's testimony would constitute specific acts, as he is testifying to specific acts that Vic had done in the past. Therefore, the method of character evidence used is permissible.

Personal Knowledge

In this case, David does not have personal knowledge as to the fight. While he heard about it from someone before June, he did not personally witness it, nor is there any indication as to who he heard it from, for example, whether the person who told him was the other man involved in the fight whose arm was broken, or was from someone else. Thus, there is no indication that he has personal knowledge as to the fight, and as a result, the testimony would not be admissible.

Thus, the court erred in permitting David's testimony into evidence.

5. David's Testimony about the Second Fight:

Logical and Legal Relevance

The evidence is logically relevant, in that it, like the testimony about the first fight, goes towards David's self-defense claim by showing Vic's character for violence and his action in conformity with such character on this particular occasion – a fact at issue in this case. The evidence is also substantially probative, as it tends to show that Vic, not David, started the fight and makes David's self-defense claim more likely. In addition, as will be demonstrated below, the use of such evidence is a permissible use of character evidence, and as a result, the testimony would not be barred by CEC 352.

Character Evidence

As with the first fight, David's introduction of Vic's prior threatening a woman with a gun is character evidence, as it is being used to show that Vic had a character for violence and acted in conformity with such character during the June fight. Yet, as indicated above, a criminal defendant can bring in evidence of the victim's character for violence if he claims self-defense and wishes to show that the victim was the initial aggressor – which is the case here, as David is claiming self-defense and wishes to show that Vic was the initial aggressor.

As with the testimony above, this testimony takes the form of specific acts, as David is testifying as to specific violent acts that Vic took in the past, and thus is a permissible use of character evidence.

Personal Knowledge

Here, David again does not have substantial personal knowledge to testify as to the fight. He only heard about it from someone else, and there is no indication as to whom; he did not actually perceive it himself nor hear about it directly from the victim or someone who saw it occur. Furthermore, he did not hear about the second incident until after his trial had commenced, thus running the possible risk of such evidence not being particularly reliable or truthful and being created solely for the purposes of trial. As a result, David lacked sufficient personal knowledge to testify as to the second incident, and the court erred in permitting the evidence to be admitted.

Answer B

CA Constitution Truth-in-Evidence Provision

In California, evidentiary rules in criminal cases are sometimes changed by the Truth-in-Evidence Provision of the California Constitution. The Truth-in-Evidence provision generally provides that all relevant evidence is admissible in California criminal trials. As state constitutional law, the Truth-in-Evidence provision overrides any contrary California Evidence Code provisions. However, the Truth-in-Evidence provision itself explicitly preserves numerous rules of the California Evidence Code, including the rule against hearsay and the CEC 352 Balancing Rule. With this general framework in mind, we can discuss the individual evidentiary items.

Wanda's Testimony About Vic's Statement Regarding the May Phone Call

Logical/Legal Relevance

Irrelevant evidence is never admissible. In California, evidence is logically relevant if it has a tendency to make a disputed fact of consequence more or less probable. However, even if evidence is logically relevant, it may still be excluded at the discretion of the court if the court finds that the probative value of the evidence is substantially outweighed by concerns of prejudice, confusion or delay. Neither the basic rule governing relevance nor the balancing rule are changed in criminal trials by Proposition 8.

Here, Vic's statement that David planned to "make [him] sorry" is relevant because it tends to prove that David and Vic were in a feud and that David intended to hurt Vic. Thus, it tends to make more probable that David committed the later violence and strangulation to Vic. However, the fact David attacked Vic does not appear to be in dispute, because David is claiming he acted in self-defense. Thus, it is likely that Vic's statement about the phone call is not relevant under California standards.

If it is logically relevant, it will not be excluded. The evidence is probative of David having committed intentional violence against Vic, and there is no substantial risk of unfair prejudice.

Personal Knowledge

Wanda can only testify as to matters for which she has personal knowledge. Here, Vic told Wanda about the phone call directly; thus she personally perceived the statement by Vic and can testify about it.

Hearsay

Hearsay is an out-of-court statement that is offered to prove the truth of the matter asserted. Hearsay is not admissible unless an exception to the hearsay prohibition applies. Moreover, where a statement contains multiple levels of hearsay, a hearsay exception must apply to each level for the statement to be admissible.

Vic's Statement

In this case, Vic's statement that David called and said he would make Vic sorry is hearsay. Vic is making this statement to prove the truth of the matter asserted, i.e., that David did call and threaten Vic.

Vic's hearsay statement, however, is likely admissible as a spontaneous statement. Under the CEC, a hearsay statement made describing a startling event while still under the stress of excitement is an exception to the hearsay prohibition. In this case, Vic described the phone call to Wanda immediately after receiving it. Moreover, the evidence indicates that Vic was still in a state of anger and excitement after receiving the phone call. Thus, Vic's statement is a spontaneous statement.

The prosecution may also claim that Vic's statement was a contemporaneous statement. The contemporaneous statement exception applies to hearsay statements made by a declarant to describe his conduct contemporaneously to or immediately following his actually doing it. However, in this case, Vic's statement describes David's conduct, not his own, and thus would not fit within the contemporaneous statement exception.

David's Statement

David's statement that he would make Vic sorry is also an out-of-court statement. Moreover, it is also offered to prove the truth of the matter asserted in that it is intended to prove that David did intend to make Vic sorry.

David's statement is admissible under the present state of mind exception. The present state of mind exception applies to statements by a declarant that describe the declarant's state of mind at that time. The exception can be used to admit statements of the declarant's intent in order to prove that the declarant carried out that intent. In this case, David's statement that he "was going to make [Vic] sorry" was a statement of David's present intent and thus fits within the present state of mind exception. It is thus admissible to prove that David later carried out actions to make Vic sorry.

David's statement may also be a spontaneous statement. However, there is no indication that David was in a state of excitement, especially considering he initiated the call. Thus, this exception likely does not apply.

Accordingly, Vic's statement is admissible hearsay because both his statement and David's fit within hearsay exceptions.

Authentication of David's Statement

David's alleged statement, however, can only be admissible if properly authenticated. To be authenticated, there must be sufficient evidence for a jury to find that David's statement is what it was purported to be. In this case, Vic's statement indicates that the caller used a voice-changing device, calling into possible doubt whether David actually called. However, given Vic's belief that it was David that had called, and evidence of the feud between them, there is probably sufficient evidence for a jury to find David made the call. Thus David's statement is authenticated.

Spousal Privileges

David may claim that the evidence is not admissible because of spousal privileges. However, the spousal testimonial immunity only allows a current spouse to choose to refuse to testify against her husband. Moreover, although confidential marital

communications made during marriage are protected by privilege, this privilege is only held by either spouse, not an outside party. Thus, even though Vic's statement to Wanda was a confidential marital communication, only Vic or Wanda could assert the benefit of the privilege.

Confrontation Clause Issues

The confrontation Clause of the federal Constitution forbids the use of otherwise admissible testimonial hearsay evidence against a defendant if the defendant did not have an opportunity to cross-examine the hearsay declarant. "Testimonial" statements are those concerning a past event that are made to incriminate the defendant.

In this case, Vic's statement about David is likely not "testimonial" because it was not made to police or concerning a past event. Thus, it was not a statement that was made for the purposes of incriminating David and the Confrontation Clause will not apply.

Conclusion

Vic's statement should not have been admitted because it was irrelevant, but otherwise it would be admissible hearsay.

Certified Copy of Vic's 2007 Felony Perjury Conviction

Relevance

Vic's felony perjury conviction tends to prove that Vic's statement may have been a lie, negating [a] possible motive by David to attack Vic and strengthening his claim of self-defense. However, it is unclear whether there is any dispute about the veracity of Vic's statement, and thus it may not be relevant under California law. Assuming, however, that the fact of the phone call is in dispute, then Vic's prior conviction is relevant.

Authentication

The copy of the conviction must be authenticated. However, under the CEC, certified copies of public records are self-authenticating, meaning that the document itself provides sufficient evidence for a finding that it is genuine, and no additional foundational evidence is necessary.

Hearsay – Public Records Exception

The copy of Vic's conviction is hearsay because such a document is an out-of-court statement offered to prove the truth of its contents, i.e., that Vic was convicted of perjury. However, factual records made by public officials in the regular course of their duties are excepted from the hearsay prohibition. Records of convictions are made in the regular course of public officials' duties and thus are admissible hearsay as public records.

Character Evidence/Impeachment

Evidence of a victim's character to prove the victim acted in conformity with that character is generally inadmissible in a criminal trial. However, such evidence is permissible if first introduced by the defense or for the purpose of impeaching the victim. Moreover, Proposition 8 allows for the admissibility of the victim's character in a criminal trial wherever relevant, subject to balancing. Moreover, a hearsay declarant can be impeached by any applicable method.

In this case, the evidence was both introduced by David and to impeach Vic, so it is admissible either because David "opened the door" or because it is impeachment evidence.

Use of Conviction

However, a conviction can only be used for impeachment purposes under the CEC if the conviction is for a felony involving a crime of moral turpitude. Proposition 8 broadens this rule for criminal trials by allowing in any relevant convictions, which include misdemeanors involving a crime of moral turpitude.

In this case, Vic's conviction was for a felony involving a crime of moral turpitude, perjury, and thus was admissible to impeach Vic's statement.

Conclusion

The conviction was properly admitted as allowable impeachment evidence.

Certified Copy of David's 2006 Misdemeanor Simple Assault Conviction

Relevance

Evidence of David's misdemeanor assault conviction is relevant because it tends to prove that David was an aggressive individual and may have been the aggressor in the fight against Vic. This does concern a fact of consequence that is in dispute because it undermines David's claim of self-defense.

However, this evidence may be excluded because of its prejudicial effect. By introducing evidence of David's conviction for a violent crime, there is a risk that the jury will decide to punish David because of this past crime or "criminal character" rather than the conduct at issue in this case. Thus, the court should have excluded this evidence because of the risk of unfair prejudice.

Authentication

As with Vic's conviction copy, David's conviction copy is a self-authenticating document.

Hearsay

The certified copy of David's conviction is admissible under the public records exception for the reasons discussed above.

Character Evidence

Generally, evidence of a defendant's character cannot be introduced to prove the defendant acted in conformity unless first introduced by the defendant. However, where the defendant has introduced evidence that the victim has a character for violence, California law permits the prosecution to introduce evidence of the defendant's same character trait for violence.

In this case, the prosecution may be introducing David's prior conviction as evidence that David had a character for violence and acted in conformity on the particular occasion when he attacked Vic in June. This would be an inadmissible use of the conviction because at this point in the trial, David had introduced no evidence regarding his own character or evidence that Vic had a character for violence. However, because

the defendant later testified about Vic's prior fights, the error of admitting evidence of David having a trait for violence was harmless.

The Truth-in-Evidence Provision does not change the rules regarding character evidence about a criminal defendant.

Impeachment by Conviction

As discussed above, misdemeanor convictions cannot be used to impeach a witness or party. However, because of the Truth-in-Evidence provision, misdemeanors involving crimes of moral turpitude are relevant impeachment evidence.

In this case, the defendant has not yet testified, so it was improper for the prosecution to introduce the conviction in order to impeach him. Moreover, a conviction for simple assault is not a crime of moral turpitude because it does not involve lying or similar immoral conduct. Thus, the conviction is not admissible for impeachment purposes.

Other Purposes

The conviction may be used for non-character and non-impeachment purposes, however. Conviction evidence can be used if it is relevant to establishing the defendant's motive, intent, and absence of mistake, or other relevant non-character issues.

In this case, David's prior assault conviction does not appear to be relevant for any purpose besides proving that David was a violent individual. Thus, there are no other purposes for which it may be admissible.

Conclusion

David's conviction should not have been admitted because of its prejudicial effect.

David's Testimony About First Fight

Relevance

David's testimony about Vic's first fight involving the tire iron is relevant because it tends to prove that David reasonably believed Vic was violent and thus David's actions were reasonable self-defense. The fact of David's self-defense is in dispute.

Personal Knowledge

David cannot testify on matters to which he does not have personal knowledge. Here, David is claiming that he knew about the fight, however, and thus may have had personal knowledge about Vic's prior fight.

Character Evidence

As discussed above, the defendant can open the door to prove the victim's character. Thus, David could properly introduce evidence of Vic's character to prove that Vic acted in conformity with that character by attacking David on the occasion at issue.

Other Purposes

Furthermore, the evidence is also relevant to showing David's reasonable belief that he was in danger.

Conclusion

David's testimony about Vic's first fight was properly admitted.

David's Testimony About Second Fight

Relevance

David's testimony about Vic's second fight also tends to prove Vic was an aggressor. However, its probative value is likely substantially outweighed by unfair prejudice because it tends to show that Vic is a violent individual and thus may have deserved David's strangulation even if it wasn't in self-defense. The probative value is limited because David did not know about this fight before his fight with Vic, and thus it cannot be probative of David's belief regarding Vic's nature.

Personal Knowledge

David likely did not have personal knowledge of this incident, and thus it should not have been admitted on these grounds too.

Character Evidence

David could open the door on character evidence regarding Vic.

Conclusion

This evidence should not have been admitted because of its unfairly prejudicial impact.

JULY 2010

ESSAY QUESTIONS 4, 5, AND 6

California Bar Examination

Answer all three questions. Time allotted: three hours

Your answer should demonstrate your ability to analyze the facts in question, to tell the difference between material and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

Q4 Business Associations

Alfred, Beth, and Charles orally agreed to start ABC Computers ("ABC"), a business to manufacture and sell computers. Alfred contributed $100,000 to ABC, stating to Beth and Charles that he wanted to limit his liability to that amount. Beth, who had technical expertise, contributed $50,000 to ABC. Charles contributed no money to ABC but agreed to act as salesperson. Alfred, Beth, and Charles agreed that Beth would be responsible for designing the computers, and that Charles alone would handle all computer sales.

ABC opened and quickly became successful, primarily due to Charles' effective sales techniques.

Subsequently, without the knowledge or consent of Alfred or Charles, Beth entered into a written sales contract in ABC's name with Deco, Inc. ("Deco") to sell computers manufactured by ABC at a price that was extremely favorable to Deco. Beth's sister owned Deco. When Alfred and Charles became aware of the contract, they contacted Deco and informed it that Beth had no authority to enter into sales contracts, and that ABC could not profitably sell computers at the price agreed to by Beth. ABC refused to deliver the computers, and Deco sued ABC for breach of contract.

Thereafter, Alfred became concerned about how Beth and Charles were managing ABC. He contacted Zeta, Inc. ("Zeta"), ABC's components supplier. He told Zeta's president, "Don't allow Charles to order components; he's not our technical person. That's Beth's job."

Charles later placed an order for several expensive components with Zeta. ABC refused to pay for the components, and Zeta sued ABC for breach of contract.

Not long afterwards, ABC went out of business, owing its creditors over $500,000.

1. How should ABC's debt be allocated? Discuss.

2. Is Deco likely to succeed in its lawsuit against ABC? Discuss.

3. Is Zeta likely to succeed in its lawsuit against ABC? Discuss.

Answer A

1. How should ABC's Debt be Allocated?

To begin, one must determine the nature of the organization that was created. In this instance, there were no formalities or written arrangements to begin a business with Alfred (A), Beth (B), and Charles (C). Corporations require formal articles of organization to be filed with the state. In this instance, it is much more likely that a partnership existed. No formalities are required to form a partnership. Partnerships exist when two or more people agree to carry on a business for profit. In this case, ABC was formed to sell computer items for profit. Generally, partnerships are also presumed if there is an agreement to share profits equally. In this instance, there is no indication as to what profit sharing arrangement existed, if any at all. As such, the default rule is that this would be a partnership with equal sharing of profits. Furthermore, without an express agreement as to how losses will be shared, the default is that they will be shared just as the profits are shared. Therefore, losses will also be shared equally. The amount of capital contribution by each partner is irrelevant to this equation.

A will argue that he expressed a desire to limit this liability. However, absent a formal agreement and filing of the proper limited liability forms with the state (articles of organization and an operating agreement) for a Limited Liability Company, A is going to be considered a general partner. This is further indicated by his general managerial position, apparent equal voting rights, and active management in the company. A was the one to call Zeta (Z) and tell them not to accept orders from C. This indicates his active management. Limited partners, those with limited liability, generally have no managerial functions. Given there is no formal limited liability structure or arrangement, and given the various management positions by each person, they are all general partners who will share equally in the profits and losses of the business.

On top of profit and loss sharing, each general partner is liable for the debts of the entire partnership. Each partner is considered an agent of the partnership. Under agency law, any contract or tort entered into in the scope of the partnership is deemed to be partnership debt, and all partners are jointly and severally liable. As such, any of the following contracts that were properly entered into and authorized by a partner having

authority are partnership debts that A, B and C will be jointly and severally liable for as individuals.

In the event that the copy is forced to liquidate and pay, the order of payment is as follows. First, the company must pay all debt creditors first. Second, the company must pay back all capital contributions from each partner, which would be $100,000 to A and $50,000 to B. While C may argue that his contribution was in sales, partners generally have no right to salary or compensation for services unless they are winding up. As such, C is not entitled to this amount as a capital contribution absent any other agreement. Finally, any remaining loss or profit would be distributed as applicable, which is equally in this case.

2. Is Deco likely to Succeed in its Lawsuit against ABC?

Validity of the Agreement

In order to prevail Deco (D) must show that B was authorized to enter the contract. In general, all partners are authorized as agents. However, the nature of their authority may vary. Express authority exists when the arrangement expressly states what an agent may do. Here, there is no indication that B was told to enter into a sales contract. In fact, sales were expressly reserved to C. Implied authority exists when the function is 1) necessary to carry out other responsibilities, 2) one that has been done in the past dealings without object[ion], or 3) normal custom for someone with the position of the agent. Here, sales are not necessary to B's technical design responsibilities, and she has never sold before. However, D could argue that a general partner in a business customarily has authority to enter contracts. Still, the express reservation of the right to likely kills this argument. Finally, D may argue apparent authority. This exists when the company cloaks the agent with authority to do certain things and later withdraws or limits that authority without notifying a customer who is still relying on that authority. In this case, there is no indication that ABC held B out to be a sales representative in the first instance. There was likely no good basis that D had to rely on any authority from ABC. However, given that B herself is a managing partner, D likely could argue that B's actions were sufficient to show that the corporation had given her authority to act. As such, they will argue that it was reasonable to rely on this without any other notice. This would bind ABC. Failing to perform on the contract is a breach of duty and the

partnership, as well as the individual partners, will be obligated to pay as described above.

Breach of Duty of Good Faith and Loyalty

Partners have fiduciary duties to each other that are described as the utmost duty of good faith and loyalty. Under the duty of loyalty, a partner must not engage in self-dealing, usurping business opportunities, or competing against the company. In this instance, B engaged in a transaction with her sister who owned D. The terms were apparently very favorable to D. This could be viewed as self-dealing because it promoted B's familial interest with her sister and was not in the best interest of the company. The duty of good faith requires that partners act in a way that solely benefits and is advantageous to the partnership. Again, B's deal with D didn't garner the profits that it should have. Furthermore, this duty requires disclosure of conflicts of interest to the other non-interested partners so that they can either cleanse the transaction through ratification or disapprove it. There is no indication that B informed her partners. The other partners have a very strong argument to bring a claim against B for these breaches in duty. This would place the entire liability for the breached contract on B, which would deviate from the normal liability scheme described above.

3. Is Zeta likely to Succeed in its Lawsuit against ABC?

Validity of the Agreement

Zeta's (Z) claim on this contract again hinges on the authority of C to enter into it. In this instance, C has the express authority to enter into sales contracts. However, this contract was for components being purchased by C, which is outside his express authority. Z may argue that components are necessary to production and later sales, which gives C implied authority to enter into contracts. Plus, it is reasonable to assume that a partner who can sell can also buy. This also lends credence to a claim of apparent authority. Z will argue that ABC has held C out as a person whose sole responsibility is to contract, and it reasonably relied on that representation. Z's main issue is that A called and gave actual notice that C could not enter into this contract. This would destroy any reasonable reliance that Z had. A told Z that B was the technical person, not C. As such, Z should have seen that his was outside the scope of C's authority.

Notwithstanding the arguments above, C is still a general partner in the company. If Z is at all knowledgeable about agency law and partnerships, Z could rightly assume that one partner doesn't have the sole authority to terminate the management authority of another partner. Management functions are only transferable and alterable upon a unanimous vote of the partnership. In this case, A alone tried to limit what C could do. Z may argue that it knew this wasn't a proper action by A and more reasonably relied on A. In the end, I think it is likely that the court would find that Z at least should have investigated further once given notice that C may not have authority, and failure to follow through made there [sic] reliance on his apparent authority unreasonable. As such, this contract is invalid and will not bind ABC. Should the court disagree, any resulting contract liability would be distributed among the partnership and A, B and C as described above.

Effect of A's Notice on C's Duties

A might also claim that C's activities outside his scope of duty were not in good faith. There is no indication that loyalty of fair dealings are implicated. So far as we know, the contract with Z could have been completely advantageous and proper. However, the argument is that acting in an area in which C knows nothing about shows a lack of obedience to his agency limits and lack of good faith in honoring partnership agreements on authority. However, nothing in C's behavior indicates an improper motive. This is a young startup with new partners. It is unlikely that C thought he was doing anything wrong. Rather, it is reasonable to assume he thought he was helping out in another area. Also, A didn't act with the consent of B. As such, there is no indication that the majority of management is at odds with C's decision to enter the contract. This appears to be solely the reservation of A with B and C. In the end, there was likely no breach of duty and any potential liability from this contract would flow to all, not just C.

Answer B

1.) How should ABC's Debt be Allocated?

The preliminary issue to determine is what type of business was formed when Alfred (A), Beth (B), and Charles (C) agreed to start ABC computers.

Formation of a General Partnership

A general partnership is formed when two or more people agree to run a business for profit, contribute funds or services in exchange for a share of the profits. Unlike a limited liability corporation or limited partnership, a general partnership requires no formal paperwork to be filed with the secretary of state. If the above definition of a general paratnership is met, then the business will be presumed to operate like a general partnership. Here, A,B, and C agreed orally to start ABC computers and did not file any corporate or partnership paperwork with the state. A contributed $100,000, B contributed $50,000 and her technical expertise and C contributed his services as a salesperson. They distributed the work amongst themselves. Although the facts do not state that they shared in the profits, it can be assumed that they shared in the profits because ABC becomes successful. Thus, because no formal paperwork was filed, all three members contributed money or services and share in the profits, there is a presumption that ABC operated as a general partnership.

Characteristics of a General Partnership

General Liability

In a general partnership, all partnerships share equally in liability and are personally liable for the debts of of the other partners and the partnership. Although A stated that he wanted to limit his liability, there are no facts to support that this was actually accomplished through an agreement, contract or that the partnership filed for a limited liability partnership. The only way that A could limit his liability would be to become a limited partnership, but that can only be done if the proper paperwork is filed with the state; there is at least one limited partner and at least one general partner. Because there is an absence of the necessary components of a limited liability partnership, A's liability will not be limited.

Each Partner is a Fiduciary and Agent to the General Partners and Partnership

Each partner is a fiduciary and agent to the general partnership and general partners. Thus, the laws of agency apply to the partners when acting in furtherance of and conducting business for the partnership.

Default Rules for General Partnership

In absence of an agreement governing the partnership, the default rules of partnership will be applied by the court. Here, A, B, C only had an oral agreement about how to run the business and not formal structure or governing documents for the partnership. Thus, the default rules will be applied.

Several of the key default rules that are applicable in the present situation include: Each partner has equal power to manage the partnership; when there are profits they are shared equally and losses are shared like profits.

Dissolution of General Partnership

Upon dissolution of a general partnership, there is a specific order in which assets must be distributed. First, creditors must be paid and general partners who loaned money to the partnership. Second in line to [be] paid are general partners who made capital contributions. Lastly, any surplus or profits will go to the general partners or the general partners may be personally liable for existing debt of a dissolved corporation. Partners who contributed capital contributions and made loans to the company should receive their money back if it is possible upon dissolution.

Here, ABC went [out] of business and owed its creditors over $500,000. It is unclear how much profit was made or the assets of the partnership at the time it went out of business. Assuming the partnership went out of business due to lack of profits or funds, then the creditors are to [be] paid all that was left of the partnership's assets and each general partner will be personally liable for the remaining that is owed to the creditors. As discussed above, although A wanted to limit his liability, that is not done properly, so each partner will be equally liable for the debt after all partnership assets have been used to pay the creditors and there remains a debt stilled owed to the creditors.

2.) Is Deco likely to Succeed in Lawsuit against ABC?

Here, B as a general partner of ABC entered into a written sales contract with Deco, Inc. The contract was extremely favorable to Deco and not ABC. Deco was owned by B's sister. When A and C learned of the agreement with Deco they informed Deco that B had no authority to enter into sales contracts and that ABC could not profit if it sold computers at that price. ABC refused to deliver the computers and Deco sued. The issues are whether B can bind the partnership and whether A and C can cancel the contract that B made.

B's Authority to Enter Into Agreements that Bind the General Partnership

Absent an agreement, the default rules of partnership state that each general partner has an equal right to manage the partnership and act as agents for the partnership in the usual course of business. This means that the general partners have authority to enter into contracts that bind the corporation as long as the contracts are in the regular course of business of the partnership. The other partners do not need to assent to know about the agreement, but will become liable on any agreement that is validly entered into by one of the other partners in the course of business. Here, A, B, and C agreed that B would be responsible for designing computers and C alone would handle computer sales. Although they delegated responsibility for tasks, there is no agreement that limited authority of any of the partners; thus the default rules apply (although one could argue that their delegations of tasks was akin to agreement to limit authority, but the mere oral agreement is not sufficient to rise to a degree of limited partnership rights). Therefore, B can enter into contracts in the regular course of business the bind the general partnership without the knowledge or consent of either A or C. Thus, it was proper for B to use her authority as a general partner to enter into an agreement with Deco to sell computers to Deco.

B's Fiduciary Duties of General Partners and Partnership

However, every general partner owes a duty to the partnership and general partners. Each partner must act as a fiduciary, owing a duty of care and loyalty to the general partnership. Each partner has a duty of lolyalty to the corporation to do [sic] not compete with the partnership, usurp the partnership's opportunities or engage in any

self-dealing where the paratner receives a benefit to the detriment of the corporation. Here, B entered into a contract with Deco, which was owned by her sister. Inherently, there is nothing outrightly wrong with entering into an agreement with a family member. However, the contract that B entered into with her sister was extremely favorable to her sister and would actually cause ABC not to profit. Thus, the agreement was extremely beneficial to Deco, and B's sister, to the detriment of the partnership. Therefore, B's actions can be characterized as self-dealing because her sister received a benefit to the detriment of the partnership. Thus, B breached her duty of loyalty to the partnership.

When a partner breaches a duty of loyalty, the profits can be disgorged and the contract can be revoked or rescinded. Here, because B breached her duty of loyalty to the partnership in forming the contract with her sister, the contract can be revoked. Further, a court would likely allow the contract to be revoked. Because B's sister was a wrongdoer because [she] was well aware of B's positon and responsibility/duty to the general partnership, B's sister cannot claim that she was innocent and did not know that her sister owed a fiduciary duty to the corporation.

Thus, although B had authority to enter into the contract with Deco, because B breached her duty of loyalty to ABC, ABC can refuse to deliver the computers under the contract and hold B personally liable for damages.

3.) Is Zeta likely to Succeed in Lawsuit against ABC?

Here, A contacted Zeta, Inc., a supplier of components for ABC, and told the President to not allow C to order components because that was B's job. Then C placed an order with Zeta and ABC refused to pay for components. Zeta, Inc. then sued ABC. The issues are whether A can limit C's power and whether after informing Zeta that C should not be allowed to place orders, whether ABC can refuse to pay for the components ordered by C.

A's Authority to Revoke C's Authority

As discussed above, in absence of an agreement the default partnership rules apply. In the present case, ABC has no formal agreement and thus each partner will share equally in the management duties. Additionally, each manager has the authority to bind

the partnership. Here, A and C have equal management power and power to bind the coporation. The issue is whether A has the authority to revoke C's power and authority absent any agreeement.

A does not have authority to revoke C's power and authority to enter into contracts simply because he is concerned about how B and C were managing the corporation. There was no agreement as to what A was responsible for. In light of the fact that no partner was given a power similar to that of a CEO or oversight or management of the entire partnership and other partners' action, A had no authority to revoke C's authority.

Further if A was under the impression that he was [a] limited partner, he would not be allowed to engage in managing the partnership under the traditional limited liability partnership model. Under the traditional limited liability partnership model, limited partners have limited liability and cannot engage in management of the partnership. If limited partners engage in management of the partnership, then they forfeit their limited liability status. However, under the newly revised Uniform Partnership Code, if it applies in this jx, limited partners may retain their liability and manage the partnership.

Although A had no power to revoke C's authority, the president of Zeta was put on notice that A did not want C to have the ability to bind the partnership due to how management powers/oversight was delegated. Thus, the president of Zeta should have thought twice before entering into an agreement with C, because at the very minimum with such informtion Zeta's president should have known that there was some conflict over management powers or personal issues between C and A. It was irresponsible of Zeta's president to enter into the contract with C after receiving such information fromA.

C had authority to enter into the agreement with Zeta because C's authority was not limited in any way. Thus, although Zeta was aware that he could potentially have problems with the contract, the contract was validly entered into by C (assuming all contract formalties were met). Thus, the partnership and all the partners will be personally liable for breach of contract to Zeta.

Q5 Criminal Law and Procedure

Harriet was on her porch when Don walked up, pointed a gun at her, and said, “You’re coming with me.” Believing it was a toy gun, Harriet said, “Go on home,” and Don left.

While walking home, Don had to pass through a police checkpoint for contraband. Officer Otis patted down Don’s clothing, found the gun, confiscated it, and released Don. Later, Officer Otis checked the serial number and located the registered owner, who said the gun had been stolen from him.

A month later, Officer Otis arrested Don for possession of stolen property, i.e., the gun. During a booking search, another officer found cocaine in Don’s pocket.

Don was charged with possession of stolen property and possession of cocaine. He moved to suppress the gun and the cocaine, but the court denied the motion.

While in jail, Don drank some homemade wine. As a result, when he appeared in court with counsel, he was slurring his words. The court advised Don that if he waived his right to a trial, it would take his guilty plea and let him go on his way. Don agreed and pleaded guilty. Subsequently, he made a motion to withdraw his guilty plea, but the court denied the motion.

1. Did the court properly deny Don’s motion to suppress:
    a. the gun? Discuss.
    b. the cocaine? Discuss.

2. Did the court properly deny Don’s motion to withdraw his guilty plea? Discuss.

3. If Don were charged with attempted kidnapping against Harriet, could he properly be convicted? Discuss.

Answer A

1) Whether the Court Properly Denied Don's Motion to Suppress

A) The Gun

Officer Otis (O) discovered a gun on Don (D) while D was walking home and subsequently encountered a police checkpoint for contraband. Thus, whether the gun is admissible evidence depends on whether the checkpoint was constitutional. D will likely argue that the checkpoint violated his Fourth Amendment rights, which prohibits unreasonable searches and seizures.

The Checkpoint

All Fourth Amendment violations must come from the hands of the government. This is easily satisfied because the checkpoint at which the gun was discovered was a police checkpoint. However, the general rule is that for a checkpoint to be outside the scope of Fourth Amendment protection, the checkpoint must be conducted in a nondiscriminatory manner, and must be for purposes other than the police investigation of criminal activity. In this case, the checkpoint was likely conducted in a nondiscriminatory manner. A nondiscriminatory checkpoint generally checks every person who passes through or some other equal rule, such as every third person that passes through.

However, D will likely argue that the checkpoint is invalid because it directly relates to the investigation of criminal activity. The United States Supreme Court has held that a constitutional checkpoint only occurs when the underlying purpose is not criminal investigation. Such examples include DUI checkpoints being motivated by the state interest of safety on public roads, and informational checkpoints, to investigate the occurrence of an accident that happened in the area recently. In this case, the police checkpoint is specifically looking for contraband, i.e., illegal materials. While O may argue that the checkpoint's purpose of checking for contraband directly advances public safety, this argument will likely be rejected given the fact that it directly relates to criminal investigation. Thus, the checkpoint is unconstitutional.

Since D's gun was discovered through an unconstitutional police checkpoint, the court improperly denied D's motion to suppress the gun.

Terry Stop and Frisk

O may attempt to argue that the gun is a valid seizure because it was performed pursuant to a Terry stop and frisk. A stop and frisk allows an officer to pat down a suspect when the officer has a reasonable suspicion that the suspect may be armed and dangerous. In this case, O will argue that he had a reasonable suspicion that D could be armed, thus giving O the ability to pat down D's clothing, thus leading to a constitutional avenue towards discovery of the gun. However, this argument will likely fail because the Supreme Court has held that "reasonable suspicion" requires more than a "hunch," but instead a set of articulated facts that give rise to the notion that criminal activity is afoot. In this case, O had no suspicion because he was merely checking people at the police contraband checkpoint. In other words, O had less than a hunch, and thus no reasonable suspicion that would give rise to a constitutional stop and frisk.

Thus, as discussed above, the court improperly denied D's motion to suppress the gun.

B) The Cocaine

At the checkpoint, O seized the gun from D. O subsequently checked the serial number and located the registered owner of the gun, who said that the gun had been stolen from him. One month later, O arrested D for possession of stolen property. During a booking search at the police station, another officer found cocaine in D's pocket. Thus, the admissibility of the cocaine depends on whether the booking search was constitutional.

Booking Search

As discussed above, the Fourth Amendment protects against unreasonable searches and seizures. The Supreme Court, however, has held that administrative searches, such as routine booking searches performed for safety and to ensure that suspects' personal items are not lost, are not subject to the Fourth Amendment. Thus, the prosecution will likely argue that the cocaine was properly found and confiscated.

However, D will argue that the cocaine should be suppressed because the booking search was based on an arrest founded on probable cause from an illegal search, i.e., the checkpoint discussed above.

Fruit of the Poisonous Tree

The fruit of the poisonous tree doctrine precludes the admission of evidence that was lawfully seized based on prior unconstitutional acts. As discussed above, D will argue that the gun which led to his arrest and subsequent booking search was unconstitutional, and therefore the cocaine is a fruit of the poisonous tree. In response, the prosecution will likely argue that the cocaine is admissible under the independent source and inevitable discovery doctrines.

The independent source doctrine makes evidence admissible because the police had an alternative, constitutional, avenue towards its discovery. This argument is likely to fail. The only avenue the police have to D's cocaine is from a booking search based on an arrest founded on probable cause from an illegal search. There is no other source. While O may argue that his independent source is his research of the serial number and discussion with the registered owner, such an argument is likely to fail because O would not have performed those actions without the illegally confiscated gun. Thus the independent source doctrine does not apply.

The inevitable discovery doctrine makes evidence admissible because the police authorities would have eventually discovered the evidence through their investigation anyway. The argument is also likely to fail for the same reason that the independent source doctrine, discussed above, will fail: the only route towards the cocaine that O had was from a gun that was from the fruit of an illegal search.

Thus, the cocaine is the fruit of a poisonous tree, and should be suppressed unless the prosecution can show that the taint associated with the illegal search is attenuated.

Attenuation of Taint

The attenuation of taint doctrine will admit improperly seized evidence if the police can show factors that have led to the attenuation of the taint. In this case, O will argue that, despite the fact that the gun was discovered at a police checkpoint, the probable cause for the arrest was for stolen property. Specifically, it was O's investigation into the serial number of the gun and discussion with the true registered owner of the gun which led to the probable cause to arrest D for stolen property. Prior to this attenuation, the gun was merely the product of an illegal search, but now the gun is evidence in a claim of stolen property by the registered owner. Furthermore, O will argue that an entire month passed by, thus indicating that the illegal search was not the main motivating factor in D's ultimate arrest for stolen property. A court would likely agree.

Thus, the court properly admitted the cocaine discovered in the booking search because, although the arrest was based on a gun discovered in an illegal search, there was a sufficient attenuation of the taint of that illegal search to support probable cause to [sic] for D's arrest for stolen property.

2) Whether the Court Properly Denied Don's Motion to Withdraw His Guilty Plea

Whether the court denied D's motion to withdraw his guilty plea depends on: (1) whether D's initial guilty plea was knowing and voluntary, and (2) whether proper formalities were followed when D entered his guilty plea.

D's Guilty Plea and Voluntary Intoxication

The general rule is that a defendant's plea of guilty must be knowing and voluntary. In this case, D drank homemade wine and as a result, he was slurring his words. This indicates that, even if counsel and the court advised him of the nature of his rights, it is likely that D lacked capacity to understand the material details associated with a guilty plea and subsequently D could not have made a knowing and voluntary guilty plea.

Formalities to Enter a Guilty Plea

For a guilty plea to hold up under appellate review, at the time the defendant enters a guilty plea, the judge must inform the defendant: (1) the maximum possible sentence; (2) the mandatory minimum sentence; (3) that he has a right to a jury trial, and; (4) that

he has a right to plead not guilty. All of this information and dialogue must be on the record.

In this case, none of these formalities were followed. Instead, the court merely advised D that if he waived his right to a trial, the court would take his guilty plea and let him go on his way. Thus, although the court somewhat advised D regarding his right to a jury trial, it is clear that the court failed to inform D of the maximum possible sentence, the mandatory minimum, and that he has the right to plead not guilty.

Thus, the court improperly denied D's motion to withdraw his guilty plea because: (1) it is highly unlikely that D lacked capacity through voluntary intoxication to making a knowing and voluntary guilty plea, and (2) the court failed to follow constitutionally required formalities for accepting and entering a guilty plea.

3) Whether Don May Properly Be Convicted of the Attempted Kidnapping of Harriet

Whether D may be convicted of attempting to kidnap Harriet depends on whether D committed the criminal act ("actus reus") simultaneously with the requisite mental intent ("mens rea").

Mens Rea

Since the jurisdiction is not identified, this analysis presumes that the common law is applied. Under the common law, a crime may either be a general intent crime or a specific intent crime. While there is no clear-cut rule delineating the two, suffice to say that a general intent crime requires a lower mental threshold, while a specific intent crime requires a higher threshold of mental acknowledgment, such as purposefully engaging in the crime or knowing the likely outcome of the defendant's acts.

In this case, kidnapping is a general intent crime. However, if D were charged with attempted kidnapping, it would be a specific intent crime. The inchoate crime of attempt requires that the defendant have the specific intent to commit the crime. Thus, to be properly convicted a jury must find that D specifically intended to kidnap Harriet (H). It is likely that D intended to kidnap Harriet, as he pointed a real gun at her and said, "You're coming with me." While one act (pointing the gun) or the other (saying "You're

coming with me") alone may be insufficient to establish that D had the mens rea to effectuate a kidnapping, both acts together make it highly likely that D intended to kidnap H. However, D will point out that after H told him to go home, D obliged and left. Thus, it is unclear whether D had the requisite mental state to commit an attempted kidnapping.

Thus, because it is unclear whether D had the requisite mental state to commit an attempted kidnapping, required under the inchoate crime of attempt, D may not have the requisite mens rea to [be] convicted of attempted kidnapping. However, specific intent may be indicated by the actions that D took to effectuate the kidnapping, discussed below.

Actus Reus

While the normal crime of kidnapping requires that D falsely imprison Harriet (H) and either move her location or conceal her presence from others for an extended period of time, since D is hypothetically being charged with attempted kidnapping, D need not go that far. Under the common law, to be convicted of an attempted crime the defendant must be in "dangerous proximity" of committing the crime, while in other jurisdictions the defendant need only take a "substantial step" towards the commission of the crime.

In this case, it is likely that D's actions satisfy both the "dangerous proximity" and "substantial step" doctrines. Walking up to someone, pointing a gun at them, and saying "You're coming with me" is within the dangerous proximity of committing the crime, as the defendant is face-to-face with the intended kidnapping victim coupled with the fact of oral communication threatening or coercing the intended victim. Likewise, the same actions are obviously a substantial step towards the commission of a kidnapping, as D has taken the time to approach H at her house, pull a gun on her, and coerce her to come with D, which would have the result of completing the kidnapping crime, i.e., by moving the victim.

Furthermore, these acts are extremely probative as to D's mental state, as it is highly unlikely that someone who not only took a substantial step towards attempting a

kidnapping, but is also in the dangerous proximity of doing so, would have the requisite mental state to be convicted of attempt.

Thus, if D were charged with attempted kidnapping against H, D could properly be convicted for the reasons discussed above.

Answer B

1a. Don's Motion to Suppress the Gun

Don's motion to suppress will be based on the argument that the confiscation of his gun was an impermissible search-and-seizure in violation of his Fourth Amendment rights.

Governmental Conduct

For Fourth Amendment rights to attach, the search-and-seizure must have been done by government actors. In this case, Otis stopped Don at a checkpoint, and was presumably on duty. Note that even if Otis had stopped and searched Don while he was off duty that would still be sufficient for governmental conduct.

Reasonable Expectation of Privacy

In addition, the Fourth Amendment also requires that the individual have a reasonable expectation of privacy in the items or place searched. Here, the gun was located in Don's clothing and on his person. The fact that the police had to pat down Don to find it alone evidences that he had a reasonable expectation of privacy. The fact the gun was stolen and that Don was not the proper owner is not sufficient to demonstrate that he lacked a reasonable expectation of privacy.

Warrant

Generally, 4th Amendment search requires a valid warrant, where there must be particularity and probable cause. Here, there was no warrant. Therefore, Otis cannot have been in good faith relying on the warrant even if it was defective, so an exception to the warrant requirement must apply.

Checkpoint

Don will first argue that the confiscation of the gun was invalid because the checkpoint was not authorized by law. A valid checkpoint requires a neutral reason for stopping or selecting people for the checkpoint. For example, if the officers stop every third person that passes through the checkpoint, that would be a sufficiently neutral basis for the checkpoint. In this case, there is no specific evidence of an improper police purpose in stopping Don and the officer's actions are thus presumptively going to be valid.

A valid checkpoint also must address some legitimate government concern or interest. Again as an example, a checkpoint to stop drivers and watch for those that are driving under the influence is permissible because there is a valid interest in keeping dangerous drunk drivers off the road. Here, the checkpoint was to stop pedestrians carrying contraband. Don will argue that pedestrians, even if they are intoxicated, do not present inherently dangerous risks similar to that posed by drunk drivers.

In addition, Don will argue that while it may be permissible to stop pedestrians for specific reasons, there must be some sort of articulable purpose. Here, the officers are simply looking for contraband, which could be evidence of any offense. Officers are not allowed to stop every passerby without having any reason for the stop. Therefore, the checkpoint here is probably not valid absent some more articulable purpose.

Terry Stop and Frisk

A secondary justification to stop Don would be on the basis of a Terry stop. A Terry stop requires reasonable suspicion that the individual stopped either be dangerous or have some improper purpose. If the officer has reasonable suspicion necessary for the stop, if the officer also has reasonable suspicion that the suspect is dangerous, then the officer may pat down or frisk the individual to look for weapons. If during the patdown the officer by "plain feel" thinks an item is either a weapon or drugs, then the officer is allowed to seize the item.

In this case, there is no evidence that Officer Otis had reasonable suspicion to stop Don. Don was simply "walking home" and while [he] had a weapon, the weapon was in his clothing and there is no indication Otis saw the gun, saw a bulge in Don's clothing that could indicate he was armed, or some other reason that Don was acting suspiciously. Otis may point to the totality of the evidence here, that Don was leaving Harriet's after what might have been an attempted kidnapping, but even given this fact there is no indication from the way that Don was walking home that he had just tried to kidnap someone.

Therefore, the seizure of Don's gun was probably not valid under either the justification of a checkpoint or a Terry Stop and Frisk.

1b. Don's Motion to Suppress the Cocaine

Fourth Amendment Attachment

The search of Don that found the cocaine was done by a government official after Don had been arrested and Don had a reasonable expectation of privacy of items contained in his pocket. Therefore, 4th Amendment protections attach.

Booking Search

Don will first argue that the booking search was impermissible. A booking search is valid as long as it is conducted as a result of and in accordance with the regular practice of the police office. If so, the search does not require probable cause, nor does it require reasonable suspicion. In this case, the cocaine was found during a booking search of Don, in Don's pocket. Because there is no evidence of anything other than the fact that this was a routine booking search, the search-and-seizure was proper.

Fruit of the Poisonous Tree

Even though the booking search itself was valid, Don will argue that it is impermissible because the booking search only arose as the result of the impermissible search-and-seizure that led to the gun. The booking search was conducted after Officer Otis arrested Don for possession of stolen property in the gun found at the checkpoint search.

Evidence that is discovered through impermissibly tainted evidence is also invalid. In this case, because the gun was improperly seized, the prosecution will have to show some alternative means of acquiring the evidence. If the prosecution can show that they had an independent source for the evidence, would have inevitably discovered it anyway, or that the secondary evidence arose from intervening acts of free will by the defendant, then the evidence is valid anyway.

Independent Source

If the police can derive the evidence from an independent source, that will be sufficient to cleanse the taint of the impermissible evidence. In this case, the officers found the cocaine as a result of the booking search, which only arose directly from the seizure of

Don's gun. After the officers seized the gun, they checked the serial numbers and located the registered owner, who informed the officers that the gun had been stolen. The officers then followed up on the owner's statements and arrested Don for possession. There was thus only one source for the evidence that led to the cocaine, and that source was impermissibly tainted.

Inevitable Discovery

If the police can show that they would have inevitably discovered the cocaine that would also be sufficient to cleanse the taint of the seizure of the gun. Again, there is no evidence here that the officers would have discovered the cocaine without the information obtained from the gun. Without the gun, the officers probably never would have discovered the cocaine, and thus the inevitable discovery exception is inapplicable.

Intervening Acts of Free Will by Defendant

Finally, if the officers show that there had been some intervening act of free will by Don that led to the discovery of the cocaine that could lead to its admissibility as well. The prosecution will point out the fact that the police did not arrest Don for one month after the initial search, and they will thus argue that time was sufficient to clear the taint. This is probably the prosecution's best argument; however, it still fails to show any direct relationship to the evidence from anything other than the illegal search. Therefore, the cocaine will probably have to be excluded as well.

2. Don's Motion to Withdraw His Guilty Plea

Before a judge can accept the defendant's guilty plea, the judge must inform the defendant that the defendant has a right to plead not guilty and demand a trial. The judge must also inform the defendant of any mandatory minimums that will result from the guilty plea as well as the possible maximum penalty. The judge should also inform the defendant of his ability to secure an attorney or alternatively proceed per se. Finally, the judge must inform the defendant that all of this information and the defendant's plea itself must be on the record.

In this case, the judge did not do any of this. The court advised “Don that if he waived his right to a trial, it would take his guilty plea and let him go on his way.” Don then pled guilty. The judge did not inform Don of the possible results of pleading guilty, nor did the judge tell him that his plea would be recorded. Arguably, the judge satisfactorily met the requirement of informing Don of his right to trial by telling him about his ability to waive it, but the judge still should have expressly stated his right, instead of simply discussing his ability to waive trial.

Furthermore, Don will point to the fact that the judge should have been aware of Don’s lack of capacity when making the decision. As a result of drinking wine in jail, Don “was slurring his words” when he went into court. The judge at this point should have been even more careful than normal to comply with the various requirements in taking a defendant’s guilty plea. However, the judge failed to meet these requirements. Therefore, the court improperly denied Don’s motion to withdraw his guilty plea.

3. Attempted Kidnapping

Kidnapping requires refraining a person’s ability to move or leave along with either concealment or movement of the person. Here, there was no actual kidnapping because even if Harriet’s ability to leave was briefly restrained by Don pointing the gun at her, because Harriet didn’t believe the gun was real and Don left, there was no concealment or movement.

Attempted kidnapping requires the specific intent to kidnap as well as a substantial step towards completion of the act. In this case, while there is no direct evidence of Don’s state of mind, his actions demonstrate that he probably had the requisite specific intent to kidnap. First, as evidenced by his later arrest, Don had brought a real gun with him, pointed it at Harriet and made a demand of her. This is all relevant to show Don’s state of mind, that he did intend the outcome he stated that she come with him. Furthermore, had Harriet believed that it was a real gun she probably would have gone with him, sufficient for kidnapping. Therefore, while more evidence would be helpful, there is a sufficient amount of evidence to conclude that Don had the requisite intent.

In addition to the specific intent to kidnap, Don must also have completed a substantial step towards completion of the kidnapping. This test is not the most restrictive. If Don had simply brought the gun to Harriet's home and at the point was arrested, the fact that he brought a gun with him that far would probably be a substantial step. Here, however, Don not only brought the gun, he pointed it at Harriet and made a demand. There was not much more left for Don to do. Don may point to the fact that the act itself was not completed, or the fact that Harriet was not scared, but neither of these outcomes is required for an attempt. Therefore, Don would be convicted of attempted kidnapping.

The minority rule would require not that Don completed a substantial step towards kidnapping but rather that Don was dangerously close to succeeding in kidnapping. Here, the acts of drawing the gun and demanding that Harriet come with him were probably sufficient to be dangerously close to success. Don will again raise the fact that Harriet did not come with him, and will have a better argument by pointing to the fact that Harriet was not in fact even scared of him, but again this argument goes to the result of the actual crime of kidnapping. Don had done everything required to complete the act besides Harriet acquiescing to his demand. Therefore, because Don had done everything he could besides trying to further convince Harriet the gun was real, he would probably be convicted even under the minority rule.

Q6 Community Property

In 2000, Harry and Wanda, California residents, married. Harry was from a wealthy family and was the beneficiary of a large trust. After their marriage, Harry received income from the trust on a monthly basis, and deposited it into a checking account in his name alone. Harry remained unemployed throughout the marriage. Wanda began working as a travel agent. She deposited her earnings into a savings account in her name alone.

In 2003, Harry and Wanda purchased a vacation condo in Hawaii. They took title in both their names, specifying that they were "joint tenants with the right of survivorship." Harry paid the entire purchase price from his checking account, which contained only funds from the trust. Harry and Wanda orally agreed that the condo belonged to Harry.

In 2004, Harry purchased a cabin in the California Mountains to use when he went skiing. He paid the entire purchase price of the cabin from his checking account, and took title to the cabin in his name alone.

In 2005, Wanda commenced a secret romance with Oscar. During a rendezvous with Oscar, Wanda negligently operated Oscar's car, causing serious personal injuries to Paul, another driver.

In 2006, Wanda received an e-mail advertisement inviting her to invest in stock in a bioengineering company. She discussed the investment with Harry, who thought it was too risky. Wanda nevertheless bought 200 shares of stock, using $20,000 from her savings account to make the purchase. She put the stock in her name alone.

In 2007, Harry and Wanda separated. Shortly thereafter, as a result of the car accident, Paul obtained a money judgment against Wanda.

Harry and Wanda are now considering dissolving their marriage. The condo and cabin have increased in value. The stock has lost almost all of its value.

1. In the event of a dissolution, how should the court rule on Harry's and Wanda's respective rights and liabilities with regard to:
    a. The condo in Hawaii? Discuss.
    b. The cabin in the California Mountains? Discuss.
    c. The stock in the bioengineering company? Discuss.

2. What property can Paul reach to satisfy his judgment against Wanda? Discuss.

Answer according to California law.

Answer A

California is a community property state. There is a presumption that all property acquired during marriage is community property (CP). In general, community property is defined by what it is not – it is not separate property. Separate property (SP) is all property acquired by either spouse before marriage so after dissolution or acquired by inheritance. The rents and income from SP are also considered SP.

In the event of a divorce, CA requires all CP to be distributed equally between both spouses. This applies to all CP property as well as CP liabilities. Each item of CP should be distributed 50/50, unless economic circumstances warrant a different distribution. At divorce, the court has no jurisdiction to award SP. Each spouse keeps his or her own SP.

In determining whether an asset is classified as CP or SP, one must look to the source of the asset. One must also determine if either spouse has taken any action to recharacterize the property or if any presumption applies to the property.

1. Rights and Liabilities of Harry (H) and Wanda (W)

In determining the rights of H and W in all of the property at dissolution, each asset must be classified as either CP or SP.

(a) The Condo in Hawaii

Funds used to Purchase the Condo

The condo in Hawaii was purchased in 2003, while H and W were married. Since this was acquired during marriage, the general CP presumption is raised. H will attempt to rebut this CP presumption by tracing the purchase price of the condo. The condo purchased with money from H's checking account. This checking account contained only income from H's trust. These funds came from his inheritance only and (as mentioned above), money received during marriage from inheritance is characterized as SP and income from SP is characterized as SP. This checking account was never commingled with any CP funds and thus, all of the money in the account (the income

and any principal) would be SP. Further, H evidenced his intent to keep his money as his SP since he took title to the account in his name alone. Thus, the condo was purchased with SP funds.

Titled as "Joint Tenants with the Right of Survivorship"

Purchasing an item of property with SP funds does not alone classify the item as SP. One must also look to the title taken on the property. In this case, H and W took title as "joint tenants with the right of survivorship." In Lucas, the CA court held that any taking of property in joint and equal form evidences an intent to take the property as CP. The CA legislature passed a statute known as the anti-Lucas statute, which has been in effect since 1984. Under this law, joint title is still considered CP (as in Lucas) but the court dictated how SP purchase money must be treated. Absent any written agreement between the spouses, the SP proponent will not have [been] apportioned into the joint tenancy property. If no written agreement is established, the SP proponent will only be able to assert a right to reimbursement for the amount paid towards the purchase price.

Therefore, in this case, although SP was used to purchase the condo, the condo would be characterized as CP. H and W orally agreed that the condo was H's SP, but this agreement was not in writing and is thus unenforceable under the anti-Lucas statute. In the event of dissolution, H and W will each own a 1/2 interest in the condo and, thus, they will each be entitled to 1/2 of its appreciation amount. H will be reimbursed from the community for his SP contribution to the purchase price. Thus, he will be reimbursed the entire price of the cabin when it was purchased since his SP paid the entire amount.

(b) The Cabin in CA

The cabin was purchased in 2004 while H and W were married and, thus, the general CP presumption is raised. Again, H would attempt to rebut the CP presumption by tracing the purchase funds back to his SP checking account (discussed above). H paid for the entire purchase price of the cabin with SP funds.

He would also show his intent to keep his SP interest by showing that he took title to the property in his name alone. Taking title in one's name alone is not enough to rebut the

CP presumption but when this is coupled with a purely SP purchase price, the SP proponent will be able to rebut the presumption and prove the property is SP.

Therefore, at dissolution, the cabin will be characterized as H's SP and it, along with its increase in value, will be awarded entirely to H. Since H did not use his cabin for any business purpose during the marriage, the community does not receive any ownership interest as a result of its increase in value during the marriage.

(c) The Stock

Funds used to Purchase the Stock

In 2006, W purchased stock in a bioengineering company. This stock was purchased during marriage and is presumed to be CP. The source of the funds used to purchase the stock came from W's savings account. The money in this savings account came entirely from W's earnings as a travel agent. The earnings of each spouse during marriage are considered CP. Thus, the money in the savings account was all CP.

W would attempt to show the money was actually her SP since the account was titled in her name alone. But, as mentioned, title in one spouse's name alone is not enough to evidence a SP interest. The SP proponent must also be able to trace the funds to SP monies or must be able to show that the other spouse gave a gift of his or her CP share. In this case, there is no evidence that H intended to gift away his CP interest in W's earnings. Further since 1985, any transmutation, which is any agreement to change the character of property during the marriage, must be in writing. There is no writing to evidence the intent to transmute these earnings from CP to W's SP. Therefore, the stock is considered all CP.

Management and Control of CP

Under CA CP laws, each spouse is given equal rights to manage and control the CP, unless a specific exception applies. Exceptions are realized for the sale of real property, for any gift of CP, or for any sale of the necessities within the home (such as furniture). If any of these exceptions do not apply, either spouse is permitted to unilaterally make decisions regarding the CP.

In this case, H might argue that he told W the investment was too risky and thus, the liability for the loss in the stock value should be hers alone. But this would not be a winning argument since W was permitted to unilaterally spend CP monies. None of the exceptions above apply to this situation. Stock is not real property. This was not a gift since W paid $20,000 for the stock and the stock is not a necessity of the home.

Therefore, at dissolution, the liability for the loss in the stock value should be distributed equally between H and W.

Breach of Fiduciary Duty

H might also claim that W breached her fiduciary duty when she purchased this stock. In all marriages in CA, both spouses are considered fiduciaries of each other. They owe each other a duty of care and loyalty regarding CP funds. One spouse is permitted to make decisions regarding purchases and sales, but the spouse will breach his or her duty if he or she is grossly negligent or reckless in some CP transaction.

H will argue that W was at least grossly negligent when she refused to listen to his complaints regarding the purchase of the stock. He told her it was too risky and she was grossly negligent when she ignored this fact.

W would counter-argue that this was just a typical investment and there was no gross negligence. First, she had no knowledge that this stock was actually risky. All she had was H's opinion that the stock was too risky but this is not enough to show she was grossly negligent when she decided to purchase it. Second, even if she had some knowledge that the stock was risky, this is typical in most stock purchases. No stocks are guaranteed to make money and in almost all stock purchases, the buyer takes some sort of risk. This inherent risk does not equal gross negligence at all times. Since this was not a grossly negligent or reckless use of CP funds, H cannot prove that W breached a fiduciary duty and H cannot collect any losses in the value of the stock from W.

2. Property to satisfy Paul's Judgment

In general, a creditor of either spouse can reach the CP of the couple and the creditor spouse's SP to collect on the debt. This general rule applies to debts incurred during marriage as well as debts incurred prior to the marriage.

For certain kinds of judgments, there are rules that dictate how the creditor can collect from the spouse. For tort judgments, the rules depend on whether or not the tortfeasor spouse committed the tort while she was benefiting the community. If the tort was committed while the spouse was engaging in activity that benefits the community, the creditor must collect from the couple's CP first and then, if necessary, collect from the tortfeasor's SP. If the tort was committed while the spouse was not engaged in activity that benefited the community, the tort creditor must first collect from the tortfeasor's SP and then collect from the couple's CP if necessary to satisfy the entire judgment.

In this case, W committed a tort against P while she was married. This tort was committed while W was having a secret rendezvous with her lover Oscar. Thus, W was not engaging in an activity the benefited the community at this time. H had no knowledge of this activity and this activity certainly cannot be said to have benefited H. Therefore, P must first collect from W's SP to satisfy his judgment and then, if necessary, he can collect from the couple's CP. At no point is he permitted to collect from H's SP.

H may argue that this debt should be considered entirely W's SP debt because P obtained the judgment against W after H and W separated. Thus, he would argue that the debt was incurred after separation, when the community is no longer liable. H's argument would not be a winning argument. In determining liability for a tort, the liability will attach at the time the tort is committed, not at the time the judgment is actually obtained. Thus, a court will determine that W incurred this liability in 2005 when she injured P, not in 2007 when P finally obtained the judgment.

Thus, since this debt was incurred during marriage, the rules discussed regarding the order of satisfaction apply. P must first collect from W's SP but, at dissolution, W has no SP. Then, P must collect from the couple's CP. Here, the only property

characterized as CP is the stock and the Condo in Hawaii. P can reach the stock (even though it has almost no value) and then he can reach the increased value of the condo. In reaching the condo, he cannot collect from the share that H is entitled to for reimbursement of the purchase price.

Answer B

Introduction

Because Harry and Wanda are residents of California, California law is applicable. California is a community property state. All property acquired during marriage by either spouse is presumptively community property. All property acquired by either spouse before marriage or after permanent separation, or by gift, will, or inheritance, is presumptively separate property. In determining the characterization of an asset, a court will look to the source of funds used to purchase that asset. A court will also consider any actions taken by the parties that may have affected its characterization, as well as any presumptions of law that affect the asset's character. Finally, the mere fact that an asset has changed form will not change its character. With the above principles in mind, we will now look at each asset in turn.

The Condo in Hawaii

Source

The source of funds used to purchase the vacation condo in Hawaii was from Harry's checking account. Harry's checking account is entirely composed of money that he received from a family trust. The money received from this family trust is considered a gift or inheritance. Thus, the money is his separate property. In addition, he did not commingle his separate property with the funds of the community, which might have given rise to a presumption that family expenses paid from those assets are community property. The title to the condo was taken in both spouses' names, and was taken as a joint tenancy with a right of survivorship. Thus, it was taken in joint and equal form.

Presumption: Joint and Equal Form

Where joint and equal title is taken to property which was acquired through a spouse's separate property funds, the Lucas and Anti-Lucas principles apply. The property itself is presumptively community property. Upon death, Lucas applies to hold that absent an express agreement to the contrary, the separate property which was used to acquire title in the property in question will be deemed to have been made as a gift to the community. Thus, the donor spouse has no claim of ownership or reimbursement. Upon divorce, the principles of Anti-Lucas apply. These provide that absent some

express agreement to the contrary or express wording in the deed, upon dissolution of marriage, the spouse who gave separate property toward the purchase of an asset that was acquired in joint and equal form is entitled to reimbursement for the down payment, improvements, and principal, but not an ownership interest.

Actions: Oral Agreement that the Condo Belonged to Harry

Spouses may make agreements or gifts that transfer property from one form to another, whether from separate to community or community to separate. This is called a transmutation. Since January 1, 1985, all transmutations must be in writing, signed by the party to be adversely affected, and must clearly indicate that a change in characterization is intended. In this case, the agreement between Harry and Wanda that Harry would own the condo was made orally. Thus, it is not a valid transmutation and this agreement did not change the characterization of the condo.

Disposition: Community Property with Right of Reimbursement

In this case, the parties are considering dissolution of marriage. Anti-Lucas will apply. This means that upon divorce, the condo is community property and Harry can claim a right to reimbursement for the purchase price of the vacation condo, since he paid this purchase price with his separate property funds. However, he is not entitled to an ownership interest in the condo. Therefore, any increase in the value of the condo belongs to the community and will be split evenly between Harry and Wanda.

The Cabin in the California Mountains

Harry purchased the cabin in the California mountains with money from his checking account. The money in his checking account was derived solely from the trust that he inherited. Because these funds are derived from inheritance, they were his separate property. He took title to the cabin in his name alone. Separate property includes all assets purchased entirely from separate property, unless some presumption such as that of joint and equal form applies. Because Harry did not take title in any joint and equal form, a presumption of a gift to the community does not arise under Lucas or Anti-Lucas. Thus, the cabin is Harry's separate property. Upon dissolution of marriage, Harry alone will take the entire cabin, including any increase in its value.

The Stock in the Bioengineering Company

Source

Wanda purchased stock in a bioengineering company using $20,000 from her savings account. The money from her savings account was derived from her work as a travel agent. Salary that either spouse earns during the time of marriage is community property. Although Wanda kept her earnings in a separate account in her name alone, this does not change the fact that the funds are community property. Form of title is generally inconclusive. This fact might have been relevant if Harry had sought to use those funds to pay his own premarital debt. However, since that is not the case, then funds are community property. Thus, the stock was purchased with community property funds and will be presumptively community property.

Action: Title Taken in Wanda's Name Alone

Wanda took title to the stock in her name alone. Generally, the fact that a spouse takes title to an asset in his or her name alone does not change the presumption of community property, if the funds used to purchase that asset were community funds. In this case, the fact that Wanda took title to the stock in her name alone does not make the stock her separate property, unless it can be shown that some gift was intended. Wanda will likely argue that Harry intended to make a gift of the stock to her as her separate property, since he did not think the investment was a good idea and therefore did not want the investment for the community. However, it is unlikely that Harry's disapproval meant that he intended to make a gift of community assets to purchase the stock. Instead, Harry did not want Wanda to purchase the stock at all. Thus, he did not make a gift to her of the stock, and it will therefore remain as community property.

Action: Purchase without Harry's Permission

Under the equal management powers doctrine, either spouse alone may encumber, sell, or otherwise dispose of community assets. Thus, the fact that Wanda purchased the stock without Harry's permission will not change its characterization. In addition, Harry is not necessarily entitled to reimbursement for the community property that Wanda used to purchase the stock, since she had the power to use that money to purchase stock.

Duty of Loyalty

Each spouse owes a duty of the highest good faith, loyalty, and fair dealing to the other spouse. Neither may gain a financial advantage at the expense of the other. Also, neither may make a grossly negligent or reckless investment of the community's funds. In this case, Harry thought that the stock was too risky. If the stock was in fact so risky that investing in it was grossly negligent and reckless, Wanda will be said to have breached a duty of loyalty to her husband. If that is the case, she may have to reimburse him for his share of the community funds that were used to purchase the stock. However, the mere fact that Harry thought the investment was risky does not alone make it a reckless investment. Thus, it is unlikely that Wanda breached the duty of loyalty to her husband.

Disposition: Community Property

Because the stock was purchased with community funds and form of title did not change this, the stock is community property. It and its loss in value will be equally divided upon dissolution of marriage.

What Property can Paul reach to Satisfy his Judgment against Wanda?

Tort Liability

Where a spouse commits a tort during the marriage, the injured party can reach community assets and the separate property assets of the tortfeasor spouse. The order in which these items will be used to satisfy the obligation will depend on whether the tortfeasor spouse committed the tort to "benefit" the community. In this case, Wanda committed the negligent act while meeting Oscar, with whom she was having a secret romance. Having a secret romance with another man was not an action taken to benefit the community. Thus, the tort was not committed for the benefit of the community. This means that Paul may first reach Wanda's separate property, and then Paul may reach community property. Paul may not reach any of Harry's separate property, because Harry is not personally liable, and this is not a contract for necessities.

The Condo

The condo is community property upon divorce. However, where title is taken in the form of a joint tenancy with the right of survivorship, during marriage each spouse will own a 1/2 separate property interest in this property. This means that creditors of one spouse can only reach the 1/2 separate property interest of that debtor spouse. In this case, Paul may reach only Wanda's 1/2 separate property interest in the condo. This will be the first item that will be used to satisfy Paul's judgment, since it appears to be the only asset that is Wanda's separate property. Paul may not reach Harry's 1/2 separate property interest in the condo.

The Cabin

The cabin is Harry's separate property because it was purchased with his separate property funds and title was not taken in joint and equal form. Thus, Paul may not reach the cabin, since Harry is not personally liable and this is not a contract for necessities.

Harry's Checking Account and Trust Fund

Harry's checking account and his trust fund are his separate property. They may not be used to pay Paul.

The Stock

The stock is community property. Thus, once Paul has exhausted Wanda's separate property, if he has not satisfied his judgment he may proceed to use the stock as well.

Wanda's Savings Account

The savings account in Wanda's name is community property. Thus, it may be reached to satisfy Paul's judgment.

Feb 2010

California
Bar
Examination

Essay Questions
And
Selected Answers

February 2010

THE STATE BAR OF CALIFORNIA
OFICE OF ADMISSIONS
180 HOWARD STREET • SAN FRANCISCO CALIFORNIA 94105 1639 • (415) 538 - 2303
1149 SOUTH HILL STREET • LOS ANGELES CALIFORNIA 90015-2299 • (213) 765 - 1500

ESSAY QUESTIONS AND SELECTED ANSWERS
FEBRUARY 2010
CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2010 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

ESSAY QUESTIONS 1, 2, AND 3

California Bar Examination

Answer all three questions. Time allotted: three hours

Your answer should demonstrate your ability to analyze the facts in question, to tell the difference between material and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

Q1 Contracts

On April 1, Pat, a computer software consultant, entered into a written services contract with Danco, Inc. to write four computer programs for use by Danco in controlling its automated manufacturing machines. The contract provided that Danco would pay Pat $25,000 on completion of the work and that the programs were to be delivered to Danco no later than May 1. The contract stated, -This is the complete and entire contract between the parties, and no modification of this contract shall be valid unless it is in writing and signed by both parties.

Pat entered into the contract in anticipation that it would lead to significant work from Danco in the future, and he consequently turned away opportunities to take on more lucrative work.

On April 15, Pat called Chelsea, the President of Danco, who had executed the contract on behalf of Danco, and told her, -I'm having some problems with program number 3, and I won't have it ready to deliver to you until at least May 8 – maybe closer to May 15. Also, I have some doubt about whether I can even write program number 4 at all because your computer hardware is nearly obsolete. But I'll get programs numbers 1 and 2 to you by May 1.

Chelsea said in response, -I'm sorry to hear that. We really need all four programs. If you can't deliver until May 15, I guess I'll have to live with that.

On April 28, Pat called Chelsea and said, -I've worked out the problems with programs numbers 3 and 4. I'll deliver them to you on May 12.

Chelsea responded, -I've been meaning to call you. I'm going to start looking around for another consultant to do the work because I consider what you said in our April 15 telephone discussion to be a repudiation of our contract. My lawyer tells me that, because of the language in the contract, nothing I said to you in that conversation matters. You repudiated the contract, so we don't owe you anything.

Can Pat prevail in a suit against Danco for breach of contract, and, if so, what is the measure of his damages? Discuss.

Answer A

The issue is whether Pat has a valid contract with Danco and whether Danco has breached such contract, and what damages Pat is entitled to as a result.

Service Contract

Contracts for services are governed by the common law. Although a computer program could be considered a good, the UCC only applies to tangible, movable goods. Therefore, the UCC does not apply and the contract, if any, is governed by the common law.

Elements of a Contract

In order to have a valid contract, there must be mutual consent and consideration. There was mutual consent here, because Pat offered to write four computer programs for use by Danco, and Danco accepted the terms of Pat's offer in a written agreement between the two. The consideration requirement is satisfied because there was a bargained-for exchange: four computer programs in exchange for $25,000. Thus, there was an offer, acceptance and valid consideration; a valid contract exists between Pat and Danco.

Statute of Frauds does not apply

The Statute of Frauds requires that any contract for goods greater than $500, or services which may take longer than one year to be performed, must be in writing, and signed by the party to be charged. Here, the contract is for services, and was to only take one month to perform. Thus, the Statute of Frauds does not apply. Although the agreement is in writing this was not necessary.

Time of the essence

The contract stated that the work was to be completed and delivered to Danco -no later than May 1. Thus, if this is considered to mean that time is of the essence, then performance after such time could be considered a material breach of the contract. However, contracts are generally given a reasonable time for performance under the

common law, and if time was not of the essence then Pat has a reasonable time to finish his work. In any case, this condition was waived as discussed below.

April 15th call form Pat

Danco claims that Pat anticipatorily repudiated the contract when he called on the 15th of April saying, -I won't have it ready to deliver to you until at least May 8th—maybe closer to May 15. A contract is anticipatorily repudiated when a party unequivocally manifests an intention to not perform the agreement by words or conduct. Here, although the contract specified performance by the 1st of May, Pat indicated that he would perform at least half of the services by that time, and indicated he would complete the other two within a couple weeks. Thus, he did not unequivocally manifest an intention to not perform the contract, but merely requested an extension of ti me, or modification of the contract. Thus, Danco could not treat the contract as breached but could ask for assurances that the contract would be performed.

Attempted Modification of the Contract

Chelsea, who has authority to bind Danco because of her implied apparent authority as President, manifested assent to the modification when she said -I guess I'll have to live with that. A modification under the common law, however, requires additional consideration to be valid. Here, there was no change in the form of consideration, or any additional consideration by Pat to be given extra time; therefore, the modification attempt was invalid. The oral nature of the modification was not a problem, because this is a services contract and the modification did not bring the services to beyond one year, as required for the Statute of Frauds to apply.

Waiver of condition to perform on May 1st

Danco may claim that its duty to pay Pat was expressly conditioned on performance by May 1st; therefore no payment is due. As a condition precedent, no duty to pay would arise until it is met. However, Pat will counter that Chelsea, as President, waived the condition by saying -I guess I'll have to live with that. Even if a condition is not met, it may be waived by the party benefited by the condition. Thus, Danco must pay Pat as promised under the agreement because the condition was orally waived by the

president of the company. Since the Statute of Frauds does not apply, this oral waiver was valid.

April 24th call: Anticipatory Repudiation

On April 24th, when Pat made assurances that the contract would be performed by the 12th of May, Chelsea responded by saying that she was -going to start looking around for another consultant and that the company did not owe Pat anything. Pat may treat this as an anticipatory repudiation of the contract, because it manifests an unequivocal intention not to perform. He may thus, at this point, stop performance and sue for breach of contract. In the alternative, he may wait to sue for breach of contract on the date when performance is due, or ignore the repudiation and encourage Danco to pay for the programs.

Integration Clause and Parol Evidence Rule

Danco claims that no evidence of oral agreements will be allowed because the writing was intended to be a final expression of the agreement, and therefore fully integrated. The parol evidence rule, however, only bars oral evidence prior to or during negotiations leading to the writing. Any subsequent oral modifications or agreements are admissible; thus, Pat may validly admit evidence of waiver of condition and anticipatory repudiation in the conversations on May 1st and April 24th.

Expectation damages

Because Pat had a valid contract, which Danco breached by anticipatory repudiation, he is entitled to compensatory damages to put him in the position had this wrong and resulting damage not occurred. Such damages must be caused by the breach, [be] foreseeable, and certain. Pat must also have mitigated any unnecessary damages. Here, the damages are certain ($25K) and foreseeable as a result of Danco's breach, because this is what the parties expressly agreed to as payment.

Consequential damages

Pat will also claim right to consequential damages, because he turned away opportunities to take on more lucrative work in anticipation that the job would lead to future work. These damages lack certainty, however, and were not foreseeable at the time of contract formation. Danco was not aware of Pat's other opportunities to take on more lucrative work. Therefore, they will not be awarded.

Restitutionary Damages

In the alternative, Pat may seek return of any unjust enrichment of Danco should the court find fault with the contract, or that Pat breached. He would be entitled to the amount that Danco unfairly benefited: if Danco was given the two programs in the case at hand, Pat may seek recovery for the value of the benefit to Danco.

Answer B

Can Pat Prevail Against Danco for Breach of K?

Applicable Law

Pat has entered into a services contract (-K) to perform work for Danco between April 1 and May 1 or, alternatively, May 15. Thus, this K will be governed by common law rules.

Formation

For Pat to win on a breach of K claim, he must first show there was a valid contract. A valid contract requires an offer, acceptance and consideration. In this case, the first line of the facts state that Pat entered into a written services K with Danco, to write software programs in exchange for $25,000. The facts imply a valid offer was made and properly accepted. Both parties have provided consideration, a bargained-for legal detriment, when Pat agreed to perform services he was not legally required to do and Danco agreed to pay Pat without having a legal obligation to do so. Thus, a contract was likely made.

Terms

A contract at common law must also state material terms with definiteness. In an employment services contract, the primary term needed is duration. Here, the K calls for services to be provided for one month and then the K will end. Thus, duration has been provided and the contract will not fail for lack of material terms.

Statute of Frauds

This is a services K which will end, by its terms, [and/or] can be finished within one year of its inception. Thus, the Statute of Frauds will not apply. The Statute of Frauds, if applicable, requires a K to be in writing and its subsequent modifications to be in writing as well, pursuant of the Equal Dignitaries doctrine.

Modification Clause (generally not valid in CL outside SOF)

The facts state that the written K has a clause in it, however, stating that the initial written services contract signed by Pat and executed by Danco's President, Chelsea, -is the complete and entire contract between the parties and no modification of this contract shall be valid unless written and signed by both parties. Generally, at common law, clauses which seek to invalidate modifications that are not in writing are themselves not valid. Thus, though the contract states as much, a court will still allow evidence of oral modifications, particularly in light of the Parol Evidence Rule. This is important because the facts state that the contract was later sought to be modified orally by Pat, which I will discuss two sections below.

Parol Evidence

Parol Evidence Rule (-PER) states that generally, where a written contract is intended to be a complete and final integration of a K, that no evidence may be admitted outside of the four corners of the contract to establish whether a breach has occurred. However, an exception exists for subsequent modifications. In this case, as noted above, the K states that it is intended to be the -complete and entire contract, language sufficiently similar to that required under the PER. However, to the extent that the contract was later modified, the court will allow at common law for evidence, whether oral or written, to be admitted to establish any subsequent modification agreed to by the parties.

Modification without Consideration

Pat, after signing the K, called Danco and told them that he wasn't sure he could complete the K on time and would need 8 to 15 extra days to finish the project, as well has voicing concerns of his ability to finish it at all. Chelsea replied, -if you can't deliver until May 15, I guess I'll have to live with that.

Danco will want to argue that Pat's failure to provide for the four programs he agreed to write by the stated date of May 1 will constitute a material breach, thus entitling them to avoid their obligation to perform on the contract. However, Pat will want to introduce this evidence as showing a modification to the original agreement. While the PER will

not bar this evidence, the modification Pat seeks to establish occurred without any subsequent consideration. Generally, at common law, consideration is required for a subsequent modification to be considered valid. However, courts have generally been willing to find that consideration when both parties limit their right to assert their rights and sue on the original contract. Here, Danco's President, likely authorized to negotiate and make contractual agreements on behalf of Danco, appears to have agreed to the modification by stating, -I guess I'll have to live with that. Thus, Pat will argue Danco agreed to limit its rights to sue based on the original May 1 deadline, constituting consideration. However, Chelsea did not explicitly agree. Danco would likely argue that she was simply stating that, at that time, she could not legally compel Pat to finish and was thus simply stating her acknowledgment that she would have to wait until May 8 or 15 for the programs, but not that she would be willing to ignore Pat's failure to abide by the K. Further, Pat does not appear to have limited his own consideration in this modification. He still appears to have the full right to demand $25,000. Thus, Danco will likely succeed in asserting that this modification, even if admissible, is not valid.

Waiver to Time is of the Essence Clause

Generally, a -time is of the essence clause is a clause in a K that asserts a necessity for the contract to be finished, or one party to perform fully, by an established date. Here, Pat is faced with a deadline of May 1, though the contract does not explicitly state that time is of the essence, but merely provides for the deadline. If Danco wishes to assert that Pat's failure to finish by May 1 constitutes a material breach pursuant to the terms of the contract, Pat should then argue that Danco waived its right to that deadline and the time is of the essence clause when Chelsea said she would have to live with Pat's tardiness. Again, Danco will argue this does not constitute an explicit waiver. This is a close situation because of the vagueness of the statement, but a court will likely side with Pat that the deadline was waived by Chelsea, who as President of Danco is authorized to alter the K with Pat.

However, waiver usually occurs once a time is of the essence clause has passed. Thus, a court may deem the waiver argument is not as sufficient as an estoppel argument.

Estoppel

Even if Pat cannot assert a waiver claim, which usually occurs after a term has not been agreed to, Pat can assert an estoppel argument. Estoppel occurs when one party makes assurances that the other party can be reasonably, objectively expected to rely on, and the other party does so to their detriment. In this case, Chelsea's claims are vague and imply her acceptance of Pat's tardiness. A reasonable person, when told that the other person expecting earlier delivery, will -live with later delivery would assume that statement to imply acceptance. Pat indeed relied on that assertion and continued to perform his services, which is to his detriment. If he were in material breach and were told so and that he would be sued in such a manner, he would not be required to continue to perform fully. Pat continued to work for 13 days after his April 15 discussion of his problems with Chelsea and announced he would finish the services he was expected to perform on May 12. Thus, Pat's estoppel claim should succeed, and the modification will thus be included in the K.

Anticipatory Repudiation

Danco will alternatively argue that Pat gave Danco an anticipatory repudiation when he announced he could not perform his services by May 1. When a party asserts it will not perform its contractual obligations prior to deadlines stated in a K, giving the other party his reasonable grounds to believe the K will not be performed, the party notified will have the right to cease its own performance and sue for breach of K unless it has already performed fully. Alternatively, the party has the right to seek assurances from the party concerned about its potential failure to perform before continuing on the contract. In this case, Danco has not yet paid Pat so it has not fully performed. Danco will assert that Pat's statements constitute an anticipatory repudiation because he not only told Danco he was worried about the deadline, but also that their hardware was so obsolete that he may not even be able to finish 50% of the contract at all. Pat will assert that Danco made assertions in response that it would live with Pat's tardiness. However, Danco will argue that it only discussed the tardiness and not the potential failure to provide two of the software programs at all. Danco has a strong argument. However, Pat was told Danco would live with his tardiness and Danco never requested any further assurances of Pat's work. In addition, Danco never discussed concerns

about Pat's inability to finish the 3rd and 4th software programs. Finally, Pat told Danco it would deliver programs 1 and 2 by May 1. Danco told Pat prior to that date, on April 28, that it would not accept his work and was going to look for an alternative software consultant because of Pat's April 15 phone call. Thus, they did not even wait until May 1 to determine if Pat could deliver. While Danco will argue that it was not required to wait because of Pat's anticipatory repudiation, without any discussion to Pat implying that they would not allow him to miss the May 1 deadline, a court will not accept Danco's argument of anticipatory repudiation.

In fact, because Danco announced it would not pay him for his services prior to even the May 1 deadline, Pat himself will use the anticipatory repudiation claim to be able to assert his right to sue on the contract prior to the modified deadline date of May 15 (or May 12, which he claimed would now be his end date). He will be able to sue prior to that date as he has not fully finished performance and they have anticipatorily repudiated.

Thus, Pat's claim of estoppel will hold on the modification during his April 15 phone call. Based on this modification, Pat will have a valid claim for breach of K because he appeared to be able to finish the contract by the modified deadline and, prior to doing so, Danco repudiated its agreement. Thus, Danco breached its K obligations and Pat is entitled to damages.

If so, what are Pat's Remedies?

Pat's likely remedies are legal remedies, or money damages.

Compensatory Damages

Pat should be entitled to compensatory damages, which are designed to place the plaintiff in the position they expected to be in had the contract been properly performed by the defendant. To obtain them, he must show that Danco caused the damages, that they were foreseeable, that the damages are certain and that they were unavoidable. Causation, particularly but-for causation, requires that, but for Danco's actions, Pat would not have been injured. If it is clear Danco breached the K, then but-for causation follows that but for the breach, Pat would not be injured, as he would have been fully

paid. Further, it is foreseeable that Pat would be injured by Danco failing to pay him for his services. Pat will be suing for the contract price of $25,000 likely, and these are certain given the terms of his contract. Finally, Pat must show the damages were unavoidable, meaning he must seek to mitigate these damages if at all possible. Usually, in an employment K case, this requires the employee to seek other employment. However, based on the unique services he provided Danco and the relatively short time left on his contract, he will be able to show his damages were unavoidable. The court may, however wish to determine that Pat did not destroy his work for Danco or stop working prior to Danco's breach. Also, to the extent that Pat's failure to meet his original deadline injured Danco, his damages will be reduced. The facts give no mention of any specific injury caused by Pat's tardiness.

Consequential Damages

In addition to the contract price, Pat may wish to claim additional consequential damages, which are damages that do not arise specifically from the breach but are foreseeable by the defendant at the time the contract was made that the plaintiff would likely suffer if it were to breach. In this case, Pat will argue that he turned down other opportunities to finish this contract in the relatively short amount of time he was given. It would be reasonably foreseeable that, were Pat to not be paid on the contract, Pat will argue, he would not only lose that contract price but also the value of the work he turned down to perform that work. Danco will likely argue that these are merely opportunity costs which Pat gave up and were reflected in the contract price which he accepted. While Pat did likely lose out on additional work, Danco will probably win this argument unless Pat can show with specificity and certainty that he had contracts offered to him in excess of his contract price that were only turned down as a result of his agreement to work for Danco, and that he could not have taken those contracts once his work with Danco was finished.

Punitive Damages

Punitive damages are designed to punish the defendant and are based on the notion that the defendant maliciously violated its agreement. In this case, Chelsea consulted with her attorney, who told her that Danco was not liable to execute the contract. The

facts thus do not imply that Chelsea or Danco acted in any way other than negligently in breaching its contractual duties, and thus punitive will not be available.

Restitutionary Damages

If Pat for some reason could not succeed in his breach of K, he could likely obtain restitutionary damages so long as he delivers his completed software to Danco. Restitution, or -quasi-K, allows for a plaintiff to recover if a K (or modification in this case) is not deemed valid, by showing that he conferred a benefit upon the defendant, that a reasonable person would expect to be paid, and that it would be unjust to allow the defendant to be enriched freely for the plaintiff's efforts. In this case, so long as Pat delivers the software to Danco, he will be able to show he conferred the benefit of the software, and a reasonable person would expect to be paid for writing computer software for a company. It would be unjust to allow a company to obtain these services freely when it told the writer they would be paid, and thus Pat will be able to assert his quasi-K claim if he for some reason could not assert his breach claim. The damages will be the value of the work he provided them, not the contract price.

Specific Performance (not available)

Specific Performance is not applicable here because Pat's claim is primarily for money damages and, even if it were not, there is an adequate legal remedy (money) which will suffice.

Q2 Business Associations / Professional Responsibility

Able, Baker, and Charlie are successful attorneys who set up a law firm under the name -ABC Legal Services LLP (-ABC LLP). They agreed to share profits and losses equally. Able prepared the documents required to register the firm as a limited liability partnership and instructed his assistant to file them with the Secretary of State. Inadvertently and unbeknownst to Able, Baker, and Charlie, Able's assistant never filed the appropriate documents.

Able, Baker, and Charlie leased office space for four attorneys in the name of ABC LLP. They rented the extra office to David, an attorney who had a small solo law practice, for a monthly rent of the greater of $1100 or 10% of his billings. David committed malpractice arising from a case that he undertook soon after he moved into the ABC LLP office space.

Able, Baker, and Charlie hired Jack as head of computer services. Jack had just graduated from college with a degree in computer science. Jack, in an effort to save ABC LLP the cost of Internet access budgeted at $500 a month, accessed and used the wireless network of an adjacent law firm for free. Able, Baker, and Charlie were surprised at the savings, but did not inquire how it came about. Their use of the network resulted in the disclosure to a third party of confidential client information for one of Able's clients, which caused the client economic loss.

1. May Able, Baker, and Charlie each be held personally liable for the economic loss to Able's client caused by the disclosure of confidential client information? Discuss.

2. May Able, Baker, and Charlie each be held personally liable for David's malpractice? Discuss.

3. Have Able, Baker, and Charlie breached any rules of professional conduct? Discuss. Answer this question according to California and ABA authorities.

Answer A

Limited Liability Partnerships:

The main benefit of an LLP is that the partners have limited liability – meaning that they are not personally liable for the debts and obligations of the partnership. To be properly formed, the LLP papers must be filed with the Secretary of State. Here, the ABC paperwork was not filed and the LLP was never registered. Without the proper paperwork, this venture is likely to be treated as a general partnership.

General Partnerships:

General Partnerships (-GP) are formed by two or more persons carrying on a business for profit. There are no filing requirements for forming a GP. GPs can be made up of general partners and limited partners. General partners have a duty to manage the business and can be held personally liable for partnership debts and/or obligations. Limited partners, however, are not liable for partnership debts and may lose their limited status if they engage in management. Absent any agreement each partner has an equal vote, profits are shared equally, and losses are shared as profits are.

A, B, and C are likely to be seen as general partners in a GP; thus they are entitled to an equal say in the management of the business and may be held personally liable for partnership debts.

Ethical Duties of Attorneys:

Attorneys owe a wide array of duties – to clients, the court, opposing counsel, and the public generally. The duties are established by ABA rules as well as state-specific rules. California's rules on ethical conduct of attorneys largely follows the ABA rules, but there are variances which will be noted if applicable below.

Duties to clients:

Attorneys owe clients the duties of confidentiality, loyalty, financial responsibility, and competence. Duties owed to the court and opposing counsel include the duties of

candor, fairness, and decorum. Attorneys must also ensure that all members of their firm, including staff, act in accordance with the ethical standards imposed. To the extent that one attorney has a conflict, such conflicts are imputed to the firm and are shared by all other attorneys unless the conflict arises from prior governmental work or a personal relationship with the opposing party's counsel, for example.

1. The disclosure of client information:

One of the most important duties owed to clients is the duty of confidentiality. This duty requires the attorney to act so as to not reveal any confidential information of the client – without consent, either express or implied. The facts do not indicate that any consent was given to the disclosure of this information in this case.

Here, the client information was revealed due to the use of an un secured wireless network which the firm used. Although the facts indicate that the attorneys were not aware of the use of the adjacent building's wireless network, we do know that they were surprised by the cost savings. If the attorneys were aware of unexpected savings, they should have spoken with Jack to determine why internet access was so much cheaper than expected. Because they did not so inquire, and consequently were unaware of the issue, Jack acted unethically by using another network for free. A, B, and C all had a duty to ensure that Jack's actions were proper and ethical.

Because ABC is likely to be deemed a GP, all general partners may be held liable for the debts of the firm. These debts can include the economic losses incurred from the disclosure of information and/or debts incurred if the client sues the firm for malpractice.

2. David's liability for malpractice:

Here the issue will be whether David is a partner of the firm or merely a lessee of an office. A, B, and C will argue that D was merely renting space from the firm, making him not a partner, and therefore not subjecting the firm to any liability for his actions. We do not have facts to indicate whether David ran his business under a separate name, kept his files in a separate room, used the same office staff, or contributed any money to the partnership. The first three factors would indicate a separate firm, while the final factor – buying into the partnership – would indicate that D had become a partner of ABC.

What we know is that David paid monthly rent. Absent other facts, paying rent indicates the D was likely a separate practitioner. If D was acting as a separate practitioner, the ABC firm partners would not be liable for this malpractice.

However, if there were facts to indicate the D was a partner of the firm, or that the malpractice occurred with regard to a firm client, the firm general partners may be liable for D's malpractice. In a LLP, as intended, partners are all liable only for their own malpractice, but in a GP, the general partners can be held liable for all partnership obligations. In a GP incoming partners are not liable for existing partnership debts, through the money they contribute can be used to pay off such debts. Outgoing partners of a partnership are liable for debts of the partnership until creditors have been given notice of their departure or 90 days have passed since their departure.

D's malpractice occurred shortly after he took up office space with ABC. If he were deemed to be a partner, and the malpractice occurred after joining the partnership, ABC general partners would be liable for partnership debts arising out of his malpractice.

3. Professional conduct:

The attorneys of ABC have violated a number of rules of professional conduct.

a. Management of Staff:

The attorneys have a duty to properly manage staff and ensure that all members of the firm are in compliance with the rules of conduct. Here, A gave partnership documents to an assistant for filing. While staff members of a firm frequently are in charge of filing court documents or making deliveries, it was likely imprudent to allow such an important document to be handled by an assistant. Because of the assistant's negligence the firm likely lost its privileges as an LLP. Attorneys cannot allow the unauthorized practice of law by non-attorneys. Here the documents likely did not need to be filed by an attorney, but the task was nonetheless important enough that it should have been done by a partner so as to ensure accuracy.

The attorneys were prudent in hiring Jack as a computer services manager as he was properly qualified with a degree in computer science. The use of non-attorneys does

not violate any ethical rules so long as fee sharing does not occur (payment of non-attorney salaries is not considered fee sharing.) The attorneys likely violated their ethical duties in their management of Jack, however. By not managing Jack properly and being unaware of Jack's use of an unsecured wireless network, A, B, and C breached not only their duties as managers, but also their duty of confidentiality to their client.

b. Duties to clients:

Attorneys owe their clients the duty of confidentiality – the duty to not reveal any confidential information without consent. Information may be revealed where necessary to defend oneself against a claim of malpractice or potentially if the attorney knows of conduct which will result in death or serious bodily harm which can be prevented through disclosure. The CA rules indicate that the conduct must be criminal; however the ABA makes no such distinction. Here, the requisite facts for proper revelation of client information do not appear. ABC breached its duty of confidentiality to its client by allowing the transmission of client information to a third party.

Attorneys also owe clients the duty of loyalty, which prevents attorneys from taking on representation or taking actions which are in conflict with current clients. Attorneys must always act in the best interests of their clients and with their interests at heart. It is unclear to whom the confidential information was revealed, but the ABC firm may have breached their duties of loyalty as well if the use of the network resulted in revelation of information to an adverse party.

Financial responsibility imposes on an attorney the duty to properly manage client funds and avoid commingling personal money. There are no facts indicting a breach of this duty by ABC.

The duty of competence requires that attorneys provide clients with professional, skilled, competent services. Here, by use of an unknown wireless server which allowed for the disclosure of confidential information, the attorneys of ABC have acted competently. A competent attorney would have ensured that information was not revealed, and would have properly managed all staff members.

Answer B

Liability for Loss Due to disclosure of confidential information:

A partnership is an association of persons to carry on a business as coowners for profit. The partners are jointly and severally liable for the debts of the partnership, both in contract and in tort. A limited liability partnership is a partnership that registers as an LLP with the Secretary of State. As an LLP, the partners are liable for their own torts incurred in furtherance of the partnership but not for the torts of the other partners or the partnership.

Filing the documents to register the partnership as an LLP is a prerequisite to attaining limited liability status. By not doing so the partnership retains the status of a general partnership and, therefore the partners would be personally liable for all liabilities of the partnership to the extent the debt was not satisfied by the partnership.

They could argue they intended to be an LLP and treated themselves as such, so they should be deemed to be a -de facto LLP. However, this argument is likely to fail because filing is such a simple act and the -de facto argument has been applied in the corporation, not the partnership contract. Also, an LLP by estoppel argument would fail because there are no facts to indicate Abel's client thought he was dealing with an LLP, and, even if he did believe that, this defense would not apply to a loss caused by a tort – i.e., negligence.

As partners A, B, and C are liable for failing to properly supervise Jack. Jack was their employee. His tapping into a wireless network directly caused the disclosure of client information. As his employee A, B, and C Legal Services is vicariously liable for the torts of their employee. Here Jack committed the intentional tort of conversion, the intentional taking of the personal property of another. He did this while working for the ABC LLP and with the intent of furthering their business. Therefore, even though the tort was intentional, ABC LLP is liable. Further they could be found liable for negligently hiring an inexperienced computer person and then failing to adequately supervise him. See the discussion of their failure to supervise and prevent breach of confidentiality

rules infra. Violating the rules does not show a personal liability but is evidence they breached their standard of care. Since ABC LLP is liable, the partners are jointly and severally liable for reasons discussed above.

David's Malpractice

A partnership is defined above. In order to prove the existence of a partnership, the primary element is whether the parties intend to share profits. Other indications are whether they share in losses and share in the management of the enterprise.

In this case David leased an office for a monthly rent that included 10% of his billings. While that relates to David's profits, it does not represent a sharing of profits because the amount is received as rent under a landlord-tenant relationship. Moreover, there is no indication of any sharing of losses or management responsibilities. There is no partnership between David and A, B, or C. Likewise, there is no indication that David otherwise held himself out as a partner of A, B, and C. One can be deemed to be a partner if he is deemed to have apparent authority by being held out as a partner. Since that is not the case here, ABC LLP is not liable for David's malpractice, and therefore ABC or its partners are not liable.

Breach of Rules of Professional Conduct

Lawyers have a duty to preserve the confidentiality of confidential client information. It may only be disclosed if expressly or impliedly authorized by client or permitted by the rules of professional conduct. None of the exceptions are relevant here, such as to present a crime involving death or serious bodily harm, serious economic loss (ABA rules only) or in response to a court order or order of the ethics committee.

Partners in a law firm have an obligation to put in place procedures to assure compliance with the rules of professional conduct.

They also have a responsibility to take any action to prevent or mitigate violation of the rules if they are able to do so.

Here ABC did not adequately supervise Jack or have any procedures in place to prevent violations of the confidentiality rule, resulting in a breach of the confidentiality rules. They breached the rules and may be disciplined accordingly.

Q3 Trusts / Community Property

Hank and Wendy married, had two children, Aaron and Beth, and subsequently had their marriage dissolved.

One year after dissolution of the marriage, Hank placed all his assets in a valid revocable trust and appointed Trustee. Under the trust, Trustee was to pay all income from the trust to Hank during Hank's life. Upon Hank's death, the trust was to terminate and Trustee was to distribute the remaining assets as follows: one-half to Hank's mother, Mom, if she was then living, and the remainder to Aaron and Beth, in equal shares.

Trustee invested all assets of the trust in commercial real estate, which yielded very high income, but suffered rapidly decreasing market value.

Hank, who had never remarried, died three years after establishing the trust. At the time of his death, the trust was valued at $300,000. Subsequently, it was proved by DNA testing that Hank had another child, Carl, who had been conceived during Hank's marriage to Wendy, but was born following dissolution of the marriage. Wendy, Carl's mother, had never told Hank about Carl.

Wendy, Mom, Aaron, Beth, and Carl all claim that he or she is entitled to a portion of the trust assets.

1. At Hank's death, what claims, if any, do the trust beneficiaries have against Trustee? Discuss.

2. How should the trust assets be distributed? Discuss. Answer this question according to California law.

Answer A

At H's Death, What Claims do the beneficiaries have against the trustee?

Duty of Care – Prudent Investing

A trustee has a duty to manage income as a reasonably prudent investor. Under old common law, this meant that each individual investment had to be relatively safe. Under the more modern standard, risky investments are permissible, as long as the portfolio as a whole has a relatively low level of risk. The trustee will not necessarily be liable for investment losses, as long as the investments had an acceptably low level risk. Here, investing all of the trust in real estates, a fairly risky investment, violated the duty of prudent investing. The portfolio as a whole would have a very high level of risk.

Duty of Care – Investment Diversification

Related to the prudent investor duty is the duty to diversify investments. T invested 100% of the trust assets in one form of investment – commercial real estate – a clear violation of the duty to diversify investments. T should have invested in a mix of stocks and bonds, and perhaps a small percentage could be in real estate.

Duty of Loyalty to Residuary Beneficiaries

When a trust is divided between an income beneficiary and a remainder beneficiary, the trustee owes a duty of loyalty to fairly protect the interests of both beneficiaries. This includes not making investment decisions solely for the benefit of the income beneficiary, and at the detriment of the remainder beneficiary. Here, T invested all the trust assets in real estate, which produces a lot of income (which would go to H, the income beneficiary) but will have very little principal left over due to rapidly decreasing market value. This violated T's duty of loyalty to the remainder beneficiaries M, A & B.

Duty of Communication

A trustee has a duty to keep the beneficiaries updated (at least yearly) as to the general status of the trust, and investment allocations. It's not clear on the facts here if T did this – T most likely did not, as the remainder beneficiaries would undoubtedly have complained earlier If they found out the trust was 100% invested in commercial real estate, solely for the income benefit of H. So T most likely breached his duty to communicate the status of the trust.

Remedies

The beneficiaries may sue Trustee personally for the loss in market value of the real estate (they may also sue for the increase in value that would have happened if T made a reasonably safe and diversified investment).

How should the trust assets be distributed?

Pretermitted Spouse

If a will (or trust) is formed before a marriage, and the spouse is omitted from the trust, it will be presumed that the omission was accidental and the spouse will be entitled to his or her intestate share. However, if divorce has occurred in the interim, it will be presumed the spouse was intentionally omitted and the spouse gets nothing. Here, H's trust was formed after marriage to W, but they had already been divorced for 1 year by the time the trust was formed, so W cannot claim to be a pretermitted spouse.

Community Property Law

Because California law applies here, W should have already received 1/2 of all community property (property acquired during marriage by the skill or labor of either spouse). So I'll assume H's trust was made only with his separate property, and the 1/2 share of CP he got upon dissolution. This means W has no rights to it unless H makes a gift to her.

Pretermitted Heir

If a will (or will substitute such as a trust) is formed before a child was born, and the child was omitted from the will, it will raise a presumption that the child was accidentally omitted, and the child will be entitled to his or her intestate share. When a child was born before the will or trust was executed, the testator did not know of the child's existence, the child will be treated as a pretermitted heir and will get the intestate share.

Here, it appears C was born before the trust was made (C was born right after dissolution and the trust wasn't made until 1 year after the dissolution). So normally C would not be a pretermitted heir; however, H had no idea C existed when H made the trust, as W never told H about C. And it's understandable H wouldn't have noticed, as the couple divorced soon after conception, so H may not have seen W much during the following year. And the child is H's child, suggested by the fact that C was conceived during marriage, and proved by DNA testing. I don't believe it matters that C was born following the dissolution of the marriage. Thus, C will be considered a pretermitted heir and will be entitled to an intestate share.

C's Intestate Share

Property is distributed intestate to the deceased person's spouse and issue, per capita, with right of representation. Per Capita means the property is distributed in equal shares at the first level of a living heir. Normally, a spouse gets 1/3 of the estate intestate if there are also living children. However, the spouse gets nothing intestate if divorce has already occurred when the settlor or testator dies. Here, divorce has already happened when H died, so W would get nothing intestate. H has three living children, so they each would be entitled to 1/3 of the $300,000. Since there are living children, Mom would not get anything. This is in California, and divorce has already occurred by the time H died, so I'll assume W's share was already taken care of by community property law. This means C's intestate share would be $100,000.

Abatement & Distribution

Abatement is the process by which money is cleared up for a new gift by reducing previously existing gifts. I believe that, unlike abatement when the estate is insolvent, abatement for a pretermitted heir is taken pro rata from both the residuary and general gifts (gifts or money or stock). Here, there is $300K in the trust. M has a general gift of 1/2, and A & B get the remainder. Thus, before C's gift, M would get $150K, and A & B would split $75K each. C's gift of $100K will take $50 K (1/3) from M, and $25K (1/3) from both A & B.

After abatement, C will end up with $100K. M will get $100 K. And A & B will get $50K.

Answer B

What claims do the Trust beneficiaries have against Trustee?

A trustee holds title to assets for the benefit of others, beneficiaries, and as such owes them certain duties. A trustee's violation of these duties can render him personally liable to the trustees.

Breaches of the Duty to Invest

A trustee has a duty to invest the assets of a trust and to do so with ordinary care a prudent person would use in investing their own money. Many states provide lists of acceptable investments. Likewise a trustee may consult professional investors to determine what is reasonable. In any event, two specific obligations must be met: 1) the trustee must diversify, and 2) the trustee must not speculate.

In this case, the trustee did not diversify and so has violated the duty to invest because all the trust assets were invested in real estate. Similarly, a court could find that the trustee was speculating in making these investments, which is also a violation.

Breach of the duty of loyalty

Trustees owe the beneficiaries a duty of loyalty and they owe this duty to each beneficiary equally. Favoring one beneficiary over others is a violation of this duty. In this case the trustee appears to have favored H (who was a beneficiary since income went to him during his life) over the other beneficiaries by making investments which maximized income, benefiting only H, and actually resulted in harm through diminished corpus value to the other beneficiaries. Trustee is personally liable for this breach to the beneficiaries.

Breach of the duty of care

Trustees owe beneficiaries a duty of care to act as a reasonably prudent person and the failure to properly manage the trust funds as described above is also a violation of this duty.

Other

It's also possible trustee breached his duty of accounting if he was not providing the beneficiaries with regular statements of the account balance. We need additional facts but the decrease in value indicates this could be the case.

How should the trust assets be distributed?

H created an inter vivos trust which terminated at his death and provided for 2 of his children (A & B) and his mother (if she was living). This trust was created while H was single and he never remarried. Hank died intestate but his inter vivos trust will be subject to the same probate rules as a will would have been.

Does W have any right to trust assets?

W is claiming an interest in trust assets but the trust was made after dissolution to her marriage to H. Absent some evidence that community property which should have gone to W under the court's continuing jurisdiction was used to establish the trust, W has no claim to the trust.

Carl's claim

Carl is H's child and he was conceived during but born after dissolution of the marriage. He was also apparently born before the creation of the trust since the trust was created a year after dissolution of the marriage. A child who is born after all testamentary instruments have been executed (including inter vivos trusts) or not provided for in them is pretermitted and will have a claim on decedent's estate. Here, that is not the case

since Carl was born before the trust was created and would therefore normally not have a claim. However, there is an exception when it appears that the only reason the child born before the execution of testamentary instruments was not provided for is that the parent did not know of his existence. That is the case here and so Carl will be considered a pretermitted child (his having been born after the marriage was dissolved is irrelevant).

What share does a pretermitted child take?

An omitted (pretermitted child) is entitled to take an intestacy share of the decedent's estate. The rules of intestacy would first provide for the decedent's spouse and children. Here, however, H leaves no spouse (as discussed above W has no interest in the trust) and so the intestacy rules would look to H's children. Under intestacy, children would take equally so Aaron, Beth, and Carl's share would be 1/3 each of the $300,000 corpus. Thus, Carl's share as a pretermitted child is $100,000.

What do the others take from the trust?

The trust provides that Mom gets 1/2 the corpus (assuming she's still living as appears to be the case) and the A & B split the remaining 1/2. Absent Carl's claim, Mom would've gotten $150,000 and A & B would've each received $75,000. Here, however, those amounts must be abated in order to pay for Carl's share.

In abating shares to pay for the claim of a pretermitted child the other beneficiaries will have their benefit reduced in proportion to the value they receive. Here Mom got 1/2 so she will have her share reduced by 1/2 of the amount due to Carl (i.e., $50,000). A & B each got 1/4 so their amounts are each reduced by 1/4 the amount owed to Carl ($25,000 each). Thus, the final distribution will be: Mom gets $100,000, Carl gets $100,000, Aaron and Beth each get $50,000 and W takes nothing.

FEE

ESSAY QUESTIONS 4, 5, AND 6

California Bar Examination

Answer all three questions. Time allotted: three hours

Your answer should demonstrate your ability to analyze the facts in question, to tell the difference between material and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

Q4 Remedies

In 2001, Lou was the managing partner of Law Firm in State X and Chris was his paralegal. Realizing that Chris intended to go to law school, Lou invited Chris and his father to dinner to discuss Chris's legal career. Aware of Chris's naive understanding of such matters, Lou, with the authority of Law Firm, made the following written offer, which Chris accepted orally:

1) After graduation from law school and admission to the Bar, Law Firm will reimburse Chris for his law school expenses;
2) Chris will work exclusively for Law Firm for four years at his paralegal rate of pay, commencing immediately upon his graduation and admission to the Bar;
3) Chris will be offered a junior partnership at the end of his fourth year if his performance reviews are superior.

In 2005, Chris graduated from law school and was admitted to the Bar, at which time Law Firm reimbursed him $120,000 for his law school expenses. Chris and his father invited Lou to dinner to thank him and Law Firm for their support. During dinner, however, Chris advised Lou that it was his decision to accept employment with a nonprofit victims' rights advocacy center. Lou responded that, although Law Firm would miss his contributions, he and Law Firm would nonetheless support his choice of employment, stating that such a choice reflected well on his integrity and social consciousness. Nothing was said about Law Firm's payment of $120,000 for Chris's law school expenses.

In 2008, Chris's father died. Chris then completed his third year of employment at the advocacy center. Not long thereafter, Law Firm filed a breach-of-contract action against Chris seeking specific performance of the agreement or, alternatively, recovery of the $120,000. In State X, the statute of limitations for breach-of-contract actions is five years from breach of the contract in question.

What legal and equitable defenses can Chris reasonably present to defeat the relief sought by Law Firm, and are they likely to prevail? Discuss.

Answer A

I. Controlling Law

The Uniform Commercial Code governs the sale of goods.

Here, the contract is one for services, mainly an employment contract. No goods are involved.

Therefore, the contract is governed by the common law of contracts.

II. Valid Contract?

Chris may defend by claiming that there was no valid contract. For there to be a valid contract, there must be an offer, acceptance, and consideration.

Offer

An offer invites the offeree to enter into a contract and creates the power of acceptance in the offeree.

Here, Lou made a written offer to Chris on behalf of Law Firm, which is probably an LLP or general partnership. As stated, Lou as managing partner has the authority to bind the firm.

Therefore, a valid offer has been made by the Law Firm.

Acceptance

An acceptance is the manifestation of assent to be bound by the terms of the contract.

Here, Chris accepted the offer because he -accepted orally.

Therefore, there was an acceptance, subject to Statute of Frauds considerations discussed below.

Consideration

A contract will fail for lack of consideration if there is no bargained-for exchange of legal detriment. Each party must be bound to do something he is not otherwise obligated to do, or to refrain from doing something he otherwise has a legal right to do.

Here, Law Firm is to reimburse Chris for his law school expenses if Chris graduates from law school and is admitted to the Bar. Law Firm is also to hire Chris thereafter for four years and pay Chris his paralegal rate of pay, while Chris is to work for Law Firm at such rate immediately upon admission to the Bar.

Further, Chris is to be offered a junior partnership at the end of his fourth year if his performance reviews are superior. This may be an illusory promise. Analysis follows.

Illusory Promise?

A promise is illusory even if there appears to be legal detriment if one party is not bound to do anything at all. An illusory promise included in a contract containing other legal detriment will not void the contract, and can become part of the contract.

Here, Law Firm can control Chris's performance reviews, and appears to give Law Firm complete discretion. However, performance at law firms can be objectively evaluated with client reviews, revenues raised, cases handled, successful litigation, and other factors. The court is likely to read in a reasonableness requirement on the part of Law Firm in making the review.

Therefore, item 3 on the contract is not illusory, and, in either case, the contract appears to be valid on its face.

III. Statute of Frauds

Under the Statute of Frauds, certain contracts must be in writing, contain a description of the parties thereto and subject matter thereof, and be signed by both parties. A contract must satisfy the Statute of Frauds if it is one in contemplation of marriage, one which cannot be completed in one year, a contract relating to land or executors, or for the sale of goods of $500 or more.

Here, the contract calls for at least 4 years of work at the paralegal rate of pay. There is no way this contract can be completed in one year; it would not be deemed -completed if Chris dies or Law Firm goes under. Therefore, the Statute of Frauds applies.

Law Firm's offer was in writing, but Chris accepted orally. There is no indication that the agreement was memorialized or signed by Chris. Therefore, Chris may assert that the contract fails due to the Statute of Frauds.

Part Performance

Law Firm will counter, saying it has partly performed on the contract. The Statute of Frauds can also be satisfied by part performance.

Here, Law Firm already reimbursed Christ $120,000 for his law school expenses. Therefore, Chris cannot void the contract for failure to meet the Statute of Frauds.

IV. Minor?

Contracts entered into by minors are voidable upon reaching majority. I will assume that Chris is not a minor as of 2001, as he graduated from law school in 2005. I assume he graduated from college in 2002 at the latest, and that he is not a prodigy who graduated from college while still a minor.

V. Undue Influence?

Chris may attempt to void and contract for undue influence. Although not rising [to] the level of duress, undue influence arises when someone with a confidential relationship exerts pressure and steers one into the influencer's desired course of action.

Here, Lou was already Chris's boss at the time of the offer. There was a vast difference in knowledge concerning employment practices between the two. Lou was also aware of -Chris's naïve understanding of such matters when he made the offer. However, Lou did invite Chris's father to dinner with Chris, and the partner-paralegal relationship probably does not rise to a level which can be considered a confidential relationship for purposes of undue influence.

Therefore, Chris is not likely to succeed on this theory.

VI. Unconscionable?

Chris may also raise unconscionability as a defense to the contract. A contract may be unconscionable when a party with superior bargaining power imposes a contract of adhesion or otherwise imposes terms which cannot reasonably be seen as fair.

Here, hiring a lawyer at the price of a paralegal appears unconscionable. However, Lou can logically argue that Law Firm has -prepaid some of Chris's compensation by paying for law school. Further, the terms do not appear boilerplate or as adhesive.

Therefore, Chris is not likely to succeed on the theory of unconscionability. Thus the contract is valid.

VII. Defenses to Specific Performance

Specific performance is an equitable remedy which may be granted by the court where 1) legal remedies are inadequate, 2) the terms are definite and certain, 3) there is

mutuality of remedies, 4) the remedy is feasible for the court to monitor, and 5) there are no defenses.

Here, Law Firm will argue that legal remedies are inadequate because they are seeking to employ the one and only Chris. Christ knows the firm from his paralegal work and Law Firm trusts him. The terms of the contract are certain, as the term and salary are stated on Lou's offer. Mutuality of remedies, recently not very important and leans more towards mutuality of performance, is also met because Law Firm is ready, willing, and able to meet their side of the bargain. The remaining issues to consider are feasibility and defenses.

Feasibility

It is very difficult for the court to monitor a service contract, especially an employment contract. Further, forcing someone to work violates the 13th Amendment of the Constitution banning involuntary servitude. Here, we are concerned with an employment contract, and the court will find it infeasible to enforce.

Laches

Chris can also assert the defense of laches. One can defend on the theory of laches regardless of the statute of limitations because they are completely different theories. Laches operates when a party has 1) unreasonably delayed assertion of their rights so that 2) there is prejudice to the other party.

Here, Law Firm said they would nonetheless support his choice of employment, and commended Chris on his integrity and social consciousness. Chris reasonably took this to mean that he was not bound by the contract to work for Law Firm, and that the law school expenses would be paid for regardless of his decision. Further, Law Firm waited 3 years to file a breach of contract action. Chris had worked for the advocacy center for 3 years at this time, and for Chris to go back to a law firm at paralegal wages would constitute severe prejudice.
Thus, Chris can successfully assert the defense of laches.

Unclean hands

Equity does not help those who do not come to the court with clean hands. If there was foul play on the part of Law Firm, equity will not help it pursue its goals.

Here, Law Firm made the offer knowing of Chris's naïveté. Further, Law Firm took Chris's father's death as an opportunity to file their claim. The father had been there at the two dinners with Lou and could offer support as well as testimony.

Therefore, Chris will most likely succeed on this defense as well.

Note, however, that the court has discretion in granting equitable defenses.

VIII. Defenses to recovery of law school expenses

Gift

Chris will argue that Law Firm made an irrevocable gift of the law school expenses. An oral gift is revocable, but a gift is finalized and cannot be revoked when there is delivery with the intent to give and the gift is accepted.

At the second dinner, Lou supported Chris's decision but mentioned nothing about the law school expenses. Lou also commended Chris on his decision. Therefore, Chris will assert that Law Firm made a gift. Here, there was delivery of the $120,000 and the money was accepted. The problem is the question of intent. Law Firm will assert that is [an] obvious, common practice to repay someone on a prepayment when a contract is not fulfilled. This is a question of fact but, on balance, Chris will probably not succeed on this theory.

Waiver

Chris will argue that Law Firm waived its rights to take back the reimbursement.

At the second dinner, Lou supported Chris's decision but mentioned nothing about the law school expenses. Therefore, Chris will assert that he interpreted this to be a waiver. However, a waiver must be knowingly made, not assumed from silence. Further, a waiver of a significant debt must generally be in writing, and there was no such writing.

Therefore, Chris will not succeed on this defense.

Promissory Estoppel

Chris will next assert that he relied to his detriment on the gift or waiver, so that Law Firm is estopped from claiming the $120,000 back. Promissory estoppel arises when reliance is induced and the other party in fact justifiably relies.

Here, Law Firm will argue that it induced no such reliance. Chris will argue that waiting 3 years is enough for reliance. While this is another question of fact, the court will most likely hold for Law Firm.

Therefore, Chris will most likely have no defense concerning the recovery of the $120,000.

Answer B

Law Firm (LF) v. Chris (C)

Contract Formation

A contract is formed if there is mutual assent and consideration. Mutual assent is found if there's an offer and an acceptance of the offer. An offer is the manifestation of willingness to enter into a bargain so as to justify another person in understanding that his assent to that bargain is invited and will conclude it. Acceptance is the manifestation to accept the terms of the offer. Consideration is the bargained-for exchange of legal detriment – which is the doing of something one has no legal obligation to do or forbearing on doing something one has a right to do.

Here, we have Lou of LF making a written offer to C for C to work for LF. The offer has certain terms and it was communicated to C properly. C accepted orally. Thus, mutual assent is found.

Consideration is likewise found here because LF was offering to reimburse C for law school expenses and C in return promised to work exclusively for LF for four years. Each party does not need to do what it promised to do absent a contract; thus, each has legal detriment involved in the bargain.

Thus, there is a contract formed here.

Defenses to Formation

Statute of Frauds

The law of contracts requires that certain contracts have to be in writing in order to be enforceable. The writing must identify the parties, must contain the critical terms of the agreement, and must be signed by the party to be charged. One of these types of contracts falling under the statute is contract which performance takes over a year.

Here, we have a four-year contract so if falls under the statute. Although there's an offer in writing, the acceptance of C wan not in writing – i.e., he did not sign the offer so there is no writing evidencing a contract was formed between the parties. Thus, there is no writing that meets the requirements of the statute. This being so, LF cannot enforce C's promise.

However, a promise may be taken out of the Statute if the parties have already performed. Here, LF can argue that even if there's no qualifying writing, LF performed by reimbursing C the money – a clear evidence of the presence of a contract. On this issue, LF has the better of the argument.

Unconscionability/Public Policy

The law frowns upon and does not sanction unconscionable contracts where one party, because of its superior bargaining position, takes advantage of the other party either procedurally (i.e., during the negotiation phase where a party) or substantively (i.e., where the terms of the contract are unreasonably favorable to the party who drafted it and who has the superior position).

Procedurally, here, LF was the one in the superior bargaining position because it is the employer of C. C can argue that through its agent, LF took advantage of C's -naive understanding of matters relevant to the contract. Additionally, LF, aware of C's naiveté, did not advise C to seek independent advice about the contract.

LF can argue that C has other choices, however, and was not coerced into accepting the contract. Besides, LF can argue that C had his father with him when the contract was being negotiated. Further, LF may argue that C has several reasonable alternatives, including not accepting the contract itself. LF has the better argument here.
Substantively, C has a stronger argument because the contract states that he would work for LF for four years at his paralegal rate of pay. The law will see this as an unreasonable term given the duration and low rate of pay even where C is already a lawyer. Further, Ca can argue that the promised junior partnership at the end of the 4

years is illusory because the firm retains the unrestricted right to say C's performance reviews are -not superior, unless LF can point to specific and objective standards by which C's performance can be measured.

Misrepresentation

Misrepresentation is the intentional making of false statements of material fact. It can [be] affirmative or it can be through silence. Silent misrepresentation is typically found where one party, who enjoys a fiduciary or special relationship with the other, stays mum about pertinent facts that the other party should know about in order to make a knowing and intelligent decision.

C may claim LF, through Lou, misrepresented by keeping silent about the pertinent aspects of the contract when he had the responsibility to apprise C of his rights and obligations. C can argue that Lou has a special relationship with him as he is his employer and also the managing partner of a law firm.

The court, however, will likely side with LF on this issue unless C can point to specific acts by which LF affirmatively or negatively, through silence, -misrepresented facts because each party is allowed to drive as hard a bargain as possible in an arms-length transaction.

Specific Performance (SP)

SP is an action where a party goes to a court of equity seeking relief and asking the court to ask the breaching party in a contract to perform as promised. SP is granted where the following elements are met: there is inadequate remedy at law; the contract has definite and certain terms and all conditional terms precedent to formation have been met; performance is feasible for the parties; the court does not need to actively monitor performance; and there are no equitable defenses that the breaching party can raise.

Here, LF will argue that there are definite and certain terms because the offer specifies the relevant provisions of what the contract entails. It will also point out that all the conditional terms precedent to contract formation – i.e., C's graduation from law school and admittance of the Bar – have been met.

However, C will be able to argue that there are adequate remedies available for LF to pursue at law. For instance, it can ask for damages, measured by the cost of hiring another lawyer.

C will also argue that performance is not feasible because to require him to serve as LF's new lawyer against his will is unconstitutional – it is violative of the law against involuntary servitude. This is a huge argument in favor of C because it is well-established that courts are loathe to enjoin parties to perform personal services contracts against the wishes of the performing party. Additionally, the court does not want to actively monitor individual performances of this nature because of the impossibility of having measurable standards by which the party can be judged.

Moreover, C can raise two equitable defenses: (1) the doctrine of Unclean Hands and (1) Laches.

-Unclean Hands provides that one must do equity in order to seek equity; in other words, a party cannot seek relief form a court of equity when the court's -hands will be sullied because of the unethical, unlawful or otherwise improper conduct of the party seeking relief. Here, C will point out that Lou's conduct in taking advantage of his -naiveté and of inserting those unconscionable provisions render LF unworthy of relief from the court of equity because these actions were unethical and improper, if not unlawful.

Laches is another equitable defense by which the defending party can raise the issue that the plaintiff slept on its rights, thus prejudicing his defense. Here, C will be able to point out that LF should have immediately sought relief and not waited three years. C will argue that the long waited prejudiced him because the only witness to the contract negotiations was his father, who died in 2008. While LF can point to the statute of

limitations of 5 years, this argument will be unavailing for the firm because a court of equity looks at the statute of limitations as just one factor in determining whether the doctrine of laches should apply. Because SP is an equitable remedy, the court will look at the totality of the circumstances and render a decision in favor of C here, whose ability to defend himself has been compromised by the unexpected death of his father.

Restitution of $120K

Restitutionary remedies are proper where there is a promise which the defending/promising party made which the party made which the party should have reasonably expected will induce reliance on the other; the other actually relied on it and conferred a benefit on the breaching party; and unjust enrichment will result if the promising party is allowed to retain the benefit without reimbursing the other.

Here, LF will argue that C made a promise which C should have reasonably expected would induce LF to rely, and LF did rely, on his promise; that C benefited by receiving the $120K reimbursement of his law school expenses; and that allowing C to retain the money will result in C's unjust enrichment.

This is a strong argument on the part of LF, and C really does not have much in the form of argument to rebut it, except possibly to say that C's receipt of the money was a reward for working as a paralegal for the firm and that the reward is part of employment benefits and not conditioned on his working for the firm even after passing the bar. It's a weak argument and C will be asked to return the money absent a stronger defense.

One possibility for C is the doctrine of waiver. Waiver is the voluntary relinquishment of a known right. C can argue that Lou knew about his decision and said that -although LF would miss his contributions, he and LF would nonetheless support his choice of employment, which is a noble one – i.e., working for an advocacy center. C can argue that by LF's conduct, it waived its right to restitution of the money, or otherwise indicated that indeed, the money was an employment benefit to reward [him] for his loyal and worthy employment as paralegal in the prior years.

Additionally, C can raise again the equitable doctrine of laches, as discussed supra, because LF -slept on its rights when it waited 3 years to seek restitution. C will be able to again argue that the sole witness as to the real characteristics of that money is dead, thus prejudicing his ability to defend himself.

Q5 Constitution

Paula has owned and farmed a parcel consisting of 100 acres for many years. Last year, in compliance with County regulations, she expended a substantial amount of money in determining the economic feasibility of developing 10 acres of the parcel that border the shore of a small lake. She recently submitted a development application to County seeking to construct 30 homes on those 10 acres. County then determined that the 10 acres constitute protected wetlands that, under a state law enacted recently, had to be left undeveloped to protect certain endangered species. On that basis, County denied the development application.

Paula brought an action claiming that County's denial of the development application constituted a regulatory taking in violation of the U.S. Constitution. It was stipulated that the 10 acres are worth $4,000,000 if development is permitted and $200,000 if it is not.

The trial court ruled that County's denial of Paula's development application did not constitute either (1) a total or (2) a partial taking.

Did the trial court correctly rule that County's denial of Paula's development application did not constitute:

1. A total taking? Discuss.

2. A partial taking? Discuss.

Answer A

1. Did the trial court correctly rule that County's denial of Paula's development application did not constitute a total taking?

The Fifth Amendment of the Constitution prohibits the government from taking private property for public use without just compensation.

Taking

There are two types of takings: permanent physical occupation and regulatory takings. The former is not at issue because Paula's complaint contends the County is liable for a regulatory taking.

A regulatory taking is considered a ‑per se taking if it deprives the owner of 100% of all economic viable use of the owner's property. Here, Paula owned 100 acres and 10 of those acres bordered a small lake in which she [was] seeking to develop to construct 30 homes thereon. However, the County denied Paula's application to develop the 10 acres on the basis that the 10 acres constituted protected wetlands. Thus, Paula owned 100 acres but only 10 of it was denied development. Because the County did not deny development of the entire 100 acres owned by Paula (rather, the County only denied development of 10 acres), Paula was not deprived 100% of all economically viable use of her property.

Denominator Problem

The US Supreme Court has recognized an inherent denominator problem regarding takings. As applied to this case, if Paula only owned 10 acres and was denied development of that entire 10 acres, she would prevail against the County in a per se taking claim. However, because Paula owns (and has owned ‑for many years) 100 acres, she is unable to prevail in a per se taking claim since the County did not deprive her of 100% economically viable use of all her property.

However, even if Paula only owned 10 acres in the context of the state law depriving her development of that 10 acres, Paula would still not be deprived of 100% of all economically viable use of her property because the parties have stipulated that her land is worth $200,000 notwithstanding the prohibition on development. Thus, no total taking has occurred.

Private Property

The 5th Amendment is implicated here because Paula's property is private property.

Public Use

The 5th Amendment is implicated here because regulatory takings are generally considered to be public use. The US Supreme Court in Kelo defined public use to include any government action taken to serve any public purpose. Here, the state law required 10 acres of Paula's land to be undeveloped to protect certain endangered species. Because protecting certain endangered species serves a public purpose, the government may lawfully take private property so long as it meets other requirements under the 5th Amendment.

Just Compensation

If the court determines that a total taking has occurred, the government is liable to compensate Paula justly. -Just compensation is generally measured by the fair market value of a piece of property or the value as stipulated by the parties. The value of the property specific to Paula is irrelevant.

The parties here have stipulated that Paula's land is worth $200,000 if development is not permitted. Thus, Paula would be awarded $200,000 in the event that a total taking has occurred. Paula may argue she should be entitled to $4,000,000 since that's what her land would be worth had she been able to develop her property. However, -just compensation will likely not be determined by the court to be $4,000,000 because Paul lacks a vested right to develop.

Vested Rights

A private property owner has a vested right to develop when a government body has specifically approved, by individualized action, the development of a particular piece of property.

Here, although Paula has expended a substantial amount of expenditures in determining the feasibility for developing the 10 acres, she nonetheless has no ‑vested right to develop because she lacks the requisite government approval. There are no facts indicating the government issued Paula any type of building permit or other individualized action specific to her property that would vest her rights to develop. Thus, because she has no vested right to develop the 10 acres, the value of the 10 acres is tantamount to its value as undeveloped wetlands, i.e., $200,000.

Conclusion

Although Paula's property is private property and the state law is pursuant to public use, the trial court's decision that a total taking has not occurred is correct because Paula was not deprived of 100% of all economic viable use of the owner's property.

2. Did the trial court correctly rule that County's denial of Paula's development application did not constitute a partial taking?

Taking

A regulatory taking does not have to be a ‑per se taking to implicate the 5th Amendment. A regulatory taking is also considered a ‑taking under the 5th Amendment if it does not pass the Penn Central Balancing Test. In the Penn Central case, the U.S. Supreme Court analyzed three factors in determining whether a ‑taking has occurred: (1) the nature of the government action, (2) the private property owner's reasonable investment-backed expectations, and (3) the level of diminution in the owner's private property value.

1. Nature of Government Action

Here, a state law was enacted to protect wetlands to protect certain endangered species. It was not enacted to punish Paula. And it's probably safe to presume the state law is also applicable [to] other properties alongside the lake and that it was not similar in form to that of -spot zoning – where the government singles out a piece of property and changes its use in a way that's distinct from other adjacent properties. Because the nature of the state law was to protect endangered species and not to single out Paula's property, this factor weighs in favor of the trial court's decision that a partial taking has not occurred.

2. Private Property Owner's Reasonable Investment-backed Expectations

Last year, Paula expended a substantial amount of money in determining the economic feasibility of developing 10 acres of the parcel. Thus, she invested a considerable amount in her expectation to develop eth property. The County may argue, however, that Paula's level of investment was not reasonable under the circumstances because she had no vested right (see heading Vested Rights under Q1 above) to develop her 10 acres. The County would argue she should not have spent a substantial amount at a point in time when the probability of her being able to develop her property was so speculative.

However, the facts state Paula did the economic feasibility study —in compliance with County regulations. Thus, Paula has a strong argument that her investment was reasonable because the County required her to do an economic feasibility study. On balance, Paula's expenditure of a substantial amount was probably reasonable under the circumstances.

3. Level of Diminution in Value

Here, the parties stipulated that the 10 acres are worth $4,000,000 if development is permitted and $200,000 if it is not. Thus, Paula would likely argue that the level of diminution in the value of her property is great because of the difference in what her

property would be worth if the state did not prohibit her from developing her property. However, the $4,000,000 figure is a -would be value and not an -as is value. The court may weigh this factor differently if it was the case that Paula owned property worth $4,000,000 and, due to a state law, it is now worth $200,000. However, that is not the case. Here, Paula's property is worth $200,000 as it sits right now, undeveloped. Because Paula's property has not diminished in value, this factor weighs heavily in favor of the trial court's decision that a partial taking has not occurred.

Denominator Problem

A court's review of the trial court's decision that a partial taking has not occurred would have to grapple with the same denominator issue (as analyzed above and repeated below) as they would regarding the trial court's decision that a total taking has occurred.

The US Supreme Court has recognized an inherent denominator problem regarding takings. As applied to this case, if Paula only owned 10 acres and was denied development of that entire 10 acres, she would prevail against the County in a per se taking claim. However, because Paula owns (and has owned -for many years) 100 acres, she is unable to prevail in a per se taking claim since the County did not deprive her of 100% economically viable use of all her property.

However, even if Paula only owned 10 acres in the context of the state law depriving her development of that 10 acres, Paula would still not be deprived of 100% of all economically viable use of her property because the parties have stipulated that her land is worth $200,000 notwithstanding the prohibition on development. Thus, no total taking has occurred.

Private Property

The 5th Amendment is implicated here because Paula's property is private property.

Public Use

The 5th Amendment is implicated here because regulatory takings are generally considered to be public use. The US Supreme Court in Kelo defined public use to include any government action taken to serve any public purpose. Here, the state law required 10 acres of Paula's land to be undeveloped to protect certain endangered species. Because protecting certain endangered species serves a public purpose, the government may lawfully take private property so long as it meets other requirements under the 5th Amendment.

Just Compensation

If the court determines that a total taking has occurred, the government is liable to compensate Paula justly. -Just compensation is generally measured by the fair market value of a piece of property or the value as stipulated by the parties. The value of the property specific to Paula is irrelevant.

The parties here have stipulated that Paula's land is worth $200,000 if development is not permitted. Thus, Paula would be awarded $200,000 in the event that a total taking has occurred. Paula may argue she should be entitled to $4,000,000 since that's what her land would be worth had she been able to develop her property. However, -just compensation will likely not be determined by the court to be $4,000,000 because Paula lacks a vested right to develop.

Conclusion

Although Paula's property is private property and the state law is pursuant to public use, the trial court's decision that a partial taking has not occurred is correct because the factors under the Penn Central balancing test weigh in favor of the trial court's decision.

Answer B

1. DID THE TRIAL COURT CORRECTLY RULE THAT COUNTY'S DENIAL OF PAULA'S DEVELOPMENT APPLICATION DID NOT CONSTITUTE:

A. A TOTAL TAKING?

TAKINGS CLAUSE

The 5th Amendment of the US Constitution states that the government may not take private land for public use without paying just compensation. Through the Doctrine of Selective Incorporation, this is made applicable to the states via the Due Process Clause of the 14th Amendment. In this case since the County is a state municipality Paula will challenge under the 14th Amendment clause.

A taking can either be physical, where the government physically occupies the land, or a taking can be regulatory, where a government regulation renders the land economically unviable. In either case, if there is indeed a -taking and the taking is for public use the government will be required to pay just compensation.

PHYSICAL TAKING

As mentioned above, a physical taking occurs when the government physically occupies the land either in part or in total. If there is actually any -physical occupation in any way, it will constitute an official taking. If the taking is for public use the government will be required to pay just compensation.

In this case the only governmental action is a regulatory statute preventing Paula from developing the 10 acres. There is no actual physical occupation, but rather a regulation affecting Paula's use.

Therefore, there is no physical taking.

REGULATORY TAKING-TOTAL

A regulatory taking occurs when a government regulation renders property economically unviable. For there to be a taking under the takings clause through, and unlike a physical taking, the regulatory taking must leave no economically viable use of the property.

Here the court concluded that there was no total regulatory taking of Paula's property when they rejected her application. Let's explore this further to see if indeed there was a total taking.

Paula owns 100 acres of land and had done so for many years. Paula has farmed the land, but the facts don't state how much of the land she actually farms. Presumably Paul also lives on the farm as well.

In this particular case, Paula is seeking to build 30 homes on 10 acres of her land sitting next to a small lake. The government is claiming that due to a state law the 10 acres is protected land and Paula is not able to build. It should be immediately noted that only 10 of Paula's 100 acres is being negatively affected by the government's regulation. Paula is still free to use the remaining 90 acres as she sees fit. She can continue to farm it, or even build the 30 homes on any of those remaining 90 acres. It's presumed that Paula's intentions in building the homes is for business purposes. Moreover, since the 10 acres abuts a small lake, Paula will likely be able to make a bigger profit on selling the homes as she'll be able to advertise that they are -waterfront property. The facts don't specifically state what type of condition the remaining 90 acres is. 90 acres is a lot of land and perhaps there is another equally viable place for her to build the 30 homes.

However, the government regulation is not a total taking here since there appears to be a lot of economically viable use of the land remaining. First, Paula has possession and can make use of 90 of the 100 acres presumably as she sees fit. The government regulation only affects 10% of Paula's land. Paula still has a lot of remaining of which [it] has tremendous economical use. Paula can continue farming the 90 acres of land,

and even perhaps the 10 acres in question. Additionally, she may even be able to move her development plans to those 90 acres as well. In this case the government regulation may not even affect her that much at all.

Since the regulation only affects 10% of the land, and there is still considerable economical use of the remaining 90 acres of land, the government regulation is not a total taking.

B. A PARTIAL TAKING

PARTIAL REGULATORY TAKING

A partial regulatory taking occurs where the government regulation affects some economic use of the land, but there still remains a sufficient amount of economic use.

Here, Paula will argue that by preventing her from building the 30 homes on the 10 acres the government regulation is rendering those 10 acres economically unviable. She will further argue that while in relation to the total 100 acres 10 acres is only 10%, but in relation to the 10 acres in question, the government regulation is preventing her from making any economic use of the land. By not allowing Paula to build the 30 homes on the 10 acres the government is preventing her from making a profit from her use of the land. The state law in question requires the 10 acres to be undeveloped, meaning Paula cannot build any structures on the land, or make any profitable use of it.

INVESTMENT BACKED OPPORTUNITIES

Paula will argue that the government regulation destroys her investment backed opportunity since she's invested a substantial amount of money in determining the economic feasibility of developing the 10 acres. While the facts don't say, Paula has perhaps entered into contracts with prospective buyers of the homes and/or even contractors to build the land. Further, Paula will argue that she complied with County regulations the entire step of the way in her pursuit of this endeavor.

The government will argue that she should not have invested that much money before researching if her prospective use was legal. In doing so she created her own detriment and will suffer the burdens of it.

BALANCE OF INTEREST

Finally, the court will likely balance the interest of both parties to determine if there is a substantial partial regulatory taking of which compensation should be paid.

Here, Paula's interests are obvious. She wants to be able to build 30 homes on the 10 acres of land so she can make a profit on them. Also Paula can argue that by building the homes she's providing adequate housing for the public. Alternatively, the government wants to protect endangered species from becoming extinct. Weighing the two factors, given the fact the Paula's interests are purely pecuniary, the government will likely prevail in this battle. Their interest protects more of the public at large while Paula's merely protects a few, if any.

In conclusion there appears to be [not] any total or partial taking. However, in the event the court finds that there was, the taking must be for public use.

PUBLIC USE

The government may only take land if is for public use. Here, the government regulation is to preserve endangered species. This is a benefit for the public at large since it preserves the wildlife for all to enjoy.

JUST COMPENSATION

Finally, in the event that there is a taking for public use, the government must pay just compensation. This is the market value of the land to the owner at the time of the taking.

In this case, if there is a taking the government will have to pay Paula $4,000,000 since the taking prevents her from developing her land as she wants to.

STATE LAW INVALID

Paula may try to argue that the state law guiding the government's decision is invalid.

10th AMENDMENT & PREEMPTION

Under the 10th Amendment, powers not reserved to the federal government are reserved to the states.

Here the state law protects certain wetland and endangered species. Paula will argue that the state law is preempted by federal law since under the federal property power, the federal government is in control of preserving the land.

In conclusion, the court did not err in ruling that the County's denial of Paula's development application did not constitute a total or partial taking.

Q6 Community Property

Herb and Wendy, residents of California, married in 2001. Herb worked as an accountant. Wendy was an avid coin collector who hoped someday to turn her hobby into a profitable business. Prior to marriage, they had entered into a prenuptial agreement providing that each spouse's wages would be his or her separate property.

On Wendy's birthday in 2002, Herb gave Wendy a drawing by a famous artist. Herb paid for the drawing with $15,000 that his parents had given him. Wendy hung the drawing in their bedroom.

In 2003, Wendy opened CoinCo, a shop specializing in rare coins. She capitalized the business with a $10,000 inheritance that she had received when her grandfather died. Wendy worked at the shop alone every day. Customers appreciated her enthusiasm about coin collecting and her ability to obtain special coins at reasonable prices. Over time, Wendy learned that she had acquired a number of highly valuable coins. There was also a renewed interest in coin collecting due to the discovery of several boxes of old coins found buried in the area.

Although Wendy's services at the shop were worth $40,000 per year, she took an annual salary of $25,000. She also paid $5,000 in household expenses from the business earnings each year.

In 2008, Herb and Wendy separated, and Wendy filed for dissolution of marriage. At that time, CoinCo was worth $150,000, and the drawing was worth $30,000.

In 2009, before trial of the dissolution proceeding, Wendy was disabled by a serious illness and had to be hospitalized. She closed CoinCo while she was in the hospital, and the value of the business fell to $100,000 by the time of trial. Her hospital bill was not covered by health insurance.

In the dissolution proceeding, Wendy claims that the prenuptial agreement is valid and Herb claims that it is not.

What are Herb's and Wendy's respective rights and liabilities in:

1. The drawing? Discuss.

2. CoinCo? Discuss.

3. The hospital bill? Discuss.

Answer according to California law.

Answer A

California is a community property state. All property acquired during marriage is community property (CP). Property acquired prior to marriage or after permanent separation, and any property received during the marriage by gift, bequest , or devise, is separate property (SP). In order to determine the character of property, we must trace back to the funds used to acquire the property, then apply any special exceptions or conditions under the law. Both spouses are entitled to a one-half share of CP. At divorce, the CP is divided equally unless there are special considerations that apply.

1. The drawing

To determine the character of a piece of property we trace back to the funds used to acquire it. Here, we are told that H paid for the drawing with $15,000 that his parents gave him as a gift. Property acquired during marriage as a gift to one spouse is SP; therefore the $15,000 was SP, and by tracing we determine that the drawing was SP at the time it was purchased.

Transmutation

Prior to 1985, the character of property could be more easily changed or transmuted from SP to CP or vice versa. After 1985, however, any transmutation of property had to be in writing to be valid. An exception to this is where a spouse gives the other spouse a gift of relatively insubstantial value, in which case the gift between spouses can be transmuted from CP to SP or from SP to CP or even from one spouse's SP to the other spouse's SP.

Here, we are told that the drawing was by a famous artist, and that H purchased it in 2002 in honor of W's birthday for the substantial sum of $15,000. We are also told that Wendy hung the drawing in the couple's bedroom. Under these facts, the drawing was of substantial value and would not ordinarily come within the transmutation exception for gifts of insubstantial value. But we are also told that it was bought on Wendy's birthday, H gave it to her, and W hung it in their bedroom. Those facts appear to show an intent

that the painting was either given to the community from H's SP, or possibly even given to W as her SP, but hanging the painting in their bedroom looks more like a potential transmutation from H's SP to CP. However, because the drawing was clearly valuable and there was no writing, no transmutation occurred. The painting remained H's SP at the time of permanent separation.

End of economic community upon permanent separation.

A marriage ends upon dissolution/divorce, but the economic community of a marriage ends upon permanent separation, where the couple separates with the intent to not reconcile and to stay permanently separated and dissolve the marriage. Here, we are told that H and W separated in 2008, and W filed for dissolution of marriage at that time. Therefore, the economic community ended in 2008. We are also told that in 2008 the painting was worth $30,000. Because there was no transmutation, the painting was still H's SP, and now worth $30,000.

2. CoinCo

Separate property business enhanced by community labor. Where a SP business is enhanced by community labor during marriage, for the purposes of dissolution the courts will use one of two formulas in order to determine the CP's interest and share in the SP business.

Pereira: Where the SP business growth is due predominately to the spouse's labor and abilities, the Pereira method is used. Under Pereira accounting, the SP business spouse is entitled to the original principal value of the business, plus an annual rate of return calculated at 10%, both of which are SP. The remaining value of the business is CP.

Van Camp: Where the value of the SP business derives mostly from the character and nature of the business itself, the Van Camp method of accounting is used. Under Van Camp, the community is entitled to the reasonable salary value of the spouse's labor,

minus any mount received by the community, and minus any community expenses paid. All else is SP.

Pereira analysis:

Here, we are told that we can trace the beginning of CoinCo in 2003 to W using a $10,000 inheritance. This inheritance is SP; therefore CoinCo is a SP business belonging to W. We are also told that W had prior to marriage been an avid coin collector, therefore she had skill and expertise used to increase the value of the business. We are also told customers appreciated her enthusiasm about coin collecting and her ability to obtain special coins at good prices and had in fact obtained highly valuable coins. We are also told that after permanent separation with W became ill, the value of CoinCo fell from $150,000 in 2008 to $100,000 in 2009, because W was not available to lend her skills to the business. All of these factors point to W's skill and expertise as being the reason for CoinCo's success, and point to a Pereira analysis. Under Pereira, the initial value of CoinCo of $10,000 is SP, and 10% per year from 2003 when it started to 2008 upon permanent separation is $1,000 per year or $5,000. Therefore $15,000 would be W's SP, and the remainder would be CP. At permanent separation CoinCo was worth $150,000, so $135,000 was CP, and H would be entitled to half of that. We are told that in 2009, CoinCo's value fell to $100,000. If that figure is used, then we deduct the $15,000 SP and the $85,000 remaining is CP.

Van Camp analysis:

On the other hand, we are also told that there was a renewed interest in coin collecting due to the discovery of old coins found buried in the area. This would point to CoinCo being inherently valuable because of the type of business it was, and not entirely due to W's expertise skill and labor. If a court decided that was the predominant factor, then under Van Camp analysis we are told the W's services at CoinCo were worth $40,000 per year. Over five years that is $200,000. We are told that W took an actual salary of $25,000 per year, and W also paid $5,000 per year of household community expenses. So the community already received $125,000 of salary over five years from 2003 to 2008 and $25,000 in expenses totaling $150,000. Under Van Camp, the community is

still entitled to $50,000, the difference between the $200,000 value and the $150,000 actually received. The initial $10,000 investment is W's SP. We are told that by the time of 2009 divorce trial the value of CoinCo fell to $100,000. Thus $50,000 of that is CP and the rest is SP.

Prenuptial agreement:

A prenuptial agreement is valid so long as it is in writing. Here we are told that prior to marriage W and H entered into a prenuptial agreement providing that each spouse's wages would be his or her SP. The agreement is valid; therefore W's wages from CoinCo are her SP and the community is not entitled to them. Therefore, the above Van Camp analysis is altered by the prenuptial agreement. The $125,000 in salary will not be credited to the community, but the expenses (which are not mentioned in the prenup) will still be credited. Thus under Van Camp and under the prenup wages of W are not credited to the community.

This does not affect the Pereira analysis which is not based on wages. Overall, the facts show that the increase of value of CoinCo was due primarily to W's skill so because Pereira does not take wages into the analysis there is no change under Pereira. H will want Pereira used, and W will want Van Camp used, because it is based on her wages, which are SP under prenup. But a court is likely to apply Pereira.

3. The hospital bill

Debts after permanent separation

After permanent separation the economic community ends. Any debts that are incurred by either spouse post-separation are SP debts, and creditors will have to go after the SP of the spouse who incurred the debt. An exception exists, however, for debts related to the necessities of life, such as food, clothing, shelter, and, arguably, health care expenses. In that event, a creditor may go after the debtor spouse's SP, the CP, and also the SP of the other spouse.

Here, we are told that in 2009, after the permanent separation but before the divorce trial, W was disabled by a serious illness and in hospital, and that her hospital bill was not covered by insurance. Because the hospital bill is for a necessity of life and they are not divorced yet, the hospital can go after W's SP, the CP, and H's SP for this necessity of life debt.

Answer B

California is a community property state. In California, property acquired during marriage is presumed to be community property (CP). Property acquired before marriage and after legal separation is deemed separate property (SP). Additionally, property acquired by gift, bequest and devise is also SP.

The name of the title is not determinative of the property's characteristics. Courts may trace the funds used to acquire the property to determine the characteristics of the property. With these things in mend, we can understand how a court will assess the distribution of the following assets.

Prenuptial agreement

The determination of the distribution of assets at the divorce of Wendy and Herb all depend on the validity of the prenuptial agreement. A prenuptial agreement is an agreement that allows [a] party to contract out of California community property law. To be valid, there must be a writing signed by both parties, each of whom are represented by independent counsel, there must be a valid waiver in writing, a full disclosure of all assets, and a minimum of 7 days before the parties sign the agreement. Additionally, the parties must have the capacity to enter such [an] agreement, including no undue influence from either party. Also, it must be voluntary. Here the only facts we are given was that in 2001, Herb and Wendy married in California. Prior to their marriage a prenuptial agreement was entered into. The agreement stated that wages of each spouse would be his or her separate property. However, at the divorce proceedings, Wendy claims that the agreement is valid while Henry argues it is not. Without facts demonstrating the validity of the agreement, the following distribution analysis will show the results of the distribution with or without a valid prenuptial agreement.

1. The drawing

Items acquired during marriage are presumed to be CP unless tracing the assets or actions of the parties shows otherwise. Here, on Wendy's birthday in 2002, she

acquired a drawing from a famous artist. Wendy acquired this painting from her husband Herb. Herb paid $15,000 dollars for the painting using money his parents gave him. As stated above, property and money received as a gift is the SP of the party receiving the gift. When Herb acquired the painting, tracing shows that it was his SP. However, in 2002, as a birthday present, Herb gave the painting to Wendy. Wendy will argue that since she received the property as a gift, it is presumed that gifts become the SP of the receiver.

However, in 2008 the painting was worth $30,000 dollars. Herb will argue that the property should still be his property because it was an invalid transmutation of his SP to Wendy's SP.

Transmutation

Transmutation is the doctrine of transferring one person's SP into another person's SP. After 1985, stricter requirements were necessary for property to be validly transmuted. After 1985, in order to successfully transmute the property a party needed to show there was 1) a writing, 2) signed by the party who is giving up the SP and 3) expressively states the transmutation of the property. Under these facts we do not see a valid transmutation under the 1985 documents.

Here, in 2002, Herb gave the drawing as a birth gift. We are not given any other facts. If Wendy can show that she was given the drawing and was given a birthday card, that said possibly -I know you love this drawing, now it's yours! Love, Herb we may have a valid transmutation. The card in itself is a writing, as would be his statement explaining the gift. Additionally, people usually sign birthday cards. Since we do not get the facts stating this or anything like this happened, the painting was invalidly transmuted and Herb will be able to trace the drawing back to the Parents' $15K gift. Also, the actions of the parties, Wendy hanging the drawing in the bedroom does not show the property was SP. Wendy will have to return the painting.

Pre-nup?

Since this drawing was not purchased using either party's earnings, the pre-nup has no effect on the distribution of the drawing.

2. CoinCo

The next issue is the distribution of the CoinCo business. Since, under California law, earnings acquired through the effort, intelligence, and skill of either part is deemed CP, the validity of the pre-nup is vital to the distribution of Coinco.

Invalid pre-nup

The following analysis presumes that a court will believe Hank and find that the 2001 pre-nup is invalid.

The courts use two tests to determine the property interests of a self-employed company owned and worked out by a spouse during marriage. A court may use either the Pereira analysis while Wendy would desire the Van Camp if it is shown that the pre-nup is invalid.

Pereira Analysis

Under Pereira, courts conclude that the company's value is based upon the effort, hard work, and skill of the working spouse. Since we are working with the assumption of an invalid pre-nup, the earnings by a spouse during marriage are presumed CP. Under Pereira, the working party keeps their SP and receives a reasonable rate of interest on the investment (10%) multiplied by the years worked. Here, the company was capitalized by a $10K inheritance of Wendy that she received when her grandfather died. As described above, in heritance is SP.

Herb will argue that her business thrived because of her work, enthusiasm and her ability to collect special coins as reasonable prices. If the court believes this to be true,

under Pereira, Wendy would be entitled to her initial $10K + 10% of $10K multiplied by her years worked, which look to be 5 (2003 – 2008). This number would go to Wendy's SP and the rest would go to the CP estate.

Van Camp

Under Van Camp, courts conclude that it was not the work of the spouse, but certain circumstances outside their control resulted in the increase of the business value. Here, Wendy will argue that because of a discovery of boxes of old coins, a renewed interest in coin collecting caused her business to boom. She will argue that she was lucky since she always wanted to start a coin business but fortunately came in at the right time. If a court believes this to be the reason why the business flourished, a court uses a different formula than the one used above. Under Van Camp, the community receives a reasonable salary minus whatever was already received minus household expenses multiplied by the number of years worked. The rest would go to the SP of the working spouse.

Under these facts, a reasonable salary would be about $40K per year. Wendy only took out $25K per year and also spent $5K in household expenses per year. So $10K would be multiplied by the 5 years she worked, resulting in $50K going to CP. Since at the time of dissolution the company was worth $100K, Wendy would receive $50K as SP and her half of CP resulting in her receiving $75K.

Court Discretion

Although Wendy will argue for a Van Camp analysis and Herb will argue for a Pereira analysis, a court has the discretion to choose whichever one they like. Courts will look to whichever method is intrinsically fair to both parties in making their determination.

Valid pre-nup

If the court finds that the pre-nup is valid, as Wendy claims, the property will be distributed differently. Since the pre-nup rebuts the presumption that the earnings during marriage are CP, Herb may not recover anything under either test.

Presumably, income derived from one's SP is deemed to also be SP.

Under Pereira, courts conclude that the company increases based upon the skill and effort of the other party. Here, since the skill and effort are considered earnings, Herb would not receive anything under Pereira. Both the initial down payment as well as the earnings acquired during Wendy's years working would be her SP and would result in her obtaining the full $100K. Since Wendy would be able to argue that income from the company is both her earnings and investment, Herb would acquire nothing.

Also, under Van Camp, Herb would get nothing. Just like the analysis above, since the company was financed by SP and her earnings under the Pre-nup are SP, the entire $100K would be characterized as SP.

Goodwill

Herb's last ditch effort is to argue that goodwill is a community asset. Goodwill is a community property interest that increases customer retention in a business. Here Herb will argue through her enthusiasm Wendy created goodwill for the community. However, goodwill is created by the skill and effort of the working party. As stated above this is deemed part of one's earnings. Under the pre-nup, earnings are one's SP. Herb has no valid claim on receiving CP money for goodwill.

If the pre-nup is valid, Herb has no claims of CoinCo.

3. The Hospital Bill

Traditionally, a party has no financial obligations after legal separation and/or divorce. Legal separation is defined as the mutual intent to no longer continue marital relations with a physical separation. Here, the facts stated that in 2008, Herb and Wendy did separate. Without other facts, it is presumed that their separation had the required intent.

An exception to the statement above states that a spouse's SP and CP is liable for necessities acquired by the other spouse. Here, in 2009, Wendy became disabled and had to be hospitalized. The facts also state that this occurred before the dissolution proceeding. Because Herb and Wendy are not divorced, Herb retains some liabilities as it pertains to Wendy's hospital bills.

Since Wendy's bill was not covered by insurance, 3 types of property may be used for fulfill the hospital obligations. First, Wendy's SP may be used. Additionally, since medical bills are deemed a necessity by California law, both the CP and Herb's SP may be used to fulfill this obligation. If in this instance Wendy is not able to use her SP to pay the bill Herb is liable to use his own property.

Jul 2009

California
Bar
Examination

Essay Questions
And
Selected Answers

THE STATE BAR OF CALIFORNIA
OFICE OF ADMISSIONS
180 HOWARD STREET • SAN FRANCISCO CALIFORNIA 94105 1639 • (415) 538 - 2303
1149 SOUTH HILL STREET • LOS ANGELES CALIFORNIA 90015-2299 • (213) 765 – 1500

ESSAY QUESTIONS AND SELECTED ANSWERS
JULY 2009
CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2009 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

ESSAY QUESTIONS 1-3

California Bar Examination

Answer all three questions. Time allotted: three hours

Your answer should demonstrate your ability to analyze the facts in question, to tell the difference between material and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

Q1 Torts / Civil Procedure / Professional Responsibility

Patty is in the business of transporting human organs for transplant in City. She is paid only upon timely delivery of a viable organ; the delay of an hour can make an organ nonviable.

David transports gasoline over long distances in a tank truck. Recently, he was hauling gasoline through City. As David was crossing a bridge in City, his truck skidded on an oily patch and became wedged across the roadway, blocking all traffic in both directions for two hours.

Patty was delivering a kidney and was on the bridge several cars behind David when the accident occurred. The traffic jam caused Patty to be two hours late in making her delivery and made the kidney nonviable. Consequently, she was not paid the $1,000 fee she would otherwise have received.

Patty contacted Art, a lawyer, and told him that she wanted to sue David for the loss of her fee. “There isn’t a lot of money involved,” she said, “but I want to teach David a lesson. David can’t possibly afford the legal fees to defend this case, so maybe we can put him out of business.”

Art agreed and, concluding that he could not prove negligence against David, decided that the only plausible claim would be one based on strict liability for ultrahazardous activity. Art filed a suit based on that theory against David on behalf of Patty, seeking recovery of damages to cover the $1,000 fee Patty lost. The facts recited in the first three paragraphs above appeared on the face of the complaint.

David filed a motion to dismiss. The court granted the motion on the grounds that the complaint failed to state a cause of action and that, in any event, the damages alleged were not recoverable. It entered judgment in David’s favor.

David then filed suit against Patty and Art for malicious prosecution.

1. Did the court correctly grant David’s motion to dismiss on the grounds stated? Discuss.

2. What is the likely outcome of David’s suit for malicious prosecution against Patty and Art? Discuss.

Answer A

Patty instituted a suit via her lawyer Art for losses incurred due to Patty's inability to deliver a kidney on time owing to a traffic jam. The traffic jam occurred when David's truck skidded on an oily patch and became wedged across the roadway. There are two issues that need to be determined. First, the validity of the court's decision to dismiss Patty's cause of action for damages based on strict liability owing to an ultrahazardous activity. Secondly, whether David will be successful in recovering against Patty and Art in a claim of malicious prosecution.

1. David's motion to Dismiss based on Failure to State a Cause of Action

David has instituted a motion to dismiss for failure to state a cause of action upon which relief can be granted. In the alternative, David argues that damages would not have been recoverable against David for strict liability from malicious prosecution. A motion to dismiss based on a failure to state a cause of action upon which relief can be granted is a 12(b)(6) motion in federal court. This motion can be filed as a preliminary motion to the filing of a complaint or contained within the answer. Along with failure to include an indispensable party it can be raised at any time prior to trial or at trial itself. The motion charges that the plaintiff has failed to adequately state a cause of action upon which relief can be granted. It requires the judge to accept that all the facts that are stated by the plaintiff are taken to be true and then requires a determination as to whether there exists an adequate basis for relief. In other words, even if everything that plaintiff asserted in the complaint is true, would that be sufficient to allege a cause of action against the defendant?

In the current case, in order to determine whether the emotion to dismiss was appropriately granted in Art's favor, it is necessary to examine Patty's allegations against David. Patty's lawyer, Art, determined that a negligence claim would not be viable against David. Likely because there is nothing to indicate in the facts that David engaged in any activity whereby he breached the standard of care towards a

foreseeable plaintiff. There is nothing to indicate that he was negligent in driving his truck, but rather he skidded on an oily patch in the middle of the road and then his truck swerved to block all lanes of traffic. As a result, Art decided to pursue Patty's claim on a strict liability theory for transporting an ultrahazardous activity.

Strict Liability for an Ultrahazardous Activity

Strict liability for transporting an ultrahazardous activity is an action whereby the defendant is engaged in an ultrahazardous activity. This is where the activity is so dangerous that the danger of its harm cannot be mitigated even with the exercise of reasonable care. Secondly, the activity has to be one that is not of common usage in the community. In a strict liability claim for ultrahazardous activity, in jurisdictions that still retain contributory negligence, this is not a valid defense to a strict liability claim.

In the current case, David transports gasoline over long distances in a tank truck. In the current case, he was transporting gasoline through the City. It is important to note that transporting gasoline through residential parts of a city is inherently an ultrahazardous activity because of the dangers that can occur if any gasoline spills, owing to the fact that gasoline is highly combustible and can cause serious injuries and damage to property in a matter of seconds. No amount of care can mitigate against these risks, and transporting gasoline through a residential community is not a matter of common usage in the community.

However, in the current case, when David was transporting the gasoline across the bridge, he skidded on an oily patch. There is no indication that he is responsible for the oily patch, rather, it was already spilled on the road when he arrived at the scene. As a result he skidded on the spill and his truck wedged across the roadway and blocked traffic in all directions. This blockage caused a traffic jam to develop in both directions and the delay of two hours caused Patty to be late in making her organ delivery. Yet the crucial distinction in this case is that the ultrahazardous nature of the gasoline was not the cause of Patty's damages. Even if David had been transporting a truck filled

with benign materials, such as flowers or children's toys, he still would have skidded on the oily patch and his truck would have wedged across the highway and caused the traffic jam. For strict liability to attach for transporting ultrahazardous activity, the nature of the harm or loss has to emanate from the ultrahazardous activity. This is not met in this case. There is nothing about the inherently dangerous nature of transporting gasoline that is the cause of Patty's harm.

As a result, even if the judge was to take all of the allegations that Patty made in her complaint to be true, she has failed to state sufficient facts necessary to constitute a cause of action for strict liability for transporting dangerous materials. Therefore, the judge was correct to grant David's motion to dismiss.

Patty's Damages are not recoverable

Moreover, David claimed that the damages that Patty claimed in her complaint were not recoverable. In this case, Patty sought to recover the $1,000 fee she would have been paid had she been able to deliver the kidney while it was still viable.

As already noted, under strict liability the damages have to accrue from the inherent dangerousness of the activity - which in this case would have been transporting gasoline. However, in this case, the nature of Patty's damages resulted from the truck skidding on the oily patch, and as previously mentioned this could have occurred to any truck, even one transporting regular household goods. As a result, Patty is not entitled to recover for damages based on a theory of strict liability.

Her only viable claim would have been under a negligence theory which requires a duty under the applicable standard of care to all foreseeable plaintiffs (which under the majority Cardozo theory is to all plaintiffs in the zone of danger). There has to be a breach of the duty, causation (both factual and proximate), as well as damages. In this case, David would be held to the standard of care of a reasonable person driving a big truck along a bridge. The facts do not indicate that he was negligent in any manner,

such as driving too fast, or driving while distracted. As a result, Patty would be unable to establish a prima facie case for negligence and would be entitled to no damages. It is likely that Art realized that the negligence claim would be a non-starter and as a result he decided not to pursue the claim.

In conclusion, the court was correct to grant David's motion to dismiss for failure to state a cause of action and, in any event, the damages alleged were not recoverable because Patty failed to assert an appropriate and viable cause of action.

2. David's Suit for Malicious Prosecution against Patty and Art.

David decided to file suit for malicious prosecution against both Patty and Art. To establish a prima facie case for malicious prosecution, the plaintiff is required to show that there was an institution of civil proceedings against the plaintiff. Second, there was a termination of the proceedings in favor of the plaintiff. There also has to be a lack of probable cause. Moreover, the institution of the civil proceedings has to be for an improper purpose and the plaintiff has to show damages.

David's suit for Malicious Prosecution against Patty

In David's suit against Patty, David can show that Patty instituted a claim against him for strict liability based on transporting an abnormally dangerous activity. Since the judge granted the motion to dismiss, there was a termination in his favor.

The third prong requires David to show that the proceedings were instituted for an improper purpose. In the current case, when Patty came to Art for advice she was clear that she wanted to sue David for the loss of her fee, i.e., the $1,000 she would have received if she could have successfully delivered the kidney. In her mind, she believed that she had suffered damages and that David was to blame because he had caused the traffic jam on the bridge. As a result, it is unclear whether her motive to bring the suit was based on lack of probable cause. As a layperson, she likely did not have the legal knowledge to ascertain the proper basis for determining probable cause, and she

came to her lawyer for advice to determine the merits of her case. As a result, it is likely that the court will find that Patty's decision to bring suit against David was based on her relying on the legal expertise of Art and she might have honestly believed that there was sufficient probable cause to bring the action.

The fourth prong requires bringing the suit for an improper purpose. This requirement is likely met in this case, because Patty acknowledged that there was not a lot of money involved in the action; however, she wanted to teach David a lesson and try to run him out of business. As a result, the primary motivation behind the suit was not to recover damages, but rather to seek revenge and damage to David. This is an improper purpose because the legal system is not to be used in a civil proceeding in order to extract a revenge against a defendant or for an improper purpose.

Lastly, the plaintiff has to show sufficient damages. In the current case, David was forced to respond to an action for strict liability and although the matter was dismissed under a motion for failure to state a cause of action, this still might have resulted in David losing days at work because of the lawsuit. There is also the loss of professional and social reputation from being forced to defend against a lawsuit. However, David would have to present evidence of any such pecuniary loss in order to meet the damages prong.

In conclusion, David would likely not succeed in his suit for malicious prosecution against Patty because he cannot show that she instituted the proceedings without probable cause. Patty likely relied on Art's advice that there was a viable claim for strict liability and, as a result, she thought there was sufficient merit in the action to proceed to court.

David's suit for Malicious Prosecution against Art

David also filed suit against Patty's lawyer Art for malicious prosecution.

Again, the first two prongs are easily met, because Art was the attorney that brought the strict liability action against Patty and there was a termination in Art's favor with the court's decision to grant the motion to dismiss based on failure to state a cause of action.

In the current case, the third prong, whereby the plaintiff has to show that the action was brought with a lack of probable cause, is likely to bring David more success against Art. An attorney is held to possess the required duty of competence, whereby he has to possess the legal skill, knowledge, preparedness and ability to pursue the case. In this case, Art realized that a negligence action would not be successful, but he still decided to pursue a claim for strict liability. This was the only plausible claim that he could bring against David and if he failed to adequately research the facts of the case based on the elements of strict liability, then he will be held liable for bringing a cause of action based on lack of probable cause. On the other hand, if Art honestly believed, with sufficient preparation and research in the case, that a strict liability cause of action might be viable in this case, then arguably there is sufficient probable cause. However, as previously noted under the first part, there was no connection between the ultrahazardous nature of transporting the gasoline and the accident that occurred in this case, and, as a result, Patty would be unable to recover damages based on a strict liability theory. As a result, Art should have realized this and counseled Patty against filing suit, and therefore, David will be able to successfully demonstrate the lack of probable cause in a suit for malicious prosecution against Art.

The fourth prong requires the plaintiff demonstrating that the suit was brought for an improper purpose. In the current case, Patty told Art that she knew that there was not a lot of money involved in the case, but that she simply wanted to teach David a lesson and run him out of business. A lawyer is held to a duty of candor and fairness to the court and an adversary. He is required to properly research the cause of action to

ensure that there is a viable cause of action. A lawyer signs Rule 11 motions asserting that there is a proper factual basis to the claim and legal contentions are accurate and that a claim is not being brought for an improper purpose. In the current case, Art should have counseled Patty against bringing a lawsuit for an improper purpose and made her aware of the legal basis of the claim and whether there were sufficient facts to bring a cause of action. Attorney representation can be expensive, and Art should not have taken a frivolous claim simply as a means of earning fees and wasting time. As a result, David will be able to show that the cause of action was brought for an improper purpose.

As previously noted, as long as David can show damages in the form of lost wages from days missed from work owing to the need to defend the lawsuit or other pecuniary losses, he will have sufficiently demonstrated the damages prong.

In conclusion, David will be successful in a claim for malicious prosecution against Art. Even though his case against Patty is not likely to be successful owing to the inability to demonstrate that Patty consciously knew that there was a lack of probable cause to the action. However, as an attorney, Art will be held to a higher professional standard, and he had an ethical duty to ensure that he only brings suit where there is a sufficient legal and factual basis and that the suit is not being brought for a frivolous purpose or to waste time or embarrass an opponent. As a result, he should be entitled to damages, based on the damages he incurred due to the inappropriate suit brought against him for strict liability.

Answer B

1. Patty (P) v. David (D) – Motion to Dismiss Suit for Strict Liability

A motion to dismiss for failure to state a claim looks at the facts in a light most favorable to the party it is being asserted against. The court will then see if sufficient facts have been pled to sustain a prima facie case of the cause of action alleged. The court does not evaluate the merits nor go beyond the complaint.

In the present case, P filed a claim of strict liability for ultrahazardous activity against D. Therefore, the elements of the claim must be evaluated in light of the complaint to see if grant of the motion was proper. Additionally, the court noted the case would be dismissed because the damages alleged were not recoverable.

Strict Liability – Ultrahazardous Activity

Strict liability is tort liability without fault. It applies in cases of products liability, ultrahazardous activities, and wild animals. Here, the allegation is one of ultrahazardous activity. The elements of strict liability are 1) an absolute duty of care, 2) breach of that duty, 3) causation, and 4) damages.

Absolute Duty of Care – Is the activity an ultrahazardous activity?

For there to be an absolute duty of care (a duty that may not be met by reasonable protective measures), a court must decide if an activity is in fact ultrahazardous. An ultrahazardous activity is one where the activity is 1) highly dangerous even with remedial measures, and 2) not within common usage within the community. This is a question of law to be decided by the trial judge.

In the present case, D was driving a tanker truck filled with gasoline. P will argue that this is a dangerous activity, because no matter how safe D behaves the tanker is a giant gas bomb waiting to explode. D can argue that it is not that dangerous because, as the facts show, there was no explosion when the tanker crashed. However, because the

court will view the facts in a light favorable to P, the tanker is probably sufficiently dangerous.

However, the second element poses a problem for P. The activity must not be in common usage within the community. Here, D's tanker truck was transporting gas. This is an activity in common usage within all US communities, because gasoline is the primary fuel for automobiles, which is the most common method of transportation in the US. Additionally, gasoline must be transported by some means to service stations. Tanker trucks are the most common, if not [the] exclusive method of delivering gas to service stations in the US. Therefore, driving a tanker truck is an activity of common usage in City.

Therefore, the duty element has not been met, because driving a tanker truck is not an ultrahazardous activity.

Breach: if the duty element had been met, any damage caused by the ultrahazardous activity would be sufficient breach. Here, the truck crashed and blocked traffic for 2 hours.

Causation

Causation has 2 parts: 1) actual (factual) cause and 2) legal (proximate) cause. Both must be met for the causation element to be sustained.

Factual Cause

The test for factual cause is the "but for" test. This asked but for the defendant's conduct the injury would not have occurred. In the present case, but for D crashing the tanker on the bridge, P would not have been late for her delivery, the kidney would have been viable, and P would have been paid $1,000. Viewing the facts in a light most favorable to P, factual cause is met.

Proximate Cause

Proximate cause is a question of foreseeability. First, the court must ask what is dangerous about the activity. Here, a tanker truck filled with gas is dangerous because it could explode or cause a fire. Second, the court will isolate the breach. Here, the breach was a crash that resulted in blocked traffic on the bridge. Lastly, the court will match up the danger of the activity to the breach; if they do not match up, then the injury is not the type of harm that would result from the ultrahazardous activity. Therefore, it would not be foreseeable. In the present case, the danger of explosion or fire does not match the breach of mere traffic jam. Thus, P's injury was not foreseeable.

Damages

Strict liability compensates damages from personal injury or property damages. In the present case, the type of harm is economic damages. Economic damages are those damages which result from the loss like lost wages or lost business opportunity. Therefore, there is not sufficient damage that P may be compensated for. While she may argue that the breach damaged the kidney. However, the kidney did not belong to her. At the very least it belonged to the kidney donor or the recipient. Additionally, one cannot have ownership interest in human tissue (see 13th Amendment). Thus, there is no personal injury or property damage that P has pled to sufficiently make a prima facie case.

Conclusion

The motion to dismiss was proper, because P did not sufficiently plead facts to sustain a cause of action of strict liability for an ultrahazardous activity. Tanker driving is not an ultrahazardous activity. There is no proximate causation between the crash and the loss of $1,000. Additionally, the damages requirement is not met because it is mere economic damages. Additionally, the trial judge was correct to assert that P's alleged damages are unrecoverable.

2. D v. P and Art (A) – Malicious Prosecution

Malicious prosecution is a tort that protects the interest of only having process instituted against a party for proper purpose and only when there is a valid case. The elements are 1) institution of legal proceeding, 2) termination of case in plaintiff's favor, 3) absence of probable cause, 4) improper ulterior purpose for bringing legal process, and 1) damages.

Institution of proceedings: Typically, malicious prosecution involves the institution of criminal proceedings. However, institution of civil proceedings will sustain a cause of action as well. Here, P (under the advisement and representation of A) filed a civil claim for $1,000 in lost damages in strict liability for an ultrahazardous activity (see above). A civil complaint was filed against D. This is sufficient to meet the first element/institution of legal proceeding.

Termination: The second element, termination of the case in plaintiff's favor, is met because the case was dismissed on failure to state a cause of action. This was a termination in D's favor, because he filed the motion to dismiss. The case was terminated on the granting of the motion.

Absence of probable cause

Probable cause is the reasonable belief that there was a valid cause of action. In the present case, P relied on A's advice as her attorney to form her basis of probable cause. A told her that he believed there was a plausible claim for strict liability. Reliance on counsel will sustain a finding of probable cause. Therefore, this element is not met, as to P.

A, on the other hand, probably did not have probable cause. As discussed above, the claim of strict liability lacked sufficient facts to make a prima facie case. The complaint was just so bad that an attorney with minimal competence could not have a reasonable belief that there was a valid cause of action based on strict liability. Therefore, this element is met as to A.

Improper purpose is any purpose except that of justice. Here, the just purpose would be to make P whole again, after the loss of her $1,000. This is the point of tort liability: to make the plaintiff whole. In the present case, she wanted to "teach D a lesson." P and A will argue that this is not improper because D should be a safer driver. D may argue that strict liability has no punitive damages; therefore, strict liability is not to punish. Therefore, teaching a lesson is an improper purpose.

Additionally, and more flagrantly, P believed that D could not afford the legal fees, and bringing the strict liability case would cause him to go out of business. A acquiesced in assisting her in the case. This is an improper purpose because the $1,000 was not a lot of money to her, but it would be a total loss of D's livelihood. This is not a proper basis for suit because it is merely to harass and damage D.

Defenses: A may assert that he would qualify for immunity based on the prosecutor exemption. However, this will not happen because of the exception for state prosecutors filing criminal charges.

Conclusion: D will probably prevail against A. However, he will probably not prevail against P, because she had probable cause.

Q2 Professional Responsibility

Alex, an attorney, represents Dusty, a well-known movie actor. Dusty had recently been arrested for battery after Vic reported that Dusty knocked him down when he went to Dusty's home trying to take photos of Dusty and his family. Dusty claims Vic simply tripped.

Paul, the prosecutor, filed a criminal complaint against Dusty. Suspecting that Paul was anxious to publicize the arrest of a high-profile defendant as part of his election bid for District Attorney, Alex held a press conference on the steps of the courthouse. He told the press: "Any intelligent jury will find that Dusty did not strike Vic. Dusty is the innocent victim of a witch-hunt by a prosecutor who wants to become District Attorney."

Meanwhile, Paul received a copy of the police report describing Dusty's alleged criminal behavior. Concerned that the description of Dusty's behavior sounded vague, Paul asked the reporting police officer to destroy the existing police report and to draft one that included more details of Dusty's alleged criminal behavior.

Paul interviewed Dusty's housekeeper, Henry, who witnessed the incident involving Dusty and Vic. Henry told Paul that Dusty did not knock Vic down. Paul told Henry to avoid contact with Alex.

Paul has not been able to obtain Vic's version of the events because Vic is on an extended trip abroad and will not be back in time for Dusty's preliminary hearing. Confident that Dusty is nevertheless guilty, Paul has decided to proceed with the preliminary hearing.

1. What ethical violation(s), if any, has Alex committed? Discuss.

2. What ethical violation(s), if any, has Paul committed? Discuss.

Answer according to both California and ABA authorities.

Answer A

1. A's Ethical Violations

As an attorney, under both ABA and CA authorities, A has a blanket duty of fairness to the tribunal and opposing counsel and a duty to maintain the dignity of the profession.

Extrajudicial Statements

A lawyer has a duty to not make any extrajudicial statements which he knows or should know will be disseminated by means of public communication which have any likelihood of prejudicing the proceedings. The exceptions to this duty revolve around permitting extrajudicial statements that do not contain a substantial likelihood of prejudice. The exceptions include making statements regarding any information contained in public documents, the results of any hearing, routine booking information, scheduling of public hearings, or in the case of prosecutors, requesting the public to come forward with any information or evidence of the crime or to aid in apprehension, and to possibly warn the public of any reasonable danger presented by a criminal on the loose. Additionally, a lawyer may make an extrajudicial statement when it is reasonably necessary to rebut a violative statement made by opposing counsel.

Public Dissemination

Here, A held a press conference in which he stated that his client was unquestionably innocent and that P was only pursuing the case because he wanted to make a name for himself by prosecuting a well-known movie actor as part of his bid for District Attorney. First of all, A had to know that his statements would be disseminated by means [of] public communications. In fact, not only did he know his statements would be disseminated, he specifically intended that they be. That is why he called the press conference. He did so to get his message out to as many people as he could.

Likelihood of Prejudice

Moreover, these statements present a strong likelihood of prejudice to opposing counsel. By making such statements, it creates disdain in the public eye with regard to P's conduct. It makes the public believe that he is only acting for the personal gain of

becoming an elected official as opposed to acting in their best interest to get criminals off the streets. A jury is going to be more likely to side against P in any later trial because they believe he is only prosecuting D because of the personal motive. Moreover, by stating that "any intelligent jury" will find D innocent, A was representing to the public as fact something which may not be so. By using his position in society and the words "any intelligent jury," it is likely that if a potential juror hears this statement he will be more likely to find in favor of D out of fear that he otherwise may be labeled as unintelligent.

Conclusion

None of the normal exceptions apply here. Moreover, since A held this press conference preemptively instead of in response to other extrajudicial violations, A is most likely to be subject to discipline under both the ABA and CA rules of professional conduct.

Dignity of Profession

A lawyer has a general duty to always uphold the dignity of the profession and to do nothing which would bring disdain to it in the public eye. Here, A has likely violated this duty by asserting that P is acting for an improper purpose without any actual knowledge of its truth. When a lawyer represents publicly, without justification, that another lawyer is dishonest or otherwise untrustworthy, it leads the public to believe that all lawyers are dishonest and untrustworthy. This detracts from the dignity of the profession and all lawyers must strive to avoid it wherever possible.

Improper Influence of Jury

A lawyer has a duty to not seek any improper influence over any jurors. Here, as stated above, A's statement basically amounted to a claim that only unintelligent people could convict his client. He thus is seeking to gain influence over potential jurors in any future hearings by these statements. However, he may not be subject to discipline on this basis alone because it is unclear whether a jury has been sworn or not. If a jury has not been sworn, then there are not really any jurors, in the literal sense, which could be improperly influenced. He would only be tainting the potential juror pool, but there is no

guarantee that a future juror would have heard this statement or, depending on how long before the trial, there's no guarantee that they will have remembered it. Moreover, there is likely to be actual cause to strike from the venire any person who has been influenced by the statement. Therefore, A is probably not subject to discipline merely because of this aspect of the statement unless a jury has already been sworn.

2. P's Ethical Violations

Fairness to Opposing Counsel

Though all lawyers must be zealous advocates of their positions, there remains a duty of fairness to opposing counsel which may trump zealousness in certain situations.

Allow Access to Evidence

A lawyer has a duty to not alter, destroy, or obstruct access to evidence or to counsel, aid, or encourage any other person to do so. Here, upon receiving a copy of the police report describing D's conduct, P asked the police officer to destroy the record and replace it with one that included more details of D's alleged criminal behavior. Although it may have been proper for P to ask the officer to include more details in a supplemental report, by instructing him to destroy the original report, P has obstructed A's access to such evidence. It is highly unfair to opposing counsel to destroy a substantial piece of evidence just because it does not clearly favor your position. Here, A had a right to see that report in its unaltered state and then to point out any discrepancies contained therein at trial.

Instructing Witnesses to Remain Silent

Related to the duty to allow access to evidence, a lawyer has a duty to not instruct or encourage a witness to remain silent about relevant knowledge unless that witness is the employee/agent of the lawyer's client and the lawyer reasonably believes that the witness' refusal to testify will not cause the witness any harm. Here, P interviewed D's housekeeper who witnessed the alleged criminal battery. The housekeeper, H, [said] D

did not knock down V as V had alleged. Thereafter, P told H to avoid contact with the opposing counsel, A. H clearly has relevant knowledge about the incident. He was a percipient witness of it and could accurately testify about what he saw. However, because H's perceptions were harmful to P's case, P instructed him to remain silent and not offer up his story to opposing counsel. This is most likely a violation of the rules of professional conduct because the exception does not apply. Though P may reasonably believe that H's interests will not be harmed by refusing to relate his story, P's client is the State and thus H is not an employee/agent thereof.

No Falsification of Evidence

Along with the duty of access to evidence comes the duty to not falsify evidence or put on false testimony and not counsel, aid or encourage anybody to falsify evidence or testimony. It is unclear exactly what occurred when P instructed the officer to destroy the report and draft a new one with more details. P could have legitimately felt the original report was vague and wanted the officer to include additional accurate details to avoid the vagueness. However, there is a legitimate possibility that P was impliedly asking the officer to exaggerate the details to make P's case more compelling. If this is the case, P is certainly subject to discipline as it was a direct encouragement to falsify evidence.

Special Duties of Prosecutors

Under both the ABA Model Rules and the CA Rules of Professional Conduct, because of the prosecutor's role as defender of the public, he is held to special heightened duties in a few areas. After all, his duty is to protect the public, but a criminal defendant is a member of the public as well and is owed at least some duty of fairness by the prosecutor.

Exculpatory Evidence

A prosecutor has an absolute duty to divulge any and all possible exculpatory evidence to the defense in sufficient time to allow proper preparation for the trial. Here, P

instructed the officer to destroy the original report. Exculpatory evidence is any evidence which weighs in favor of acquitting a criminal defendant. The facts indicate that the report was vague as to the details surrounding the alleged battery. Thus, it is not certain that the report was exculpatory in the sense that it stated that D was not responsible for the crime. However, that is not the standard by which exculpation is judged. The evidence must only have a tendency of favoring the criminal defendant. And if this report was so vague that P felt it necessary to destroy it, surely there was substantial probative value for D's case. A could have used this report to, at the very least, point out an inadequate investigation and discredit the police officer who arrested D.

Moreover, P interviewed H, who basically said D is innocent. This is direct exculpatory evidence. And even though it is not in P's possession because H is a live witness, he has a duty to disclose its existence to A.

Thus, by failing to inform A of H's existence and by instructing the officer to destroy evidence, P is likely to have violated his special duty to inform opposing counsel of any exculpatory evidence.

Absence of Probable Cause

The other special duty of prosecutors is to not proceed with a case in the absence of probable cause. Probable cause is facts sufficient to lead a man of ordinary caution to believe that a crime was committed and the defendant was the one who committed it. Here, P has filed a criminal complaint alleging battery by D against V. However, P has been unable to obtain V's version of the events because he has been overseas and he will not be back by the preliminary hearing. Moreover, the only witness P has spoken to, H, said that D is innocent. Thus, it appears that the only evidence of criminal conduct that P had was the vague police report which he requested the officer to destroy and embellish. This seems to be an absence of probable cause. If the only incriminating facts regarding the incident were those contained in the vague police report, it would not lead a reasonable person to believe that an offense was committed

by the defendant. P should not have filed suit and proceeded to the preliminary hearing without at least hearing V's testimony regarding the matter. P should have waited until V returned before filing suit. By failing to wait, P has violated his duty to not proceed with criminal cases in the absence of probable cause.

Answer B

1. Alex's Ethical Violations

Duty of Fairness to Opposing Parties – Press Conference

A lawyer owes the opposing party a duty of fairness, which includes not making public, extrajudicial statements that have a substantial likelihood of materially prejudicing the case.

Alex held a press conference and told the press that "Any intelligent jury will find that Dusty did not strike Vic. Dusty is the innocent victim of a witch-hunt by a prosecutor who wants to become District Attorney." Because Alex's statement was made to the press at a press conference, he knew that this extrajudicial statement would be widely publicized. This statement also has a substantial likelihood of materially prejudicing the case because his statement was inflammatory and may influence potential jurors to cause them to make up their mind or at least to have some pre-existing beliefs or bias regarding the case.

The one exception to this rule against extrajudicial statements is that a lawyer may make a public extrajudicial statement if necessary to protect his client from the undue influence of recent adverse publicity that was not self-initiated.

Alex might argue that he only made this statement to the press because he was trying to defend his client from what he believed was Paul's desire to publicize the arrest of a high-profile defendant as part of an election bid for District Attorney. However, Paul has not yet made any public statements regarding the case against Dusty, and, therefore, there is no recent publicity to defend Dusty against. Hence, this exception does not apply, and Alex has violated his duty of fairness to the opposing party.

2. Paul's Ethical Violations

As a prosecutor, Paul has many additional ethical duties that are particular to prosecutors, in addition to all of the professional responsibilities that all lawyers are subject to.

Duty of Fairness to Opposing Parties – Destroying Original Police Report

A lawyer owes the opposing party a duty of fairness, which includes the duty not to tamper with, alter, or destroy evidence.

Paul asked a police officer to destroy the existing police report describing Dusty's alleged criminal behavior. The original police report was a piece of relevant, material evidence for the case against Dusty. By asking the police officer to destroy the original police report, Paul violated his duty of fairness to Dusty.

Duty of Candor to the Court – Creating New Police Report

A lawyer also has a duty of candor to the court, which requires not making a false statement of material fact and not presenting false evidence.

Paul asked the police officer to draft a new report that included more details of Dusty's alleged criminal behavior. If Paul's request to include more details of Dusty's alleged criminal behavior required the police officer to make up details that he did not in fact remember, this would entail the creation of false evidence, in violation of Paul's ethical duties. Furthermore, even if the new police report only contained truthful information that the police officer remembered from the incident, if the police report is offered by Paul as the original, rather than disclosing that it was a second version created at his request, then Paul would be making a false statement of material fact and knowingly presenting false evidence, in violation of his duty of candor to the court and his duty of fairness to the opposing party.

Exculpatory Evidence

A prosecutor has a duty to disclose exculpatory or mitigating evidence to the defendant.

Paul did not disclose the original police report to Alex and Dusty. The original police report described Dusty's behavior in a vague manner, such that Paul was concerned about the police report in making his case. Therefore, this police report could be viewed as potentially exculpatory or mitigating evidence, and Paul, as prosecutor, had a duty to disclose it to the defense. His failure to do so violated his ethical duties as prosecutor.

Paul also did not disclose his interview with Henry, Dusty's housekeeper. Henry had witnessed the incident, and he told Paul that Dusty did not knock Vic down. Because this is exculpatory evidence, Paul had a duty to disclose the interview to Alex and Dusty. Paul might argue that since Henry was Dusty's housekeeper, Dusty is probably already aware of his version of events. Nonetheless, Paul has the duty to disclose all exculpatory or mitigating evidence to the defense, even if he suspects that the defenses might be aware of it. His failure to do so violated his ethical duties as prosecutor.

Duty of Fairness to Opposing Parties and Third Parties – Telling Henry to Avoid Alex

A lawyer has the duty not to tell a third party not to voluntarily speak with the opposing party, unless: (1) the third party is a relative/employee/agent of the lawyer's client, and (2) not voluntarily speaking will not be adverse to the third party's interests.

Paul told Henry to avoid contact with Alex, Dusty's lawyer. Because Henry is a third party, Paul may not ask him to refrain from voluntarily speaking to Alex. (The exceptions do not apply because Henry is not a relative/employee/agent of the state, whom Paul represents, and failing to speak to Alex may actually be adverse to Henry's interests because he is Dusty's housekeeper and may lose his job as a result.) Paul might argue that since Henry is Dusty's housekeeper, he probably has already spoken to Dusty himself. Nonetheless, Paul may not ask a third party to refrain from speaking with the opposing party's counsel, and by asking Henry to avoid Dusty's lawyer, Paul violated his duty of fairness, both to Dusty and to Henry.

Probable Cause

A prosecutor has the duty to only prosecute when there is probable cause.

During Paul's investigation of the case against Dusty, he found a police report where Dusty's behavior was only vaguely described, and he spoke to Dusty's housekeeper, who witnessed the incident and said that Dusty did not knock Vic down. Dusty claims that Vic simply tripped, and Paul has not been able to obtain Vic's version of events because Vic has been on an extended trip abroad. Based on these facts, Paul does not have probable cause to prosecute the case against Dusty. Paul might argue that the police report does not entirely clear Dusty's name because it is only vague, not exculpatory, and that Dusty's housekeeper was likely an interested, biased party who had reason to lie. However, Paul does not have sufficient evidence affirmatively establishing probable cause for finding Dusty guilty. Even though Paul subjectively felt confident that Dusty was nevertheless guilty, probable cause is an objective standard, and this standard has not been met on the facts. Therefore, Paul's decision to proceed with the preliminary hearing anyway, without having spoken to Vic or obtained other evidence of Dusty's guilt, violated his ethical duty to prosecute only when there is probable cause.

Q3 Evidence

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

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

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

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

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

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

Answer according to California law.

Answer A

Preliminary Matters

Proposition 8 not applicable

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

Standard of Relevance

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

Discretion to Exclude under CEC 352

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

1. Dan's statement to Paula about Insurance

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

Logical Relevance

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

Legal Relevance

Insurance to Prove Negligence or Ability to Pay

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

Use as Acknowledgment of Fault

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

Offer to Pay Medical Expenses

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

Hearsay

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

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

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

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

2. Paula's Statement to the Physician

Logical Relevance

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

Hearsay

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

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

Present Physical Condition

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

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

Excited Utterance

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

Statement Pertaining to Medical Diagnosis or Treatment

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

<u>Portion 2 – Statement about D Failing to Yield</u>

Present Physical Condition

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

Excited Utterance

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

Exclusion under CEC 352

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

3. Officer's Accident Report

Logical Relevance:

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

Report - Hearsay

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

Public Records Exception

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

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

Part A - Unnamed Bystander's Statement

Bystander's Statement - Hearsay

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

Excited Utterance

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

Present Sense Impression

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

Part B - Conclusion and Basis

Lay Opinion

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

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

Expert Opinion

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

Legal Relevance - CEC 352

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

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

4. Hank's Greeting Card

Logical Relevance

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

Hearsay

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

Non-Hearsay - To Show Effect on Listener

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

Authentication

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

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

5. Wilma's Note

Hearsay

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

Excited Utterance

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

Lay Opinion re: Speeding

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

Lay Opinion re: Negligence

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

Authentication

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

CEC 352

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

Answer B

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

1. Dan's statement to Paula about the insurance

Relevance

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

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

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

Reliability

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

Evidence of Medical Insurance

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

Offers to pay for injuries

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

Statements of sympathy

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

Statements to settle

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

Hearsay

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

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

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

2. Paula's statement to the physician

Relevance

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

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

Reliability

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

Hearsay

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

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

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

Statement of a then-existing physical or mental condition

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

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

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

Excited utterance

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

Present sense impression

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

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

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

Relevance

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

Reliability

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

Hearsay

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

Excited utterance

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

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

Public records exception to the hearsay rule for the police reports

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

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

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

Relevance

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

Expert witness opinion

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

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

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

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

4. Hank's greeting card

Relevance

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

Authentication

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

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

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

Hearsay

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

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

5. Wilma's note

Relevance

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

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

Authentication

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

Reliability

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

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

Hearsay

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

Excited utterance

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

Present Sense Impression

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

JULY 2009

ESSAY QUESTIONS 4, 5, AND 6

California Bar Examination

Answer all three questions. Time allotted: three hours

Your answer should demonstrate your ability to analyze the facts in question, to tell the difference between material and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

Q4 Constitution

In a recent statute, Congress authorized the United States Secretary of Transportation "to do everything necessary and appropriate to ensure safe streets and highways." Subsequently, the Secretary issued the following regulations:

> Regulation A, which requires all instructors of persons seeking commercial driving licenses to be certified by federal examiners. The regulation details the criteria for certification, which require a minimum number of years of experience as a commercial driver and a minimum score on a test of basic communication skills.
>
> Regulation B, which requires that every bus in commercial service be equipped with seatbelts for every seat.
>
> Regulation C, which provides that states failing to implement adequate measures to ensure that bus seatbelts are actually used will forfeit 10 percent of previously-appropriated federal funds that assist states with highway construction.

The State Driving Academy, which is a state agency that offers driving instruction to persons seeking commercial driving licenses, is considering challenging the validity of Regulation A under the United States Constitution. The Capitol City Transit Company, which is a private corporation that operates buses within the city limits of Capitol City, is considering challenging the validity of Regulation B under the United States Constitution. The State Highway Department, another state agency, is considering challenging the validity of Regulation C under the United States Constitution.

1. What constitutional challenge may the State Driving Academy bring against Regulation A, and is it likely to succeed? Discuss.

2. What constitutional challenge may the Capitol City Transport Company bring against Regulation B, and is it likely to succeed? Discuss.

3. What constitutional challenge may the State Highway Department bring against Regulation C, and is it likely to succeed? Discuss.

Answer A

State Driving Academy Challenges

Standing

In order to bring a claim in federal court challenging this regulation each of the parties must have standing. In order to have standing the plaintiff must show (1) injury in fact, (2) that the defendant caused the harm, and (3) that a favorable opinion will remedy his harm. In this case, the state agency is likely to have standing because the regulation will require their instructors to obtain the federal certification and therefore they will incur greater expense because of the regulation. Moreover, a challenge brought against the US Secretary is proper because he is the one who issued the regulations. Finally, a favorable opinion invalidating the regulation would remedy the injury because they would no longer have to incur the expense to comply with the regulation.

Constitutional Challenges

State Action

In order for the constitution to apply there must be state action. State action exists whenever the government or a government official is acting or a private party with sufficient entanglement with the state is acting. In this case, the US Congress and the US Secretary of Transportation issued these regulations and therefore there is state action and the constitution will apply to such regulations.

Not Within Enumerated Powers

The State agency would argue that such regulation is not within Congress' enumerated powers and therefore would violate the constitution. Congress would argue that it has the power to regulate interstate commerce and therefore has the ability to regulate (1) the channels of interstate commerce, (2) the instrumentalities of interstate commerce including those things within interstate commerce, (3) those activities that

have a substantial effect on interstate commerce. When Congress is using its commerce power to regulate an activity the activity must have a substantial effect on interstate commerce. If the activity is an economic activity then the court will uphold the regulation so long as in the aggregate all substantially similar activity is likely to have a substantial effect on interstate commerce.

In this case, the activity is commercial driving instruction. Congress is requiring that all instructors of persons seeking commercial driving licenses be certified by federal examiners. The regulation requires [a] certain minimum number of years of experience and a minimum score on a test of basic communication skills. In this case, Congress is not regulating an instrumentality of interstate commerce or a channel of interstate commerce but rather an activity. This activity is a commercial activity because it involves the provision of driving instruction for a fee. This commercial activity, although entirely intrastate, may be regulated by Congress so long as there is a reasonable belief that such economic activity would, in the aggregate, have a substantial effect on interstate commerce. In this case, since this [is] an economic activity, it is likely that such activity would have a substantial effect on interstate commerce because driving instruction provided to commercial truckers is likely to have an effect on the way that truck drivers drive on the road. If the truckers are taught more effectively then it is likely that they are going to [drive] safer when on the roads and therefore cause less accidents. Moreover, the safety of the highways has a substantial effect on interstate commerce. Moreover, in the aggregate if the instruction is not sufficient then our highways are likely to be unsafe and therefore will increase the cost of interstate commerce or reduce the amount of interstate commerce.

Since the activity is likely to have a substantial effect on interstate commerce the court will likely uphold regulation.

Delegation of Legislative Powers

This State may also challenge the regulation as an invalid delegation of legislative power. As a general rule Congress may delegate its legislative authority so

long as it provides reasonably intelligible standards. In this case, Congress has delegated its authority to the US Secretary of Transportation. This delegation will be valid so long as Congress has provided reasonably intelligible standards. In this case, Congress has said that the Secretary should do everything "necessary and appropriate to ensure safe streets and highways." While this guidance is broad the court is not likely to invalidate this as unintelligible because such broad delegations of authority have been upheld in the past. Therefore it is likely a valid delegation of legislative power.

10th Amendment: Commandeering

The State may challenge this regulation on the ground that it is commandeering state officials by forcing them to comply with a federal regulation. In this case, the State Driving Academy is a state agency; therefore their employees are state officials. The state would argue that by forcing them to comply with the regulation Congress is infringing on the state's inherent powers protected by the 10th Amendment. In this case, while the regulation does require the state officials to comply with the regulation, the regulation is not likely to violate the 10th Amendment because it is regulating both private as well as state actors. In prior cases, the court has upheld generally applicable regulations that require state agencies to comply so long as they were applicable to both private and public actors. In this case, the regulation applies to all commercial driving instructors, public and private, and therefore will likely not violate the 10th Amendment.

Capitol City Transport's Challenges

State Action

As mentioned above, there is state action in this case, so the construction applies.

Not Within Enumerated Powers

Transport would likely argue that this regulation is not within Congress' enumerated powers and therefore is unconstitutional. As mentioned above, under the Commerce Clause Congress has the power to regulate the instrumentalities of interstate commerce as well as those things within interstate commerce. Instrumentalities of interstate commerce include cars, planes, buses, etc. Moreover, Congress has the power to regulate an activity [that] has a substantial effect on interstate commerce.

In this case, the Regulation requires that every bus in commercial service be equipped with seatbelts for every seat. A bus is an instrumentality of interstate commerce because it is generally used to move people both within the state and between states. Even though Transport does not operate buses within interstate commerce (since it only operates within the City limits) the bus, itself, is an instrumentality of interstate commerce and therefore can be regulated by Congress under the Commerce Power. Moreover, commercial busing is an activity that has a substantial effect on interstate commerce because it is an economic activity that in the aggregate moves thousands of people and goods between states. So even though City itself does not move people in interstate commerce, the commercial activity of busing people within the city, in the aggregate, has a substantial effect on interstate commerce. If buses that operate in the country are safer then the roads and highways are likely safer and therefore there is going to be beneficial effect on interstate commerce.

Therefore the regulation is within Congress' enumerated powers.

Delegation of Legislative Powers

A challenge claiming invalid delegation is likely to fail for the reasons mentioned above.

Equal Protection

Under the 5th Amendment Due Process Clause, the federal government is prohibited from making unjustifiable distinctions between its people. In this case, the plaintiff may challenge the regulation as a violation of equal protection because it distinguishes commercial buses from other buses. As a general rule, any classifications among economic actors is subject to minimum rationality review. In that case, the regulation is valid so long as it is rationally related to a legitimate government interest. In this case, the regulation is likely to be upheld because the regulation is rationally related to the legitimate interest of ensuring the safety of those instrumentalities of interstate commerce. Secretary may have concluded that commercial buses are more of [a] threat to safety and therefore needed to be regulated before other buses were regulated. Moreover, putting safety belts on buses makes them safer by ensuring less injuries when and if there is an accident. Therefore this challenge is likely to fail.

State Highway Department's Challenges

State Action

As recommended above, there is state action in this case, so the construction applies.

Not Within Enumerated Powers

The State Highway Department may challenge this regulation by claiming that the regulation is not within Congress' enumerated powers. Congress has the power to tax and spend for the general welfare. In addition, Congress has the power to condition federal funds so long as the condition is related to the purpose for which the funds were granted.

In this case, the regulation requires states to implement adequate measures to ensure that bus seatbelts are actually used by conditioning 10% of the previously appropriated federal funds that assist states with highway construction on the implementation of such measures. Under Congress' conditional spending power this

condition placed on the funds is appropriate so long as the condition is related to the purpose for which the funds are used. The funds are being used to assist with highway construction. Such funds are likely to be used to build better, safer and more highways. The condition on the funds is that the states must implement measures ensuring that buses have seatbelts. The purpose of the condition is to improve the safety of an important instrumentality of interstate commerce. In this case, the condition is clearly related to at least one of the likely goals of the federal funds. Therefore the regulation is not outside of Congress' enumerated powers.

Delegation of Legislative Powers

A challenge claiming invalid delegation is likely to fail for the reasons mentioned above.

10th Amendment: Commandeering

The State Highway Department may challenge the regulation as invalid because it compels the state to legislate. As a general rule Congress cannot compel the state to implement legislation. Such regulations would be invalid and a violation of the 10th Amendment. However, Congress does have the power to condition its provision of federal funds on the states enacting certain regulation so long as the condition is not compelling the states to implement the regulation. In this case, Congress has conditioned only 10% of the federal highway funds on the implementation of such measures. 10% is only a slight percentage of the total and therefore it is unlikely that such an amount would constitute coercion of the states into implementing measures. If the state decides not to implement the measures it still will get 90% of the funds that were previously appropriated. Therefore the court is likely to find that such regulation is only inducing the states to act, not compelling them to act.

Therefore the regulation is not likely a violation of the 10th Amendment.

Answer B

1. What constitutional challenges may the State Driving Academy bring against Regulation A, and is it likely to succeed?

Standing

It first must be determined whether the State Driving Academy (SDA) has standing to challenge Regulation A. Because of the requirement in Article III that federal courts only hear actual cases and controversies, the United States Supreme Court has imposed various requirements to determine whether a case is justiciable. Importantly, a litigant must have standing to bring a claim in federal court. This requires the litigant demonstrate injury in fact, causation, and redressability.

The SDA can demonstrate injury in fact based on Regulation A. The SDA offers its own driving instructions for persons seeking commercial driving licenses. However, the current federal regulation requires that the instructors at the SDA be certified by federal examiners, and meet specific criteria for eligibility. Thus, the SDA is injured because it cannot continue to offer driving instruction until it has complied with the federal regulations. Causation is also met, since the fact that the SDA cannot continue to offer instruction was caused by Regulation A. Finally, the SDA can also demonstrate redressability. If it succeeds in challenging Regulation A under the U.S. Constitution, it will be overturned, and the SDA will no longer have to comply.

As such, the SDA has standing to challenge Regulation A.

Improper delegation of legislative power

The SDA will first argue that the entire regulatory scheme is an improper delegation of legislative power. Congress may delegate its power to other branches, so long as intelligible standards are given and the power assigned is not uniquely confined to Congress (e.g., the power to declare war). It should be noted that although some

intelligible standard is required, the United States Supreme Court has not struck down a delegation of legislative power in nearly 30 years.

In this case, Congress authorized the United States Secretary of Transportation, an executive officer, to "do everything necessary and appropriate to ensure safe streets and highways." This does seem possibly overbroad. However, the facts indicate that, as regards Regulation A, specific details were given for the licensing scheme. The facts say that the criteria for certification were detailed, and lists the types of things required for certification. Based on the fact that the United States Supreme Court is hesitant to overturn delegations of legislative power, these criteria are likely sufficient.

As such, a challenge based on improper delegation of legislative power will likely fail.

Interstate Commerce Clause

In order for Congress to take action, it must exercise an express power granted to it in the Constitution or it must exercise an implied power, typically those necessary and proper to achieve those powers expressly granted. Article I of the Constitution grants Congress the power to regulate interstate commerce. The United States Supreme Court has interpreted this power broadly, and Congress may regulate interstate commerce in three different areas: (1) it may regulate the channels of interstate commerce, such as highways and rivers; (2) it may regulate the instrumentalities used in interstate commerce, as well as regulate to protect the persons and things engaged in interstate commerce; and (3) it may regulate activities which have a substantial effect on interstate commerce.

In this case, Regulation A requires that all instructors of persons for commercial driving licenses be certified by federal examiners. Regulation A is part of the overall scheme "to ensure safe streets and highways." The SDA will argue that this regulation is too broad, because it is not limited to those engaged in interstate commercial driving. Specifically, they will argue that the regulation also requires instructors to be certified

even when they're only instructing commercial drivers engaged in wholly intrastate commerce, and thus, the Interstate Commerce Clause cannot justify Congress' action here.

First, Congress will argue that Regulation A is a method of regulating the instrumentalities used in interstate commerce. Specifically, Congress will point out that those engaged in commercial driving are instrumentalities of interstate commerce, and thus regulating those who grant licenses to these drivers is entirely proper under the second prong mentioned above. However, Congress will also argue that the activity regulated has a substantial effect on interstate commerce.

Importantly, when Congress regulates an activity which may be entirely intrastate, it has to demonstrate that the activity has a substantial effect on interstate commerce. However, where the activity regulated is commercial or economic in nature, the regulation will be upheld if there is a rational basis to conclude that the activity regulated, in the aggregate, does have a substantial effect on interstate commerce. That test would easily be met in this case. It can rationally be assumed that commercial drivers within a state would impact commercial activities in interstate commerce – intrastate drivers could convey goods to interstate drivers, goods in interstate commerce could be moved by commercial drivers through the state, etc.

As such, Regulation A is constitutional under the Interstate Commerce Clause.

Intergovernmental immunity/principles of federalism

The SDA will next argue that Regulation A violates principles of intergovernmental immunity. Specifically, it will state that the federal government is targeting the states and forcing them to comply with federal regulations. The SDA will argue that Regulation A commandeers state official to enforce the regulatory scheme, since all state driving instructors must now comply with federal certification rules. However, state governments are not immune to federal regulation, and it should be noted that principles

of federalism are not violated where a federal law regulates both states and private individuals equally, without directly targeting states.

This argument will likely fail. First, Regulation A is not targeted only to states. The facts indicate that Regulation A is applicable to all instructors of persons seeking commercial driving licenses. Thus, Congress is not requiring states to regulate in a certain way, but merely requiring those engaged in a specific activity [to] meet certain requirements.

Next, Regulation A does not commandeer state officials. Although state officials must meet certain requirements before being permitted to instruct, the Regulation does not mandate that state executive officials enforce a federal law. It merely requires all persons engaged in commercial driving instruction, both private and governmental, follow the federal rules.

As such, Regulation A does not violate principles of intergovernmental immunity.

Preemption

Because of the Supremacy Clause of Article IV, a lawfully passed act of Congress may preempt or supersede state laws. Congress may expressly preempt state law, or impliedly do so. It does so impliedly where the state law prohibits obtaining a federal objective or interferes with a federal scheme.

In this case, the SDA will argue that Congress is intruding on areas left to the States under the 10th Amendment. However, this argument will fail. As demonstrated above, Regulation A is lawful under the Interstate Commerce Clause. If the SDA has conflicting licensing requirements for commercial driving instructors, its scheme will be struck down and Regulation A upheld under the Supremacy Clause.

Conclusion

As such, the SDA's challenge to Regulation A will fail.

2. What constitutional challenge may the Capitol City Transport Company bring against Regulation B, and is it likely to succeed?

Standing

As indicated above, a litigant must have standing to bring suit in federal court, meaning it must demonstrate injury in fact, causation, and redressability**.** The Capitol City Transport Company (CCTC) can demonstrate injury from Regulation B because it requires CCTC to put seat belts in all of its buses. This is an economic detriment that CCTC will have to incur. Because this economic detriment is due entirely to Regulation B, causation is met. Additionally, redressability is also met, because if the regulation is declared unconstitutional CCTC will no longer have to comply.

As such, CCTC has standing to litigate the constitutionality of Regulation B.

Interstate Commerce Clause

CCTC will also likely argue that Regulation B exceeds Congress' power under the commerce clause. However, this argument will likely fail. Again, as indicated above, Congress may regulate interstate commerce in three different ways (see above).

Regulation B requires that every bus in commercial service be equipped with seat belts. This indicates that Congress is regulating instrumentalities of interstate commerce, since buses engaged in commercial service are being regulated and are an instrumentality. Additionally, Congress is protecting persons involved in interstate commerce, since the regulation require seat belts. However, CCTC will argue that the regulation is again overbroad**,** because it does not regulate only buses engaged in

interstate commercial activity. Once again, as indicated above, since this activity is economic, Regulation B will be upheld if there is a rational basis to conclude the activity, in the aggregate, has a substantial effect on interstate commerce. Such a rational basis is easy to see here. Buses engaged in commercial service, even if only within the state, will likely impact commercial activity coming into the state and leaving it.

As such, a challenge under the interstate commerce clause will fail.

Government action

The CCTC may also argue that the law infringes its substantive due process rights under the 5th Amendment, as well as its rights to equal protection (which is implied in the 5th Amendment). However, to properly allege a violation of due process or equal protection, some government action must be shown. This is easy here, since the act complained of is a federal regulation, which would count as government action.

Equal protection

Again, implied into the 5th Amendment is a clause providing that no one be deprived of equal protection of the laws. Where a law regulates on a suspect or quasi suspect clause, or infringes a fundamental right, strict scrutiny or intermediate scrutiny may be used. However, for all other activities or classes, only a rational basis test is used. Specifically, the claimant must demonstrate that the law is not rationally related to a legitimate government purpose. This test is very deferential to the government.

In this case, CCTC will argue that its equal protection rights are violated. Particularly, it will argue that the regulation targets only commercial buses, and not other buses. However, commercial buses are not a suspect or quasi suspect class. Additionally, no fundamental rights are infringed by Regulation B. Thus, only a rational basis review will be used to determine the validity of the law. The state purpose of these regulations is to ensure safe streets and highways. This is clearly a legitimate government purpose.

Additionally, the law is rationally related to this purpose because regulating commercial drivers, who would frequently be on streets and highways, is a manner of ensuring that the roads are safe for other drivers.
As such, an equal protection challenge to this regulation will fail.

Substantive due process

The due process clause analysis is similar to the equal protection analysis. However, we are not concerned with discrimination based on a group or class, but a law which equally deprives people of constitutionally protected rights. Where a law infringes upon fundamental rights, strict scrutiny must be used. However, for all other rights only a rational basis test is used.

The analysis is the same as the equal protection analysis above, and the law will be upheld.

Taking

CCTC may also argue that the regulation affects a taking of private property. The 5th Amendment provides that the federal government shall not take private property for public use without paying just compensation. The takings clause can apply both to physical takings as well as regulatory takings which deny owners the economic use of their property.

CCTC will argue that the law affects a taking, because it requires them to put in seat belts. Specifically, it will argue that Regulation B is [a] governmental act which requires them to pay money to install seat belts, thus decreasing the value of their overall business enterprise.

However, Congress will argue that in no way does the regulation deprive CCTC of all economically viable uses of its buses. To the contrary, it is simply making the buses

safer for their continued commercial use in which CCTC was making profits. And although the takings clause does apply to regulations, it typically applies to those regulations which limit the use of the land. In this case, the regulation only requires that CCTC install seat belts in its buses, which would in no way limit the use of the buses.

Conclusion

As such, Regulation B will be upheld under the US Constitution.

3. What constitutional challenge may the State Highway Department bring against Regulation C, and is it likely to succeed?

Standing

Again, the 3 standing requirements must be met. The State Highway Department (SHD) can show that Regulation C injures it because the state will lose federal funding if it does not implement adequate measures for providing seat belts. Causation is met, since the funding will be cut due to the requirements of Regulation C. And finally, redressability is met, because a successful constitutional challenge will overturn the law, meaning SHD no longer has to comply.

Intergovernmental immunity

Here, a challenge based on violations of intergovernmental immunity might succeed. As stated above, the federal government cannot commandeer state executive officers or state legislatures to ensure enforcement of federal laws. Specifically, the federal government cannot force the states to enact laws or regulations.

In this case, Regulation C punishes states which fail to enact adequate measures under the federal scheme. The SHD will argue that this violates intergovernmental immunity,

since the federal government is requiring states to regulate and punishing them if they don't.

In response, Congress will argue that this is perfectly acceptable under its taxing and spending power. As indicated above, this is a successful argument, and a challenge based on intergovernmental immunity will fail.

The power to tax and spend

Article I of the Constitution grants Congress the power to tax and spend to ensure a common defense and provide for the general welfare. This essentially allows Congress to spend money for any purpose which is related to the general welfare of the United States. Of particular importance, under the Spending Clause, Congress may "attach strings" to congressional grants of money to require [that] States act in a certain way. Thus, although Congress may have no power to regulate a certain area, it can require states to regulate as a condition of receipt of federal funds.

In this case, Congress cannot constitutionally require states to legislate on the subject of commercial drivers' licenses. However, under the spending clause, it can incentivize [sic] states to so regulate by conditioning the receipt of federal funds on enacting proper measures under the federal scheme. Here, the facts indicate that Congress has indicated that states will forfeit 10% of federal funds for highway conditions if they fail to enact measures to ensure compliance with Congress' regulation of seat belts on buses. The SHD will argue that Congress has no power to require states to regulate, and thus this scheme is unconstitutional. However, as discussed above, Congress can properly condition receipt of federal funds on state compliance with federal regulations, and thus Regulation C is constitutional.

Conclusion

As such, Regulation C is constitutional.

Q5 Civil Procedure / Remedies / Professional Responsibility

Diane owns a large country estate to which she plans to invite economically-disadvantaged children for free summer day camp. In order to provide the children with the opportunity to engage in water sports, Diane started construction to dam a stream on the property to create a pond. Neighbors downstream, who rely on the stream to irrigate their crops and to fill their wells, immediately demanded that Diane stop construction. Diane refused. Six months into the construction, when the dam was almost complete, the neighbors filed an application in state court for a permanent injunction ordering Diane to stop construction and to remove the dam. They asserted causes of action for nuisance and for a taking under the United States Constitution. After a hearing, the state court denied the application on the merits. The neighbors did not appeal the ruling.

Thereafter, Paul, one of the neighbors and a plaintiff in the state court case, separately retained Lawyer and filed an application for a permanent injunction against Diane in federal court asserting the same causes of action and requesting the same relief as in the state court case. Personal jurisdiction, subject matter jurisdiction, and venue were proper. The federal court granted Diane's motion to dismiss Paul's federal court application on the basis of preclusion.

Infuriated with the ruling, Paul told Lawyer, "If the court can't give me the relief I am looking for, I will take care of Diane in my own way and that dam, too." Unable to dissuade Paul and after telling him she would report his threatening comments to criminal authorities, Lawyer called 911 and, without identifying herself, told a dispatcher that "someone is on his way to hurt Diane."

1. Was the state court's denial of Diane's neighbors' application for a permanent injunction correct? Discuss. Do not address substantive property or riparian rights.

2. Was the federal court's denial of Paul's application for a permanent injunction correct? Discuss. Do not address substantive property or riparian rights.

3. Did Lawyer commit any ethical violation when she called 911? Discuss. Answer according to both California and ABA authorities.

Answer A

I. Was the State court's denial of Diane's neighbors' application for a permanent injuction correct?

A permanent injunction is an equitable remedy which is appropriate where there is an inadequate remedy at law, the plaintiff has a protectable property interest, enforcement of the injunction is feasible, balancing of the hardships, and there are no applicable equitable defenses to enforcement of the injunction.

Inadequate remedy at law – A remedy at law is inadequate where monetary damages are insufficient to compensate the plaintiff, or where they are unlikely to be recovered because the plaintiff is insolvent. Furthermore, a legal remedy may be inadequate. In this case, the neighbors are going to argue that an award of monetary damages will be inadequate because they rely on the stream that Diane is diverting to irrigate their crops and fill their wells. While an award of damages would give them money, it would in no way help them in dealing with this problem. Furthermore, they will also argue that because the use and enjoyment of their real property is involved, this is a situation where their land is unique and legal damages will be inadequate because of the irreparable harm that will occur to the neighbors if they lose access to the water.

Protectable Property interest – A plaintiff may only seek a permanent injunction where they have a property interest that a court in equity will protect. While the traditional rule was very strict, the modern rule provides that an interest in property will suffice. The plaintiffs will argue that as landowners living downstream, they have a protectable property interest in the water. The court is likely going to accept this argument because they had been using the water before Diane came into the area and likely have at least some rights to continue using some of the water.

Feasibility of enforcement – Enforcement problems arise in the context of mandatory injunctions which requires the defendant to do something. Negative injunctions which

prohibit the defendant from performing certain actions create no enforcement problems. In the enforcement area, courts are concerned about the feasibility of ensuring compliance with a mandatory injunction and also with the problem of continuing supervision.

Under these facts, Diane's neighbors initially asked for a partial mandatory injunction and partial negative injunction, ordering Diane to stop construction and remove the dam. With regard to the mandatory part (removing the dam), Diane has to affirmatively take this action, rather than being required simply to stop building the dam. Because this is a mandatory injunction, this creates an enforcement problem for the court. It will have the problem of continually supervising Diane to make sure that she in fact takes the dam down. The part of the injunction regarding stopping construction is a negative injunction because all that is required is that Diane stop construction. As such it creates no enforcement problems. While the part of the injunction that requires Diane to take down the dam creates some enforcement problems, the court could solve this problem by couching it as a negative injunction.

Balancing of the hardships – In balancing the hardships, the courts will always balance the hardships if the permanent injunction is granted on the defendant with the hardship to the plaintiff if the injunction does not issue. The only time that courts will not balance the hardships is where the defendant's conduct is willful. Finally, in balancing the hardships, the court can take the public interest into account.

Was the plaintiff's conduct willful so as to prohibit balancing of the hardships – In this case, while Diane willfully continued the construction and used the dam to divert the water, there is no indication that when she was doing this that she knew that her conduct was wrong or was intentionally violating the rights of the plaintiffs. While the neighbors demanded that she stop, there is no indication that she believed that she was not entitled to continue. Consequently, the hardships should be balanced because the defendant's conduct was not willfully in violation of the plaintiffs' rights.

Balancing the hardships – The plaintiffs are going to argue that they will suffer great harm if an injunction does not issue. Under these facts, the plaintiffs need the water from the stream for their crops' irrigation and to fill their wells. Thus if a permanent injunction does not issue their crops are likely to die and they will not have a water supply in their wells. This is a great showing of hardship. The defendant is going to counter that she is trying to construct a free summer day camp for poor kids and that she cannot do so if she is forced to halt construction and if she cannot use the water diverted by the dam for her pond. However, in this case, these hardships do not seem so great compared to the hardships faced by the plaintiffs. There is no indication that she cannot get the water from her pond from somewhere else; furthermore, it seems likely that she could continue constructing her property in a way that does not interfere with the rights of the plaintiffs. The direct balancing of the hardships thus favors the plaintiffs.

Consideration of the public interest in balancing the hardships – Courts may also consider the public interest in balancing the hardships. Diane is going to argue that the public interest favors her because she is doing this project to create a free summer day camp for children who do not have a lot of money. This certainly indicates that her action is in the public interest. However, the neighbors can also make a public interest argument. Assuming that they sell their crops for consumption by the general public, they also have public interest factors on their side. Thus this factor does not seem to favor either side very strongly.

On balance, thus, it seems that the balancing of the hardships favors the plaintiffs when taking the direct hardships and the public interest into account.

Equitable Defenses – Courts in equity will not issue an injunction in favor of plaintiffs where they have unclean hands, where laches applies, or where the claim is barred by estoppel.

Unclean hands – is a defense in equity where the plaintiffs have committed acts of bad faith with regard to the subject matter before the court. In this case, there is no indication that the plaintiffs have unclean hands, so this argument by Diane will be unsuccessful as a defense.

Laches – Laches applies where a plaintiff or group of plaintiffs unreasonably delay in instituting a cause of action or claim against a defendant and this delay prejudices the defendant. In this case, Diane is going to argue that the plaintiffs' delay in this case was unreasonable. When Diane refused the neighbors' initial request to stop construction, they waited six months before filing an application with the state court for an injunction. Furthermore, she is going to argue that she was harmed by this delay because she continued construction and expended substantial funds during this delay. While Diane can make a pretty compelling argument, it does not seem that a delay of six months is enough time that the plaintiffs' claim should be barred by laches.

Estoppel – applies as a defense in equity where plaintiffs take a course of action that is communicated to the defendant and inconsistent with a claim later asserted, and the defendant relies on this to their detriment. In this case, estoppel will not bar the claim by the plaintiffs because once they became aware of the construction, they immediately indicated that they did not approve. They commanded Diane to stop so the plaintiffs' claim is not barred by estoppel.

Conclusion – The state court was incorrect in denying the permanent injunction because it appears that the permanent injunction should have issued because of the factors discussed above.

II. Was the federal court's denial of the permanent injunction correct?

Claim Preclusion (Res Judicata) – The equitable doctrine of res judicata stands for the proposition that a plaintiff should only have one chance to pursue a claim against the same defendant. This doctrine applies and bars relitigating of a claim where (1) the

claim is asserted by the same claimant against the same defendant in case #2 as in case #1, (2) where the first case ended in a valid final judgment on the merits, and (3) where the same claims are being asserted in case #2 as in case #1. In federal court these claims arise from the same conduct, transaction or occurrence.

Same Claimant Against Same Defendant in Case #2 as in Case #1 – In this case, second case, Paul is suing Diane in federal court. The facts indicate that he was one of the neighbors and a plaintiff in the first case in state court. Consequently this element is met, because Paul was also a claimant against Diane in the first case.

Case #1 ended in a valid final judgment on the merits – The facts indicate that in the first case, the court denied the application for a permanent injunction on the merits. The facts also indicate that the neighbors did not appeal. A judgment on the merits is clearly a valid judgment and because no appeal was made, this judgment is also final. Consequently, this element of res judicata is also met. The one issue that Paul may raise on this point is that if the time for appeal has not run in state court, he may argue that he could file a notice of appeal in state court. However, taking up this suit in federal court is improper because absent an appeal in state court, there has been a valid final judgment on the merits that the federal court should adhere to.

Are the same claims asserted in case #2 as were asserted in case #1? Under federal law there is a theory of merger whereby a plaintiff is deemed to have asserted all claims pertaining to a prior claim that arise from the same conduct, transaction, or occurrence. In this case, the facts indicate that Paul asserted the same causes of action and requested the same relief in the second case as in the first case. Consequently, this element is met. California follows the primary rights theory which gives the plaintiff a cause of action for each right that this invaded. However, in this case, because there is no indication that any of the causes of action are different than the ones in the first case, the result in California would not be different.

Conclusion – The court was correct to dismiss Paul's application for permanent injunction because the doctrine of claim preclusion (res judicata) precluded relitigating claims that had already been asserted in a prior case.

III. Ethical Violations of Lawyer in reporting Paul's communications to the 911 Dispatcher

Duty of Confidentiality – Under the ABA Model Rules, a lawyer has a duty of confidentiality to a client which precludes disclosing any information obtained during the representation. Under the California rules, while there is no express duty of confidentiality, a lawyer is required to keep his client's confidences and this is a strict duty.

In this case, Paul is going to argue that lawyer violated this duty when he revealed the information that he was told after the ruling to the 911 dispatcher. While he is correct that this raises an issue with regard to the duty of confidentiality, he may be incorrect that Paul has violated this duty because both the ABA Rules and the CA Code recognize that there are certain situations whereby the duty of confidentiality is overridden by other concerns.

Exceptions to the Duty of Confidentiality – Under the ABA Model Rules, a lawyer may reveal client confidences where he believes necessary to prevent reasonably certain death or serious bodily injury. The California Code has the same requirements but also requires that where reasonable a lawyer should first try to talk the client out of committing the act and then tell them that they will reveal confidences if they are not assured that the client will not commit the act. Under both the ABA and California rules, this type of disclosure of client confidences is permissive; it is not mandatory. Under the federal rules, there is also an exception to the duty of confidentiality where the client has used or is using the client's services to commit a crime or fraud which will result in substantial financial loss. California has no such exception, but this exception will not be applicable anyway because there is no indication that Paul will be using Lawyer's services if he acts against Diane or the dam.

Federal Rules – Under the federal rules, the main issue is whether Lawyer reasonably believed that his disclosure was necessary to prevent reasonably certain death or substantial bodily injury to Diane. If this is the case then he was entitled to reveal client confidences and will not have breached his duty of loyalty. The facts indicate that Paul

was infuriated with the ruling that the federal court had made in dismissing his claim and that he said “If the court can’t give me the relief I am looking for, I will take care of Diane in my own way and that dam too.” The question is whether the belief that he was going to get Diane made it reasonable to believe that she was threatened with death or serious bodily injury. Based on the facts of this case, this may not be met here because Paul had just lost his case and was upset. People often say things when they are upset, but don’t necessarily act on them. Lawyer will argue that he tried to talk Paul out of hurting Diane and that he only reported the comments then. However, under these circumstances, it seems like this disclosure may have been unreasonable and violated Lawyer’s duty of confidentiality, particularly because such a disclosure is permissive.

California Code – In addition to the federal requirements discussed above, before revealing any client confidences based on a reasonable belief of a reasonable threat of death or substantial bodily injury, Lawyer was required to first try to talk Paul out of committing the violent act against Diane and inform client of his intention to reveal the confidential communications. In this case, the facts indicate that Lawyer did this by trying to dissuade Paul and telling him that she would report his threatening comments to criminal authorities. However, as discussed above, given all of the circumstances this disclosure may not have been reasonable.

Attorney/Client Privilege – Under the attorney-client privilege, a lawyer may not reveal information intended by the client to be confidential which is given in order to get legal advice. However, in both California and under the ABA Model Rules, there is an exception where disclosure of confidential information obtained during the course of the attorney-client privilege is permitted to prevent death or serious bodily injury. This analysis while similar to the analysis above and the question is whether the statements made by Paul were for the purpose of legal advice; it seems like he was just telling Lawyer what he was planning to do so. The statements may not even be covered by the Attorney/Client privilege. Furthermore, these statements may fall within the exception for threats of death or serious bodily injury if the threat that Paul made against Diane was credible.

Duty to uphold justice – Under their duty to uphold justice under both the ABA Model Rules and the California Code, a lawyer is permitted to disclose client confidences where necessary to prevent reasonably certain death or substantial bodily harm. Lawyer will argue that this is why the disclosure was made. However, if this disclosure was unreasonable, this duty will not protect Lawyer from breaching her duty of confidentiality and potentially the Attorney-Client privilege.

Conclusion – Lawyer may have violated her duty of confidentiality and the attorney-client privilege under both ABA Model Rules and the CA Code if it is found that the threat made by Paul against Diane was not a credible one and just made in the heat of the moment without any reasonable chance of actually carrying it through. However, in her defense, Lawyer may argue that she did not disclose the identity of who was on their way to hurt Diane because she just told the dispatcher that “someone was on the way.” However, this will not be dispositive on this issue of whether she breached ethical duties.

Answer B

1. Denial of Diane's neighbors' application for permanent injunction

Permanent injunction

A permanent injunction is a court order mandating a person to either perform or refrain from performing a specific act. A permanent injunction is granted after a full trial on the merits. In order to obtain a permanent injunction, a claimant must establish the following elements.

a. Inadequate legal remedy alternative

A claimant must first establish that any legal remedy alternative is inadequate. In this case, the neighbors will argue that a money damages remedy would be inadequate because it would necessitate the filing of multiple suits. The harm that Diane is inflicting by constructing the dam -- i.e., stopping the flow of the water to neighbors downstream who rely on the stream to irrigate their crops and fill their wells -- affects multiple parties and is ongoing, therefore giving rise to multiple suits. Moreover, the neighbors will argue that a money damages remedy would be inadequate because it would be difficult to assess damages. It may be difficult, for instance, to establish how much damages they will sustain as a result of not being able to irrigate their crops. It may also be difficult to determine how much it would cost to obtain such water from other sources. Finally, the dam may be the neighbors' only source of water, and, therefore, the award of any amount of money damages may be inadequate (i.e., the stream is unique). Therefore, the neighbors will likely satisfy this element.

b. Property right/protectable interest

Traditionally, permanent injunctions only protected property rights. However, the modern view holds that any protectable interest is sufficient. In this case, the neighbors likely have a property right in the stream to the extent that the stream flows through their respective properties. Even if they do not have a property right, however, they still have

a protectable interest stemming from their right to use water from a stream that runs through their property. Thus, this element is likely satisfied.

c. Feasibility of enforcement

There is usually no enforcement problem in the case of negative injunctions (i.e., court orders mandating that a person refrain from performing a specific act). Mandatory injunctions (i.e., court orders mandating that a person perform a specific act) present greater enforcement problems. For instance, a court may be unwilling to grant a mandatory injunction if: (a) the mandated act requires the application of taste, skill or judgment; (b) the injunction requires the defendant to perform a series of acts over a period of time; or (c) the injunction requires the performance of an out-of-state act.

In this case, the neighbors seek both a negative injunction (i.e., order requiring Diane to immediately stop construction of the dam) and mandatory injunction (i.e., order requiring Diane to remove the dam). There will be little enforcement problem in ordering Diane to immediately stop construction of the dam. There will likewise be little enforcement problem in ordering Diane to remove the dam since both Diane and the dam are within the court's territorial jurisdiction, and the injunction does not require Diane to perform an out-of-state act. Therefore, the neighbors will satisfy this element.

d. Balancing of hardships

The court will balance the hardship to the neighbors if a permanent injunction is not granted against the hardship to Diane if a permanent injunction is granted. Unless the hardship to Diane greatly outweighs the hardship to the neighbors, a court will likely not grant a permanent injunction. In this case, Diane will suffer little hardship if the permanent injunction is granted because the pond was intended to be used for a free summer day camp. Therefore, the only economic harm she will suffer as a result of this injunction is the money she has already expended in constructing the dam and any additional amount she will incur in removing the dam if the injunction is granted.

However, the neighbors will suffer substantial harm if the injunction is not granted and the dam is completed. They rely on the stream to irrigate their crops and to fill their wells and will likely suffer substantial damage if they either cannot obtain substitute water from another source or must pay significant amounts to obtain any substitute. Thus, the hardship to the neighbors if a permanent injunction is not granted greatly outweighs the hardship to Diane if a permanent injunction is granted, and a court is more likely to grant the injunction.

e. Defenses

Diane may raise the defense of laches and argue that the neighbors delayed in bringing the permanent injunction action, thereby prejudicing her. The laches period begins the moment the neighbors know that one of their rights is being infringed upon. In this case, the neighbors knew six months before they filed an application in state court for a permanent injunction that Diane was constructing a dam and that such construction infringed on their right to obtain water from the stream. By waiting these six months to bring suit, Diane incurred substantial construction expenses in building the dam that could have been avoided if the neighbors had brought the suit sooner.

Thus, Diane will likely be able to successfully assert this laches defense.

In the end, a court may still grant the neighbors the injunction and order Diane to remove the dam. However, the court may require the neighbors to compensate Diane for any construction expenses that could have been averted if the neighbors brought the suit sooner.

2. Denial of Paul's application for permanent injunction

Claim preclusion

Once a court renders a final judgment on the merits with respect to a particular cause of action, the plaintiff is barred by res judicata (i.e., claim preclusion) from trying that same cause of action in a later suit. I will examine each element of claim preclusion, in turn, below:

a. Final judgment on the merits

The court must have rendered a final judgment on the merits in the prior action. For federal court purposes, a judgment is final when rendered. For CA state court purposes, a judgment is not final until the conclusion of all possible appeals. In this case, Paul is filing his case in federal court. Since judgment was rendered by the state court in the prior action, the judgment is considered final.

A judgment is "on the merits" unless the basis for the decision rested on: (a) jurisdiction; (b) venue; or (c) indispensable parties. In this case, the state court's decision did not rest on any of these grounds. Therefore, the judgment was on the merits.

b. Same parties

The cause of action in the later suit must be brought by the same plaintiff against the same defendant. In this case, Paul was one of the plaintiffs in the prior state court case, and the suit is brought against Diane, who was the same defendant in that prior case. Therefore, this requirement is also met.

c. Same cause of action

The cause of action in the later suit must be the same cause of action asserted in the prior suit. In general, if causes of action arise from the same transaction or occurrence, a claimant must assert all such causes of action in the same suit. However, under CA's "primary rights doctrine," a claimant may separate the causes of action into separate suits so long as each suit involves a different primary right (e.g., personal injury vs. property damage).

In this case, Paul is asserting the same permanent injunction claim based on nuisance and taking grounds that he asserted in the prior state court action. He is also requesting the same relief as in the state court case. He is not asserting a different primary right, and, thus, the "primary rights doctrine" is inapplicable. Therefore, this requirement is likewise met.

d. Actually litigated or could have been litigated

The same cause of action must have either actually been litigated or could have been litigated in the prior action. This requirement is met because the permanent injunction cause of action based on nuisance and taking grounds was actually litigated in the prior action.

In the end, Paul will [be] barred by res judicata (i.e., claim preclusion) from trying the permanent injunction cause of action against Diane in federal court, and the court was correct in granting Diane's motion to dismiss.

3. **Lawyer's ethical violations**

Confidentiality

Under both ABA and California rules, a lawyer has a duty not to reveal any information related to the representation of a client. However, several exceptions may nonetheless permit a lawyer to reveal such confidential information. First, a lawyer can reveal confidential client communications if the client gives the lawyer informed consent to do so. In this case, Paul has not given Lawyer such informed consent, and, therefore, this exception does not apply. Second, a lawyer can reveal confidential client communications if he is impliedly authorized to do so in order to carry out the representation. Again, this exception does not apply here.
Third, under the ABA rules, a lawyer can disclose confidential client communications if he reasonably believes it is necessary to prevent a person's reasonably certain death or serious bodily injury. Under the CA rules, however, a lawyer can disclose such information only to prevent a criminal act that is likely to lead to death or serious bodily injury. The lawyer must first make a good faith effort to convince the client not to commit the criminal act and, if the client refuses, then the lawyer must inform the client of his intention to reveal the client's confidences.

In this case, Paul told Lawyer that he "will take care of Diane in my own way" after becoming infuriated with the court's ruling on his permanent injunction application. On the one hand, Paul's statement is too unclear and ambiguous to provide any indication of what specific harm he intended to inflict on Diane. On the other hand, Lawyer will argue that he reasonably believed that Paul intended to inflict serious bodily harm on Diane, as evidenced by his infuriation after the ruling. Lawyer was so convinced that Paul intended serious harm to Diane that he told the 911 dispatcher that Paul was "on his way to hurt Diane." In the end, a disciplining body would likely hold that Lawyer was reasonable in his belief that Paul intended to cause death or serious bodily injury to Diane and, therefore, his disclosure of Paul's confidential communications was permissible. The killing or injuring of a person also constitutes a criminal act, and since

Lawyer first made a good faith effort to dissuade Paul from committing any harm against Diane, Lawyer's revelation of this confidential information would also not subject Lawyer to discipline in CA.

Fourth, under the ABA rules only (i.e., CA has no equivalent rule), a lawyer may disclose confidential client communications to prevent a crime of fraud that is likely to produce substantial financial loss to a person, so long as the client was using the lawyer's services to perpetrate the crime or fraud. In this case, Paul threatened to "take care… of that dam." While this threat may result in substantial financial loss to Diane, the threatened act did not involve the use of Lawyer's services. Therefore, this exception does not apply. Nonetheless, as discussed above, Lawyer should escape discipline for his revelation of client's confidential communications under the "death or serious bodily injury" exception.

Q6 Criminal Law and Procedure

Polly, a uniformed police officer, observed a speeding car weaving in and out of traffic in violation of the Vehicle Code. Polly pursued the car in her marked patrol vehicle and activated its flashing lights. The car pulled over. Polly asked Dave, the driver, for his driver's license and the car's registration certificate, both of which he handed to her. Although the documents appeared to be in order, Polly instructed Dave and his passenger, Ted: "Stay here. I'll be back in a second." Polly then walked to her patrol vehicle to check for any outstanding arrest warrants against Dave.

As she was walking, Polly looked back and saw that Ted appeared to be slipping something under his seat. Polly returned to Dave's car, opened the passenger side door, looked under the seat, and saw a paper lunch bag. Polly pulled the bag out, opened it, and found five small bindles of what she recognized as cocaine.

Polly arrested Dave and Ted, took them to the police station, and gave them *Miranda* warnings. Dave refused to answer any questions. Ted, however, waived his *Miranda* rights, and stated: "I did not know what was inside the bag or how the bag got into the car. I did not see the bag before Dave and I got out of the car for lunch. We left the windows of the car open because of the heat. I did not see the bag until you stopped us. It was just lying there on the floor mat, so I put it under the seat to clear the mat for my feet."

Dave and Ted have been charged jointly with possession of cocaine. Dave and Ted have each retained an attorney. A week before trial, Dave has become dissatisfied with his attorney and wants to discharge him in favor of a new attorney he hopes to select soon.

What arguments might Dave raise under the United States Constitution in support of each of the following motions, and how are they likely to fare:

1. A motion to suppress the cocaine? Discuss.

2. A motion to suppress Ted's statement or, in the alternative, for a separate trial? Discuss.

3. A motion to discharge his present attorney and to substitute a new attorney in his place? Discuss.

Answer A

1. Motion to suppress the cocaine

Standing:

Dave has standing to bring this motion because he is being charged with possession of cocaine that was found in his car. He, unlike Ted, has a reasonable expectation of privacy in compartments within his car that are not visible in plain view, and can therefore assert a violation of the 4th Amendment if they are unlawfully searched, and assert the exclusionary rule to suppress evidence found that way.

Traffic stop

A police officer has the right to stop and detain a car that is violating any provision of the vehicle code. Here, the car was speeding and weaving in violation of the code, so Polly had the right to cause the car to pull over. Upon such a stop, both the driver and passenger are considered detained according to the Terry v Ohio doctrine. The request for Dave's driver's license and registration were lawful, as was her intended search for arrest warrants.

Search

However, instead of going to her patrol car, Polly saw Ted "slip something under the seat." This must have been a very minimal viewing, and somewhat lacks credibility, because Ted was in the passenger seat, and Polly was walking away from the driver's side back to her own vehicle. Anyway, assuming that she actually did [see] what she says she saw, her actions were still unlawful. Polly opened Ted's car door, looked under his seat, and opened a bag found there. This action qualifies as a search, because a person has a reasonable expectation of privacy in the compartments of his car which are not visible in plain view. The contents of a paper bag under a car seat are certainly not in plain view. Therefore, to search it, Polly needed a warrant, or a warrant exception.

Auto Exception:

The auto exception the warrant requirement allows an officer to search any compartment within a car in which the officer has probable cause to believe that she will find evidence of a crime. Here, Polly saw Ted "slip something under his seat." Under these circumstances, that sight is not enough to generate probable cause. If asked, she could not articulate with particularity what it is she suspected she saw. There were no other facts to cause Polly to suspect that something under Ted's seat would contain evidence of a crime. The mere fact that Ted appeared to be concealing whatever-it-was is not enough. A Supreme Court case involving a student on school grounds, who held a black pouch behind his back when approached by the principal, provides precedent that the mere inarticulate hunch or suspicion created when a suspect appears to be hiding something is not enough to create reasonable suspicion, much less the higher standard of probable cause.

Search incident to arrest:

Before a Supreme Court decision [in] March of 2009, an officer would be allowed to search the passenger compartment of a car during or after the arrest of a car's occupant, based on a search incident to arrest. However, this rule has been changed, and does not allow a search if the passenger has been removed and is no longer in arm's reach of the contents of the car. Additionally, Polly had not chosen to arrest Ted and Dave at the time she made the search. Although she had the right to arrest Dave for a vehicle code infraction, she had not made the decision to do so, and therefore, even under the old rule, she would not have been able to use this exception to search under Ted's seat.

Terry frisk

As stated earlier, the traffic stop was a detention. When an officer detains a suspect because of a reasonable suspicion that a crime has occurred (here, the vehicle code infractions), she has the right to frisk the suspect for weapons to protect herself. This allows a visual scan, as well as a brief physical inspection of the outer garments by running her hands along them. To do this, the officer must have at least a reasonable

suspicion that the person might be carrying a weapon. Here, Polly went far beyond what was allowed. She wasn't looking for weapons; she was simply indulging her suspicious curiosity when she checked to see what Ted put under the seat. As mentioned above, she had no reason to believe Ted would be concealing a weapon. Now, if perhaps she had run her check for warrants, and found a warrant out for Ted or Dave for a violent offense, that might have generated the necessary suspicion for some kind of frisk. But even then, the frisk would have required her to command Dave and Ted out of the car and she could frisk their clothing - not permitted her to look under their seats and inside bags.

Conclusion:

Since no warrant exception permitted Polly to make the search, and she did so in violation of Dave's reasonable expectation of privacy without a warrant, the search was unlawful, the cocaine that was found is "Fruit of the poisonous tree" and should be excluded.

2. Motion to suppress Ted's statement or for a separate trial

Confrontation Clause

A statement by a coconspirator is not admissible against a defendant as an admission of a party opponent. Therefore it must be admissible under some other hearsay exception if it is hearsay. Even if it is admissible under evidence law, the constitution sometimes allows for suppression.

The confrontation clause of the constitution requires that for any testimonial evidence offered against a defendant, the defendant must have the opportunity to confront and cross-examine the declarant. Here, Dave and Ted are being tried jointly, and Ted's statement is offered substantially against both of them. Ted's statement is not admissible against Dave unless Ted can be cross-examined. And because it is Ted's trial too, Ted has the right not to take the stand because of his Fifth Amendment right against self-incrimination. If Ted exercises this right, then Ted cannot be cross-examined, and Dave's right of confrontation is violated. The remedy is, as Dave requested, to either exclude the statement, or try Ted and Dave separately.

The prosecution, if it wishes to avoid both these remedies, can argue that the statement is not offered "against" Dave. The statement really doesn't incriminate Dave in any way; in fact, it is more exculpatory than anything for both defendants. More facts would be needed to be sure of this, because if Dave's defense is that Ted owned the cocaine, then the statement, while good for Ted, weakens Dave's defense. Or if Ted has changed his story, this prior inconsistent statement may hurt Ted's credibility, which may hurt Dave's defense by association with Ted. So the prosecution's attempt to include the statement and maintain a joint trial will probably fail, but will succeed if Ted's statement is not harmful to Dave's defense.

If the statement is helpful to [the] prosecution of Ted, the prosecution will not wish it to be excluded. Rather than exclude it, the prosecution will prefer to try Dave separately, and this remedy will be granted upon the prosecution's agreement.

Miranda

Even if Ted's statement was obtained in violation of Miranda rights or 14th Amendment voluntariness rights, Dave cannot assert those rights as a reason to exclude the statement from use against him. A defendant can only assert his own constitutional rights in seeking to exclude evidence, not those of another person.

3 . Motion to discharge Dave's attorney and substitute a new attorney in his place

A criminal defendant has an absolute right to counsel at trial, as long as incarceration is a possible punishment. The issue is whether Dave has a right to discharge and replace his attorney a week before trial. Dave has retained an attorney, not used a publicly provided one, and this is helpful to his case, because no public financial hardship is involved. However, because [the] trial is so soon, the court has discretion to grant Dave's motion only if it finds that the case will not be unduly delayed. The court will not permit Dave to delay the case so much that he will have a defense of a speedy trial violation; however, it may allow Dave the delay if he waives that defense. And, if the substitution will cause delay that will make a necessary witness unavailable, the court will be disinclined to grant it.

The court will balance Dave's interests as well. If he has differences with his attorney that make it impossible for his attorney to provide him with competent representation, then the court will be strongly inclined to grant the substitution, because otherwise Dave may have a case for Ineffective Assistance of Counsel that could undo the court's and prosecution's time and efforts. If the only consequence of the substitution will be delay, the court will consider its calendar, and it will also consider the right to a speedy trial. But weighing all these considerations, the court will likely permit the substitution because no facts show that any undue burden on the court will occur.

Answer B

Q1: The Motion to Suppress the Cocaine

Fourth Amendment / Fourteenth Amendment Applicability: Any action by the state (a government official) that invades a person's reasonable expectation of privacy (REOP) will trigger the applicability of the Fourth Amendment protections against unreasonable searches and seizures.

Here, assuming that Polly was a state police officer, the Fourth Amendment will apply to her actions through selective incorporation via the Fourteenth Amendment.

Fourth Amendment -- State Action: Private actors are not bound to constitutional norms. As mentioned above, any Fourth Amendment challenge to a search or seizure must involve "state action" in the searching and seizing. Here, there is no question that Polly, a police officer, is an agent of whatever state or local government she works for. Since her actions revealed the cocaine, the state action requirement is satisfied.

Fourth Amendment -- Reasonable Expectation of Privacy: To have standing to bring a Fourth Amendment claim to suppress seized evidence, the person asserting the claim must have standing.

To have standing under the Fourth Amendment, Dave must prove that he had a reasonable expectation of privacy in the contents of his passenger compartment. Under existing case law, because Dave is the owner of the vehicle that was stopped by Polly, Dave has a reasonable expectation of privacy in the contents of the passenger compartment of the vehicle, as well as the trunk and any other places that items could be stored.

Note also that the state cannot argue that Dave lacked a REOP due to the item being in plain view from the exterior of the car (placing an item in plain view in the passenger

compartment may indicate that the owner had no reasonable expectation of privacy), the item in question--the bag--was under a passenger seat, and not visible from the exterior of the car.

Therefore, Dave has standing (a REOP in the item seized) to move for its suppression.

The Traffic Stop -- Lawful Stop: A police officer may conduct a routine traffic stop if the police officer has reasonable suspicion that a law has, is, or will be violated by the occupants of the car, or if the police officer has probable cause that the car contains contraband, or the driver has violated the law.

Here, Polly personally observed Dave's car "speeding" and "weaving in and out of traffic" in violation of the Vehicle Code. Therefore, Polly was justified under the Fourth Amendment in stopping the car, because she had at least reasonable suspicion, if not probable cause, that a law had been violated.

The Traffic Stop -- Lawful Seizure: The Supreme Court has made clear that a traffic stop seizes not only the driver, but any passengers, under the Fourth Amendment. However, because the stop was justified (as discussed above), this seizure is lawful under the Fourth Amendment.

The Search of the Passenger Compartment -- Improper Search

Warrant Requirement

The general rule, subject to a number of exceptions, is that any search by a state actor of any area that a person has a REOP in cannot be conducted without (1) probable cause, (2) supported by a validly executed warrant.

Here, it is clear that Polly did not have a validly executed warrant to search Dave's car. Therefore, we must look to see whether any exceptions will apply to this general rule.

Automobile Exception Does Not Apply Because NO PROBABLE CAUSE

The automobile exception, which exists because items in an automobile may be quickly transported and disappear before a warrant can be applied for and issued, is only a replacement for the general warrant requirement. However, it does not absolve the state actor from having probable cause to search.

Probable cause to search means that the person has probable cause to believe that the place to be searched will contain specific items of contraband. It is determined based upon a totality of the circumstances, and must be based upon more than just mere suspicion, but reliable sources and articulate observations.

Here, Polly merely saw Ted slipping "something" under his seat as she was walking away. Polly had no other facts to support a belief that the item was contraband or a weapon, nor could she be sure that Ted was actually performing that act (she was walking when she observed it). Therefore, Polly did not have probable cause to perform the search of Dave's car. Moreover, the basis for the stop itself was a routine traffic violation, and not something (perhaps intoxicated driving) that would provide probable cause to search the automobile compartment (perhaps for open liquor bottles).

Because Polly did not have probable cause to search Ted's car, the automobile exception cannot apply.

An Exception to Probable Cause -- A Terry Search of the Car: An officer may conduct a "Terry Frisk" of a person if the officer has reasonable and articulable suspicions that the person may be armed. This is to ensure that officers are safe while conducting their duties.

Here, the state may argue that Polly's observation created an articulable and reasonable suspicion that the occupants of the car were stowing weapons or other materials that might put her in danger. Therefore, pursuant to her lawful seizure of Ted

and Dave, she was within her rights to conduct a “Terry Search” of the automobile (only for weapons) to ensure her safety.

However, a Terry search is limited solely to a search of weaponry, and the paper lunch bag was likely clearly not a weapon (even if Polly conducted a plain feel of it, which she didn’t). Polly was not authorized to open the bag under a Terry search theory, because she did not first ascertain that it was contraband based upon a “plain feel.”

Therefore, this exception will also not apply.

Plain View Does Not Apply: As mentioned earlier, because the paper bag was beneath the passenger seat, the item was not in plain view of the officer from a lawful vantage point (outside the car), nor was the paper bag immediately incriminating on its face. Therefore, the discovery of the paper lunch bag does not meet either of the requirements for this exception.

Evanescent Exception Does Not Apply: The evanescent exception often applies to contraband that can be easily disposed of, or will easily disappear, thereby excepting officers from obtaining a valid warrant. However, it requires that the officer have probable cause to search the area in which the contraband is discovered. Because no probable cause existed, this exception does not apply.

No Consent: The seizure of a passenger vehicle in a routine traffic stop does not provide consent to the officer to search the passenger compartment, nor did Dave or Ted give such consent to Polly. Therefore, this exception will also not apply.

No Exception to the Warrant Requirement or Probable Cause Applies [To] The Cocaine: Because no exception to the warrant requirement or probable cause applies to the circumstances here, the search of the car and the discovery of the cocaine must be suppressed. Thus, Dave will likely succeed on this motion.

Q2: Motion to Suppress Ted's Statement or for a Separate Trial

State Action: Again, private actors are not bound to constitutional norms. Thus, the statement must have been obtained by a "state actor" for the suppression motion to be valid. Here, the statements by Ted were obtained by questioning by Polly, who as discussed above is a state actor. Therefore, this requirement is met.

Suppression of Statement After Unlawful Arrest -- No Standing to Bring: As discussed in Q1, the arrest of Ted and Dave was the result of an improper search of Dave's vehicle, because the probable cause to arrest Ted and Dave was based entirely upon the improperly seized cocaine. If probable cause to arrest is based solely on unconstitutionally obtained evidence, then the subsequent arrest is invalid and unlawful.

Any statements made by a suspect in custody following an unlawful arrest must be suppressed unless the state can show that the "taint" of the unlawful arrest has been purged. Case law is unclear whether Mirandizing a suspect unlawfully arrested is sufficient to "purge the taint" of the prior arrest, even if the suspect waives his Miranda rights following a properly administered warning. What is clear is that releasing the suspect would purge the taint (but that didn't happen here).

However, regardless of the merits of this valid issue, Dave has no standing to bring a claim that Ted's statement was improperly obtained as evidence of an unlawful arrest. This is because only the person who made such a statement can bring such a challenge. Thus, Dave would be wise to encourage Ted to bring this argument forward.

Co-Defendant Confession, Confrontation, and Self-Incrimination Rights -- Redact or Suppress: Because this is a criminal trial with co-defendants, special constitutional concerns arise when one defendant's confession is being admitted against the other defendant. This is because of the intersection between the right of a defendant against self-incrimination (and the right to not take the stand) and the right of an accused to

“confront” the witnesses against him, meaning being able to put the witness under oath, cross-examine him, assess his demeanor, and physically be present for the process.

The Confrontation Clause only applies to “testimonial statements,” which case law clearly includes confessions to police officers within the definition. Here, Ted’s statement falls within this category, because his statement was made to Polly after waiving his Miranda rights. Therefore, the admission of the statement falls within the “testimonial” category of testimony.

Moreover, the testimony clearly implies that Dave is responsible for the contents of the bag, as Ted makes it clear that he--the only other passenger in the car--had nothing to do with the paper bag. This testimony will likely be used against Dave to show that he had true possession of the bag.

Under these facts, because Ted cannot be forced to take the stand and be confronted (because he can assert his Fifth Amendment right to not take the stand), the confession must be redacted as to not cast any negative light onto Dave, or be suppressed.

Conclusion on Suppression: Because it is unlikely that the statement can be redacted to not cast an accusatory light upon Dave, the court will likely grant its suppression.

Conclusion on Alternative -- Separate Trials: The Court may alternatively grant separate trials for Dave and Ted, and should do so in the interests of justice, since it appears under the facts that Dave and Ted will be asserting inconsistent defenses, and will likely attempt to implicate each other in the process.

This has the potential of prejudicing each defendant’s right to a fair trial, and confuse the issues to the jury, because the jury may be tempted to conclude that one defendant is “correct” and the other defendant is “wrong” in accusing the other of fault. This may violate the Fourteenth Amendment requirement that the state bear the burden of

proving the element of every crime charged, and, therefore, separate trials may be the only way to ensure that the state still bears this burden.

Under these circumstances, the court, in the interests of justice should grant the request for separate trial.

Q3: Motion to Discharge Attorney

The Sixth Amendment Right to Counsel of Choice: The "root meaning" of the Sixth Amendment, per Supreme Court case law, is that the Sixth Amendment right to counsel also includes a Constitutional right to the counsel of one's choice. This right, of course, does not apply to appointed counsel (which the Supreme Court has clarified), but only to retained counsel. Moreover, this right is not absolute. A criminal defendant cannot improperly delay criminal proceedings by abusing this right, constantly requesting permission to substitute counsel for no good reason.

Here, it is clear from the facts that Dave has retained counsel, and was not appointed counsel by the court. Therefore, Dave does have a Constitutional right to the counsel of his choice. However, it is also clear that the time frame in which Dave has requested a new lawyer is one week before trial.

Under these facts, the court must consider whether granting the request for substitution of counsel would be unfairly prejudicial to the other parties (both the co-defendant and the state), because it would likely have to grant time for the new counsel to become familiar with the details of the case.

Thus, under these facts, it is unlikely that the court would agree--at the eve of trial--to allow the defendant to exercise his Constitutional right to the counsel of his choice.

The Sixth Amendment Right to Go Pro Se: Note that the Sixth Amendment also guarantees the right of a defendant to represent himself (subject to competency

requirements and a knowing and intelligent waiver of the right to an attorney). Here, the Court could grant the discharge of the present attorney (but deny the substitution of a new attorney) if Dave would rather represent himself. However, the facts do not show such a desire, and therefore, the Court will likely not propose such an alternative.

The Sixth Amendment Right to Effective Counsel: The Sixth Amendment guarantees a defendant the right to effective assistance of counsel. The deficiency of counsel in representation, if it causes actual prejudice (a reasonable probability of a different outcome due to the deficiency), is a structural Constitutional error that is grounds for reversal of a conviction and retrial.

Here, the facts show that Dave was merely dissatisfied with his attorney's performance. If Dave had alleged an actual conflict of interest (which would exist if the same attorney represented both Dave and Ted), and the court agreed with this claim of actual conflict, the court should allow Dave to discharge his present attorney and substitute a new attorney, or risk any conviction being reversed under the Sixth Amendment.

Feb 2009

California
Bar
Examination

Essay Questions
and
Selected Answers

February 2009

THE STATE BAR OF CALIFORNIA
OFFICE OF ADMISSIONS
180 HOWARD STREET • SAN FRANCISCO CALIFORNIA 94105-1639 • (415) 538 - 2300
1149 SOUTH HILL STREET • LOS ANGELES CALIFORNIA 90015-2299 • (213) 765 -1500

ESSAY QUESTIONS AND SELECTED ANSWERS
FEBRUARY 2009
CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2009 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

ESSAY QUESTIONS 1, 2, AND 3

California Bar Examination

Answer all three questions. Time allotted: three hours

Your answer should demonstrate your ability to analyze the facts in question, to tell the difference between material and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

Q1 Professional Responsibility

Betty formed and became president and sole shareholder of a startup company, ABC, Inc. (–ABC), which sells a daily on-line calendaring service. ABC retained Lucy, a lawyer, to advise it about a new trademark.

As ABC was very short on cash, Lucy orally proposed that, in lieu of receiving her usual $200 per hour fee, she could become a 1% owner of ABC. On behalf of ABC Betty orally agreed. Lucy performed 20 hours of legal work and received her ABC stock shares. Years later, Lucy would sell her shares back to Betty for $40,000.

While Lucy was performing legal services for ABC, she discovered certain representations by ABC that were false and misleading and caused customers to pay for services they would never receive. She reported her discovery to Betty, who told her to ignore what she had found. After Lucy finished her legal work for ABC, she reported the false and misleading representations to a state consumer protection agency.

Betty sold all of her interest in ABC, including the shares previously held by Lucy, and formed and became president and sole shareholder of another startup company, XYZ, Inc. (–XYZ).

After Lucy had finished her work for ABC and closed that file, she was retained by a new client, Donna, in a trademark dispute with XYZ.

What ethical violations, if any, has Lucy committed? Discuss.

Answer according to California and ABA authorities.

Answer A

Attorneys owe their clients the duties of confidentiality, loyalty, fiduciary responsibility, and competence. They owe the public and the courts the duties of candor and truthfulness, fairness, and the obligation to uphold the dignity and decorum of the legal profession. Here, Lucy's conduct implicates the duties of confidentiality, loyalty, and fiduciary responsibility.

1. Lucy & ABC's Fee Agreement

Lucy and ABC have entered into a fee agreement whereby Lucy will receive a 1% ownership interest in ABC as the fee for her legal services, rather than her usual $200 per hour fee.

A. Requirement of Written Fee Agreements

Fee agreements between lawyers and clients must generally be in writing unless the fee to be charged will be less than $1,000, the work is routine work for a regular client, the client is a corporation or business organization, or the circumstances of the engagement make a written agreement impractical or impossible. Here, the agreement between Lucy and ABC does not appear to have been reduced to writing. The facts indicate that Lucy orally proposed the terms and that Betty orally agreed to them. However, ABC is a corporation. Therefore, it falls within the exception requiring the fee agreement to be in writing. Accordingly, Lucy has not breached any ethical duty by entering into what appears to be an oral fee agreement.

B. Accepting Ownership Interest in Client's Business As Fee For Legal Services

When a lawyer holds an ownership interest in a client's business, the duty of loyalty is implicated. The duty of loyalty requires an attorney to put his or her client's interest ahead of his own. When a lawyer holds an interest in a business that is also a client, the lawyer must be able to separate his or her own interest from that [of] the business, and must be able to put the business' interest ahead of his or her own interest. Generally, a lawyer is permitted to accept an interest in a client's business as part or all of the fee for legal services. However, consent must [be] in writing and [must] obtain independent legal counsel before entering into the transaction.

In this case, it is not clear that there was any consent by ABC in writing. Moreover, it does not appear that Lucy advised Betty or ABC to obtain independent legal counsel with regard to the transaction, nor does it appear that Betty or ABC obtained such advice. Accordingly, Lucy has violated the rules of professional conduct.

C. Reasonableness of Fee

Under the ABA Model Rules, a lawyer's fee must be reasonable, taking into account a number of factors, including the amount of work required, the complexity of the matter, the lawyer's skill and experience and other factors. Under the California rules, a fee must not be ‑unconscionable (that is, it must not —shock the conscience). Here, Lucy's —normal fee was $200 per hour. The facts do not indicate Lucy's experience or skill level or what type of matters she normally handled, but a $200 per hour fee would likely be considered to be reasonable. The facts do not indicate any value of ABC at the time of the fee agreement or at the time Lucy performed the services for ABC. However, Lucy sold her shares in ABC back to Betty for $40,000 —years later. Had the shares

been worth $40,000 or anywhere in the ballpark of $40,000 at the time of the agreement and the time Lucy provided her services, they would likely be considered both —unreasonable and —unconscionable under the circumstances. Lucy performed only 20 hours of work to obtain certain trademark advice. Although trademark advice may be a specialized field that might justify a —premium fee, if Lucy were given stock worth $40,000 to perform 20 hours of work, she would be receiving the equivalent of $2,000 per hour for her work, a fee that would most likely be considered both —unreasonable and —unconscionable. Accordingly, unless the value of the shares grew significantly, the amount of the fee would be a violation of the rules of professional conduct.

However, it is not clear what the value was at the time the agreement was entered into or when the services were provided. The facts suggest that all 20 hours of service were provided before Lucy received the stock. If that is the case, and if the stock only had a value of roughly $4,000 at that time, then the fee was not unreasonable or unconscionable, and the amount of the fee would not be a violation of the rules.

2. Lucy's Report of ABC to the State Consumer Protection Agency

Attorneys owe their clients a duty of confidentiality. The duty of confidentiality requires a lawyer to keep confidential all information provided to the lawyer for the purpose of rendering legal services. The duty of confidentiality is necessary to ensure complete candor between clients and their attorneys, so as to facilitate effective legal advice. There are certain exceptions to the duty of confidentiality, such as when a lawyer is accused of malpractice, or is required to sue to collect a fee. Moreover, a lawyer who becomes aware that his or her client intends to commit an act that will cause great bodily injury or death may under certain circumstances disclose confidential information. Under the ABA Model Rules, a lawyer who is aware that a client intends to commit fraud that will cause significant financial injury can disclose confidential information to the extent

reasonably necessary to avoid the fraud if the lawyers' services were used in connection with the fraud. Under the California rules, there is no similar exception for information related to fraud.

Here, Lucy became aware that ABC had made certain representations that were false and misleading that caused customers to pay for services they would never receive. Although Lucy learned of these false and misleading representations during the course of her work for ABC, there is no indication that Lucy's services were used as part of any effort to mislead consumers.

A. Lucy's Report to Betty

Lucy properly reported her discovery to Betty. Under the ABA Model Rules, when a lawyer working for a business organization discovers misconduct that might damage the organization, he or she has an obligation to report that misconduct up the chain of authority within the organization. Under certain circumstances the lawyer may also be able to report that misconduct to the SEC if the organization is a reporting company and the CEO/CFO/CLO fail to act upon receiving the information. California permits but does not require a lawyer to report such misconduct —up the chain and prohibits reporting it outside of the company, although with regard to securities law violations, federal law may preempt California law.

B. Lucy's Report to the State Consumer Protection Agency

However, it was a breach of Lucy's duty of confidentiality to ABC to report the misconduct to the State Consumer Protection Agency. Under the California rules, there is no exception to the duty of confidentiality to report fraud. Even under the ABA Model Rules, the exception would not apply here. As indicated above, Lucy's services were apparently not used to make the misrepresentations. Moreover, Lucy discovered evidence of past

misrepresentations in which consumers had already paid for services they would not receive. Therefore, it does not appear that disclosure of those past instances of misrepresentation were necessary to prevent or mitigate any further fraud.

3. Lucy's Representation of XYZ

A lawyer's duty of loyalty prohibits the lawyer from undertaking matters in which he or she has a conflict of interest except under certain circumstances. When a new client seeks to engage a lawyer in a matter involving a former client, the duties of loyalty and confidentiality are involved. A lawyer must not use confidential information obtained in a prior engagement in the new engagement. Generally, a lawyer may not undertake to represent a new client if there is a significant risk that representation of another client might have a material impact on the lawyer's ability to diligently and competently represent the new client. If a reasonable lawyer could conclude that he or she could undertake the subsequent representation without impact on the lawyer's ability to diligently represent the new client, and that the representation of the former client will not result in the use of any confidential information obtained in the prior engagement, the lawyer may undertake the new engagement so long as both clients are informed and [provide] consent in writing. The California rule is similar, but does not have a reasonable lawyer standard and requires only disclosures, not a signed consent.

Here, after completing her work for ABC and closing her file on that matter, Lucy is asked to represent Donna, in a trademark dispute with XYZ. Lucy has not previously had any attorney-client relationship with XYZ. It is true that XYZ is solely owned by Betty, the former president and shareholder of ABC, Lucy's former client, but corporations are separate legal persons. It is clear that Lucy's prior client was ABC, not Betty. The facts indicate that Betty engaged Lucy on behalf of ABC. Moreover, Donna's dispute is with XYZ, not with Betty (or ABC). If ABC had merged or consolidated with XYZ, or if ABC had sold assets

(particularly its intellectual property, including any trademarks that Lucy was involved with) then it might be possible that Lucy would be in possession of confidential information belonging to ABC/XYZ that might be pertinent to her representation of Donna in her dispute with XYZ. However, the facts do not indicate this is the case, and assuming that XYZ is a separate company from ABC, there is no conflict of interest that would result in any ethical violation if Lucy undertakes the representation of Donna.

Answer B

Financial Duties

Lawyers are governed by professional ethics in their practice of law. Lawyers have several duties to their clients, the court, the public, and the profession. One duty lawyers have to their clients is in the realm of finances. Such duties include the amount of fees and how fees may be charged to clients.

Fees

The ABA requires that fees must be reasonable, taking into account the lawyer's skill level, the amount of work involved in a case or matter, and the novelty of the service being provided.

In California, fees must not be unconscionable. Also, fee agreements must be in writing, unless the services are for a routine matter dealing with a business client or the matter is handled in an emergency situation.

It is permissible for lawyers to accept stock shares from clients in lieu of money payment, but the deal must be objectively reasonable to the lawyer and fair to the client at the time that it is made. However, in business dealings with clients, lawyers must only engage in a transaction so long as it is fair to the client and the client is advised to seek separate counsel before proceeding.

Fee Amount

In this case, Betty, as sole shareholder and owner of ABC, needed legal counsel in starting her business. Since she was short on cash, she offered to pay Lucy with stock shares, which would make Lucy a 1% shareholder in ABC. Lucy's regular fee is $200 per hour and she ended up doing just 20 hours of work for

ABC. When Lucy eventually cashed in her shares, she earned $40,000. The issue is whether this would be reasonable at the time the company was started and the deal between Lucy and Betty was formed.

The amount that Lucy eventually recovered was 10 times greater than the fees she would have collected in her work for ABC. Since Lucy probably had some idea of what the stocks were worth at the time she made this fee arrangement with ABC, it turns on whether the stock returns would have been unreasonable had Lucy sold the stocks around the time she made this arrangement. It is likely that the ABA rules may determine that a lawyer receiving a $40,000 payment for $4,000 of work is simply unreasonable. However, since the standard is whether it was reasonable and fair at the time of the contract or arrangement, Lucy may be able to show the stock prices spiked unexpectedly and that she did not act unfairly or unreasonably here.

In CA, however, the standard is unconsionability. Since ABC was a startup company and offered an online calendaring service, there are no facts to suggest that Lucy's receiving 1% of the stock would amount to a windfall, or even an unreasonable fee amount. In the case the company failed, Lucy would have received very little or nothing for her services. Since Lucy didn't know that the fees would be so out of proportion to her normal fees, the fee arrangement probably would not be deemed unconscionable in California and therefore would be upheld.

Fee Agreement

The other issue is that the fee arrangement was oral. In CA, all fee arrangements must be in writing, unless there is an emergent or routine matter being handled by the attorney. Since ABC is a new client, we have no reason to believe this work was routine. Also, it was not an emergency since Lucy merely

was handling some trademark work for ABC. Lucy should have reduced this fee agreement in writing.

Lucy also should have advised Betty to obtain separate counsel since the fee arrangement is tantamount to a business engagement between Lucy and Betty. That way, Lucy would protect herself and follow ethical rules by ensuring that Betty knew her rights and was prepared to continue with the fee arrangement, having received independent advice on the matter.

Duty of Confidentiality

Lawyers have an ethical duty to maintain confidential all communications related to the representation of their client. The source of the information is irrelevant to this duty, and the duty extends to clients even after representation has ended.

Should a lawyer receive information from or about a client that the client will be engaging in activity that poses serious risk of death or bodily harm to another, the ABA allows the lawyer to report this to authorities, notwithstanding the duty of confidence. In CA, the act must amount to a crime. In the case of financial crimes or fraud, CA does not permit reporting to authorities. In the ABA, reporting is allowed only if (a) the lawyer's services are being used to perpetrate the crime or fraud, and (b) reporting would prevent the financial crime from occurring.

Here, Lucy obtained confidences in her representation of ABC that were related to the representation; therefore she has a duty to maintain those confidences unless she is excused from that duty.

False Representations to Customers

In this case, Lucy learns that ABC is making certain false and misleading representations that caused customers to pay for services they would never receive. Here, this would amount to a financial fraud or crime since customers will be wrongfully led to believe they are receiving something they are not, after they turn over their money. In CA, Lucy may not report this to authorities such as the police or the District Attorney. In the ABA, Lucy may only report this to authorities if her services are used to commit the wrong, and she believes reporting will stop it.

Lucy only performed trademark work, so the likelihood that she was assisting in this fraudulent activity is slight. However, Lucy may argue that, without the trademark, the company couldn't have started [the] business, so she is responsible for assisting. Lucy could prevent the crime if she told authorities and ABC was required to stop operations or refund customer funds.

Reporting Up and Reporting Out

The ABA authorities permit attorneys to report within the corporation to higher authorities if they suspect wrongdoing or fraud. The ABA also allows attorneys to report to outside authorities, such as the SEC, for securities violations or fraud within a corporation. In CA, again, only reporting within is allowed. Reporting out is not allowed in any case; however, if the federal law requires or allows an attorney to report, federal preemption means she cannot be held liable for that.

Here, Lucy reported up when she told Betty of her concerns. However, this was probably futile since Betty is the sole shareholder and president of the company, and told Lucy to ignore what she had discovered. Lucy then went to the State Consumer Protection Agency. In the ABA, this would be permitted. And, if it were a federal agency, Lucy would be permitted to report out if the agency so

required. However, in CA, Lucy is not permitted to report out to prevent financial crime. The ethical rules in CA prohibit Lucy from doing anything but discussing her concerns with Betty. Since the agency she reported to was state-governed, and not federal, Lucy will be subject to discipline for violating her duty of confidentiality to ABC and to Betty.

Withdrawal

If an attorney's services are used to perpetrate a crime or a fraud, they must make [an] attempt to withdraw from the representation; this is mandatory withdrawal. Permissive withdrawal means that Lucy could attempt to withdraw from the representation if she finds the client's wishes or activities to be morally repugnant. If Lucy withdraws, she must provide timely notice to Betty and must return all materials obtained during the representation. She also must not divulge any confidences since the duty of confidentiality persists indefinitely.

Duty of Loyalty

Lawyers owe their clients a duty of loyalty. This means that if there is a conflict with the lawyer and the client, a past client, or any third party that materially limits the lawyer's ability to effectively represent the client, she must not take the representation or withdraw from it. Some conflicts can be waived upon informed consent from the client. In CA, this consent must be in writing.

In CA, the lawyer must be able to effectively represent their client. The ABA requires that the lawyer reasonably believe she can effectively represent the client, notwithstanding conflicts. This is an objective test and the lawyer's actions will be judged objectively. Therefore, representation of one client that compromises the confidences of another may make consent impossible, and would make representing both parties unreasonable.

Past Client Conflicting with Present Client

If a lawyer has represented a client in the past who is now on the opposing side in litigation, representation of the new client may still be permitted if written consent is obtained from the former client, and the lawyer may represent each client effectively without compromising her duties of confidence and loyalty to both. However, if the subject matter of the litigation is similar to the past representation of the former client, this will be deemed unreasonable and therefore a non-consentable conflict.

Lucy's Representation of Donna

Lucy represented ABC on trademark work. ABC has been sold, but Betty, the essential founder and controller of ABC, has now started a new company, XYZ. The work Lucy performed for Betty is regarding the same matter currently at issue in her representation of Donna—trademarks. However, it may not be related to anything that Lucy handled for ABC in the past, and, so, even though it is the same nature of work, it may not directly relate to her work with ABC.

Now, Lucy seeks to represent Donna, her new client, in an action against XYZ. Since XYZ is essentially run by Betty, Lucy must get consent by Betty to represent Donna. However, Donna must also be informed about the conflict. Lucy knows confidential information regarding misrepresentations [of] ABC, and, therefore, Betty, has made in the past. Since she may not reveal this information to Donna, Donna cannot be informed fully about how Lucy's representation may harm her. She may not understand fully the reasons behind the conflict, and therefore, consent is not possible.

Since Lucy cannot obtain fully informed consent from Donna, she must not take Donna's case and should withdraw.

Q2 Civil Procedure

Copyco, Inc. (–Copyco), a maker of copy machines, was incorporated in State A. Most of Copyco's employees work in State B at its sole manufacturing plant, which is located in the southern federal judicial district of State B. Copyco also has a distribution center in the northern federal judicial district of State B.

Sally is a citizen of State B. Sally was using a Copyco copy machine at Blinko, a copy center within the northern federal judicial district of State B, when the machine started to jam. When Sally tried to clear the jam, she severely injured her hand. She underwent several surgeries at a nearby hospital. Her physician believes she may never recover the full use of her hand.

Sally filed a lawsuit against Copyco as the sole defendant in the State B northern district federal court. Her complaint alleges that Copyco was negligent and that she has suffered physical injury, and also seeks damages of $100,000, exclusive of costs and interest.

The federal court has subject matter jurisdiction to hear Sally's lawsuit on the basis of diversity of citizenship. Copyco, however, moved for a change of venue to the southern federal judicial district of State B. The court denied Copyco's motion.

Sally wishes to obtain from Blinko a copy of the maintenance records for the copy machine that caused her injuries.

Questioning the extent of the injuries Sally alleged, Copyco wishes the court to compel Sally to appear for an examination by both a physician and a psychologist of Copyco's own choosing.

1. Was the federal court correct to deny Copyco's motion for change of venue? Discuss.

2. (a) Is Sally entitled to a copy of the maintenance records? Discuss.

   (b) If so, how must she proceed to obtain them? Discuss.

3. (a) Is Copyco entitled to an order to compel Sally to appear for an examination by a physician and an examination by a psychologist chosen by Copyco? Discuss.

   (b) If so, how must it proceed to obtain such an order? Discuss.

Answer A

1. Change of Venue

Proper Venue

Under the federal rules of civil procedure, venue is proper in any district where (1) all defendants reside or where a substantial portion of the claim arose, (2) there is subject matter jurisdiction over the claim, and (3) there is personal jurisdiction over the parties. If there are multiple defendants and they reside in different districts, the venue may be satisfied in any district where one of the defendants resides.

Residence of Corporations

A corporation is subject to special rules with regard to its residence for venue purposes. Unlike a person, who is a resident of whichever district that he/she is domiciled in, a corporation is considered a resident of any district where there is a personal jurisdiction over the corporation. Personal jurisdiction may be specific or general. General jurisdiction requires substantial, continuous and systematic contacts with the forum. Specific jurisdiction requires that the defendant have sufficient minimum contacts with the forum so as not to offend traditional notions of fair play and substantial justice.

Copyco (C) will argue that venue is not proper in the northern district (ND) of State B because it lacks personal jurisdiction over C. This argument will likely fail, however, because C arguably has substantial, continuous and systematic contacts with ND by the fact of its distribution center. C's contacts are clearly continuous and systematic because C maintains a permanent presence in the district and presumably the distribution is an integral part of C's overall business operation. Thus, the only real question is whether C's presence in ND is substantial. The better argument is that C's permanent physical presence in ND,

which presumably requires it to transport materials in and out of the district on a daily basis, is substantial.

Moreover, even if ND does not have general jurisdiction over C, the court will in all likelihood conclude that it has specific jurisdiction. Specific jurisdiction requires minimum contacts, which consist of purposeful availment and foreseeability, and basic fairness, which requires relatedness. Here, C purposefully availed itself of the ND by establishing a distribution center there. That C could be sued in ND is clearly foreseeable because it regularly transacts shipping/distribution operations there. Thus, the minimum contracts prong is satisfied. On these facts, the relatedness prong of the test may be debatable as it is difficult to determine if C actually sells any of its copy machines to businesses or consumers in the ND. Blinko may have obtained the copy machine outside C's normal chain of retail/distribution, in which case the relatedness inquiry may cut in C's favor. However, even where this [is] the case, if C took any action in ND to advertise its copy machines or otherwise availed itself of customers in ND, then relatedness is satisfied.

Where Injury Arose

Of course, venue is also proper because the Northern District is where S was injured in the district while using a C copy machine; thus, a substantial portion of S's personal injury claim arose in the Northern District.

Personal Jurisdiction

The Northern District has personal jurisdiction over C – see discussion above re residence of corporations.

Conclusions – Northern District is Proper Venue

Because (1) a substantial portion of the claim arose in the Northern District (and also because C is a resident of the Northern District), (2) the Northern District has specific jurisdiction and probably general jurisdiction over C, and (3) the facts

state the diversity subject matter jurisdiction is present, then venue in the Northern District is proper.

Change of Venue

Where venue is improper, the defendant may move for dismissal of the plaintiff's claim. The court may grant the dismissal or order that venue be transferred (assuming there is a federal district court with proper venue) if the transfer is in the interests of justice. Here, C did not seek dismissal. Moreover, venue in ND is proper (see discussion above). When a defendant seeks to transfer venue from a proper forum, a three part test is applied: (1) the transferee court must have subject matter and personal jurisdiction; (2) the transfer must be convenient; and (3) the transfer must be in the interests of justice. District courts are afforded great discretion when deciding permissive venue transfer requests.

Jurisdiction

The Southern District, where C seeks to have the case transferred, may assert both personal jurisdiction and subject matter jurisdiction. Subject matter jurisdiction is present because the district is the same state as where the plaintiff filed her lawsuit, and therefore there is no disruption of the requirement of complete diversity. Personal jurisdiction is also present because C has its principal place of business in the Southern District and therefore C satisfies the general personal jurisdiction requirement of substantial, continuous, and systematic contacts.

Note: On the facts present, it is unclear how the federal court may assert the presence of subject matter jurisdiction based on diversity of citizenship. Diversity required complete diversity – no plaintiff may be a resident of the same state as any defendant. S is a citizen of B. As a corporation, C is a resident of (1) the state of its incorporation, and (2) the state where it maintains its principal place of business (PPB). The PPB is determined using either the muscle center test (where most of the corporation's operations are located) or the nerve center test

(where most of the corporation decision making occurs). It would appear on these facts that C's PPB is in State B because that is where most of its employees work and where it maintains its sole manufacturing plant. Yet the facts state the federal court has subject matter jurisdiction based on diversity, so perhaps the court applied the nerve center test (assuming C's decision making occurs in A).

Convenience

A court may transfer venue if it promotes convenience, and courts frequently focus the convenience issue on questions of witness availability. S will oppose the transfer and argue that convenience favors keeping the case in ND. That is the site of C's injury and is also where she received medical treatment. Thus, virtually all of the key witnesses, and presumably the plaintiff, are located. On the other hand, C will argue that [the] machine in question was manufactured in SD, and thus, there [are] a number of witnesses present in that district (presumably, witnesses who will testify regarding any design or manufacturing defect).

Interest of Justice

Normally, a plaintiff's choice of forum is entitled to deference and should not be disturbed absent compelling reasons of fairness. At most, C has demonstrated that the convenience issue is a close call. Generally, a marginal difference in convenience will not be sufficient to overcome the deference afforded to the plaintiff's forum choice.

<u>Conclusion</u>

Because C will be unable to demonstrate that [it] is significantly more convenient to try the case in SD or that fairness issues dictate transferring the case to SD, the court acted appropriately in denying the motion to transfer venue.

2. Maintenance Records

(a) Relevant/Discoverable

Unlike the admission of evidence at trial, the test for what information is discoverable is extremely broad and is not limited to simply that information which is deemed relevant (defined as having any tendency to make a fact of consequence more or less likely than in the absence of the evidence). Information is discoverable if it is relevant or if it is reasonably calculated to lead to the discovery of relevant information.

S will argue that the maintenance records are directly relevant to whether the copy machine was maintained in a manner and on the schedule established by C, the manufacturer. She is likely [to] attempt to preempt any possibly defense by C of an intervening supervening cause for her injury – namely, the lack of maintenance by Blinko or negligent maintenance by Blinko or a third party service contractor. Thus, the information sought by S is discoverable and, indeed, C would likely not oppose the discovery. S is therefore entitled to the discovery subject to the discussion below re third parties.

(b) Third Party Discovery

Here, S seeks to obtain the records not from C, a party to the litigation, but rather from Blinko, who is a third party. As such, S is not entitled to many of the discovery devices set out in the FRCP, such as interrogatories or requests for production. Yet the rules do provide for limited discovery of third parties through use of a subpoena. Thus, a third party [may] be subpoenaed to appear for deposition. In this case, S seeks discovery of documents as opposed to live testimony. She must therefore serve a subpoena duces tecum to obtain the documents. Note that she does not have to seek court approval to serve the subpoena on Blinko, although she must include in the subpoena a list of Blinko's third party rights under the FRCP, including the right to file a motion to quash the

subpoena. The subpoena must specify a time and location when Blinko will make the requested records available for inspection and copying by S.

Ideally, S will serve a subpoena duces tecum on Blinko in which she requests that Blinko produce its records custodian at deposition along with the actual records. This way, S can examine Blinko under oath to establish both the authenticity of the documents and attempt to establish any exceptions under the hearsay rules (such as business records). Note that if S simply wishes to secure the authenticity of the documents, she can simply negotiate with Blinko to have the records custodian provide an affidavit certifying the authenticity in lieu of a deposition.

If Blinko objects to the subpoena, Blinko may file a motion to quash or may simply respond to the subpoena duces tecum with written objections along with a refusal to produce the records. In this case, the burden shifts to the moving party (S) to establish the need for the discovery. Although courts generally try to protect the interests of third parties to be free from discovery, the maintenance records are highly relevant to S's claims, and therefore, the court will in all likelihood overrule any objections to the discovery by Blinko.

Of course, S is always free to simply negotiate the production of the discovery with Blinko with the need to use any formal discovery devices.

Conclusion

The maintenance sought by S is discoverable and she is entitled to use third party discovery devices, including subpoena duces tecum, to obtain the records.

3. Medical/Psychological Examination

(a)

C will be entitled to an order compelling S to a medical examination by a physician chosen by C because S, by the filing of her claim for personal injuries,

placed her physical condition at issue in her case. In personal injury cases, defendants have a right to examine the injured plaintiff upon a showing of good cause, In this case, C challenges the extent of S's injuries and therefore the good cause condition is likely met. However, S will probably not be able to establish good cause with respect to the need for S to submit to a mental examination. The issue depends on the extent to which S is alleging any special emotional/mental damages. Generally, courts will permit a party to recover for emotional distress as a result of physical injuries and will not require any special expert testimony on this issue, largely because a jury is competent to understand this issue. However, if S intends to offer any expert testimony regarding her mental/emotional distress, then C will be able to show good cause as to why it should be entitled to have its own expert examine S.

(b)

There is a specific rule under the FRCP which addresses requests by one party to conduct a physical/mental examination of the other party. Under this rule, the party seeking the examination [must] first serve a written discovery request on the party to be examined. The written request must identify the time and place for the examination as well, the amount of time the examination is expected to take, and the person who will be conducting the examination. The request must set forth good cause as to why the examination should be permitted to proceed. Preapproval of the court is not required. However, a party may object to the discovery request, in which case court involvement is necessary.

Answer B

1. Denying Copyco's motion for change of venue

The first question to determine is whether the original venue was proper, because in federal court this determines which law the court should apply if a transfer is granted.

Original Venue in Northern District Federal Court

Venue in federal court is proper (1) in any district where any defendant resides if all reside in the same state, or (2) where a substantial amount of the action or the property involved in the lawsuit is located. If neither applies, then in a diversity case, venue is proper where any defendant is subject to personal jurisdiction, and, in all other cases, where any defendant can be found. In local actions venue is proper where the land is located.

Here, since the property involved in this location is located in the Northern Federal District, venue was originally proper.

However, if this wasn't the case, then we must look at the residence of C.

Residence of Copyco

A corporation is a resident of any place where it is subject to personal jurisdiction. It is not like citizenship for the purposes of diversity, which is its principal place of business and its state of incorporation.

Thus, we must do a personal jurisdiction analysis.

Personal Jurisdiction Over Copyco

Personal jurisdiction requires both that the state statute must allow jurisdiction and that it meet the constitutional requirements.

Statutory Requirements

In general, states allow jurisdiction when (1) the defendant is domiciled in the state, (2) the defendant is personally served in the state, (3) the defendant consents, or (4) if the long-arm statute applies.

Here, Copyco is domiciled in State B because it has its sole manufacturing plant in State B, and this would be considered its principal place of business. It is unclear where C was served. It appears that C has consented to venue in State B since it is simply asking for a transfer to any other district in the state. The long-arm statute probably allows this as well.

However, the real question is whether it is domiciled in the Southern or Northern District. Although it has a distribution center in the Northern District, this might be a very small operation. The facts are not clear on this. But assuming that the state statute allows this, which it might, the next question is whether this is appropriate for the Constitution.

Constitutional Limitations

This requires that the defendant have minimum contacts such that jurisdiction does not offend traditional notions of fair play and substantial justice. This requires (1) minimum contacts, which in turn requires (a) purposeful availment, and (b) foreseeability, and (2) fairness, which requires (a) relatedness of claim to contact, which can either be general or specific, (b) no severe inconvenience to defendant, and (c) weighing the interests of the forum.

However, the traditional bases have been found by the Supreme Court to satisfy this standard, and these are (1) domicile, (2) service in state, (3) consent.

As explained above, it is unclear if C is domiciled in the Northern District; thus we must do a minimum contacts analysis.

1. Minimum Contacts

(a) purposeful availment

C has a distribution center in the Northern District; thus, it is making use of the privileges and protections of the law of the Northern District. And it likely had knowledge +, as explained immediately below, that its machines would end up in a place like Blinko or actually in Blinko, since it might have personally done the distribution to the shop, and the Supreme Court is unanimous that knowledge plus is enough for purposeful availment.

(b) foreseeability

It was foreseeable that C might be haled into court in the Northern District since it sold machines to Blinko, which is in the Northern District, and thus they would probably sue there. The Supreme Court is split between knowledge and knowledge + requirement for PJ. It can be shown that C knew that B had some machines most likely, and C most likely purposefully sent them to Blinko or caused them to be distributed there; thus this was foreseeable.

2. Fairness

(a) relatedness

This suit is directly related to the contact between C and the Northern District since this was the machine that was sold in the Northern District and Sally was injured there.

(b) inconvenience

It must be severely inconvenient for C to defend there; this seems unlikely unless State B is incredibly large.

(c) state's interest

The Northern District has an interest in protecting its citizens from defective products and the injuries they cause.

Conclusion

Original venue was proper in the Northern District.

Transfer of Venue

The court will transfer to another district in the federal court if (1) it could have originally been bought there, (2) the interests of justice and the convenience of the parties require it. The court has discretion to grant or deny the motion.

Could Have Been Brought

This requires (1) subject matter jurisdiction, (2) personal jurisdiction, and (3) venue.

Subject Matter Jurisdiction

Federal courts are courts of limited jurisdiction. They can only hear diversity of citizenship jurisdiction cases and federal question cases. Diversity requires complete diversity of citizenship between defendant and plaintiffs, and that the claim exceed $75,000, exclusive of interest and costs.

Here, the claim that Sally is asserting is negligence. This is a state law claim; thus, there is no federal question jurisdiction.

However, the facts stipulate that there is diversity of citizenship jurisdiction (although this seems questionable since C is incorporated in State A and seems to have its principal place of business in State B, and the facts state that Sally is a citizen of State B; thus, it would seem that there is not complete diversity between plaintiff and defendant; however, since the facts stipulate it, that is settled.) The amount in controversy is $100,000, which exceeds $75,000.

Thus there is a subject matter jurisdiction.

Personal Jurisdiction

There is this over C; see above.

Venue

See rule above.

As analyzed above, because C had its sole manufacturing plant in the Southern Federal Judicial District, there is personal jurisdiction over it in this district, and thus venue is proper.

Interest of Justice and Convenience of the Parties

Here, the claim is for negligence. In order to prove the negligence there must be (2) duty, (2) breach, (3) actual cause, and (4) proximate cause. The defenses are (1) contributory negligence, (2) comparative negligence, and (3) assumption of the risk.

Here, the claim arose from a machine that is located in Blinko, a copy center in the Northern Federal District of State B. The property is thus located in the Northern District. All maintenance records and employees and witnesses to the use of the machine will likely be at or near the Northern District, since other customers might be called to testify as to whether they noticed anything or how Blinko maintained the machine. This is important because C will not be found liable if the defect was not present when the machine left its control; thus many Blinko employees might have to testify. Furthermore, S had her surgeries in a nearby hospital, and its staff and doctors might have to testify, and they likely live in the Northern District. It wasn't just one surgery, it was several; thus many doctors could be involved, and staff and they might all have to appear as witnesses.

On the other hand, C could argue that its sole manufacturing plant is located in the Southern District, and it will have to call its employees to testify as to their manufacturing procedures and how they check their products for defects. However, on balance, it seems likely most of the witnesses and the records will come from the Northern District; thus, it seems like the most appropriate place.

Moreover, the Northern District has a big interest here because this was a severe injury, and it does not want this to happen to others.

Conclusion

Thus, the court did not err in denying the motion.

Original Venue Law

Note that because the original venue was proper, the original venue law would apply if the court had granted the motion, i.e,, the law of the Northern District of State B.

Note

This is not a motion for forum non conveniens since the federal court can transfer to another federal court.

2. (a) copy of maintenance records

Discovery in federal court is allowed as to anything that is nonprivileged and relevant to a claim of defense. It does not have to be admissible in court; it just had to be reasonably calculated to lead to the discovery of admissible evidence.

Here, the maintenance records will be necessary for Sally to prove her negligence claim against C. If B has an excellent record for maintaining its machines, then this circumstantial evidence that her negligence claim is viable because the defect in the machine must have been there when it left C's control. On the other hand, the records could also show that the machine always had problems, which would also indicate that there was a defect from the start. However, if the machine had been tampered with by a customer, this would hurt her case. Thus, the records would likely lead to discovery of admissible evidence (customer names, maintenance company name). Note the records themselves are probably admissible as a business record.

(b) how can she obtain them

Since B is not a defendant, Sally will have to send a request to produce along with a subpoena duces tecum. This requires a non-party to produce documents in its possession.

It is not possible for this to be obtained by deposition or interrogatory since these are simply questions that are asked and interrogatories are just for [a] party.

3. (a) (i) physician

As above, discovery is allowed as to anything relevant to a claim of defense.

A physical examination will be relevant for C to disprove the amount of damages that S is claiming or to prove that she did not mitigate, or was perhaps herself negligent in seeking help for her injuries in a strange manner. Thus, an examination by a physician should be allowed by the court. While C can request that the court allow it to use a physician of its choosing, the court is not required to do this. The court is free to choose a neutral physician or to order the parties to decide together.

(ii) psychologist

A psychologist examination does not appear reasonably calculated to lead to the discovery of admissible evidence, and it does not appear relevant to any claim or defense by C. Here, Sally is not suing for emotional trauma; she appears to only be suing for her physical injuries. Thus, an examination by a psychologist will not determine the extent of her physical injuries. However, if Sally is claiming some pain and suffering or emotional scarring from the fact that she may never recover the full use of her hand, then a psychological examination would be appropriate.

(b) how does it proceed

Unlike in state court in California, where one physical examination is granted as a matter of right, if the physical condition of the party is in issue, in federal court, the requesting part must take a motion to the court to compel a physical examination and issue an order. The court then allows a hearing where both sides present their case, and decides whether it should issue an order. This is a form of discovery called a request for physical or mental examination. It must occur during the discovery period in accordance with the discovery schedule that the court has determined, although the court has discretion to allow it past the date if it would not prejudice the parties and the interests of justice don't require otherwise.

Q3 Evidence

Dustin has been charged with participating in a robbery in California on the morning of March 1.

(1) At Dustin's trial in a California state court, the prosecution called Wendy, who was married to Dustin when the robbery took place. Dustin and Wendy divorced before the trial and Wendy was eager to testify.

During the direct examination of Wendy, the following questions were asked and answers given:

(2) Prosecutor: You did not see Dustin on the afternoon of March 1, is that correct?

Wendy: That is correct.

(3) Prosecutor: Did you speak with Dustin on that day?

Wendy: Yes, I spoke to him in the afternoon, by phone.

(4) Prosecutor: What did you discuss?

Wendy: He said he'd be late coming home that night because he had to meet some people to divide up some money.

(5) Prosecutor: Later that evening, did you speak with anyone else on the phone?

Wendy: Yes. I spoke with my friend Nancy just before she died.

(6) Prosecutor: What did Nancy say to you?

Wendy: Nancy said that she and Dustin had —pulled off a big job that afternoon.

(7) Prosecutor: Did Nancy explain what she meant by —pulled off a big job?

Wendy: No, but I assume that she meant that she and Dustin committed some sort of crime.

Assuming all proper objections, claims of privilege, and motions to strike were timely made, did the court properly allow the prosecution to call the witness in item **(1)** and properly admit the evidence in items **(2)** - **(7)**? Discuss.

Answer according to California law.

Answer A

1. In the prosecution of D for a robbery, the prosecution called W, who was D's wife at the time of the robbery as a witness.

Spousal Testimonial Privilege

California recognizes a spousal testimonial privilege in both civil and criminal cases. Under that privilege, a person is permitted to refuse to testify against his or her spouse. However, this privilege does not bar W's testimony for two reasons.

First, because W and D are no longer married, the privilege does not apply; the spouses have to be married at the time of the trial for the privilege to apply.

Second, the testifying spouse holds the privilege, so that if W decided to testify because she wanted to, D could not assert the privilege to prevent her from testifying. Here, W is eager to testify, and D cannot prevent her from doing so.

Thus, W was properly called as [a] witness, even though she was D's spouse at the time of the robbery and even over D's objection.

Confidential Marital Communications Privilege

California also recognizes a confidential marital communications privilege. That privilege protects communications that were made during marriage if those communications were made in confidence. Even though W and D are no longer married, the privilege would still apply to statements made during the marriage. Additionally, D and W jointly hold the privilege, and D can prevent W from testifying as to confidential communications. However, the privilege would not preclude W from testifying in general, so W was properly called as a witness.

2. Question about seeing D on the day of the robbery

Presentation

D should object that to the form of this question because it is leading. A leading question is one that suggests the answer to the witness. Leading questions are only proper on cross-examination, or an direct examination if a witness is hostile or has trouble remembering. Here, the prosecutor's use of a leading question on direct examination is improper, and an objection to the form of the question should be sustained.

Relevance

The question, though leading, is nevertheless relevant. Relevant evidence is evidence that tends to establish the existence of a material, disputed fact. Here, it is likely material whether W saw D on the day of the robbery, depending on D's defenses and alibis about that day.

Relevant evidence is nonetheless inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, waste of time, or confusion. Nothing in W's answer suggests these factors, and it is therefore admissible.

3. W's answer to the question about speaking with D.

Presentation

D should move to strike W's answer because it answers questions not asked. The prosecutor's question was simply if W spoke with Dustin on that Day. W should simply have answered yes, but instead offered –in the afternoon and –by phone. That additional material was not in response to the question and could

be stricken by the court. In California, both the party conducting the examination and the opposing party can move to strike a witness's answer.

Relevance

The answer is, however, likely relevant to the existence of a material, disputed fact because it relates to where D was and what he was doing on the day of the robbery.

4. W's testimony of D's statement

Relevance

W's testimony is relevant because it is offered to prove the existence of a disputed, material fact: namely, that D was going to divide up money with his friends, which suggests that he participated in the robbery.

The testimony can nevertheless be excluded if its prejudicial value substantially outweighs its probative value. Although, it's prejudicial to D because it establishes guilt, it is not unfairly prejudicial because it does not improperly appeal to the jury's sensitivities. Thus, the information is relevant.

Competence

Furthermore, W is competent to testify about D's statement because she has personal knowledge of it, as she heard it.

Hearsay

D should object to this testimony on the basis that it is hearsay. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Here, the

D's out-of-court statement is being offered to prove that he was meeting up with friends to divide money, as evidence that D participated in the robbery.

Hearsay Exceptions

The prosecution should argue that a number of exceptions apply to this statement.

Admissions by Party Opponent

First, the prosecution should argue that D's statement is admissible hearsay under California law because it is an admission by a party opponent. D, the defendant, is the prosecution's party opponent. His statement that he was going to divide up money with friends is an acknowledgement of fact, and is, therefore, admissible hearsay as an admission from a party opponent.

Present State of Mind

Additionally, the prosecution could argue that the statement is admissible hearsay because it is not being offered to prove the truth of the matter asserted, but rather is being offered as circumstantial evidence of D's state of mind and his intent to go see his friends to divide up money and as circumstantial evidence that he carried out that intent. A limiting instruction could be given to limit the use of the evidence for that purpose.

Present Sense Impression

California also recognizes a hearsay exception where the declarant is describing his conduct at the time he is acting. However, because this statement is one of future action, this exception would not apply.

Confidential Marital Communication Privilege

D should also object on the basis that this statement is privileged through the confidential marital communications privilege. As described above, this privilege applies even where the marriage has ended at trial, if at the time the statement is made the parties are married and the statement was made in reliance of the confidential nature of the marital relationship. D will argue that his statement that he was going to divide up money with his friends was intended to be confidential. Given its incriminating nature, it is likely he will win that argument. Unless W can show that there was no confidentiality because others were present when the statement was made, the court should probably grant D's motion to exclude W's testimony about his statement on the basis of privilege.

5. Question about conversation with Nancy

Form of Question

D could object to this question as another leading question, because it suggests the correct answer, and is improper on direct examination.

Form of Answer

D could also object to the answer and move to strike, since it offers information (–just before she died) that was not asked for in the question. In California, both the person conducting the examination and the other party can move to strike an answer that is nonresponsive to the question asked.

Relevance

D could argue that this evidence is not relevant to a material fact in dispute. On the face of the question, it does seem irrelevant that W's friend Nancy died

shortly after they spoke. However, as explained below, at this information is probably relevant to lay the foundation to establish whether any hearsay exception (dying declaration) applied to Nancy's statement, and so is likely admissible for that reason.

6. Testimony of Nancy's statement

Competence

W is competent to offer this testimony because she has personal knowledge of the statement, that is, Nancy said it to her. However, she may not be competent to testify as to its meaning, as will be discussed below.

Relevance

The testimony of Nancy's statement is relevant to a disputed material fact because it tends to establish D's participation in the robbery and his guilt.

Hearsay

D should object to the admission of this statement on the basis that it is hearsay, that is, Nancy's out-of-court declaration is being offered to prove the truth of the matter asserted (that she and D committed a robbery).

Dying Declaration Exception

California's dying declaration hearsay exception applies to both criminal and civil cases and permits the admission of statements that were made while the declarant was dying, about the circumstances leading to her death. California requires that the declarant actually have died.

Here, Nancy actually died, and her statement was made shortly before her death. However, nothing indicates that the statement was related to the circumstances of her death. Perhaps if Nancy was injured during the robbery, the statement would be admissible, but on the facts presented currently, nothing suggests the statement was made about the circumstances of her death, and it is therefore not admissible under this exception.

Statement Against Interest

California also recognizes a hearsay exception where the declarant's statement is against his or her financial, social, or penal interest at the time it was made. The declarant must be unavailable.

Here, Nancy is unavailable because she is dead. Additionally, the statement that she and D —pulled off a job suggests criminality on her part and is therefore, against her penal interest, and was so at the time that it was made. The statement should be admitted under this exception.

7. W's interpretation of Nancy's statement

Relevance

W's comment about Nancy's statement is relevant because it goes to prove a disputed material fact, that is, whether D committed a crime on March 1.

Form of answer

D should move to strike W's answer because the prosecutor did not ask W what she thought Nancy meant by the statement; the prosecutor only asked whether Nancy explained what she meant, and W's answer was therefore nonresponsive and possibly in narrative form.

Competence

However, D should object to W's statement on the basis that W is not competent to interpret Nancy's statement. W has no personal knowledge of what Nancy meant by —pulled off a big job because, as W testifies, Nancy never explained what that meant.

Lay Opinion

D could also object to W's statement on the basis that it offers a lay opinion evidence, since W has no personal knowledge of what the statement meant when Nancy made it. Lay opinion is admissible where it is rationally based on a witness's perception and is helpful to the jury. Here, it is unlikely that W's statement is helpful to the jury because members of the jury are just as able to offer an interpretation of Nancy's statement as W is. Unless W has some other basis for her opinion (i.e., Nancy and D had used those terms in the past, or that it was customary where she lived), W should not be allowed to offer her interpretation of Nancy's statement.

Proposition 8

In a California criminal case, all relevant evidence is admissible, subject to certain exceptions (such as hearsay rules and privilege). Here, the court could determine that the evidence is admissible notwithstanding that it is an otherwise inadmissible lay opinion, if the evidence's probative value was not substantially outweighed by its prejudicial value.

Answer B

Because this is a criminal prosecution in California, Prop 8 applies. Prop 8 makes any relevant information admissible subject to unfair prejudice balancing. However, Prop 8 doesn't apply to hearsay, rape shield, the exclusionary rule, privilege, evidence of D's character first presented by the prosecution, and secondary evidence.

1. Spousal Privilege

Testimonial Privilege

In California, a witness may refuse to testify against their spouse in both civil and criminal proceedings. This privilege exists only during a valid marriage. Further, it is the [witness] spouse that holds the privilege.

Because D and W are divorced and W wants to testify, she may.

Confidential Communication Privilege

All communications made during the course of a valid marriage and intended to be confidential between the husband and wife are privileged. The party spouse holds the privilege, and thus may prevent the witness spouse from testifying to these communications. The communications made during marriage remain privileged even after divorce.

Therefore, Wendy may testify to information other than confidential communications made between her and D during the marriage. The defense may not prevent her from taking the stand. The court allowed the prosecution to call the witness.

2. You did not see Dustin on ……

Relevance

Logical

In order to be admissible, evidence must be relevant. It is relevant if it tends to make any disputed material fact of consequence more or less probable.

Here, the fact that D wasn't in S's presence on the afternoon in question makes it more probable that he could have been participating in a robbery. Thus, it is relevant.

Legal

Although logically relevant, evidence may be excluded for public policy reasons or because the risk of unfair prejudice substantially outweighs the probative value. Neither of these apply here.

Form

The prosecution should object to this question as leading. Leading questions are questions that suggest the desired answer. They are inadmissible on direct except where the witness is hostile, adverse, or needs help remembering. It doesn't appear that any of these exceptions apply; thus, the form of the question was improper.

Competence of Witness

A witness may testify only based on personal knowledge and present recollection. Here, W is testifying based on what she observed that day from present recollection. Thus, it is proper.

Therefore, the question was asked in an improper form, and any objection to form would have been granted. However, the answer would be admissible.

3. Did you speak with D on that day?

Relevance

This information is relevant to lay a foundation for the next question. The fact that W spoke with D makes it more probable that he told her something in the phone conversation.

Further, it is neither unfairly prejudicial nor excluded for public policy reasons.

Competence

Evidence is based on present recollection and personal knowledge.

4. What did you discuss?

Relevance

Evidence is relevant in that it makes more probable that D committed the robbery if he had money to divide up.

Hearsay

Hearsay is an out-of-court statement used to prove the truth of the matter asserted. It is inadmissible unless it fits under one of California's hearsay exceptions.

W's response of what D said is hearsay because it is used to prove the truth of the matter asserted, i.e., that he would be home late because he had to divide some money. The prosecution is using it to show he did have some money from the robbery.

Exceptions

Party Admission

The statement, although hearsay, would be admissible under the party admission hearsay exception. A statement by any party is admissible hearsay regardless of whether the statement was against their interest when made.

Here, D's statement that he had money to count up is an admission by a party, D, that he had some money to divide up.

Statement Against Interest

Further, the statement may be admissible under the statement against interest hearsay exception. For this exception to apply, the statement must be against the declarant's interest and the declarant must be unavailable. It is unclear if D is testifying, but if he doesn't he is unavailable. Further, the statement could be argued to be against his interest because he is admitting he has a sum of money to divide.

Present State of Mind

This exception includes statement of intent as circumstantial evidence that the intent was carried through. D's statement of intent to meet people and divide some money may be admissible as circumstantial evidence that he did in fact do that.

Confrontational Clause

Under the 6th Amendment, criminal defendants have the right to cross-examine the witnesses against them. If a statement of a hearsay declarant is admitted, the confrontation clause is violated if the declarant is not available, doesn't testify, wasn't subject to cross, and the statement is testimonial.

The confrontation clause doesn't apply here because the declarant is the defendant himself and he wasn't giving testimonial evidence.

Privilege

As discussed above, the confidential communication privilege may bar this testimony. It was made during a valid marriage and intended to be confidential.

Therefore, the defense may properly object to this testimony, and it should be excluded.

Therefore, the evidence would be admissible hearsay as a party admission. However, the confidential communication spousal privilege likely would aply to exclude the evidence.

5. Later that evening did you speak with anyone else….

Relevance

Relevant to lay the foundation for the following question. If W spoke to Nancy, it is more likely she obtained the information she is about to testify to.

Form

This answer may be non-responsive in that it goes beyond the question asked of the witness. Further, it may assume facts not in evidence as there is no indication that Nancy had died. As such, an objection to form should have been granted.

6. What did Nancy say to you?

Relevance

It is relevant because it tends to make it more likely that D was in fact involved in a robbery.

Hearsay

W's testimony is an out-of-court statement by Nancy used for the truth of the matter asserted. Thus, it is inadmissible unless an exception applies.

Exceptions

Dying Declaration

The dying declaration hearsay exception applies to statements made with belief that death is imminent and that concern the cause of circumstances of death and, under California law, the declarant must actually die. In CA, it applies in both civil and criminal cases.

The declarant actually died, but the statement didn't involve the cause or circumstances of death. Thus, it is not applicable.

Party Admission

An admission by a coconspirator may be admissible against a fellow conspirator as an exception to hearsay. The statement must be made concerning the conspiracy and during the existence of the conspiracy.

It appears that N and D were coconspirators (an agreement between two or more persons w/the intent to agree and intent to complete the target offense). However, a conspiracy ends when the target offense is completed, and thus, when the bank robbery was completed, it is unlikely N and D were coconspirators any longer. Therefore, it is not an admissible party admission.

Statement Against Interest

A statement that, when made, was against the declarant's interest may be admissible under this exception. The declarant must be unavailable for this exception to apply.

Here, the statement that N and D had pulled off a big job, depending on how interpreted, was against N's interest when made. At the time made, it subjected her to criminal punishment because most people would interpret that as having committed a big robbery. Therefore, this exception likely applies.

Therefore, the statement is admissible hearsay under the statement against interest exception.

7. Did Nancy explain what she meant by—pull off a big job?

Form

The defense could move to strike the witness' answers as non-responsive (except the —No). The prosecution asked [for] a —yes or —no answer, and the witness responded with something in addition to —yes or —no that did not respond to the question. The prosecution didn't ask her what she thought of what it meant. This would be granted by the court.

Competence/Opinion Testimony

A witness must testify as to present recollection and personal knowledge. Here, W is testifying based on speculation and this is improper.

Further, a lay witness may give opinion testimony only if it is based on personal knowledge and helpful to the jury. Again, there is no personal knowledge and the speculation is not helpful to the jury. Thus, W's last statement should be stricken.

FEBRUARY 2009

ESSAY QUESTIONS 4, 5, AND 6

California Bar Examination

Answer all three questions. Time allotted: three hours

Your answer should demonstrate your ability to analyze the facts in question, to tell the difference between material and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

Q4 Torts

ConsumerPro, a consumer protection group, published a manual listing the names, addresses, telephone numbers, and specialties of attorneys who represent plaintiffs in tort cases. The manual also included comments rating the attorneys. The manual was distributed by ConsumerPro to its members to aid them in the selection of an attorney should they need one.

Paul was listed in the manual as an attorney who litigates automobile accident cases. In the related comments, the manual stated that —Paul is reputed to be an ambulance chaser and appears to handle only easy cases.

Paul sued ConsumerPro for defamation, alleging injury to reputation and requesting general damages. ConsumerPro moved to dismiss for failure to state a claim on which relief could be granted, on the grounds that (1) the statement was non-actionable opinion, (2) Paul failed to allege malice or negligence under the United States Constitution, (3) Paul failed to allege special damages, and (4) in any event, the statement was privileged under the common law.

How should the court rule on each ground of the motion to dismiss? Discuss.

Answer A

1. Statements of Opinion May Be Actionable in a Defamation Action

To state a claim for defamation, the plaintiff must allege (1) a defamatory statement (2) that is published to another. ConsumerPro alleges that the statements about Paul in its manual are not actionable defamatory statements because they are opinions. This is incorrect. Statements of opinion are considered defamatory (and actionable) if a reasonable reader or listener would have reason to believe that the declarant has a factual basis for his or her opinion. Here, a reasonable person reading the manual would have reason to believe that ConsumerPro has a factual basis for its statements concerning Paul. A reader would reasonably assume that ConsumerPro – a consumer protection group – researched the various attorneys before writing and publishing its manual, that it investigated their reputations and their prior experience, and that it based its assertions on facts it had discovered through this investigatory process. In such circumstances, statements of opinion are actionable. Accordingly, the court should not grant ConsumerPro's motion to dismiss on this ground.

2. Failure to Allege Malice or Negligence Does Not Defeat Liability Here

If the subject of a statement is a matter of public concern, the First Amendment requires a plaintiff in a defamation action to allege falsity and fault in addition to the elements listed above. If the plaintiff is a public official, public figure or limited public figure, the level of -fault the plaintiff must prove is that the defendant acted with malice or recklessness. If the plaintiff is a private figure, he need only show that the defendant acted negligently. If, however, the subject matter of the statement is not a matter of public concern, the plaintiff need not prove malice, recklessness, or negligence. Even a non-negligent good faith publication of a defamatory statement on matters that are not of public concern will support liability for defamation.

Here, ConsumerPro may argue that the subject matter is a public concern because lawyers offer a service to the public, making their abilities and expertise relevant and important information for the public to know. This argument should fail. While an individual's qualifications to do a job may be relevant to specific people (or a specific group of people), it does not qualify as a mater of public concern that it [is] important information for the community at large. Accordingly, Paul did not have to allege fault (malice, recklessness, or negligence) here and ConsumerPro's motion to dismiss on this ground should also be denied.

3. Failure to Allege Special Damages Does Not Defeat Liability Here

In some defamation cases, the plaintiff is also required to allege special (i.e., actual economic) damages in addition to the elements discussed above. A plaintiff need not allege or prove special damages; however, in cases involving libel (written defamation) or slander per se (spoken statements concerning a person's ability to do his or her job, imputing unchastity to a woman, accusing someone of a crime of moral turpitude or stating that a person has venereal disease). Special damages are only a necessary element in complaints alleging regular slander. Here, the statements were made in writing and are therefore properly characterized as libel. Accordingly, Paul need not allege special damages, and ConsumerPro's motion to dismiss on this ground should be denied.

Notably, Paul may not be able to recover a substantial amount of money if he is unable to prove any special damages at trial, but failure to allege special damages is not a ground on which to dismiss a defamation action based on libel.

4. The Statements Are Subject to a Qualified Privilege

There are two types of privilege that may be asserted as a defense to a defamation action: Absolute privilege and qualified privilege.

Absolute privilege is available as a defense with respect to statements made by one spouse to another, and with respect to statements made by government officials (including lawyers) in the course of their duties. This privilege is not applicable here.

Qualified privilege is available when there is a socially useful context for the speech at issue. In such cases, statements will be privileged if (1) the speaker has a good faith belief in the truth of the statements and (2) the statements are relevant to and within the scope of the useful purpose for the speech. For example, a former employee providing a reference will have a qualified privilege defense to a defamation action if he believed the statements he made and refrained from injecting extraneous and irrelevant information into the communication. Here, ConsumerPro is providing a service to the public by providing information about lawyers to individuals who may require a lawyer's services. This is a socially useful context. The statements about Paul being an —ambulance chaser and taking —only easy cases are relevant to the purpose of the manual in that they provide information that a person looking to hire an attorney would be interested to know to inform his or her selection. Accordingly, the latter element of the qualified privilege defense is likely satisfied here.

Nevertheless, ConsumerPro's motion to dismiss on the ground of qualified immunity should be denied. A factfinder could find based on evidence presented at trial that ConsumerPro did not have a good faith belief in the truth of the statements. If so, the privilege would not be applicable and Paul could prevail at trial.

Conclusion

In sum, ConsumerPro's motion to dismiss should be denied in its entirety because none of the arguments asserted by ConsumerPro are meritorious.

Answer B

Paul's motion to dismiss will be evaluated on the basis of the facts alleged in his complaint. The court will assume that the facts alleged by Paul are true and will determine whether Paul is entitled to relief on the basis of the facts as he alleges them.

Part One: Non-Actionable Opinion & Application of the Basic Definition of Defamation to Paul

Definition of Defamation

Paul sued ConsumerPro for defamation. Defamation requires a defamatory statement about the plaintiff that is published to a third person. A defamatory statement is one that tends to negatively affect the plaintiff's reputation. However, statements of opinion are usually excluded from the definition of defamatory statement. You may not hold someone liable for offering their opinion, unless the defendant gives the impression that the statement is based on verifiable facts known to the defendant.

Publication to a third person may be oral or written; the defamatory statement must be conveyed in some manner to someone other than the plaintiff. Truth is always a defense to defamation but, depending on the type of defamation alleged, the plaintiff may bear the burden of proving the untruth of the statement or the defendant may bear the burden of raising truth as an affirmative defense. Whether and what kind of damages plaintiff must prove depends upon the type of defamation alleged.

Here, Paul alleges that ConsumerPro's statement was defamatory and that it was published to the group of persons who read the ConsumerPro manual.

Defamatory Statement or Non-Actionable Opinion

To succeed in his claim, Paul must show a defamatory statement about him made by ConsumerPro. ConsumerPro stated in its manual that Paul "is reputed to be an ambulance chaser and appears to handle only easy cases. Since Paul is a lawyer, the allegation that he is an "ambulance chaser reflects poorly on Paul's integrity and draws on stereotypes of lawyers propagated in the media. The statement suggests that Paul takes advantage of people by finding them at their weakest—immediately after an accident or illness—and trying to convince them to hire him. Moreover, stating that he only handles easy cases suggests that Paul is not a very good lawyer or that he is lazy and refuses to take challenges. Since the statement will negatively affect Paul's reputation, it could be considered a defamatory statement.

As to the first part of the statement, ConsumerPro will argue that its statement is merely a non-actionable opinion. It will point out that the statement does not address a particular incident. For example, if ConsumerPro alleged that Paul was seen at the hospital yesterday talking to an accident victim, that would be a statement of fact that is either true or untrue. Here, the statement is more general and just says Paul is reputed to be an accident chaser.

Paul will argue that the claim that he is "reputed to be an ambulance chaser gives the impression that ConsumerPro's statement is based on fact. The opinion of ConsumerPro alone does not make a reputation. Rather, ConsumerPro gives the impression that it has talked to a group of people who all hold opinions about Paul and that the majority of the group believes Paul to be an ambulance chaser.

As to the second part of the statement, ConsumerPro will again argue that the statement that Paul "appears to handle only easy cases is non-actionable opinion. ConsumerPro will point out that the statement cannot be proven true or

untrue because different people hold different views of which cases are easy and hard. Moreover, ConsumerPro will argue that the statement does not give the impression that it is based on any facts. Unlike the first statement, the second part of the statement does not imply that ConsumerPro's statement is based on the opinion of more than one person. Instead of referring to Paul's reputation (which implies many people's opinions), ConsumerPro directly asserts its own opinion by stating that Paul -appears to only handle easy cases.

The court should conclude that the first part of ConsumerPro's statement is actionable because it gives the impression that it is based on facts. The statement could be verified by polling the relevant community and determining whether Paul indeed has a reputation for being an ambulance chaser.

The court should, however, conclude that the second part of ConsumerPro's statement is non-actionable because it is purely ConsumerPro's opinion. As explained above, it does not imply that it is based on any facts and it cannot be proven either true or false.

Conclusion: The court should deny ConsumerPro's motion to dismiss as to the first part of the statement (reputation as ambulance chaser) because it gives the impression that it is based on facts. It should grant the motion to dismiss as to the second part of the statement (only takes easy cases) because it is non-actionable opinion.

Part Two: Allegation of Malice

Whether or not a plaintiff must allege malice depends on whether the defamatory statement deals with public persons and public matters or not. When a defamatory statement involves a private person and a private matter, plaintiff need not allege any fault on the part of the defendant. However, if the statement involves a matter of public interest and a private person, the plaintiff must allege

and prove at least negligence on the part of the defendant. Finally, if the statement involves a matter of public interest and a public figure, the plaintiff must allege and prove malice. Malice requires a showing that the defendant made the statement either knowing that it was false or with recklessness to the truth or falsity of the statement.

Conclusion: As explained below, a court will conclude that the statement concerns a matter of public interest, but that Paul is a private figure. Therefore, Paul will be required to allege negligence or more on the part of the ConsumerPro. Because he did not do so, the motion to dismiss should be granted on this ground.

Matter of Public Interest

A matter of public interest is a topic that would be of general concern or interest to the community. ConsumerPro will argue that the statement is a matter of public interest because many people eventually need to hire attorneys. Consumers have a strong interest in knowing which attorneys will responsibly handle their cases and which will not. ConsumerPro will support its argument by pointing to the fact that members of the community join ConsumerPro, a consumer protection group, to learn more about the issues that ConsumerPro discusses in its manual. People go out of their way to access the information offered by ConsumerPro, suggesting that the information is of general concern to the community.

Paul, on the other hand, will argue that the matter is not of public interest. He might point out that ConsumerPro is only one group amidst the entire community, which shows that consumer protection issues are really of limited concern and interest only a small number of people. Paul will argue that, if consumer issues were really of public concern, they would be covered in the newspaper and ConsumerPro would not need to publish its manual.

Since the topic of ConsumerPro's statement is of interest to a number of people (ConsumerPro's members) and since the entire public has an interest in making an informed decision when it hires lawyers, the court will probably decide that the statement by ConsumerPro concerns a matter of public interest.

Public Figure

A public figure is one who lives their life in the public eye, for example, a politician or movie star. The person may have sought out fame or may have become notorious, for example, as a well-known criminal.

Paul will argue that he is not a public figure because he does not live his life in the public eye. Since the facts do not indicate that he is a famous lawyer or that he has had any particularly notorious cases, he probably does not give press conferences or appear on television. There is nothing to indicate that he even engages in public speaking, for example, at lawyer's conventions or continuing education events.

ConsumerPro will argue that Paul became a public figure by making himself available as an attorney. However, there are no facts to support this argument. Nothing suggests that Paul has sought out public attention or has unwillingly received it. Therefore, he is neither famous nor notorious. A court will conclude that Paul is not a public figure.

Since Paul is not a public figure but the statement does involve a matter of interest to the general public, Paul will be required to plead negligence on the part of ConsumerPro.

Did Paul Plead Negligence?

In order to plead negligence, Paul needs to allege that ConsumerPro did not act with reasonable care in making its statement about Paul. Paul has not alleged any particular actions by ConsumerPro in relation to the making of the statement. He alleges only that the statement was made. Negligence, on the other hand, requires more. For example, Paul could have pled negligence by alleging that ConsumerPro made the statement without engaging in a fact-checking process, even thought it is standard for consumer protection organizations to do three hours of research before publishing a review of an attorney. If Paul had alleged that ConsumerPro fell below the normal standard of care, he would have alleged negligence. However, he failed to do so. Therefore, the motion to dismiss should be granted on this ground.

Part Three: Special Damages

Defamation carries a variety of damages requirements, depending on the type of defamation alleged. Plaintiffs injured by slander, which is oral defamation, but [sic] allege and prove special damages unless the statement falls into one of the four slander per se categories. However, plaintiffs injured by libel, which is written defamation, generally need not allege special damages. However, when the defamatory statement involves a public figure, the plaintiff must allege special damages even for libel.

As explained in Part Two, the court will conclude that ConsumerPro's statement concerns a matter of public interest but that Paul is not a public figure. Because Paul is not a public figure, he will not be required to allege special damages.

Conclusion: Because Paul is not a public figure and is not required to allege special damages, the motion to dismiss on this ground should be denied.

Part Four: Privilege?

At common law, to protect the free flow of information, certain types of statements received a qualified privilege. If a statement falls within the privilege, a defamation plaintiff must show that the speaker knew the statement was false when it was made.

Statements made for the benefit of either the speaker or the audience fall within this qualified privilege. For example, a statement in a credit report would fall within the qualified privilege because it is made for the benefit of the audience of the credit report. Because the public has an interest in ensuring the accuracy and reliability of credit reports, the publishers of such reports receive a qualified privilege. The privilege encourages them to openly and honestly report blemishes on someone's credit because they will be protected from suit unless the publisher knows the statement is false when it is made.

Does the Statement Fall within the Privilege?

Paul will argue that ConsumerPro's statement does not fall within the privilege because a manual reviewing attorneys is not as important as something like a credit report. He will argue that the public has a weaker interest in the accuracy of consumer information manuals than they do in other sorts of documents and that the privilege should not be applied to ConsumerPro's statement.

However, ConsumerPro will prevail in its argument for privilege. ConsumerPro's statement was made for the benefit of its members: to help them make informed decisions about hiring attorneys. Moreover, the public has a strong interest in being able to access accurate consumer information when it hires attorneys or buys products. Because the accuracy of ConsumerPro's statement is important to the audience and the statement was made for the benefit of the audience, the

court will conclude that ConsumerPro's statement falls within the qualified privilege.

Did Paul Allege Knowledge of Falsity?

Paul will argue that it is clear that ConsumerPro must have known that the first part of its statement was false when it was made. The statement gives the impression that ConsumerPro polled the community to determine Paul's reputation. Paul will argue that since he does not have a reputation as an ambulance chaser, ConsumerPro could not possibly have based the statement on a poll. If ConsumerPro did not make a poll, it must have known that the statement was false.

ConsumerPro will prevail, however, because Paul did not allege that ConsumerPro knew that the statement was false when it was made. Assuming for the moment that the statement implies that it was based on a number of opinions, ConsumerPro could only have known its statement was false if it had conducted a poll and determined that Paul has a reputation as a wonderful diligent lawyer. Paul has not alleged that ConsumerPro had any knowledge, good or bad, about Paul's reputation at the time it made its statement.

Conclusion: ConsumerPro's motion to dismiss should be granted because ConsumerPro's statement falls within the qualified privilege and Paul has not alleged that ConsumerPro knew that the statement was false when it was made.

Q5 Contracts

Developer had an option to purchase a five-acre parcel named The Highlands in City from Owner, and was planning to build a residential development there. Developer could not proceed with the project until City approved the extension of utilities to The Highlands parcel. In order to encourage development, City had a well-known and long-standing policy of reimbursing developers for the cost of installing utilities in new areas.

Developer signed a contract with Builder for the construction of ten single-family homes on The Highlands parcel. The contract provided in section 14(d), —All obligations under this agreement are conditioned on approval by City of all necessary utility extensions. During precontract negotiations, Developer specifically informed Builder that he could not proceed with the project unless City followed its usual policy of reimbursing the developer for the installation of utilities, and Builder acknowledged that he understood such a condition to be implicit in section 14(d). The contract also provided, -This written contract is a complete and final statement of the agreement between the parties hereto.

In a change of policy, City approved —necessary utility extensions to The Highlands parcel, but only on the condition that Developer bear the entire cost, which was substantial, without reimbursement by City. Because this additional cost made the project unprofitable, Developer abandoned plans for the development and did not exercise his option to purchase The Highlands parcel from Owner.

Builder, claiming breach of contract, sued Developer for the $700,000 profit he would have made on the project. In the meantime, Architect purchased The Highlands parcel from Owner and contracted with Builder to construct a business park there. Builder's expected profit under this new contract with Architect is $500,000.

What arguments can Developer make, and what is the likely outcome, on each of the following points?

1. Developer did not breach the contract with Builder.
2. Developer's performance was excused.
3. In any event, Builder did not suffer $700,000 in damages.

Discuss.

Answer A

This contract is for construction services. As a result, it will be governed by the common law.

Valid Contract

In order to proceed, Builder must establish a valid contract, which requires (1) offer, (2) acceptance, and (3) consideration. The facts state that Builder and Developer reached an agreement and signed a contract. Therefore, there is likely the required offer, acceptance and consideration. The contract does not fall under the Statute of Frauds because it is not: in consideration of marriage, suretyship, contract for real property, sale of goods $500 or more, or unable to be performed within one year. In any event, the contract was signed, which indicates that it would satisfy the Statute of Frauds anyway. There is a valid enforceable contract.

1. Developer did not breach

A breach of contract occurs when a party to the contract does not perform after performance comes due. Therefore, if performance has not come due, there can not be a breach. Likewise, if the party substantially performs his obligations under the contract, there is no breach. Performance only comes due after the occurrence of all conditions precedent to performance. This contract contained such a condition. The contract contained the condition that obligations were only due once the City approved —necessary utility extensions. Therefore, unless the City approved these extensions, performance is not due.

Builder will argue that the City did approve the extensions, and that performance is due. The fact that the City approved the extensions is true; however, it still may not give rise to performance. Developer will rebut this argument with a claim that Developer and Builder agreed that this condition impliedly included the condition that City reimburse Developer for the cost of the extensions.

Merger and Parol Evidence: A merger clause in a contract indicates that the contract is a final integration of the agreement between the parties. This clause causes the Parol Evidence rule to apply. This rule states that no prior or contemporaneous oral statements are admissible that contradict the final integration between the parties. Builder will argue that the statements by Developer that the condition means that the City must approve and reimburse for the extensions is barred as parol evidence. However, the parol evidence rule does not outlaw all statements. Developer can still admit statements that prove the existence of a condition precedent to the formation of the contract or statements that explain the meaning of a clause in the contract. Both of these rules apply here.

The statements in question represent the agreement by Developer and Builder that the condition in 14(d) means that the agreement is conditioned on reimbursement by the City for the cost of the extensions. This means that there was an additional condition precedent: the contract is conditioned upon reimbursement by the City. This also means that statements that Developer seeks to admit will explain the language of 14(d). Therefore, the statements Developer seeks to admit will [be] admissible by the Parol Evidence Rule.

Because Developer can admit the statement pertaining to reimbursement, he will be able to establish that performance is not due. As a result, his failure to perform is not a breach.

2. Performance was excused

Performance can be excused by the occurrence of a number of events. These include frustration of purpose, impracticability, impossibility, and failure of a condition precedent. Failure of a condition precedent is discussed above.

Frustration of Purpose

Frustration of purpose excuses performance under a contract when performance is still technically possible, but the purpose of the contract no longer exists. In order to prevail, the defendant must show (1) the purpose of the contract was known by the plaintiff at the time of contracting, (2) circumstances that are out of the defendant's control changed, and (3) the change of circumstances caused the original purpose to be unavailable.

Here, the purpose of the contract was to make money on the development of a residential community. Builder, who knew that he was expected to build single family homes, was aware of the purpose of the contract. Circumstances did change pertaining to the development. The City had a long-standing policy of reimbursing the cost of extensions to new areas. After this contract was entered into, the City changed this policy. Therefore, the second element is met. Lastly, Developer must show that the change in circumstances made the purpose of the contract unavailable. City's change in policy made Developer bear the cost of the extensions. However, Developer could still build the extensions, and therefore, build the residential development. It would cost Developer more money; however, the purpose of the contract was still available. Therefore, the purpose of the contract was not frustrated. It may have been less appealing to Developer, but it was not frustrated.

Impracticability

Performance of a contractual obligation is impracticable when (1) circumstances affecting the contract have changed, (2) the change is not due to any act by the defendant, and (3) the change of circumstances causes undue hardship on the defendant. Here, as discussed above, circumstances did change: City changed a long-standing policy. This was out of Developer's control. Therefore, Developer need only demonstrate undue hardship to prevail with this claim. The change of the policy meant that Developer would bear the burden of financing the extensions required to build the community. This cost was —substantial, and

made the project unprofitable for Developer. Making a project unprofitable is probably inadequate for a court to find impracticability. Developer would have to establish more than simple unprofitability. If Developer could show that the cost is so burdensome that he would be forced out of business, that would establish impracticability. However, simply unprofitability is probably inadequate. Therefore, this element is not met. The court will probably not find that performance was excused by impracticability.

Impossibility

Impossibility occurs when (1) circumstances affecting the contract have changed, (2) the change is not due to any act by the defendant, and (3) the change of circumstances causes performance to be impossible for the defendant. As discussed above, the change in circumstances makes performance unappealing, but not impossible. Impossibility will not excuse performance.

Developer should be able to successfully argue that performance should be excused by failure of a condition precedent.

3. Builder did not suffer $700,000 in damages

A plaintiff in breach of contract claim can pursue damages that put the plaintiff in the position he would have been in had the defendant fully performed. This is generally established by expectation damages, incidental damages, and consequential damages, minus any mitigation available to the plaintiff. These damages are not available to the plaintiff if there is a valid liquidated damages clause. This contract fid not have a liquidated damages clause, so that will not apply. Punitive damages are not available in a contract cause of action.

Expectation Damages

For a seller or provider of services, these damages typically equal the amount of profit the plaintiff expected to make. Here, that is clearly established as $700,000.

Incidental Damages

These damages are the damages that the plaintiff incurred as incidental to the defendant's breach. They typically include the cost of finding a replacement buyer and administrative costs incurred because of the breach. Here, the facts do not indicate any incidental damages. However, if Builder incurred any costs in contracting with Architect to construct a business park, such as lawyer's fees, etc., these would be covered as incidental damages.

Consequential damages

These are the damages that occurred as a foreseeable result of the breach. In order to recover these damages, the plaintiff must establish that the parties contemplated these damages at the time the contract was formed. Builder does not appear to have incurred any consequential damages.

Mitigation

Generally, a plaintiff is required to mitigate damages. He is not allowed to sit by after a breach and allow himself to incur more damage than is necessary. Here, the original contract required Builder to build residences for Developer on The Highlands. After the alleged breach by Developer, Architect hired Builder to build a business park on the Highlands. This contract would not be available to Builder had he performed for Developer. If it would have been possible for Builder to perform both contracts, then this would not be mitigation. However, that would be impossible. Therefore, this is proper mitigation of damages. The other issue involved with mitigation is time. If the work for Developer would have taken 9 months, and the work for Architect takes 12 months, Builder could argue that the entire $500,000 profit should not be considered for mitigation. However, no facts indicate the time required for either job, so the court will assume equal performance for both contracts.

Builder's damages for the alleged breach are $700,000. However, because Builder is required to mitigate his damages, the $500,000 from the contract with

Architect will be applied to the damages. Therefore, Builder's total damages due to the alleged breach are $200,000.

Answer B

1. Developer did not breach the contract with Builder.

Parol Evidence Rule

Although Developer will assert that he was not obligated to perform under the contract with Builder unless the City followed its usual policy of reimbursing for installation costs, Builder will argue that this condition precedent is not part of the agreement between the parties and therefore Developer has breached the contract by failing to perform. Builder's argument will rest on the parol evidence rule.

The parol evidence rule provides that the terms of a written agreement cannot be varied by prior or contemporaneous oral terms where the writing represents the party's final agreement. Consistent additional terms may supplement the writing if the contract is not complete, and extrinsic evidence may also be introduced to interpret ambiguous terms as long as the terms are reasonably susceptible to the proffered meaning.

Here, the agreement between Developer and Builder has been reduced to writing. Under the Williston rule, a court will look at the contract and determine whether the parties likely intended it to be the final and/or complete expression of the agreement given the detailed or specific nature of the terms. In this case, the contract provides for the construction of 10 single family homes and has several sections (including section 14(d)) describing aspects of the venture. Importantly, the writing contains a merger clause which states that -This written contract is a complete and final agreement between the parties hereto. Courts typically find that the parol evidence bar to extrinsic evidence presumptively applies where the writing contains a merger clause.

Accordingly, a court will likely find that the parol evidence rule applies. Developer's best arguments, therefore, are exceptions to the parol evidence rule. These exceptions include where extrinsic evidence show (1) fraud, (2) subsequent modification of the contract, (3) absence of consideration and other formation defects, (4) to interpret ambiguities, (5) to show a collateral agreement, (6) to show the existence of a condition precedent.

Exception to Parol Evidence Rule – Conditions Precedent

One exception to the parol evidence rule's bar on extrinsic evidence that may be helpful to Developer is the exception permitting a showing of conditions precedent. A condition precedent modifies a promise to perform; the promise to perform will not mature until the condition is satisfied, and accordingly a party cannot be in breach of said promise unless the condition precedent occurs.

Developer can argue that the City's following of its ordinary policy of reimbursing utility installation was a condition precedent to the obligations under the contract, and therefore the parol evidence rule does not bar him from presenting evidence on the existence of this condition.

However, Builder will have a good argument in response; specifically, Builder will point to section 14(d), which provides —All obligations under this agreement are conditioned on approval by City of all necessary extensions. Section 14(d) clearly is a condition precedent to Developer's performance, but it is expressly provided for in the written contract. Under the Williston Rule of contract interpretation, Builder will argue that since the contract included written terms covering conditions precedent, it is reasonable to presume that the parties would include all such agreed upon conditions precedent in the writing.

Accordingly, in light of these arguments, the —condition precedent exception to the parol evidence rule is probably not Developer's best argument, although a

court that mechanically applies the exceptions to the parol evidence rule could be sympathetic. Developer should raise it and hope for the best.

Exception to Parol Evidence Rule – Explaining Ambiguity

Another exception to the parol evidence rule is extrinsic evidence admitted to explain an ambiguity in the written contract. Some jurisdictions, such as California, permit a party to also introduce extrinsic evidence to first demonstrate the existence of the ambiguity. This exception will be helpful to Developer in light of the difficulties presented by section 14(d) above.

Under this exception, Developer will argue that the term —conditioned on approval by City of all necessary utility extensions implicitly included the City's willingness to pay for utility installation. To support his argument, Developer will utilize the general commercial construction customs and understandings in the community, which may likely include the fact that any reasonable builder or developer operating in City would interpret —approval by the city of necessary utility extensions to include, as a matter of course, funding to install the utility extensions. Developer will particularly be likely to avail this exception to the parol evidence rule in jurisdictions like California, since this ambiguity is not clear from the face of the contract.

Builder, however, will argue that section 14(d) is not reasonably susceptible to the meaning proffered by Developer. Availing the Williston Rule, Builder will likely harp on the fact that the sophisticated, commercial parties would insert such a material condition if it was in fact part of the agreement, especially where the writing contains a merger clause.

Ultimately, Developer's arguments supporting the introduction of the prior negotiations will likely be successful; courts are loath to ignore clear, understood commercial patterns in an industry in contracts between sophisticated parties. Merger clauses are typically inadequate in such circumstances unless they

explicitly except course of dealing, course of performance, usage of trade from being permissible interpretive tools for the contract.

Exception to Parol Evidence Rule – Collateral Agreement

Developer may also argue that he did not breach the contract because it was controlled by a separate, collateral agreement. However, this argument will likely fail. Although collateral agreements are exceptions to the parol evidence rule, a court must conclude that the parties would reasonably have made the proffered collateral agreement separate from the primary contract.

Here, interpreting the condition of receiving installation funding from the City as a collateral agreement would be unreasonable. First, it is intimately related with the primary contract, and it is unlikely that Builder and Developer would fashion it separately from the main agreement. Second, it is unclear whether the proffered —collateral agreement could even be an enforceable contract, as there would not be any consideration—i.e., bargained-for-legal detriment—flowing to support the agreement.

Accordingly, although the —collateral agreement arguments is available to Developer to argue that the failure of a condition precedent did not mature his obligation to perform, it is one of his weakest arguments.

Mistake Due to Ambiguity

Mistake due to ambiguity is a contract formation defect. Developer could foreseeably argue that no contract was formed because of his mistake as to the meaning of a material term in the contract. Mistake due to ambiguity usually does not obtain relief for a party (typically the form of rescission or reformation) unless the other party was aware of the ambiguity.

Here, under these facts, Developer might argue that Builder was aware that section 14(d) was ambiguous and would not necessarily be interpreted to have

the meaning that Developer intended. Further, Developer would argue that the term was material to the contract, as the failure of the city to pay for the utility installation would drastically alter the expected benefits he would receive. If Developer can demonstrate these facts persuasively, he may be able to argue that there was either no —meeting of the minds or that the contract should be reformed to match the –innocent party's interpretation of the contract. Under either scenario, Developer would not be in breach.

Unconscionability

Unconscionability is another contract formation defect, which is determined at the time of formation. There are two types, procedural and substantive. No facts suggest that the terms of the contract were so prolix as to amount to procedural unconscionability, but Developer may argue that the absence of a condition requiring reimbursement from the City makes the bargain so one-sided as to —shock the conscience of the court.

Such an argument will likely not succeed in this case; the parties are sophisticated, commercial parties who are able to fend for themselves. Developer's unfortunate circumstances are not of the type that would raise to unconscionability.

2. Developer's performance was excused.

Impossibility

Developer may try to argue that his performance under the contract, even if matured because the court does not recognize his proffered condition precedent, was excused under the doctrine of impossibility.

Impossibility excuses performance of the contract where performance would be objectively impossible, i.e., not only can the party asserting the defense not perform, but no one could perform the contract under the unforeseeable circumstances that have arisen.

Here, impossibility will not be a helpful argument because not only could other developers potentially execute the agreement Developer has with Builder, Developer himself could do so, but simply at a large loss because he would have to pay for the utility installations.

According, the Developer's performance is unlikely to be excused by impossibility.

Nonetheless, Developer could successfully argue impossibility in that the subject matter of the contract can no longer be obtained by him because it was sold by Owner to Architect.

Impracticability

Developer may be better suited to prevail under the argument that performance was excused under the doctrine of impracticability. Impracticability is a subjective test that examines whether performance would be commercially unreasonable due to subsequent circumstances unforeseeable at the time of contract formation.

Here, Developer will argue that City's long-standing policy of paying for utility installation was a reasonable assumption by both parties. Further, the policy had been so ingrained in the community and understood by commercial developers and builders that a change in the policy was practically beyond the realm of possibility. Builder will respond that Developer's reliance on the permanence of the policy was misplaced, and he assumed the risk that the City could easily change its discretionary policy if economic requirements warranted. Ultimately, if Developer is able to persuasively argue his position, he may ultimately prevail on his argument of impracticability.

Frustration of Purpose

Developer may try to argue that the failure of the City to reimburse for construction costs constituted frustration of purpose. Frustration of purpose arises where circumstances unforeseeable at the time of contract formation arise that destroy the purpose of the contract, and that this purpose was known by both parties involved.

Here, Developer is unlikely to prevail on his frustration of purpose argument. Although, both Developer and Builder were aware of the purpose of the contract, the purpose of the contract—namely to construct ten single-family homes on the Highlands—was not —destroyed by the City's decision not to reimburse for utility installation. Accordingly, whether or not the City's decision was foreseeable, it would not constitute frustration of purpose. Accordingly, this argument by Developer would fail.

3. Builder did not suffer $700,000 in damages.

The purpose of compensatory damages is to place a non-breaching party in as good a condition as he would have been had the breach not occurred. The requisite showing in order to obtain compensatory damages is (1) breach, (2) causation, (3) foreseeability, (4) certainty, and (5) unavoidability.

Applicability of —Lost Volume Seller Rule

Builder may try to argue that he is a –lost volume seller, and accordingly the fact that he was hired by Architect should not reduce his damages in the slightest because, had the contract with Developer been performed, he would have made both $700,000 and $500,000 in profits.

Builder's argument is unlikely to succeed. Lost volume sellers must, in effect, have —unlimited supply of whatever good or service they provide. Builder is not properly viewed as a car or TV salesman; he builds structures, and therefore his

services are in limited supply. Accordingly, a lost-volume seller type argument by Builder will be unavailing.

Certainty Requirement

In order to recover compensatory damages, such damages must be relatively certain. If the contract provided that Builder's payment was in any way contingent on the ultimate sale of the homes, his damage may well be too uncertain to permit recovery.

Unavoidability / Mitigation Requirement

A non-breaching party is required to mitigate his damages. Although failure to mitigate will not eliminate one's damages, it can reduce them to the amount that would have been incurred had proper mitigation been pursued.

Here, Builder did not fail to mitigate his damages; rather, he sought employment by Architect to construct a business park for $500, 000. By mitigating, Builder was only damaged by the alleged breach to the extent of $200,000, because only $200,000 is needed for Builder to obtain the —benefit of his bargain with Developer.

Q6 Business Associations

Stage, Inc. (–SI) is a properly formed close corporation. SI's Articles of Incorporation include the following provision: —SI is formed for the sole purpose of operating comedy clubs. SI has a three-member Board of Directors, consisting of Al, Betty, and Charlie, none of whom is a shareholder.

Some time ago, Charlie persuaded Al and Betty that SI should expand into a new business direction, real estate development. After heated discussions, the board approved and entered into a contract with Great Properties (–GP), a construction company, committing substantial SI capital to the construction of a new shopping mall, which was set to break ground shortly.

Although Charlie remained enthusiastic, Al and Betty changed their minds about the decision to expand beyond SI's usual business. SI was struggling financially to keep its comedy clubs open. Al and Betty decided to avoid SI's contract with GP in order to devote all of SI's capital to its comedy clubs.

Last month, GP approached Charlie about another real estate project under development. GP was building a smaller mall on the other side of town and was seeking investors. Aware that Al and Betty were unhappy about the earlier contract with GP, Charlie believed that SI's board would not approve any further investments in real estate. As a result, Charlie decided to invest his own money in the endeavor without mentioning the project to anyone at SI.

Meanwhile, Al and Betty have come to suspect that Charlie has been skimming corporate funds for his personal activities, and, although they have little proof, they want to oust Charlie as a director.

1. Under what theory or theories might SI attempt to avoid its contractual obligation to GP and what is the likelihood of success? Discuss.

2. Has Charlie violated any duties owed to SI as to the smaller mall? Discuss.

3. Under what theory or theories might Al and Betty attempt to oust Charlie from the Board of Directors and what is the likelihood of success? Discuss.

Answer A

Stage, Inc. (S) vs. Charlie

1. The issue is whether Al and Betty can avoid its contractual obligations to GP under the theory that the contract is ultra vires (outside scope of corporations purpose). Ultra vires statement is the corporation's statement of purpose and can either be broad and indicate that the corporation is incorporated for the purpose of —conducting lawful business or can be as specific as Stage, Inc.'s and indicate that —SI is formed for the sole purpose of operating comedy clubs. At common law, if a corporation acts outside the scope of its statement of purpose, the contract is voided. At modern law, when a corporation conducts ultra vires activities, the transaction is valid; however, individual directors and officers who enter into the transaction can be held personally liable. Here, SI's Articles of Incorporation include the provision that SI is formed for the sole purpose of operating comedy clubs and decided at a later point to expand into the real estate development area.

In entering into the contract with Great Properties (GP), a construction company, and committing substantial SI capital to the construction of a new shopping mall, SI has acted outside its statement of purpose because the business of real estate is wholly different and apart from the business of running comedy clubs. Thus, SI has committed an ultra vires act and, modernly, it cannot avoid its contractual obligations with SI. The corporation's assets, however, will not be liable for the act of its Board of Directors, but the directors can be held personally liable for entering into an ultra vires act. Thus, although SI may not be able to void the contract, its assets are protected and Al, Betty, and Charlie will be held personally and be responsible for damages to GP.

2. The issue is whether Charlie has violated his duty of loyalty to SI by investing money into GP's project of building a smaller mall. A director owes the

corporation a duty of loyalty to act in good faith and in the best interest of the corporation. One of the several ways a director can violate his duty of loyalty to the corporation is by usurping a corporate opportunity. Before taking a business opportunity upon himself that he reasonably believes the corporation would be interested in, the director must inform the corporation of such opportunity and wait for the corporation to reject it. It is important to note that it is not a valid defense to state that at the point the corporation was not adequately financed to take on the opportunity.

The courts use the interest/expectancy test in order to determine whether an opportunity is one that the director should believe the corporation is interested in. Here, the corporation's statement of purpose is to operate comedy clubs and not deal in real estate; thus, the business opportunity is not within the corporation's line of business. Further, given that Charlie, Betty, and Al engaged in heated discussions before approving and entering into the contract with GP and given that Al and Betty later changed their minds about the decision and sought to void its contractual obligation to GP, it was reasonable for Charlie to believe that the opportunity was one that SI was not interested in. Also, the facts also state that Al and Betty decided to devote all of SI's capital to its comedy clubs since it was short on capital and struggling financially to keep its comedy clubs open. Finally, the facts state that Charlie was aware that Al and Betty were unhappy about the earlier contract with GP and believed that SI's board (which consisted of Al, Charlie, and Betty) would not approve any further investments in real estate. Thus, given the fact that the business of real estate development was out of SI's line of business and one that they would not likely be interested in taking advantage of, Charlie did not usurp a corporate opportunity and did not violate his duty of loyalty to the corporation in investing in the smaller mall with GP.

3. The issue is whether Al and Betty could oust Charlie from the Board of Directors for fraud and gross abuse of authority and for violating his duty of due care to the corporation.

Duty of Due Care

A director owes the corporation a duty of due care and must act as a reasonable prudent person and run the business as if it were his own. A director who takes action that harms the corporation (misfeasance) will be liable to the corporation unless he can defend himself under the business judgment rule. Here, if Charlie did in fact skim corporate funds for his personal activities as Al and Betty suspected, and if they could prove such activities, Charlie has violated his duty of due care to the corporation because a reasonably prudent person would not embezzle funds from a corporation. Under these facts, he will not be able to defend under the business judgment rule because that requires a showing that he acted in good faith and made a reasonably and well informed decision. It would be difficult and near impossible to show he was acting in good faith for the corporation's interest in embezzling money for personal use. Thus, he has violated his duty of due care to SI.

Removal of a board member for fraud and gross abuse of authority

The issue is whether Al and Betty would be able to remove Charlie from the Board of Directors for his acts of skimming corporate funds for his personal activities. A Director may be removed from the board by court order for fraud or gross abuse of authority or by a vote of the majority of shares of the corporation for any reason. Here, given that the corporation is a closed corporation with no shareholders, Al and Betty can petition the court to remove Charlie if they can show that he engaged in fraud or gross abuse of authority as a director of SI.

Here, the facts state that Al and Betty only suspected Charlie of skimming corporate funds for his personal use and had little proof of his unlawful activities. Further, Charlie would likely argue that SI has been struggling financially and thus it is unlikely that he was able to skim funds from SI. Additionally, the fact that Charlie was able to invest his own funds into the mall project with GP may

show that he is financially stable enough to not have to skim funds from a struggling corporation. Finally, Charlie could also defend himself on the grounds that perhaps Al and Betty are acting in retaliation because they resent him for convincing them to enter into the contract with GP which they wish to rescind at this point.

Unless Al and Betty can show clear proof that Charlie has engaged in such fraud, it is unlikely that the court will oust Charlie from his position as Board Member of SI.

Answer B

I. SI's Ability to Avoid the Contract with GP

SI may attempt to avoid its contractual obligations on the basis that it was an ultra vires act. A corporation may only engage in activities which fall within the stated business purpose in its Articles of Incorporation. SI's Articles explicitly stated that it was formed for the sole purpose of operating comedy clubs. The contract with GP had nothing to do with comedy clubs, but rather was for an investment of capital into construction of a new shopping mall. Traditionally, corporations could always void contracts that were ultra vires and, in a jurisdiction that retains that approach, SI would prevail on this theory. SI could make a strong argument that the use of the term sole purpose left no ambiguity as to whether SI was able to take action in the form of real estate development. Modernly, however, most corporations are allowed to engage in any legitimate business purpose and are not able to void contracts on the mere claim that they were ultra vires. This protects the other contracting party from being abandoned if the corporation determines that the contract would not be profitable and then cites their Articles of Incorporation, which the other contracting party probably had no notice of, as a reason to evade contractual obligations. Insofar as that is exactly what is happening here (Al and Betty knew what the stated purpose of their corporation was and discussed and approved entering into the area of real estate development, then had second thoughts because of SI's struggling financial position), this theory may not work. Furthermore, the shareholders would have to bring the suit and SI is a close corporation, so it may be unlikely that a court would believe that the directors acted in complete defiance of the shareholder's wishes. Finally, it could be argued that investing in real estate is a way to earn capital that would ultimately be used to operate their comedy clubs, and thus the contract was actually within the corporate purpose.

The shareholders of SI may argue that the directors had no authority to enter into the contract and that the corporation should not be bound by the unauthorized acts of its agents. This would require showing that the directors had no actual, implied, or apparent authority to contract with GP and would likely fail. The entire Board of Directors approved the decision to expand in the direction of real estate development after heated discussion and subsequently entered the contract with GP. The directors of a close corporation most likely have implied, if not actual, authority to conduct the business of the corporation by approving and entering contracts. The role of the Board is to manage the corporation's affairs and make decisions about actions to be taken by the corporation. Often the actual authority to pursue those approved actions would be vested in a corporate officer like a president, but the small size and nature of a closely-held corporation typically implies a more fluid power structure. If there are, in fact, officers who are expressly vested with exclusive authority to enter [into] contracts on behalf of SI and none of the directors hold those officer positions, then SI may be able to avoid the contract on the basis that it was an unauthorized act. However, at the very least, it is likely that the directors held themselves out to GP as having authority to bind the corporation such that GP could argue they had apparent authority and prevail in enforcing the contract. Finally, the Directors did approve the decision, so it is likely that they ratified the contract in some way even if it was entered into by someone without authority.

The easiest way for a corporation to avoid a contract is not present here. If SI had not yet been formed and someone like Charlie had entered into the contract as a pre-incorporation contract, SI could claim they were not bound if the corporation never ratified the contract or received the benefit of it. SI has been properly formed and the directors approved the contract so this defense is not available.

II. Charlie's Potential Breach of Duties to SI

As a director of SI, Charlie owes the corporation the fiduciary duty of loyalty which involves a duty to avoid usurping corporate opportunities. When a director learns of an opportunity based on his position as director (Charlie was approached by GP about —another real estate project of theirs), he may not personally benefit from the knowledge by acting on the opportunity until he presents it to the corporation and allows the corporation to reject it. Here, Charlie will claim that he knew Al and Betty were unhappy with the earlier contract and that they wouldn't approve any further contracts with GP. However, Charlie's mere —belief that the board would not approve further contracts does not absolve him of the duty to report the opportunity to them and wait for them to reject it. Considering the circumstances of SI's financial difficulties, they probably would have rejected it immediately and Charlie could proceed on the investment with his own money after fully and properly disclosing it to SI. Instead, Charlie never mentioned the project to anyone at SI, but went forward with investing his own money into the opportunity. Traditionally, the financial inability of the corporation to take advantage of the opportunity may have been an adequate defense to a director accused of usurping a corporate opportunity, but even if that was the case here, this defense is no longer a good one. Charlie breached his duty of loyalty.

The other fiduciary duty which Charlie owes SI, the duty of care, could also be potentially implicated in this situation if Charlie denied the GP smaller mall contract on behalf of SI and it would have been a good investment. The duty of care requires a director to act as a reasonably prudent person would in similar circumstances. As discussed above, Charlie should have presented the opportunity to SI's board and let them vote to refuse it. Given SI's financial struggles, it would have been a proper exercise of business judgment to decline the opportunity and a court would not question Al, Betty, or Charlie's decision to not enter the contract under the business judgment rule.

III. Removing Charlie from the Board of Directors

Betty and Al will attempt to oust Charlie from the Board of Directors on the theories that he breached his fiduciary duties. If they know about his usurpation of the opportunity to enter a contract with GP related to the smaller mall, they would be able to show that he breached his duty of loyalty. If he is, in fact, skimming corporate funds, then he is self-dealing, another violation of the duty of loyalty which exists when a director reaps personal advantage at the expense of the corporation. They would also argue that he breached his duty of care by acting unreasonably in his pursuit and advocacy of the new business direction of real estate development. A director has the responsibility of acting in the corporation's best interests as a reasonably prudent person would in the investments they make. Betty and Al would argue that the investment of a —substantial amount of SI's capital into real estate development (especially given that their sole purpose is operating comedy clubs) would not escape scrutiny and condemnation, even under the business judgment rule. However, Al and Betty agreed to taking SI in that new direction and no matter how —heated the discussions were, they eventually approved the decision.

Importantly, Betty and Al cannot oust Charlie from the Board of Directors by their own act because only shareholders can remove a director. Thus, Al and Betty would need to bring all of the information they have about Charlie's breaches of fiduciary duties and any other reasons they have to desire his removal to the shareholders and let the shareholders address the question. A majority vote of all shareholders would be required for Charlie's removal. Considering what appears to be bad financial judgment on Charlie's part, the obvious breaches of the duty of loyalty, and the fact that shareholders can remove a director with or without cause, the shareholders would probably vote to remove him and Al and Betty would succeed in their ousting, although indirectly.

Jul 2008

California
Bar
Examination

Essay Questions
and
Selected Answers

July 2008

ESSAY QUESTIONS AND SELECTED ANSWERS
JULY 2008
CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2008 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

TUESDAY MORNING

California Bar Examination

Answer all three questions. Time allotted: three hours

Your answer should demonstrate your ability to analyze the facts in question, to tell the difference between material and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

Q1 Professional Responsibility

Alex is a recently-licensed attorney with a solo law practice. Alex was contacted by Booker, a friend during college, who is now a successful publisher of educational books and software. Booker asked Alex to perform the legal work to form a partnership between Booker and Clare, a creative writer of books for children. In a brief meeting with Booker and Clare, Alex agreed to represent both of them and set up the partnership for a fee of $5,000.

Because Alex had no experience with forming partnerships, he hired Dale, a recently-disbarred attorney, as a —paralegal at a wage of $250 an hour. Although Dale had no paralegal training or certification, he had decades of experience in law practice, including the formation of partnerships. Alex notified the State Bar about hiring Dale and disclosed Dale‘s involvement and disbarred status to both Booker and Clare.

Dale spent four hours on his own preparing the partnership documents and meeting with Booker and Clare about them. Alex paid Dale $1,000 for his work. Alex spent a total of two hours on the partnership matter, including the initial meeting with Booker and Clare, reading the partnership documents in order to learn about partnerships, and a final meeting to have Booker and Clare sign the documents.

What ethical violations, if any, has Alex committed? Discuss.

Answer according to California and ABA authorities.

Answer A

In interactions with clients, an attorney owes a client four overarching duties: the duty of confidentiality, the duty of loyalty, the duty of maintaining financial integrity, and the duty of competence. In the practice of law, a lawyer also owes a duty of decorum to the profession. Attorney Alex‘s (A) actions in this matter raise issues under the duties of confidentiality, loyalty, financial integrity, and competence, as well as some question as to the duty of decorum to the profession. With these general principles in mind, each action will be analyzed individually.

Duty of Loyalty: Representation of Multiple Clients

An attorney owes a duty of loyalty to his or her client, to exercise his or her time and professional judgment and efforts solely for the benefit of that client, without any interference from outside loyalties of interests. This duty does not equate to an absolute prohibition or the representation of multiple clients, particularly in such matters as a business transaction; however, a lawyer generally must not accept the representation of more than one client if he believes their interests to be materially adverse or that any loyalties or interest might prevent the fair and competent representation of either or both clients. The ABA rules require that a reasonable attorney in [a] like situation would also believe in his ability to represent both clients without material adverse effect. California does not have this reasonable attorney standard.

Initially there do not appear to be direct conflicts in a matter regarding the construction of a partnership, so A‘s initial agreement to undertake the representation of both clients might be reasonable. However, one of the clients is a friend of A‘s from college, [a] potential source of loyalty that would potentially hinder the representation of Clare, should the interests ever diverge. Moreover, Booker, as a friend, sought out A as a new attorney for this representation, which might engender feelings of indebtedness to A that might hinder his representation of Clare. If Alex feels that he can competently represent both clients and there are no present conflicts, there is no violation under California law. However, under the ABA standard a reasonable attorney might not accept representation of multiple clients with the potential that he would feel more loyal to one than the other due to pre-existing friendship. Thus, there may be a violation under the ABA reasonable attorney standard.

In addition to only taking on the representation if the attorney deems he can properly represent both clients, the attorney has a duty to disclose the potential conflicts, including the potential that he will have to withdraw from the representation if a conflict arises. After this, the attorney must obtain the client‘s informed consent to the joint representation. California requires this consent to be in writing.

Here, it is unclear as to whether A discussed the potential of conflicts under this duty. The facts state only that the meeting was ‑brief and that A agreed to represent both clients for a fee of $5,000. There is no mention of informing the clients or obtaining their consent. There is, further, no mention of a written consent. Thus, A has likely breached

both ABA and California rules regarding the representation of both clients by not informing them of potential conflicts and obtaining their consent. A should have made the potential conflict much more clear and obtained clear consent from both, in writing, to satisfy both standards.

Duty of Confidentiality: Representation of Multiple Clients

The ABA requires a lawyer not divulge any information obtained from the client in the course of the representation intended to be kept confidential. California has no on-point rule for confidentiality, aside from the lawyer‘s oath to ‗maintain inviolate client confidences‘.

Though not apparent from these facts, the representation of multiple clients may raise issues regarding the duty of confidentiality to each, because a conflict my only arise when one client discloses something to the lawyer. When the lawyer cannot make a due disclosure to the other client regarding the conflict without violating the duty of confidentiality, the lawyer must withdraw.

Duty of Competence

A lawyer owes a duty of competence to a client to exercise the amount of research and inquiry as well as to possess sufficient knowledge and skill regarding the matter to render competent services. If an attorney is not familiar with the subject matter of representation, he may still represent the client if he can do sufficient research to familiarize himself with the subject area and such research will not result in undue expense to the client or delay in the matter. An attorney may also elect to associate or solicit advice from an attorney with experience in the area.

Within this duty of competence is a duty of diligence to zealously pursue the matter to completion.

The facts state that A is a recently-licensed attorney and has no experience with forming partnerships—the subject mater of the representation. The facts also state that A spent only a total of two hours on the partnership matter, which included reading other partnership documents and his initial and final meetings with Booker and Clare. Given his status as a new attorney and his lack of experience with this subject area, it would appear A neither possessed the requisite knowledge and skill necessary to competently represent the clients in this matter, nor did he do sufficient research or training to make himself competent in the area.

A would likely argue that he remedied this shortcoming by hiring Dale as a —paralegal, who had decades of experience in the practice of law, including partnership formation. Had Dale been a duly licensed attorney, this may have been proper. However, because (as will be discussed below) only an attorney may engage in activities that call for the judgment, training, and skill of an attorney, hiring a paralegal with a good deal of knowledge may ameliorate this shortcoming to some degree, but it is unlikely that it totally accounted for it. This is primarily because the only way Dale could provide

sufficient help to remedy the violation of the duty of competence would be by violating the rule against the unauthorized practice of law.

Thus, it is likely that A also breached his duty of competence in the matter by accepting representation in an area he was not familiar with, not doing sufficient research, and not associating with a more experienced attorney who could function as an attorney. A should have either declined the representation, or undertaken steps to make himself competent in the matter, if possible, without undue delay or expense.

Financial Integrity: $5,000 fee

Under ABA rules, an attorney's fee for work must be reasonable in light of the skill, experience, time, degree of specialty, and difficulty required for the task. California merely requires that fees not be —unconscionable.

A $5,000 fee for setting up a partnership does not appear reasonable in light of the time, degree of specialty, skill, and difficulty of the task. The facts state that A himself spent only 2 hours on the partnership matter, including the initial meeting and a final meeting in which documents were signed. After paying Dale $1,000 for his work, this leaves a charging effectively a fee of $2,000 per hour. Given A's status as a new attorney and that lack of difficulty or specialty required in setting up a simple partnership agreement between a publisher and writer, the fee arrangement would appear to violate both the ABA standard of reasonableness and the California standard of unconscionability.

Additionally, California requires fee agreements to be in writing unless the situation constitutes an emergency, the client is a regular client, the client is a corporate client, or the fee is under $1,000. Here, there does not appear to be any emergency or exigency warranting an exception to the writing requirement. Though Booker and A were friends prior, A is a new attorney and there is no prior attorney-client relationship between the two. Thus, Booker would not qualify as a ‒regular client. Booker is obviously not a corporate client and the fees are for $5,000.

Thus, A has violated the California rule regarding client agreements being in writing.

Financial Integrity: Fee Splitting

Whether or not A has also violated his duty of financial integrity to his clients depends in some part on whether or not Dale qualifies as an attorney or not, which will be discussed below.

Fee Splitting With Attorneys

If Dale qualifies as an attorney, under the ABA standard, A may split fees so long as the fee-splitting is proportional to the work done on the mater and the client consents. Here, A did notify both Booker and Clare about ‗hiring' Dale, though it is not clear he notified them as to the $250 per hour salary. If he did notify them, there may not be a violation under ABA rules. However, if he did not, he may have violated the ABA rule, given he ultimately paid Dale $1,000 for his services. Dale may have also violated the proportionality rule, given that in this case, Dale should have received the bulk of the

fee, rather than simply $1,000 worth, given A‘s minimal work on the matter and Dale‘s four hours meeting with the clients and preparing the documents.

Under California law, an attorney may split fees with another if the split is reasonable. Here, there is likely nothing unreasonable about the arrangement, except that A took too much of the fee.

Fee Splitting With Non-Attorneys

The facts state that Dale is currently disbarred. This would make him a non-attorney and lawyers are prohibited from sharing fees with non-attorneys. However, attorneys may share fees with such personnel as paralegals and legal secretaries so long as the lawyer is ultimately responsible for the work done by the personnel. This latter issue raises the primary issue with the hiring and use of Dale‘s services: the duty not to assist in the unauthorized practice of law.

Duty Not to Assist in the Unauthorized Practice of Law

A lawyer has a duty not to assist in the unauthorized practice of law. The practice of law is defined as anything that would call for the judgment, reasoning, or skill of an attorney. Here A has hired Dale, a disbarred attorney, as a —paralegal. An attorney may hire a currently-disbarred attorney to do work [as] a paralegal or legal secretary, but, like with the work of a paralegal or legal secretary, the individual must not engage in activities that call for the special skills of an attorney and the licensed attorney, A, must be ultimately responsible for the work.

The fact state that A hired Dale, who spent four hours preparing the partnership documents and meeting with Booker and Clare about them. A paralegal may meet with clients to obtain information, but must not engage in explanations that require the judgment of a lawyer in so doing, such as explaining legal options or ramifications. A non-lawyer may similarly prepare documents to some degree, but generally not much more than in the capacity of a scrivener. Here it would appear that Dale functioned as an attorney for Booker and Clare in both meeting with them and preparing the partnership documents.

A‘s reasons for hiring Dale as a paralegal—for his experience in years of practice—would also be more germane to functioning as an attorney. Also, the fee of $250 an hour seems more akin to that of an attorney‘s fee than the fee charged for a paralegal in a simple matter by a new solo practitioner.

Moreover, A must ultimately be responsible for the work done by the non-attorney and, in this case, the facts do not make any mention of his review of the final version of Dale‘s preparation of the documents, only that he was present at the final meeting in which the documents were signed.

Thus, A breached his duty to the profession and the client not to assist in the unauthorized practice of law.

Answer B

What Ethical Violations Has Alex Committed?

Duty of Loyalty

A lawyer owes his client the duty of loyalty. This duty requires a lawyer to work in the best interests of the client, and not for the lawyer's personal interest or for the interest of any third party.

Potential Conflict of Interest

When a lawyer is presented with a potential conflict of interest, the ABA Model Rules and California's ethical provisions differ slightly in terms of what a lawyer must do in order to undertake the representation. Under the Model Rules, a lawyer may undertake the representation of a client if the lawyer has a reasonable belief that there is no significant risk that a conflict of interest will materially limit the representation, and the client gives informed consent. CA rules do not have a –reasonable lawyer standard, but rather state that a lawyer can undertake the representation if the client gives written consent.

In this case, Alex was contacted by Booker, who was a friend during college, to form a partnership between Booker and Clare. There are potential conflicts of interest present in this representation, because Alex agreed to represent Booker and Clare jointly. Because Alex may be tempted by his friendship with Booker to work to the disadvantage of Clare, he should have informed Clare of his prior relationship with Booker. Moreover, he should also have made clear whether he represents only Booker and Clare, or if he is also representing the partnership itself.

There are no facts, other than his prior friendship with Booker, to indicate that he would work to the disadvantage of Clare. Under the ABA rules, a reasonable lawyer under the circumstances would likely believe that he could undertake the joint representation of Booker and Clare without a material limitation. Thus, if Alex informed Clare of his prior relationship with Booker, she could likely still consent to the representation. Similarly, in California the decision to undertake representation was proper if Clare consented to the representation.

Duty of Competence

A lawyer owes his client a duty of competence, which means that the lawyer must exercise the ordinary skill, diligence, and zeal in representing his client that an ordinary lawyer would under the circumstances.

As part of the duty of competence, a lawyer must be knowledgeable regarding the subject matter of the representation. However, in both CA and under the ABA rules, a lawyer need not be an expert in all maters to undertake the representation. A lawyer without prior experience in a field of practice may still take a case so long as the lawyer

either 1) does the work to become educated and competent without any extra expense to the client or 2) associate with competent counsel, who can help assist the lawyer.

Here, Alex had no experience forming partnerships. Thus, Alex either had to do the work necessary to educate himself regarding the law of partnerships, or he could also associate with another counsel who had such knowledge. In this case, Alex did not educate himself, but rather hired Dales as a —paralegal. Dale had decades of experience in law practice, including the formation of partnerships. Thus, Dale was a person with the requisite knowledge and skill to form the partnership between Booker and Clare.

However, Dale was a recently-disbarred attorney. Thus, Dale was not a licensed counsel and Alex could not associate with him without violating another ethical duty – the duty not to engage in the unauthorized practice of law, discussed below. A reasonable lawyer under the circumstances would not have associated with a disbarred attorney in order to satisfy his duty of competence.

Alex may argue that he eventually became informed by reading the partnership documents in order to learn about partnerships. However, Alex spent a total of two hours on the case, including the initial meeting with Booker and Clare and a final meeting to have Booker and Clare sign the documents. While there are no facts to indicate the precise number of minutes Alex spent learning about partnerships, it is clear for someone with no prior experience handling the formation of partnerships, Alex‘s cursory review of the documents prepared by Dale could not have satisfied his duty of competence. Thus, Alex violated his ethical duty by failing to become informed regarding the subject matter of the representation.

Fee Agreement

Under the Model Rules, all fees must be –reasonable. Except in the cases of a contingency fee, an oral fee arrangement will not violate a lawyer‘s ethical duty per se. The courts look to several factors in order to determine if a fee arrangement is reasonable, including the lawyer‘s reputation, knowledge, skill, the fee customarily charged for such work, whether the work involved particularly novel claims, and, in the case of a contingent fee, the amount of recovery by the plaintiff.

In this case, a $5,000 flat fee is likely unreasonable under these circumstances. Alex had no prior experience handling partnership agreements, and thus his per-hour fee should not be too high. Moreover, Alex spent only two hours total in working on this case. A fee of $5,000 – or even $4,000 if Dale was paid out of this fee – for two hours of work. Thus, Alex essentially charged Booker and Clare a fee of $2,500 or $2,000 per hour to form the partnership. Formation of a partnership is a relatively simple legal process and does not involve any complex or novel legal argument. Alex also has no prior experience and thus had no reputation for being a particularly efficient partnership lawyer. Thus, on balance, Alex‘s fee arrangement violated his ethical duties to Booker and Clare.

In California, a fee must not be —unconscionable, which is to say that it must not —shock the conscience. A fee agreement must also be in writing, unless the fee is less than $1,000, the lawyer is representing a corporate client, or there is a long history between the attorney and client. On these facts, none of those exceptions apply. While Alex had a prior friendship with Booker, that is insufficient to constitute a long history of representation such that any fee arrangement would be understood by the client. The facts also state that Alex represents Booker and Clare jointly, rather than the partnership. Thus, the $5,000 fee had to be in writing, and Alex violated his ethical duty with respect to this fee arrangement in California.

Moreover, for the same reasons that make the fee unreasonable under the ABA rules, this fee would also likely be unconscionable in California. To charge a client over $2,000 per hour – especially by a recently-licensed attorney – would very likely —shock the conscience of the court.

Fee Sharing

Similarly, under both California and the Model Rules, a lawyer cannot share any part of his fee with a non-lawyer. This is considered a duty to both uphold the dignity of the profession, and a duty to protect the public. The facts are unclear whether Alex paid Dale out of pocket, or whether Dale's $1,000 payment came out of the fee paid to Alex. If in fact, Alex planned to pay Dale his fee by deducting it out of the $5,000 paid to Alex, then Alex breached his ethical duty. Even if, however, Alex paid Dale out of pocket, this still violated his ethical duty because he did not inform his clients as to how costs would be handled in this mater. Rather, Alex simply charged a flat fee without any further disclosures.

Under the Model Rules, a lawyer may also not pay a referral fee to any other lawyer. That is to say that a lawyer may not only be paid a portion of a fee when the lawyer has actually done some portion of work on the case. It should be noted that in California, unlike the Model Rules, a referral fee is not a per se violation of ethical rules, so long as the arrangement is disclosed to the client and no extra amount is charged to the client.

Thus, Alex may attempt to argue that Dale's payment was a valid referral fee under California law. However, as noted above, Dale was a recently-disbarred attorney. Thus, he is considered a non-lawyer and, as such, cannot share in any part of the fee arrangement.

Unauthorized Practice of Law

Part of the lawyer's duty to uphold the dignity of the profession, and also his ethical duty to protect the public, prohibit a lawyer from assisting in the unauthorized practice of law. Such practice is defined as a non-lawyer doing something which requires exercising the judgment ordinarily required by a lawyer.

In this case, Dale – a non-lawyer by virtue of his being disbarred – prepared partnership documents at the request of Alex. There are no facts to indicate what Dale actually did in the four hours he worked on the case. However, while the filing of a partnership

document with the state would not likely require the judgment of a lawyer, the actual drafting of the documents would very likely constitute the practice of law. Dale would have had to make arrangements between Clare and Booker regarding the sharing of profits and losses, how they would be compensated in the event of a dissolution and winding up, whether either of them would enjoy limited liability, and various other important considerations. Such work would require the skill and exercise of judgment required by a lawyer. Thus, Dale was engaging in the unauthorized practice of law.

Alex, therefore, will have violated his ethical duty if he failed to supervise Dale in his work. A lawyer may delegate certain tasks to an employee, such as a law clerk or paralegal, but must always supervise such work. Here, Dale spent four hours on his own. Alex did not supervise Dale's work at all. Rather, Alex simply delegated the work to someone whom he knew was a disbarred attorney. Moreover, Dale had no paralegal training or certification. Thus, Alex could hardly argue that he delegated this work to a paralegal.

As such, Alex violated several ethical duties. First, he violated his duty of competence, because he failed to represent Booker and Clare with the ordinary skill a reasonable lawyer would have under such circumstances. Second, he violated his duty to uphold the dignity of the profession, because he permitted a non-lawyer to engage in the unauthorized practice of law and share in the fee. Third, he violated his duty of loyalty, because he delegated work [to] a recently-disbarred attorney, and thus put his clients' partnership in the hands of someone who had already been deemed by that state bar to be unfit to practice law. Finally, he violated his duty to the public, because he permitted someone automatically deemed incompetent (even though Dale clearly had the requisite skill) by virtue of the disbarment to continue in the unauthorized practice of law.

Duty of Confidentiality

A lawyer owes his clients a strict duty of confidentiality. Model Rule 1.6 prohibits the disclosure of any information –relating to the representation. California does not have any direct rule on point, but the Cal Business Code states that a lawyer must —protect inviolate the confidences of his client.

Here, Alex disclosed to the State Bar that he had hired Dale to work on the partnership. This information would be confidential – and thus could not be disclosed – under both the Model Rules and in California. However, there are certain exceptions to the ethical duty of confidentiality. One such exception permits disclosure of certain information in order to obtain an advisory opinion from the state Ethics Board. Thus, if Alex was revealing this information to the Bar for the purposes of obtaining advice regarding his ethical duties, then such revelation was proper.

Therefore, on these facts, Alex likely did not violate his duty of confidentiality because he was probably attempting to obtain some sort of advice regarding how he should proceed regarding hiring Dale.

It should be noted that the related issue of Attorney-Client privilege is inapplicable here. The Attorney-Client privilege protects compelled disclosure of confidential communications between attorney and client made for the purpose of obtaining legal advice. If Alex had been called to testify regarding what he told Booker and Clare regarding the formation of the partnership, such information could not be revealed without waiver of the privilege by Booker and Clare.

Q2 Constitution

To protect the nation against terrorism, the President proposed the enactment of legislation that would authorize the Secretary of Homeland Security (—the Secretary) to issue —National Security Requests, which would require businesses to produce the personal and financial records of their customers to the Federal Bureau of Investigation (–the FBI) without a warrant. Congress rejected the proposal.

Thereafter, in response, the President issued Executive Order 999 (–the Order). The Order authorizes the Secretary to issue —National Security Requests, which require businesses to produce the personal and financial records of their customers to the FBI without a warrant. The Order further authorizes the Secretary to require state and local law enforcement agencies to assist the FBI in obtaining the records.

Concerned about acts of terrorism that had recently occurred in State X, the State X Legislature passed the –Terrorism Prevention Act (–the Act), requiring businesses in State X served with National Security Requests pursuant to the Order to produce a copy of the records to the State X Department of Justice.

1. Is the Order within the President‘s authority under the United States Constitution? Discuss.

2. Assuming the Order is within the President‘s authority, does the Order preempt the Act? Discuss.

3. Assuming the Order is within the President‘s authority and does not preempt the Act, do the Order and the Act violate the Fourth Amendment to the United States Constitution on their face? Discuss.

Answer A

1. Is the order within the President's authority under the United States Constitution?

Order 999

Order 999 was issued by the President after an identical piece of legislation proposed by him was rejected by Congress. The Order requires business[es] to produce the personal and financial records of their customers to the FBI without a warrant upon issuance of a —National Security Request by the Secretary of Homeland Security. It is unclear what the use of such information so produced would be, other than the President's stated goal of protecting the nation from terrorism.

As an initial matter, assuming that the Order is valid (see below), it would not be a violation of the nondelegation doctrine. The President may delegate executive power as he sees fit to other members of the executive [branch].

Congressional Authorization

The President's power is at its apex when he acts pursuant to power given him by Congress. The U.S. Supreme Court has said that when he acts in the face of Congressional disapproval, he may only do so if the power he exercises is vested in him alone by the Constitution and denied to Congress. Where he acts in the face of Congressional silence on a matter, he acts in a —gray area. The case law is split as to whether Congressional rejection of a proposed power (but not the enactment of some act disallowing the President's use of that power) is silenced or disapproval, but the cases tend toward disapproval.

In this case, the President has issued Order 999 in the face of Congressional rejection of an apparently identical piece of legislation. The courts would likely treat such an action as occurring in the face of Congressional disapproval. Therefore, the court will only allow the Order if it is within the powers that only the President may exercise. If the court treats Congress' disapproval of the proposed legislation as silence, then the court will treat the Order as in the —gray area of executive power and probably approve it if it is within the President's power. In this gray area, the court will likely look to the legislative history surrounding the defeat of the President's proposed legislation to divine some intent from the defeat.

Congress, on the other hand, could have authorized the act (assuming it is not unconstitutional under the 4th Amendment, see below). Congress has the power under the Commerce Clause to regulate the people, channels and instrumentalities of interstate commerce, as well as those things having a substantial effect on interstate commerce. The personal and financial information of individuals in America are most likely instrumentalities of commerce, and almost certainly have an effect on interstate commerce. So Congress does not have the ability to regulate in the field.

Congress is not bound by the Contracts Clause, so it does not pose a problem.

Given the fact that the power to make an Order such as this is not exclusively vested in the President, and the fact that he acted in the face of Congressional denial of his proposal to do so, the court will likely treat his act as outside his authority.

The President‘s Domestic Affairs Powers

The President has some domestic affairs powers reserved to himself. These include the appointment and removal powers, the pardon power, the commander in chief power, and the duty to execute the law. The President may make an argument that the latter two powers support the Order.

As an exercise of the commander in chief power, the President has the exclusive power to control the deployment of troops and their day-to-day control. There is a very weak argument that turning over financial records supports this role.

There is a better argument that the duty to execute the law supports the Order. In order to keep the nation safe, the President will argue, he must allow the FBI access to personal and financial records of all Americans. This is still a weak argument and there is no law to support it.

The President‘s Foreign Affairs Powers

The President shares foreign affairs powers with Congress, but has some reserved to himself, including the power to conduct foreign negotiations, to deploy troops overseas, and to make executive agreements.

The Order is not even arguably within his foreign affairs powers, as it concerns Americans‘ financial records at home, and gives them to the FBI, the government‘s domestic law enforcement agency.

Commandeering

Finally the Order poses a problem with commandeering; that is, the federal government‘s forcing the states to act. The Constitution as interpreted by the Supreme Court prohibits the federal government from requiring the states to enforce its laws. The Order forces law enforcement officials to —assist the FBI. While the Congress could, for instance, condition spending to the states on such help, the President cannot force the states to do so. The Order violates the Constitution to that extent as well.

2. Does the Order Preempt the Act?

State X has passed an Act requiring business[es] in the state to provide the information they provide to the FBI under the Order to the state‘s DOJ as well. This section assumes that the Order is valid and treats it as federal law.

Preemption

Federal law can preempt state law in two ways, express and implied. In either case, where there is preemption, the state law is invalid under the Supremacy Clause of the Constitution. Express preemption occurs when the federal law by words states that it is the only regulation allowed and state regulation is prohibited. The Order does not contain an express preemption.

Implied preemption can occur in one of three ways, by direct conflict with state law, by so-called field preemption, and where the state law interferes substantially with the federal objective. Here, there is no direct conflict between the Order and the Act. The Act does not call for state business[es] to do anything they are prohibited from doing under the Order and vice versa. The Act merely requires businesses to provide a separate copy of their response to the Request to the state DOJ. This is not direct conflict.

Field preemption occurs when it appears from the legislative history of a federal law or from the law itself that it intends to be the only regulation in the area (for instance, environmental regulations typically provide that they are intended to fully occupy their fields). There is no legislative history for this Order other than the President‘s statement that it is to protect the nation from terrorism, and there is no language that a court might read as field preemption.

When a state law substantially interferes with the objectives of federal law, the state law will give way. Here, it does not seem like the Act interferes at all with the objectives of the Order. The Order provides that financial records go to the FBI (federal law enforcement) and the Act provides that a copy will go to state law enforcement. The Act is therefore not preempted.

Congressional vs. Executive Action

The above analysis assumes that an Executive Order can preempt a state law. The case law is unclear as to this point but it might be instructive to look to the President‘s authority to preempt state law under his power to make executive agreements with foreign governments. Because an executive agreement preempts state law, it is reasonable to assume that a court would declare an executive order to do so as well.

Contracts Clause

The Contracts Clause prohibits the states from substantially interfering with the obligation of existing contracts unless they have a substantial and legitimate reason for doing so and the means are reasonable and narrowly tailored to do so. Here, in the absence of the Order, the Act might have interfered with private contracts requiring businesses [to] keep their customers‘ records confidential. However, because the Order already breaks those contracts, and the Act goes no further, if the Order is valid, so is the Act.

3. Does The Order and Act Violate the 4th Amendment On Their Face?

The 4th Amendment applies to the federal government directly and to the states via incorporation by the 14th Amendment. The Order and Act call for the same information to be passed to equivalent agencies upon the same request. Therefore, the Order and the Act are essentially the same for the purposes of the 4th Amendment and will be analyzed together in this section.

The 4th Amendment

Purpose

The 4th Amendment prohibits unreasonable searches and seizures. The purposes [is] to prevent police and law enforcement misconduct. The Order and Act involve law enforcement collection of data without a warrant and therefore are generally within the scope of the 4th Amendment.

Use

The 4th Amendment generally provides that all evidence unreasonably seized be excluded (subject to some exceptions, for instance, for impeachment) from criminal prosecutions. The 4th Amendment is satisfied where a warrant has been issued and does not apply where there is an exception to the warrant requirement. The exceptions to the warrant requirement include searches incident to a lawful arrest, automobile searches, plain view, consent, stop and frisks, hot pursuit and evanesce. None of those exceptions apply here. There are also reduced requirements for so-called administrative warrants issued in highly regulated industries. However, that likewise does not apply here, as there is no warrant issued in a Request setting.

Government Action

The 4th Amendment only applies to government action. Here, the Order and Act require that private businesses turn over their records to law enforcement. In and of itself, this might not be considered government action, but the fact that the Order and Act [are] triggered by the Secretary‘s issuance of a Request (clearly government action) brings them within the scope of the 4th Amendment.

Reasonable Expectation of Privacy – Standing

The 4th Amendment prohibits unreasonable searches and seizures. The court has interpreted this to mean that it prohibits intrusions in areas where a person has a reasonable expectation of privacy. The facts do not state exactly what information is subject to the Requests. The case law is mixed on what sort of information is subject to a reasonable expectation of privacy. Pen registers (which record phone numbers dialed but not conversations) and bank account balances are not subject to the reasonable expectation of privacy, but it appears that the Requests go beyond those and will most likely be struck down if such information is used against an individual in a criminal prosecution.

Use of Information Discovered

In and of themselves, the Order and Act do not violate the 4th Amendment. However, any use of information in a criminal prosecution found thereby would violate the 4the Amendment, so, while the Order and Act are constitutional, they are essentially useless for criminal prosecution. For other purposes where the 4th Amendment does not apply (for instance, grand jury proceedings, parole revocation proceedings, immigration proceedings), the use of information discovered pursuant to the Order and Act is likely constitutional.

Answer B

1) Is the Order Within the President's Authority Under the United States Constitution?

There are several potential sources of authority for the order in question. Unlike Article I, which vests specifically enumerated legislative powers to Congress, Article II, Section 1 vests —all executive authority with the President. The President could claim that orders of this nature are inherently part of the —executive power imbued in his office by the so-called —vesting clause. This does not amount to an executive —police power, but it does allow the executive to take actions traditionally taken by heads of state. There is little case law on this clause, so it is uncertain whether it would provide sufficient justification for the President's actions.

The President could also seek to justify the order under his foreign affairs power. The President's powers in this area are plenary and expansive. The President would argue that the Order is designed to prevent and deter acts of international terrorism. Given the plenary and complete nature of the President's authority in this arena, this is a potentially solid grounding for the President's ability to enact the order.

Relatedly, the President could seek grounds for his order in his war powers. This claim would be based o the assertion that the United States is engaged in a —war on terror. The Order would be seen as part of the President's efforts to defend the country from potential terrorist attacks. This grounding, however, probably goes too far. While the President's war powers are expansive, even in the case of a non-declared war, they are unlikely to justify an order of this nature. In dealing with the deployment and movement of troops, the President's powers are plenary. However, when dealing with civilian matters unrelated to the armed forces, his authority is greatly diminished.

Finally, the President could attempt to find a basis for his actions here in the —Take Care Clause. The President is charged to ensure to —take care that the laws be faithfully executed. Here, he would argue that terrorism, by its very nature, precludes and disrupts and disrupts the execution of the laws of the land. His Order would be seen as a necessary step to ensuring that the laws are indeed faithfully executed.

The President's actions here would be unaffected by the test for executive authority set forth in the Steel Seizure case. Under that tripartite formula, the President's powers are at their highest when acting pursuant to congressional legislation; they are lessened if there is no congressional legislation on the matter, and they are at their lowest when he is acting in the face of congressional legislation. In this case, the President's proposal was indeed rejected by Congress. However, if that rejection did not come in the form of legislation barring the President from taking such action, it is unlikely that the rejection would have much impact on his authority to enact the Order. The mere refusal to enact a bill does not put the President's actions in the third Steel Seizure category. Thus, it appears that the President's actions fall in the middle ground-with no congressional legislation on the matter.

Thus, in this case, the President appears to be operating in an area where he is not bound or backed by congressional authority. In such an arena, the President‘s actions are bolstered by past acts of the executive. Here, the —National Security Requests operate in much the same way that national security letters operate in the current system – FBI or DOJ can issue such letters and demand documents in return, without a warrant. It is likely therefore that the bulk of the Order would appear authorized under some combination of the vesting clause, the foreign affairs power, or the Take Care Clause.

A contrary argument would be that executive Orders are only binding on officials within the executive branch. As such, since this order attempts to control the actions of those outside the executive branch (the businesses), it is unconstitutional.

In either scenario, the portion of the Order that allows the Secretary to require state and local law enforcement agencies to assist the FBI in obtaining the records is probably unconstitutional. The Supreme Court has held that the 10th Amendment prohibits Congress from —commandeering either state legislatures or state executive officials (Printz). In other words, Congress cannot compel state governments to take action. It may incentivize [sic] action, and it may make grants of funds contingent, but it cannot demand. While the cases themselves referred to congressional action, it is likely that executive action would fall under the same rubric. In this case, the Order authorizes the Secretary to –require state and local law enforcement to assist in the collection of records. That requirement effectively commandeers state officials and is therefore unconstitutional (there is an exception for requiring state governments to produce records already in their possession, but that is inapplicable here, as the records are not in state government possession).

2) Assuming the Order is within the President’s Authority, does the Order Preempt the Act?

By action of the Supremacy Clause, federal law may —preempt state law. Federal law is the supreme law of the land and renders any contrary state legislation void. This preemption can take several forms. Preemption can be express – in other words, the legislation may specifically indicate that it is preempting state law (express preemption does not rule out implied preemption). In this case, however, there is no indication that the Order by its express terms preempts state law.

Preemption can also be implied. In other words, federal law can preempt state law if it is clear that the federal legislation was meant to occupy the entire field of regulation, if the state law poses an obstacle to carrying out the federal law, or if the legislation conflicts with the relevant state law. These principles are generally applied to congressional action. If they only applied to congressional action, then, by definition, an executive order like the one in this case could never preempt state law. Assuming, however, that executive orders can indeed preempt state law, there is no implied preemption in this case. There is no indication that the order was intended to occupy the entire field of regulation in this area. It is plausible that states would be allowed to

assist (indeed, the Order attempted to mandate that they would assist) and in any case, there are alternative means of obtaining business records, etc. (warrants). The law does not pose an obstacle to the enforcement of the federal act, nor does it conflict with it. Again, the Act appears to be an attempt to aid the federal government in carrying out its order.

Thus, under either theory, the Act is not preempted by the Order.

3) Assuming the Order is within the President's authority and does not Preempt the Act, do the Order and the Act violate the Fourth Amendment?

Order

The Fourth Amendment applies directly to the federal government and prohibits unreasonable searches and seizures. Unreasonable searches and seizures have been deemed to be those involving state action which intrude upon an individual's reasonable expectation of privacy.

In this case, the state action element is clear. The federal government is ordering businesses to produce the records of their clients.

The next question is whether there was a reasonable expectation of privacy in the customer records. Individuals have a reasonable expectation of privacy, for example, in their homes. However, there are other things in which an individual has no reasonable expectation of privacy. Generally, items passed on to third party businesses cannot reasonably be expected to be considered private. For example, there is no reasonable expectation of privacy in bank records. By analogy, therefore, it is unlikely that there is a reasonable expectation of privacy in business records. Generally speaking, an individual has no standing to sue for the seizure of his property that is in the possession of another. On occasion, the owner of property does have standing to sue, but given the fact there is no expectation of privacy in bank records, it is unlikely applicable here.

Assuming, however, that there was indeed a reasonable expectation of privacy, the search is only permissible if there was a warrant or if the search fell into one of the exceptions to the warrant requirement. Here, it is clear that there was no warrant. A warrant must issue on the basis of probable cause, specifically describe the place to be searched or the person or things to be seized and be issued by an unbiased magistrate. In this case, while there is arguably a description of the things to be seized, there is no indication of probable cause, and the issuing authority (the Secretary) is not an unbiased magistrate (in many senses, he is akin to a prosecutor who has an interest in the outcome of the investigation).

A search may still be reasonable, however, if it falls into one of the exceptions to the warrant requirement. However, none of the main exceptions appear to be applicable. This is not a search incident to a lawful arrest, it is not a Terry stop, it is not under the automobile exception, there is no consent, there is no hot pursuit, the items are not in

plain view, and this is not an inventory search. The government could attempt to argue that this falls under the —special needs exception to the warrant requirement, but that does not appear to be applicable. The special needs exception is justified only in extreme situations where law enforcement could not carry out its duties in any other fashion (i.e., drunk driving checkpoints, airport security searches). In this case, while the threat of terrorism may pose an extreme danger, it is unlikely that this is the only way of protecting the public.

Act

The Fourth Amendment has been incorporated against the states through the due process clause of the 14th Amendment. Thus it applies against the states in the same manner as it does against the federal government, so the analysis is the same as above.

Q3 Contracts

On May 1, Owner asked Builder to give her an estimate for the cost of building a wooden fence around her back yard. Builder gave Owner signed written estimates of $4,000, consisting of $2,500 for labor and $1,500 for materials for a cedar fence, and of $7,000, consisting of $2,500 for labor and $4,500 for materials for a redwood fence. He said, however, that he would have to verify that the redwood was available.

Owner said she liked the idea of a redwood fence but wanted to think about it before making a decision. In any case, she said she wanted the fence completed by June 1 because she was planning an important event in her back yard for a local charity. Builder said he would check with redwood suppliers and get back to her within two days.

On May 2, Builder telephoned Owner. Owner‘s phone was answered by her voice-message machine, which informed callers that she had been called away until about May 25 but would be checking her messages daily and would return calls as soon as she could. Builder left a message stating, —I‘ve found the redwood, and I can build the redwood fence for $7,000, as we agreed. Please give me a call, as I will otherwise buy the redwood, which is in short supply, and start the work within a few days. Owner heard the message, but because the charity event she had planned had been cancelled and there was no longer any urgency about getting the fence erected, she decided to wait until she returned to speak to Builder.

By May 14, Builder had still not heard from Owner. He was concerned that the supply of redwood might not hold and that if he did not start work immediately he would not be able to finish by June 1. Thus, he bought the redwood and completed construction of the fence on May 24.

When Owner returned on May 25, she saw the completed fence and sent Builder a letter stating, —You did a great job, but I never agreed to go ahead with the fence, and I certainly hadn‘t decided on redwood. Besides, the charity event that I had planned got cancelled. You should have waited until I got back. But, to avoid a dispute with you, I‘ll offer to split the difference – I‘ll pay you $5,500.

Builder received the letter on May 26. He telephoned Owner and said, -When I first read your letter, I was going to get a lawyer and sue you, but I decided to let it go and I do accept your offer of $5,500. Owner replied, -Well, you‘re too late. I‘ve changed my mind. I don‘t think I owe you anything.

May Builder recover all or any part of $7,000 from Owner on a contractual or other basis? Discuss.

Answer A

Applicable Law

This contract will be governed by general common law contract principles. Contracts for the sale of goods are governed by Article 2 of the Uniform Commercial Code. All other contracts are governed by general common law contract principles. The contract at issue, assuming there is one, involves personal services: building a fence. Although Builder may also supply materials such as the wood, that does not convert it into a contract for the sale of goods because the materials are collateral to the primary purpose of the agreement, which is to provide the service of fence building.

Formation

There was no enforceable contract between the parties, because they never had a meeting of the minds. For a contract to come into formation, there must be an offer, followed by a manifestation of assent to the offer. The parties must objectively agree to a bargained-for exchange.

Offer - May 1 Estimates

Builder (B) may argue that the estimates he provided on May 1, were offers. An offer is a communication of definite terms of the agreement which creates a power of acceptance in the offeree. The estimate for the redwood fence was not an offer, however, because B did not objectively manifest an intent to be bound if Owner (O) accepted right there. B said that he would have to verify that redwood was available. This suggests that he did not intend to be bound to the terms of these estimates until he verified the supply of the redwood. The estimate for the cedar fence was not similarly conditioned, and so it may be construed as an offer. Since he withheld the power to accept with regard to the redwood fence, that estimate was a mere invitation to make an offer.

Offer – May 2 Message

The May 2 voicemail message from B does qualify as an offer for the redwood fence. In the message he referred to their earlier discussion, and said that he would be willing to build the redwood fence for $7,000. Furthermore, he expressly granted O the power to accept by calling him back or that he would start the work in a few days if he did not hear from her. Since he created power of acceptance, this message was an offer to build the redwood fence for $7,000.

Offers have no effect, however, unless actually communicated. B reasonably expected that his message would be heard by O since her message said that she would be checking her messages daily. Owner did in fact hear the message. Once she heard the message, the offer was effective.

Acceptance by Silence

The general rule is that the offeree must objectively manifest assent to the offer to be bound. As a corollary, silence on the part of the offeree is not generally an objective

manifestation of assent. There are exceptions to this general rule where the parties have a prior history of dealing on such a basis. There is no indication that B and O have any such history. Although B attempted to create a power of acceptance by O's silence, she will not be bound by silence unless it is objectively assent.

B would argue that under the circumstances, O's silence should be construed as assent. O had already told him that she needed the fence to be completed by June 1. She had not informed him that the charity event scheduled for June 1 had been cancelled. B was under the impression that O need[ed] the fence done on time. Furthermore, her message said that she would be checking her messages daily, but would return calls as soon as she could. Given this, B was reasonable in believing that she heard the message but was too busy to respond. Since he told her he would start in a few days unless he heard back from her, it may have been objectively reasonable to believe that her silence meant that she wanted him to start but was too busy to respond.

On the other hand, O would argue that it would be unfair to hold her to an agreement that she had not assented to. After all, at the time, there were two outstanding offers: one for the cedar fence, and another for the redwood fence. Moreover, on their last communication, O had told B that she liked the idea of a redwood fence, but wanted to think about it before making a decision. Given that she could have decided on either, it was not objectively reasonable to interpret her silence as assent to the building of the redwood fence. O has the better argument here, particularly because courts are loathe to enforce an agreement where one party has not affirmatively manifested assent. Thus, O is not bound to the contract by her silence.

Consideration

There are no issues of consideration here. For a contract to be binding, there must be a bargained-for exchange whereby each party incurs some legal detriment. In this case, B would be obligated to build a fence, and O would be obligated to pay.

Remedies

Compensatory Damages

If there is no enforceable contract then B may not recover the $7,000 from Owner. If there is a contract, however, then B would be entitled to recover the entire $7,000. In California, the measure of compensatory damages is the expectancy interest. In other words, the law seeks to place the parties in the monetary position they would have been in had the contract been fully performed by both parties. Here, B fully performed by obtaining the materials and building the fence. When O refused to pay, she was in breach of her obligation to pay. Had the contract been fully performed, B would have expected to be paid the contract price of $7,000. Thus, if there is an enforceable contract, B would be entitled to $7,000.

Quasi-Contract

If there was no enforceable contract, B may still be able to obtain some of the money under the theory of quasi-contract. A quasi-contract is an equitable doctrine used to

prevent the unjust enrichment of one party. A quasi-contract arises where one party confers a benefit upon the other with the reasonable expectation that they will receive payment for the benefit. Unlike contract damages, however, the measure of damages under quasi-contract are restitution, or the prevention of unjust enrichment. In other words, the law will require O to pay B for the reasonable value of the services to prevent her unjust enrichment.

In this case, a quasi-contract likely arose. B certainly conferred a benefit on O. She has a brand new redwood fence. The issue is whether it was reasonable for B to expect that he would be compensated for his services. As discussed above, it is a close call as to whether B was reasonable in interpreting O's silence as consent. While it was probably not sufficient to bind O to the contract terms, it may have been sufficient under the circumstances to create a reasonable expectation in B that he would be compensated for his services.

If B prevails on a quasi-contract theory, he would at a minimum be entitled to recover the value of the materials, or $4,500. If the new fence has increased the value of O's property, he may also be entitled to recover that increased value because to allow O to benefit from the increased value to her property would also unjustly enrich her. If this measure is applied, however, it would be limited to a maximum of $7,000 representing the effective contract price. Furthermore, O may oppose this measure of damages as being too speculative.

Accord and Satisfaction

O will be required to pay B $5,500 on the accord and satisfaction contract. When O returned and discovered the fence, she sent B a letter. In this letter, she agreed that B did a —great job but asserted that she had never agreed to the contract. O then offered that in order to –avoid a dispute she would -split the difference and pay B $5,500. This may be interpreted as an offer of accord. The offer was effective on May 26, when B received it.

There is sufficient consideration to bind the parties to this agreement because O has agreed to pay $5,500 in exchange for B agreeing not to waive any claim to the original contract. As discussed, although her claim that she never agreed is stronger, B still had a viable contract claim against her. B reinforced his reasonable belief that he had a non-frivolous claim when he called her and told her that his first instinct was to get a lawyer and sue her. By forgoing his right to sue her on the contract theory, B has incurred a legal detriment sufficient for consideration.

O became bound to the offer when B called her and accepted it. In general, an offer may be revoked at any time by the offeror, but a revocation is not effective until communicated. Here, B called O and immediately accepted her offer of accord. Although O may have decided to revoke the offer before B called (which she suggests by saying -You're too late. I've changed my mind), her subjective intent does not legally revoke the offer until she communicates the revocation to B. Here, since B

accepted before she could revoke, and there is sufficient consideration, O will be bound to the accord and satisfaction contract. B may recover $5,500 from her on that theory.

Answer B

Builder v. Owner
Builder may wish to proceed on three theories: 1) that Owner is in breach of contract formed on May 2, and thus, he should recover the full contract price; 2) that Owner is in breach of contract formed on May 25; and 3) that Builder should be entitled to restitutionary remedies under an unjust enrichment or quasi-contract theory.

Controlling Law
The first issue is whether the agreement between Builder and Owner is controlled by the UCC or the common law of contracts. The agreement was for the construction of a fence. In general, constructions are contracts for the personal services of the builder, with the cost of materials being incidental to the contract. However, the contract also involves the sale of goods, since the fence was being built out of wood. The UCC controls contracts for the sale of goods, which are defined as movable, tangible personal property. Thus, whether the UCC or the common law controls the contract depends on which part of the contract was the most important part.

If the agreement were for a cedar fence, the labor was valued at $2,500 and material valued at $1,500. Thus, such a contract would be governed by the common law of contracts. If the agreement were for a redwood fence, the labor was again valued at $2,500 but instead the materials were valued at $4,500. This contract could be governed by the UCC, since the primary part of the contract was the sale of the redwood, with the labor constructing the fence being incidental to the sale of the expensive wood.

Here, Builder is asserting a contract for the construction of a redwood fence. This is a close issue, because while there is a disparity between the value of the labor and the goods, the entire purpose of the contract was not to buy and sell wood, but rather to construct a fence. A pile of redwood would not be of use to Owner. Rather, Owner contacted Builder for the purpose of the construction of a fence. Thus, the court could also hold that the contract should be controlled not by the UCC, but rather by the common law.

1. Contract Formation on May 2

K Formation
In order to form a valid contract, there must be 1) offer, 2) acceptance, and 3) consideration.

Offer
An offer is the manifestation of a present intent to contract, definitely communicated to the offeree, inviting acceptance. Whether a statement constitutes an offer will be judged by a reasonable person standard. If a reasonable person in the offeree‘s shoes would understand the commitment to be a contract, then the statement is an offer.

Builder may argue that he made an offer to build the redwood fence on May 1. However, this argument will likely fail because Builder stated on May 1 that he would have to verify that the redwood was available. Thus, Builder‘s equivocation regarding the availability of redwood made his statement too indefinite to be considered an offer. Builder may also argue that he made an offer to build a cedar fence, but his argument would also likely [fail] because he was simply responding to an inquiry by Owner for an estimate regarding the cost of completion.

Builder will also argue that his May 2 telephone message constituted an offer. Owner stated in her phone message that she would be checking her messages daily. His message stated a price term, was definitely communicated to Owner, and manifested a present intent to contract. Thus, Builder‘s May 2 message would very likely be considered an offer because, judged by a reasonable person standard, it was clear that he was inviting acceptance of his promise to build a fence for $7,000, and it was clearly directed at her based on their prior conversation.

Acceptance

Acceptance is words or conduct manifesting an assent to the terms of the offer. At common law, acceptance had to be a ‑mirror image of the offer. Any deviation from the terms of the offer constituted a rejection of the offer, and instead formed a counteroffer. Under the UCC, acceptance may be made on different terms, and whether such terms become part of the contract depends on whether the parties are merchants.

Builder may argue that Owner accepted his offer on May 1. This argument will fail because, as noted above, Builder did not make an offer on that date. Thus, there could be no acceptance. Builder‘s better argument is that Owner accepted his May 2 offer by her silence.

Silence ordinarily does not manifest an assent to the terms of the offer. Silence can only indicate acceptance when the circumstances would clearly indicate to the offeror that his offer had been accepted. In this case, Builder will argue that he knew Owner was checking her phone messages daily. Thus, he would understand that Owner would receive his message if not on May 2, then certainly soon thereafter.

However, this argument should also fail because Builder himself requested that Owner —give him a call soon, since redwood was in short supply and he wanted to get to work right away. Twelve days elapsed between May 2 and May 14, when Builder – who still had not heard from Owner – commenced building the fence. Based on their past conversations, Builder was aware that Owner wanted to think about building the fence before coming to a decision. Thus, it was unreasonable for Builder to assume that Owner‘s silence manifested an assent to his offer.

Moreover, Builder may argue that Owner had made time of the essence of the contract, since she stated in their May 1 conversation that she wanted the fence completed by June 1 in any event. Builder was concerned on May 14 that he would not be able to complete the fence by June 1 and therefore he commenced building in order to comply

with this condition set by Owner. This argument would also likely fail, because while a time of the essence clause makes late performance a material breach of contract, no contract had yet been formed between Owner and Builder. Thus, Builder cannot state that Owner‘s silence was acceptance even if time was of the essence.

Consideration

Consideration is the bargained-for exchange between the parties. Consideration is present any time promises or performances are exchanged. Any legal detriment or forbearance, as well as actual benefits and performance, can constitute consideration.

If there was a valid offer and acceptance on May 2, consideration would be present because Owner would have promised to pay $7,000 in exchange for Builder‘s promise to construct the fence. This would be a bargained-for exchange of promises, and thus consideration would be satisfied.

However, as noted above, Owner did not accept Builder‘s offer on May 2 through any action or through silence. Therefore, no valid contract could have been formed on May 2.

Unilateral v. Bilateral

A unilateral contract is one whose acceptance is expressly conditioned on performance. That is to say, the offer can only be accepted by the demanded performance. All other contracts are bilateral. Builder may attempt to argue that, on May 1, Owner made an offer to pay $7,000 if the fence were completed by June 1, and that a unilateral contract was formed by his full performance of building the fence. However, for the same reasons noted above, Owner did not make any offer on that date, and thus a unilateral contract argument will be rejected.

Statute of Frauds

Even assuming a contract was formed between Owner and Builder, Owner may attempt to assert a statute of frauds defense if the contract is governed by the UCC. Under the UCC, contracts for the sale of goods in excess of $500 must be in writing. If the court finds that the UCC governs this contract, it would be in violation of the Statute of Frauds because all communications made between the parties were oral. In order to satisfy the Statute of Frauds, there must be a writing evidencing the contract, signed by the party to be charged (unless the parties are merchants).

Builders may argue that the signed written estimates he sent to Owner should satisfy the statute of frauds. Under the UCC, a Merchant‘s Firm Offer will take a contract out of the statue of frauds, even if the party to be charged does not sign a writing evidencing the contract. The merchant‘s firm offer rule will apply if 1) the sender is a merchant, 2) the recipient has reason to know its contents, and 3) does not respond to the writing. Here, Builder is likely a merchant under the UCC‘s broad definition of a merchant, since he probably frequently deals in construction contracts. Owner received the estimates and knew their contents, since she expressed that she liked the idea of the redwood fence. However, Owner did respond to the estimate, indicating that she wanted time to

think about it. Thus, the merchant's firm offers rule here cannot apply. Any subsequent agreement must still be evidenced by a signed writing, which here is absent under these facts.

It should also be noted that if the contract is governed by the common law, there would be no Statute of Frauds issue because the contract did not fall within the types of contract normally governed by the Statute.

Frustration of Purpose

Additionally, assuming a contract was formed, Owner may attempt to assert a defense based on frustration of purpose since the whole purpose for which she wanted to build the fence – the charity event in her backyard – was cancelled. However, this argument would fail because the purpose of the contract was not to perform a charity event, but rather to build a fence, which was still possible even after the event had been cancelled.

Conclusion

Thus, on May 2, no contract was formed between Owner and Builder. As such, Owner is not in breach of contract for refusing to pay $7,000 and Builder has no contract remedy to recover any part of that money.

2. Formation of Contract on May 25

Builder may alternatively argue that a new contract was formed on May 25, when Owner returned home. Builder will assert that Owner's letter to him was an offer to pay $5,500 in exchange for the fence, which Builder accepted by his phone call on May 26. Again, every contract must contain both offer, acceptance, and consideration. Offer and acceptance are likely satisfied, but Owner will assert that no consideration was present.

Owner will argue that the consideration for her promise to pay $5,500 was Builder's completion of the fence. That would be past consideration, which cannot constitute a bargained-for exchange, since there was no promise to support Builder's performance at the time he rendered it. In other words, Owner will argue that she did not bargain for the fence, and thus there was no return promise or performance in exchange for her offer to pay Builder $5,500. Owner will very likely prevail on this point, and therefore since no consideration was present, a new contract to build the fence could not have been formed on May 25.

Good Faith Settlement of a Dispute

Alternatively, Builder may argue that Owner's promise to pay $5,500 constituted a good faith settlement of a dispute, which Builder then accepted. Here, the exchange was not money for the construction of the fence, but rather money in exchange for Builder's release of any legal claim he might assert against Owner.

In this case, Owner stated that she never agreed to the fence, and that Builder should have waited until she returned – but that to avoid a dispute, she will offer Builder $5,500. Builder stated that he was going to get a lawyer and sue Owner, but agreed to accept the money instead. Thus, there is a good faith dispute between these parties as

to the existence of the debt and as to the amount owed. Owner made an offer via her letter on May 25, and Builder accepted it on May 26. Consideration is present because there was a bargained-for exchange: in this case, Owner promised to pay money in exchange for Builder‘s legal forbearance (doing something he had a right to do, in this case, sue Owner).

Accord and Satisfaction

An accord is an agreement which rests on top of an underlying contract. An accord occurs when one party agrees to accept a different performance in lieu of the performance promised in the underlying agreement. An accord suspends performance of the underlying agreement. Satisfaction is the performance of the accord agreement. When a satisfaction occurs, the accord merges with the underlying agreement, which is extinguished.

Here, Builder will argue that the settlement of their dispute constituted an accord but not a satisfaction. As analyzed above, the good faith dispute contained an offer, acceptance and consideration. Thus, there is an overlying agreement resting on top of an underlying agreement. However, the accord was never performed. Owner did not pay the $5,500 in lieu of her original performance. Thus, Builder could seek damages for breach of the accord agreement – but not damages for breach of the underlying contract since, as noted above, no actual contract was formed to build the fence. Builder‘s damages would be measured by the loss he incurred as a result of the breach of the accord agreement, which here would be $5,500.

Revocation of Offer

Owner will argue that she revoked the offer on May 26 when she told Builder that she had changed her mind. In a bilateral contract, an offer may be revoked at any time before acceptance is made. Once acceptance is given, the contract is formed and an offer cannot be revoked. Here, Owner‘s argument will fail because Builder accepted the offer by calling her immediately. Thus, Owner could not revoke her offer.

Therefore, if Builder proceeds on this theory, he could likely recover the $5,500.

3. Quasi-K Remedies

If Builder decides that he cannot succeed on a contract theory, he may proceed on a quasi-contract theory, which will avoid unjust enrichment on the part of the defendant. In this case, Owner has a new redwood fence in her backyard. Builder will argue that if she were permitted to keep it without paying any sort of damages to Builder, she would be unjustly enriched.

Builder could likely prevail on this argument. Owner would argue that she should not have to pay any amount of damages because she did not actually request that Builder construct the fence. However, Owner heard Builder‘s message on May 2 and decided not to reply, because the event had been cancelled. Owner knew that she would not be returning until May 25, and that she had told Builder she wanted the fence built by June 1. Additionally, Builder had asked her to call him back as soon as possible, because

the redwood was in short supply. Thus, based on Builder‘s message on May 2, Owner should have at least communicated to Builder that she was no longer interested in having the fence constructed.

Fairness would therefore require that Owner make restitution for the benefit conferred upon her by Builder. Builder will be able to recover the fair market value of the work he did in order to build the fence. It should be noted that restitutionary remedies can sometimes even exceed the contract price, if that is the fair market value of services rendered. Thus, Owner can recover all, part, or more of the $7,000 depending on the fair market value of the benefit conferred upon Owner.

THURSDAY MORNING
JULY 31, 2008

California Bar Examination

Answer all three questions. Time allotted: three hours

Your answer should demonstrate your ability to analyze the facts in question, to tell the difference between material and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

Q4 Remedies

Barry is the publisher of *Auto Designer's Digest,* a magazine that appeals to classic car enthusiasts. For years, Barry has been trying to win a first place award in the annual Columbia Concours d'Elegance (–Concours), one of the most prestigious auto shows in the country. He was sure that winning such an award would vastly increase the circulation of his magazine and attract lucrative advertising revenues. This year's Concours was scheduled to begin on June 1, with applications for entry to be submitted by May 1.

Sally owned a 1932 Phaeton, one of only two surviving cars of that make and model. The car was in such pristine condition that it stood a very good chance of winning the first place prize.

On April 1, Barry and Sally entered into a valid written contract by which Barry agreed to buy, and Sally agreed to sell, the Phaeton for $200,000 for delivery on May 25. In anticipation of acquiring the Phaeton, Barry completed the application and paid the nonrefundable $5,000 entry fee for the Concours.

On May 10, Sally told Barry that she had just accepted $300,000 in cash for the Phaeton from a wealthy Italian car collector, stating —That's what it's really worth, and added that she would deliver the car to a shipping company for transport to Italy within a week.

1. Can Barry sue Sally before May 25? Discuss.

2. What provisional remedies might Barry seek to prevent Sally from delivering the Phaeton to the shipping company pending resolution of his dispute with Sally, and would the court be likely to grant them? Discuss.

3. Can Barry obtain the Phaeton by specific performance or replevin? Discuss.

4. If Barry decides instead to seek damages for breach of contract, can he recover damages for: (a) the nondelivery of the Phaeton; (b) the loss of the expected increase in circulation and advertising revenues; and (c) the loss of the $5,000 nonrefundable entry fee? Discuss.

Answer A

1) Can Barry Sue Sally Before May 25?

Contract
A contract is a promise or set of promises, for the breach of which the law provides a remedy. A valid contract requires an offer, acceptance, and consideration. Here, the facts provide that Sally (S) and Barry (B) entered into a valid written contract on April 1. Thus, it is stipulated that there was a valid offer and acceptance. The consideration requirement is also met, because B promised to pay money and S promised to convey the Phaeton to B. However, the fact that B promised only to pay $200,000 when S thinks the car's real value is $300,000 will not invalidate the consideration element; the court will not inquire as to the adequacy of consideration. What has really happened here is that S learned that another buyer was willing to pay more and, as a result, she has willfully breached her contract with B. Finally, the statute of frauds is triggered because the car is a movable good valued at greater than $500. However, it will be satisfied because the contract is in a writing (assuming it is signed by the party to be charged, or Seller).

Thus, a valid contract existed between the parties as of April 1.

Anticipatory Repudiation
An anticipatory repudiation is a definite and certain expression of intent not to perform a contract before the time for performance is due. Under the parties' contract, S was to deliver the car on May 25. However, on May 10, S told B that she had accepted $300,000 cash for the vehicle from an Italian collector. The fact that she sold the car to another party and then told B about it is a definite and certain expression of intent not to perform the contract; she already sold the car to someone else and there are only two 1932 Phaetons that exist.

Wrongful Prevention
A party may also prevent a contract by conduct that wrongfully prevents the occurrence of a condition. A condition is a requirement that must be met or excused before the duty to perform becomes absolute. All contracts contain at least one condition; that is, that the other party will perform. Here, S was obligated to convey the Phaeton (the car) to B as a result of their contract. By selling the car to someone else, S has wrongfully prevented the occurrence of the condition that she actually transfer title of the car to B.

Effect of Anticipatory Repudiation / Wrongful Prevention
When a party anticipatorily repudiates or prevents the occurrence of a condition, the aggrieved party may 1) encourage performance, 2) treat the repudiation as final and sue for breach, or 3) await performance and sue for breach. The repudiating party may also retract her repudiation unless the aggrieved party has indicated that he considers the repudiation final or detrimentally relied thereon.

Here, S has already accepted $300,000 from a wealthy Italian collector for the car that she promised to sell to B. Moreover, she added that she will deliver the car to a shipping company for transport to Italy within a week. B has not communicated intent to treat the repudiation as final. He may, however, do so, and then sue for breach prior to May 25 because S's conduct indicates that she has certainly repudiated the contract.

Conclusion:
B may sue S before May 25 because she has repudiated and/or wrongfully prevented performance of the contract.

2) Provisional Remedies / Likelihood Court Would Grant

Injunction
An injunction is a device that a party may use to stop another party from acting or, in some circumstances, force another party to act in a certain manner. An injunction requires the following elements:

Inadequate Legal Remedy
Because an injunction is an equitable remedy, the court must first determine that the legal remedies available to the plaintiff are inadequate. Here, the parties bargained for the transfer of a rare vehicle that B intended to use to attempt to win a first place award in the Concours. B specifically wanted a rare vehicle such as this because he thought that winning the Concours would help him increase his subscriptions and advertising revenues. It is true that B could procure another rare car that may have a similar chance of winning the car show, however. Nevertheless, B contracted for a rare good and the fact remains that the breaching party will be delivering the car to the shipping company for transport to Italy within a week.

No amount of damages will prevent the car from being shipped to Italy. Thus, the legal remedy is inadequate.

Property Right
Historically, the court would only award injunctions with respect to property rights: namely, real property rights. Modernly, however, the court will award injunctions to enforce personal rights. While a car is personal property, the contract is better viewed as giving B the personal right to purchase the car. Thus, though the contract involves personal rights, the court will still enforce it.

Feasibility of Enforcement
The court must be able to issue an enforceable decree. An injunction is either mandatory, in that it requires a party to act, or prohibitory/negative, in that it prevents a party from doing certain acts. Prohibitory injunctions are easier for the court to enforce since the defendant will be required only to stop acting in a certain manner as opposed to doing something in an affirmative manner. Finally, the court will use its powers of contempt to enforce the injunction (either civil or criminal). Civil contempt coerces a defendant to act while criminal contempt punishes a defendant from failing to act. The

court here could use its powers of civil contempt to coerce S to stop transfer of the vehicle to Italy by issuing a negative decree.

Therefore, the feasibility requirement will be met.

Balancing of the Hardships
The type of balancing that the court will do depends on the type of injunction that [it] will issue.

Temporary Restraining Order
A temporary restraining order (TRO) is a temporary decree issued to preserve the status quo for the period leading up to the Hearing on the preliminary injunction. The court typically will not balance the hardships under a TRO. The plaintiff must be faced with imminent, irreparable harm and the issuance of a TRO must be necessary to preserve the status quo, typically lasting no longer then 10 days. It is obtained by going in Ex Parte and making a showing of proof of the aforementioned requirements. In most jurisdictions, the plaintiff must also post a bond proportionate to the possible amount of damages the defendant could suffer from a wrongful issuance of the TRO.

Here, B would request that the court issue a TRO preventing her from transporting the car to Italy within the week. Once the vehicle is in Italy, the court will no longer have jurisdiction over it. Depending on how long it may take for the court to hold a hearing on his preliminary injunction, the court may issue a TRO to enjoin S from shipping the car.

Preliminary Injunction
A Preliminary Injunction is an injunction that lasts during the pendency of the action, up and until trial on the permanent injunction is complete. In determining whether to issue the injunction the court will factor 1) the likelihood of Plaintiff's success, 2) Balance the Harms – the harm to plaintiff if the injunction is wrongfully denied versus the harm to the defendant if wrongfully granted, 3) The plaintiff must post a bond if he has not done so under a TRO, and 4) issuance is necessary to preserve the status quo.

Likelihood of Success
S has willfully breached the contract, which was stipulated as valid. In the face of such a breach, B enjoys a strong likelihood of success on the merits in a claim for either damages or specific performance since the parties were bargaining for a unique good (there are only two cars in existence). Thus, B has a strong likelihood of success on the merits.

Balancing the Harms
If the injunction is wrongfully denied, B will be deprived of perhaps his only opportunity to own a Phaeton. His motivations for purchasing the car are irrelevant. Most collectors of high end vehicles view the purchases of such as not only a hobby, but also as an investment. Thus, the fact that B wished to use the car to win the Concours, one of the most prestigious auto shows in the country, for profit motives, will not lessen the harm he suffers as a result of the breach. If anything, it means that he will suffer pecuniary

harm, as opposed to mere emotional harm from not purchasing a car he wanted to have, as a result of S's breach.

On the other hand, if the injunction is wrongfully issued, S will likely lose the opportunity to sell the vehicle to an Italian purchaser willing to pay $300,000. However, as S now claims, if the true value is $300,000 and she is selling it to someone for the same amount, she will not be damaged by not being able to sell it to this particular purchaser. Therefore, S's harms are comparatively slight.

Thus, the harms balance in favor of Barry.

Post a Bond
If B has not obtained a TRO and posted a bond, he will be required to do so upon the issuance of a preliminary injunction.

Necessary to Preserve the Status Quo
There are only two cars like this in existence. Keeping the car within the court's jurisdiction is necessary to maintain the status quo because otherwise B may not be able to obtain what he is entitled to under his contractual rights.

Therefore, the court will likely issue a preliminary injunction.

Permanent Injunction
A permanent injunction is not a provisional remedy; it is awarded after a full trial on the merits. The court will not typically balance the hardships unless the injunction pertains to a nuisance. Therefore, B's best recourse prior to trial on the merits is through one of the above-given preliminary methods considering he will likely pursue a claim for specific performance (thus making the issuance of a permanent injunction improper).

Conclusion:
The court may issue a TRO to prevent B's imminent harm if it is not possible to obtain a hearing on the preliminary injunction prior to S's shipment of the car to Italy.

3) Specific Performance/Replevin

Specific Performance
Specific performance is an equitable remedy that the court may utilize to enforce the terms of a valid contract. As discussed above, the contract between B and S is valid notwithstanding the fact that B may have got a —good bargain by contracting for the car for $200,000. To issue a decree of specific performance, the plaintiff must demonstrate.

Inadequate Legal Remedy
The legal remedy is inadequate when the parties are contracting for unique or specially manufactured goods. Here, the car is one of only two in existence. Thus, there is a small possibility that B could purchase another Phaeton. Moreover, B wished to have the car because it appeals to classic car enthusiasts; that is not to say, however, that it

is the only car that would win the award. Nevertheless, S's car was in —pristine condition. The condition, nor location, of the other vehicle is unknown. Thus, the legal remedy of damages will be inadequate if B is unable to recover the replevin, which, discussed below, is a legal remedy. However, even under replevin, if the defendant posts a bond then the legal remedy may be rendered inadequate because the court will not order the sheriff to seize the goods.

Definite and Certain Terms

The terms of the contract must be such that the court knows what type of order to issue. Here, the parties contract in which B agreed to buy and S agreed to sell —the Phaeton for a price of $200,000. The contract identified the subject matter of the contract, the parties, and stated a price and time for performance. The court could simply enforce the contract by requiring S to perform by delivering the car on May 25.

Mutuality

Historically, for a specific performance decree to be issued, the remedy had to be available for both parties. This requirement has since been relaxed under the security of performance test. Thus, as long as the court can secure performance of both parties to its satisfaction, the decree may be issued. Here, the court could force B to pay the contracted for price of $200,000 while forcing S to deliver the car to B.

Feasibility of Enforcement

The court must be able to enforce the specific performance decree; personal service contracts will not be subject to specific performance. The facts do not provide where S or B live, but it is likely that both live in Columbia. Nevertheless, they entered into a contract in Columbia. S sought to place her goods into the Columbia stream of commerce. Therefore, the court very likely has jurisdiction over the parties and may enforce the decree using its powers of contempt, as discussed above.

Conclusion:

The court will issue a decree of specific performance if the legal remedy is inadequate.

Replevin

In the contract sense, replevin is the recovery of contracted-for goods by the plaintiff. Replevin is a legal remedy, in that the sheriff will seize the property; the defendant is not ordered to do anything. To obtain an order of replevin, the plaintiff must show 1) the goods are specifically identified in the contract, and 2) the plaintiff is unable to cover despite reasonable attempts to do so.

Specifically Identified

As discussed, the car was specifically identified in the contract because the contract specified S was to convey —the Phaeton, of which only two exist, to B. Therefore, the goods are specifically identified.

Plaintiff Unable to Cover

The facts do not provide that B has exerted efforts to cover. However, there are only two Phaetons in existence. It is not clear where the other one is located and what

condition it is in. Therefore, assuming B made reasonable efforts to do so, it is not likely he could cover.

Conclusion:
The court will issue an order of replevin as long as the defendant does not post a bond to stop collection of vehicle by the sheriff.

4) Damages for Breach of Contract

All damages must be causal, foreseeable, definite and certain, and unavoidable; that is, the plaintiff has a duty to take reasonable steps to mitigate his losses.

a) Damages for Nondelivery

This contract is for the sale of goods (the car); thus, the UCC applies. When the seller breaches under the UCC, the buyer is entitled to cover or market damages. Here, B would be entitled to damages in the difference between the $200,000 contract price and the price of the other Phaeton in existence, if he was able to actually cover. Alternatively, B may seek damages of $100,000 if the market price of the car is really $300,000 as S has indicated.

b) Loss of increased circulation and advertising revenues

The buyer may also be entitled to consequential damages when their possibility is known at the time of contract or specifically communicated to the defendant. If S knew of the Concours, which she may have since it was one of the most prestigious shows in the country and she owned a vehicle that stood a good chance of winning it, then the fact that B would enter the car in the show is foreseeable. It is not clear that B indicated his intent to enter it in the show, or that C knew that he was motivated to increase circulation and advertising revenues thereby.

However, Barry has been operating Auto Designer‘s Digest for years, trying to win a first place award. Nevertheless, future increases in circulation and ad revenue as a result of winning a car show are speculative, and uncertain. Therefore, B will not obtain damages here.

c) Loss of $5,000 entry fee

In some contexts, the plaintiff may recover reliance damages. Here, B paid the $5,000 entry fee after contracting with S to purchase the car. He had no reason to suspect that S would breach the contract with him. Therefore, his reliance was foreseeable and B would be entitled to $5,000 in reliance damages.

Conclusion:
B has a number of strong claims against S for her willful breach and will likely obtain a preliminary injunction and prevail under a suit for specific performance.

Answer B

Applicable Law

2) This contract involves the sale of goods. As a result, the applicable law will be UCC Article 2. Because the goods being sold are over $500, the UCC Article 2 Statute of Frauds provision requires the contract to be in writing, and contain all material terms and be signed by the party against whom enforcement is sought. The facts state that the requirements have been met.

Anticipatory Repudiation

Generally, a party cannot sue on a contract for breach until the time for performance has come due. Anticipatory repudiation is an exception to that general rule. Anticipatory repudiation applies when one of the parties to a contract makes a statement or an act that unequivocally and clearly shows that party will not perform on the contract. That is the case here. There is a valid contract between Barry (B) and Sally (S) supported by adequate consideration (B‘s promise to pay $200,000 and S‘s promise to deliver the car) which is in writing.

There appears to be no defenses to the formation and enforceability of the contract. S may claim that the contract is unenforceable because the price provision is unconscionable. This would require her to show procedural and substantive unconscionability. There are no facts to support procedural unconscionability and the price (though $100,000 less than what S claims the car to be worth) does not seem substantively unconscionable. The value of rare and antique items is very speculative and S, knowing her car to be rare and valuable, should look into its value before selling. Also, mistake as to the value of an item is generally not a defense to a contract, even if the other party knew or should have known the item was worth more. As a result, the court will likely find the contract enforceable.

S anticipatorily repudiated the contract when she said she had sold the car to an Italian buyer and was not going to sell it to B. Because of this repudiation, B is free to halt or suspend his performance on the contract and immediately sue for breach, assuming he has not yet paid the $200,000 in full to S. If he has, he will have to wait until May 25, to sue. However, the facts do not state that he has fully performed at this point so he will be able to sue as of the date of the repudiation – May 10.

3) By the time B is able to fully have his case heard and decided, S may have already sold the car and he will have suffered substantial losses and will likely be unable to ever find another Phaeton for purchase. Thus, B should seek a Temporary Restraining Order and then a preliminary injunction immediately pending the outcome of his case. These will enjoin S from selling the car pending the outcome of the case, thereby preserving the —status quo.

A TRO can be obtained ex-parte in emergency situations. The TRO, if granted, will last for 10-15 days, depending on the applicable procedural rules. A hearing on a motion for

preliminary injunction, with both parties, must then be held, whereupon the court will determine whether to keep the injunctive relief in place.

To obtain a TRO/preliminary injunction, B must show a threat of immediate and irreparable harm, inadequacy of the remedy at law, a likelihood of success on the merits, and a balance of equities in his favor and a lack of defenses to his claim. Mutuality is not required.

B will argue that he is threatened with immediate and irreparable harm because S intends to ship the vehicle to the other buyer within a week. This harm will be irreparable because the Phaeton is an extremely rare car, he will not be able to find another one and it is unlikely that he will be able to find a comparable car in time for the Concours.

B will also argue that remedies at law – money damages, will be inadequate because the uniqueness of the car and the fact that, once the car is sold, he will not be able to find a comparable car for the Concours and he will have lost his purpose for buying the car. Due to the extreme rarity of the vehicle, the court is likely to find that B‘s remedies at law are inadequate.

Balancing the hardships of an injunction on B and S, a court will likely find that there will be substantially grater hardship to B if the contact is not performed than to S, since S can always sell the car later if she prevails in the case.

B has a likelihood of success on the merits, if he can show he is able to pay the $200,000, perhaps by putting the sum into escrow and because the facts state he has a valid contact in writing.

S‘s defenses – unclear hands, laches, unconsionability, will fail as previously discussed.

C will receive a preliminary injunction and will be required to post bond to cover damages to S if it is found she was wrongfully enjoined.

4) Specific Performance
Specific performance is a remedy by which courts force parties to a contract to perform as promised in the contract. It is an equitable remedy, and all equitable defenses are available. In contacts for the sale of goods, Specific Performance is generally only granted in cases where the subject goods are extremely unique, custom, or rare. In this case, the car, being extremely old and rare and in apparently good enough condition to compete in a prestigious show will likely satisfy the requirement for uniqueness.

<u>Valid Contract</u>
B must show that he has a valid contract in order to get Specific Performance. Here, the facts state the written agreement is valid.

Feasibility
B must show that the contract terms are definite enough so that the court can feasibly enforce them. Here, the price, subject matter and the delivery date are definite, and the contract is fairly simple so a court will feasibly be enabled to order Specific Performance.

Mutuality
Mutuality of remedies is no longer required for Specific Performance.

Full Performance

B must show that he has fully performed on the contract or will definitely fully perform. Though he has not yet paid, he can put the $200,000 in escrow to show this.

Damages Inadequate
B will have to show that damages - his at-law remedy will be inadequate. As previously discussed, he will be able to show this.

Defenses
S‘s defenses of unconsionability/unilateral mistake will fail as previously discussed. The facts do not support the defenses of unclean hands or laches being available to her. Specific Performance will be granted.

Replevin
Replevin is a remedy by which a rightful owner of personal property seeks to have that property returned to him by order of the court.

If the car is sold to the Italian buyer, B will have to seek its return by replevin. The facts do not indicate whether the Italian buyer knew of the existing obligation for S to sell the car to B. If he did, he would not be able to claim that [he] is a bona fide purchaser, who purchased in good faith and for value. If the Italian is not a bona fide purchaser B will be able to seek replevin. If the Italian had no knowledge of B‘s contract with S, he would be a bona fide purchaser for value and B would not be able to seek replevin of the car from him.

5) Non-delivery of the Phaeton
Generally, damages are designed to protect the parties‘ expectations – to put them in as good of a position as they would have been had the contract been fully performed. Damages must not be too speculative. Here, B expected to own a Phaeton for $200,000 and S expected to receive that amount.

In a contract for the sale of goods where the seller breaches and keeps the goods, the buyer can recover the difference between the contract price and the market value of the goods at the time of breach, or the buyer can cover, by buying the same goods and receive the difference between the cost of cover and the contract price.

Here, the apparent market value of the Phaeton is $300,000 at the time of breach. The K price was $200,000. B can recover, as his expectation damages [are] $100,000 or if he is able to buy another '32 Phaeton (unlikely) he could seek the differences between what he pays for the other Phaeton and the K price.

B can also recover all incidental damages incurred in dealing with S's breach.

Loss of Circulation /Revenues

Consequential damages are only recoverable to the extent they are reasonably foreseeable by the breaching party and not so speculative.

The facts do not indicate that S knew of B's purpose for purchasing the car or that he owned a car enthusiast magazine. Thus, the loss of circulation and revenue to B is likely not foreseeable to a reasonable person in S's position.

Even if S was aware of B's purpose, these damages are probably too speculative. First B would have to prove he would have won and that winning would have increased his circulation and revenue in some definite amount. This is likely not possible.

$5,000 Entry Fee

B can recover the $5,000 entry fee as reliance damages – money he spent on reliance on the K if this reliance was foreseeable to S.

If he told S he was going to enter it in the Concours or S should have known he was buying it to show, he will recover.

Q5 Real Property

Ann, Betty, and Celia purchased a 3-bedroom condominium unit in which they resided. Each paid one-third of the purchase price. They took title as –joint tenants, with right of survivorship.

After a dispute, Betty moved out. Ann and Celia then each executed a separate deed by which each conveyed her respective interest in the condominium unit to Ed. Each deed recited that the conveyance was –in fee, reserving a life estate to the grantor. Ann recorded her deed and delivered the original deed to Ed. Celia also recorded her deed and left the original deed with Ann in a sealed envelope with written instructions: —This envelope contains papers that are to be delivered to me on demand or in the event of my death then to be delivered to Ed. Celia recorded the deed solely to protect her life estate interest. Ann, without Celia‘s knowledge or authorization, mailed a copy of Celia‘s deed to Ed.

Subsequently, Ann and Celia were killed in a car accident. Betty then moved back into the condominium unit. She rented out one bedroom to a tenant and used the other bedroom to run a computer business. Betty paid all costs of necessary repairs to maintain the unit.

Ed commenced an action against Betty, demanding a share of the rent she has collected. He also demanded that she pay rent for her use of the premises.

Betty cross-complained against Ed, demanding that he contribute for his share of the costs of necessary repairs to maintain the unit.

1. What are the property interests of Betty and Ed, if any, in the condominium unit? Discuss.

2. What relief, if any, may Ed obtain on his claims against Betty for past due rent for her use of the condominium unit and for a share of the rent paid by the tenant? Discuss.

3. What relief, if any, may Betty obtain on her claim against Ed for contribution for the costs of maintaining the condominium unit? Discuss.

Answer A

Betty and Ed's Interests

Ann, Betty, and Celia originally took title to the condo as joint tenants with right of survivorship. A joint tenancy is characterized by the four unities of time, title, possession, and interest, and expressly stating the right of survivorship. The title that they all took when purchasing the unit together satisfies the four unities (they all took by the same instrument, as joint tenants, paid 1/3 of the purchase price, and have the right to possess) and expressly states that a joint tenancy with a right to survivorship is created. Hence, A, B, and C all owned an undivided interest in the property, were entitled to possess it, and if any of them died, the survivors were entitled to succeed to the decedent's interest, unless they severed the joint tenancy.

B's Interest

Joint tenants all have an equal right to possess the whole property, but they may choose not to exercise that right. B moved out after a dispute. Hence, although B is out of possession, that does not alter her interest or sever the joint tenancy as to her.

E's Interest Taken from A

A conveyed her interest to E by a deed that conveyed to A a life estate followed by a remainder to E in fee simple. A recorded this deed and delivered to E. An inter vivos conveyance will sever a joint tenancy because it destroys the unities of time and title, resulting in the grantee holding as a tenant in common with the others. Hence, if A's conveyance was valid, A severed her 1/3 interest and gave it to E as a tenant in common. A deed is valid if it describes the interest conveyed and is validly delivered and accepted. Delivery is a matter of the grantor's intent. Recordation gives rise to presumption of intent to presently transfer an interest, and acceptance is generally presumed absent some action by the grantee to reject delivery. Here, by conveying her interest in the condominium unit to E in a deed that she recorded, A had the intent to transfer, and E received the deed and did not reject it. Hence, there was a valid delivery and acceptance and A's transfer of the remainder after her life estate to E was valid. When A died, Ed's remainder vested and he now has possession of his 1/3 interest as a tenant in common.

E's or B's Interest Taken from C

C executed a deed like A did to give herself a life estate and the remainder to E. If this effectuated a valid inter vivos conveyance, then C's interest is also severed from the joint tenancy and C's 1/3 is held by C for life, remainder to E as a tenant in common with A's life estate, remainder to E, and B. If the inter vivos conveyance was invalid, however, then C's interest was not severed and C remained holding in joint tenancy with B up until C's death. In that case, B takes the entire 2/3 held by B and C in joint tenancy. The issue, then, is whether there was an inter vivos conveyance by C. If there was no effective conveyance, B takes as the survivorship of B and C, but if there was an effective inter vivos conveyance that severed the joint tenancy, E takes C's 1/3 upon C's death because C's death extinguishes C's life estate and the remainder vests.

A conveyance is valid if the deed accurately describes the property, is delivered and accepted.
The deed describes that E is to take the remainder in the condo (the condo is known and provides a good lead), presumably, so the deed itself describes enough to be effective if validly delivered. Delivery is a matter of grantor‘s intent. Here, it is unclear what C intended. When a party records a deed, intent to deliver is presumed, but here, C recorded solely to protect her life estate interest rather than to convey. However, C would have no need to protect her life estate interest if she did not intend to transfer the remainder to E, so a court might well infer that she intended the delivery to be immediately effective without conditions. Acceptance is presumed absent some action indicating rejection. When C received the deed from A, he did not reject it, so C would be deemed to have accepted, making the conveyance effective and severing the joint tenancy as between C and B. Hence, C will argue there was intent to deliver and so delivery and acceptance, making the inter vivos conveyance good. On the other hand, B will argue there was no intent because C merely recorded to keep her life estate and that A‘s act of sending the papers without C‘s consent could not create present intent to transfer, making the conveyance only meant to be a testamentary transfer which would fail because C has no interest to pass by will (joint tenancy interests are not devisable or descendible).

Further, C gave the deed to Ann with instructions that the papers were to be delivered to Ed on the event of her death, or returned to her on demand. This action evidences a different intent than a present transfer. A transfer of a deed to a third party for a donative transfer without instruction is generally deemed to be an effective delivery and present intent to transfer. But when the grantor gives to a third party rather than the grantee, written instructions not on the face of the deed itself are valid to create a conditional delivery. Further, if the grantor expressly reserves for herself the right to revoke, such a reservation of interest indicates lack of intent to presently transfer. Additionally, if there are instructions only to deliver upon death, that does not evidence present intent to transfer and instead evidences a will substitute. Here, C reserved a right to revoke. B will argue this evidences a lack of present intent to deliver. Further, C gave the deed to a third party (A) with instructions not to deliver until C‘s death. On these facts, B will argue that there was no present intent to deliver and only an intent to make a testamentary transfer because of the condition of delivery upon death (which is valid because, although not in the face of the deed, it was contained in instructions to a third party who was to deliver the deed upon happening of the condition). On the other hand, C will argue that once a donative transfer is made and delivered to a third party to deliver upon death, many jurisdictions consider this irrevocable (even if grantor tries to revoke) and therefore, effectuates a present transfer.

Ultimately, several actions indicate C‘s lack of intent to presently transfer an interest, such as her instructing A not to give the deed to E until her death. However, C did record the deed to preserve her life estate, indicating a present intent to at least have the remainder transferred to E, and E did receive the deed and accept it without instructions or conditions. Although it is close, a court will probably find that C intended

to make a present, inter vivos transfer; the recordation of the deed was sufficient evidence of intent, and that therefore E succeeds to C‘s 1/3 as the remainderman.

Hence, E owns A and C‘s 1/3, giving his 2/3 held as a tenant in common with B (if the court doesn‘t find intent to make an inter vivos transfer, however, then B will take as the survivor and will have 2/3 with C‘s 1/3 as tenants in common).

Ed‘s relief against Betty
Cotenants have a right to possession of the premises, and are not responsible to each other for rent. However, when a cotenant rents out the property to a third person, she must account for the rents to the other cotenants. Additionally, when a cotenant allows the property to earn profits from a third person, the cotenant must account.

Here, B was using one room for her own computer business, and rented out the other room to a tenant. B, as a 1/3 (or 2/3) owner of the condo as a tenant in common with E is entitled to use the property to run her own business, and is not responsible to E for rents. E might argue that use of the business creates profits, and a tenant is responsible to her cotenants for accounting for profits earned from third parties, but here, because any profits come to B as a result of her running her own business rather than allowing another third party to run a business out of the unit, she is not responsible to E for rents or profits for use of the room as an office.

On the other hand, B rented out one room to a tenant. Because that constitutes renting to a third party, B is liable to E to account for his share of the rents paid (either 1/3 or 2/3, depending on whether C‘s deed was delivered).

Betty‘s relief against Ed
An in possession cotenant has an obligation to keep the premises in good repair. The cotenant may not commit voluntary, permissive, or ameliorative waste. The cotenant is only entitled to contribution for repairs that are necessary if she notifies the other cotenants of the need for the repairs, and she is entitled to contribution for improvements only upon sale (and if the improvements decreased rather than increased the value of the property, she bears 100% of the loss).

Here, Betty is responsible for ensuring that necessary repairs were made so she was not liable for permissive waste, and she is entitled to contribution from E if the repairs were necessary and she notified him of the need for repairs in advance. Here, the repairs Betty made apparently were necessary, but it is unclear whether she notified E of the need to make them in advance. If she did, then E must contribute his share (either 1/3, or 2/3, as described above).

Answer B

1. Property Interests of Betty and Ed

Betty has 2/3 interest in the condominium as a tenant in common, and Ed has a 1/3 interest.

Joint Tenancy

Ann (–A), Betty (–B), and Celia (–C) originally purchased the condominium as –joint tenants because they took title at the same time and by the same instrument as –joint tenants with rights of survivorship. The -four unities appear to be present. A joint tenancy gives each tenant an undivided interest in the property with a right of survivorship, which means that if one of the other joint tenants dies, that tenant's interest automatically becomes part of the surviving tenants' interests.

The joint tenancy, however, may be severed when one of the tenants conveys her interest to another party. That other party then takes an interest in the property as a tenant in common.

Tenants in Common

While A and C were originally joint tenants, A and C severed the joint tenancy by conveying their interests in the condominium to Ed (–E). Generally, when a joint tenant conveys her interest in a joint tenancy to another party, that other party takes the property as a tenant in common. In this case, however, E took the property as a remainderman.

Life Estates and Remainders

Both A and C reserved for themselves life estates in the condominium. They did this by deeding the property interest to E –in fee, reserving a life estate for the grantor. E now has a vested remainder in fee simple, and A and C have life estates. Therefore, while E has a property interest in the condominium, his interest does not become possessory until the death of A or C -- i.e., at the termination of their life estates.

Effect of Deaths of A and C

As noted above, when a joint tenant dies, the surviving joint tenants automatically take her interest. A joint tenancy interest may not be devised by will. E will argue that when A and C died, their life estates were terminated, and that E as the remainderman now has an undivided 2/3 interest in the condominium, while B has the other 1/3 interest.

However, because the attempted [conveyance] from C to E was ineffective (as discussed below), C did not sever the joint tenancy vis-à-vis B. As a result, when C died, her 1/3 interest automatically passed to B, the surviving joint. Thus, B has a 2/3 interest, and E only has a 1/3 interest.

Deed Formalities and Delivery

To be valid, a deed must be both (1) executed, and (2) delivered. If either requirement is not met, the property interest is not conveyed from the grantor to the grantee.

Delivery is generally regarded as solely a question of the grantor‘s intent. Courts have held that the delivery of a deed in which the grantor reserves a life estate is effective, even though the grantee‘s interest does not immediately become possessory.

In this case, A executed the deed, and both recorded and delivered the deed to E. Thus, the deed and conveyance from A to E is valid. C executed and recorded the deed. However, C did not physically deliver the deed to E. Instead, she left the original deed in an envelope with A.

Recording a deed creates a presumption of delivery. Thus, E may argue that by recording the deed, the delivery requirement is met. However, B will argue that the presumption in this case may be rebutted. While it is true C recorded the deed, she did this to protect her life estate interest, not to satisfy the delivery requirement. Furthermore, the deed was in a sealed envelope with written instructions, providing that the papers in the envelope be delivered to A on her request. These instructions suggest that C did not intend to deliver the deed to E. Instead, she wanted to have the power to take the deed back at any point during her life.

E will argue that the instructions also provided that in the event of C‘s death, the deed was to be delivered to E. The problem with this argument is that delivery is only effective if there is a present intent to deliver. An intent to deliver a deed in the future is not effective. Alternatively, E may argue that the written instructions are a last will and testament, devising C‘s property interest to E. However, there is no indication that the Statute of Wills has been complied with. Therefore, there was no delivery to E, and C retained her interest in the condominium at her death.

2. <u>Relief Ed May Obtain for Past Rent Due and Rent by Tenant</u>

As a general rule, one cotenant does not have to share profits earned from the property with other cotenants, unless there is an agreement to the contrary. However, cotenants are obligated to share profits that they receive by renting the property to third parties.

In this case, B rented one bedroom to a third party, and used another bedroom to run a computer business. Because B rented the bedroom to a third party, E has a right to demand an accounting for his share of the profits earned from the third-party rent.

On the other hand, while B is using one of the bedrooms to run a computer business. E has no right to demand a share of the rent for the use of the bedroom as a business office. This is true even though B is clearly saving money by not having to lease commercial space from someone else. B is also not obligated to pay rent to E for her personal use of the condominium.

3. <u>Relief Betty May Obtain for Contribution of Maintenance Costs</u>

Cotenants are required to make contributions for necessary repairs, taxes, and mortgage payments (if the cotenant signed the note). Cotenants are not required to make contributions for non-necessary repair or improvements, although there may be a right of reimbursement upon partition. In this case, B made necessary repairs to

maintain the unit. As a result, B is entitled to contribution from E for his share of the cost of repair.

Q6 Community Property / Wills

In 2000, Hal and Wilma, husband and wife, lived in New York, a non-community property state. While living there, Wilma inherited a condominium in New York City and also invested part of her wages in XYZ stock. Wilma held the condominium and the stock in her name alone.

In 2001, Hal and Wilma retired and moved to California.

In 2002, Wilma executed a valid will leaving the XYZ stock to her cousin, Carl, the condominium to her sister, Sis, and the residue of her estate to Museum.

In 2003, Wilma transferred the XYZ stock as a valid gift to herself and to her cousin, Carl, as joint tenants with the right of survivorship. Wilma sold the condominium and placed the proceeds in a bank account in her name alone.

In 2004, Wilma, entirely in her own handwriting, wrote, dated, and signed a document entitled, —Change to My will, which stated, —I give my XYZ stock to Museum. The document was not signed by any witness.

In 2007, Wilma died, survived by Hal, Carl, and Sis.

What rights, if any, do Hal, Carl, Sis, and Museum have to the XYZ stock and proceeds from the sale of the condominium? Discuss.

Answer according to California law.

Answer A

This question concerns the rights of Wilma‘s survivors in the stock and proceeds from the sale of her condominium. Two areas of law will have effect on the ultimate deposition of the property, CA community property law and CA law governing will and de[s]cent. First, it is noted that Wilma may only devise her separate property and/or her share of the community estate. Therefore, it is necessary to look at the effect of community property laws to determine the ownership interest, if any, of Hal in the property which Wilma sought to devise, and then look at the impact of her testamentary actions to determine the ultimate ownership of the property.

The Basic Community Property Presumption

To begin, all property acquired during marriage while domiciled in CA is presumed to be community property (CP). Excluded from this presumption is all property acquired by gift, devise or descent. Finally, actions of the married couple may alter the character of the property during marriage and certain statutory presumptions may arise affecting the character. Finally, both husband and wife since 1975 are granted equal management and control over all community property, subject to certain limitations.

Quasi-Community Property

Quasi-community property (QCP) is all property acquired during marriage while domiciled outside of CA that would have been CP if acquired while domiciled in CA. In this case, because the couple lived in New York, a non-CP state, and the stock and condo were both acquired while there, they are QCP. QCP is treated as CP at death except that a decedent is not entitled to devise his QCP share of the surviving spouse‘s property. Because all the QCP devised here is the decedent Wilma‘s property, this does not apply and the QCP will be treated as CP.

The Condominium / Proceeds

Community Property Analysis

The condominium was acquired during marriage and would have been CP if acquired while domiciled in CA so it would be presumed QCP; however, the facts state that it was acquired by devise and is thus Wilma‘s SP. Therefore, the fact that it is titled in her name has no effect, and any proceeds, absent other facts, of the sale will also [be] her SP.

Therefore, as her SP she was free to devise it in its entirety, and Hal has no ownership interest in the condo or the proceeds therefrom.

Effect of the Devise

Valid Will

The question that next arises then is the validity of the gift to Sis. First, it is noted that the facts state that the 2002 will in which the gift was contained was valid. Therefore,

the initial gift of the condo to Sis is valid and she would take the condo. However, the facts also state that the condo was sold in 2003 and thus not a part of Wilma‘s estate when she died.

Ademption by Extinction
Therefore, the museum, as the residuary beneficiary, would want to argue that by selling the condo the gift to Sis was terminated, or adeemed. A gift is considered to be adeemed by extinction when the testator makes a specific devise of property, and then that property is either destroyed or sold prior to the testator‘s death. First, the museum will argue that the gift was specific, as it was for the Condo itself, and contained no language indicating that Sis be given a general —cash gift out of the estate. Thus, because Wilma sold the condo, this specific gift was extinguished by sale, and the museum should therefore take the proceeds as the residuary beneficiary.

However, in CA, a gift will only adeem by extinction if it is shown that is what the testator so intended. In this case, the museum will point to the sale itself, the codicil naming the museum as the beneficiary of the stock as a demonstration of intent that the museum take all the property. Sis will argue that there is nothing to specifically indicate that Wilma intended to extinguish the gift. Further, because Wilma published her codicil in 2004, she could have also made a gift of the funds to the museum at that point but did not. Thus, this shows an intent to keep the gift to Sis in effect.

Without more information as to her intent, Sis will take the funds in the account.

The XYZ Stock

Effect of CP Rules

Source
Here, the XYZ stock was acquired with Wilma‘s earnings during marriage. Earnings during marriage, like property acquired during marriage, are CP. Even though these funds were acquired in New York, they would have been CP if acquired while domiciled in CA, and are therefore QCP, treated as CP upon death. Thus, because the stock was acquired with QCP, it will also be presumed to be QCP. Because it is presumed QCP, it is presumed Hal has ½ community interest in the stocks.

Effect of Title
In this case the facts state that Wilma held the stock in her name alone; thus the museum and Carl will want to argue that by placing the stock in her name alone, the community made a gift to her SP. However, since 1985 a transmutation of CP into SP requires a writing. In this case, there is no evidence that the community intended to make a gift to Wife of the funds to purchase the stock. Further, there is no writing that would support a transmutation of the funds into SP. Therefore, absent other evidence, the stocks remain CP, and as such, Hal owns a ½ community interest in the stock.

Gift of Community Property

Further, because spouses maintain equal control and management of community property, one spouse may not make a gift of community assets to another without the other spouse‘s consent. Here, Wilma has gifted the stock to herself and her cousin Carl in 2003. There is no evidence to indicate that this gift was approved of by Hal. When one spouse gifts community property to another without consent that spouse may void the gift during the donor‘s lifetime, or after the death of the donor void ½ of the gift. It is noted that the facts state the gift was -valid. It is not clear if this means valid under CP law, or a validly executed gift. Thus, if valid means that Hal consented to the gift, his ½ interest would be extinguished.

Therefore, because the stock was acquired with CP, Hal has a presumed ½ interest in it. Further, assuming valid does not mean he consented to the gift, because neither keeping title in her name alone nor giving the stock to herself and Carl is effective to eliminate this interest, Hal maintains a ½ interest in the stock.

The Devise of the Stock

Ignoring for now Hal‘s community interest, as stated above, Wilma validly gifted the stock [to] Carl in her 2003 will. The facts then state that the stock was gifted to both herself and Carl —as joint tenants with rights of survivorship. Therefore, prior to her death, the stocks were in joint tenancy with her, and Carl. The language used explicitly created the right to survivorship, and Carl, upon Wilma‘s death would automatically take all the stock.

The 2004 Codicil

The issue then arises as to the effect of the codicil made by Wilma in 2004. In CA a holographic codicil is valid as long as all material terms are in the handwriting of the testator, and the writing is signed by the testator. The other formalities of attested wills are not required. Therefore, as the document was entirely in her handwriting and was signed, it acts as a valid codicil to her 2002 will. Thus, the museum will argue that it takes the stock. However, because the stock was held as joint tenants with Carl, all of Wilma‘s interest in the stock will pass immediately to Carl. Furthermore, the attempted conveyance in the will is not effective to sever the joint tenancy, as it is not a present conveyance of her interest in the stock. Therefore, when she executed the codicil, she had no testamentary power over any interest she had in the stock. As such, the codicil would be ineffective to convey any interest in the stock upon her death to the museum.

Therefore, Carl retains his interest in the stock, and Museum will not take the stock under the codicil. Further, Carl‘s interest in the stock, because he received it by a gift of community property without Hal‘s consent, will be subject to Hal‘s ½ CP interest in the stock.

Therefore, Sis will likely take the funds in the account from the condo sale, Carl will take his interest as a joint tenant to the stock subject to Hal‘s ½ community interest, and the museum will take whatever is left over as the residuary beneficiary under the 2002 will.

Answer B

The Rights of Hal, Carl, Sis, and Museum

The contribution of the assets and who is allowed to take is determined both by community property law and the law of wills. Because the important assets of the estate were acquired during marriage and Wilma died domiciled in California, all property that was acquired during marriage is presumptively community property, and if that property was acquired while married but outside of California then at the time of death it is treated as quasi-community property for purposes of distribution by the acquiring spouse, and is treated just like community property (i.e., the non-acquiring surviving spouse is entitled to a ½ interest in property). Furthermore, under California law, even when property is acquired during marriage, if it is acquired by gift, devise, or inheritance, it is treated as the spouse's separate property.

In order to determine the character of the item (as either CP, QCP, or SP), it is important to focus on the source of the funds, any actions taken by the parties to change the character of the property, and any presumptions that effect the property.

The Proceeds from the Condominium

The Character of the Proceeds

Wilma inherited the condominium in NYC while living in NYC. The condominium therefore is considered Wilma's SP even though it was acquired by Wilma during marriage. The proceeds from the condominium sale were then placed into a bank account in her name alone, and as such were not mingled with community property and completely retained their separate property character. Therefore, the proceeds, in the bank account in Wilma's name alone, are her SP and Hal has no ½ QCP interest in the property.

Furthermore, Hal cannot claim a pretermitted spouse status and then claim his intestate share of the SP because Hal and Wilma were married before all of Wilma's testamentary documents were executed.

Who Takes the Proceeds

Under the will executed in 2002, Wilma's sister, Sis, was specifically granted the condominium. However, because the condominium was sold the condominium is no longer in Wilma's estate and therefore there is the possibility of ademption by extinction.

Ademption by Extinction

Museum will argue that the gift to Sis was a specific gift and that because the gift was in fact sold that the gift is no longer in the estate that it has adeemed. Under the common law, the courts used an identity theory for redemption by extinction where, if a gift was a specific gift that could not be located in the estate of the decedent at the time of death, then the gift had adeemed and the specific devisee took nothing. If this were the case then the proceeds would pass to the residue of Wilma's will and therefore go [to]

museum. However, under California law, the court looks to the intent of the testator instead of using the identity theory both to determine if the gift was a specific [one] so as to determine if ademption by extinction even applies and then uses it to also determine if there was an intent to actually have the gift adeem.

Here, Sis may first argue that the gift was not specific but was instead general. While the actual phrasing of the will is not provided, the will likely used the words —my condominium or —my NYC condominium or something to that effect, which indicates a specific gift. Further, a gift of real property such as a condominium is virtually always a specific gift and therefore the court will reject her argument that the gift is general.

Second, Sis will argue that there was no intent to adeem. Under California law, besides generally looking at the intent of the testator, there is an automatic allowance to the specific devisee of anything [or] part of the property that remains and proceeds not yet paid for a condemnation sale, insurance proceeds, or installment contract, or where the gift is sold by a conservator (the specific devisee gets the FMV of the gift). However, it does not appear that any of these apply. On the other hand, Sis can argue that because the proceeds from the sale were placed into a separate account in Wilma‘s name alone and therefore the proceeds from the sale of the gift are easily traceable to one place and had not been used or commingled, that Wilma did not intend for the gift to adeem (essentially arguing tracing of the sale of the gift to the account), and therefore she should be entitled to the money from the sale of the condominium. It will be difficult for the court to accept this argument, but because it is a subjective determination, and Sis is Wilma‘s sister, the court may accept the argument and allow tracing. No other defense to ademption, such as change in form not substance, will work in this case.

Therefore, if the court accepts Sis‘s argument against ademption then she will be entitled to the proceeds of the condominium sale. However, if the court rejects the argument then she is not entitled to anything and as the residuary taker the museum takes the entire proceeds.

The XYZ Stock

Character of the Stocks

Wilma purchased the stocks by investing part of her wages into the XYZ stock. Presuming these wages were earned while married to Hal, the wages, and subsequently the stock purchased with them, would be considered community property had it been purchased while domiciled in California, and therefore it will be considered quasi-cp at the time of the acquiring spouse‘s death. However, Wilma took several actions that may have changed the character of the property.

First, Wilma placed the stock in her name alone. However, where the acquiring spouse uses community funds for the purchase of property and places the title in their name alone, the asset is presumptively untitled in that unless Wilma can prove that Hal intended a gift of his share of the property that the asset is actually community property

and each holds a ½ interest in the property (at least at Wilma's death). Because there are not facts indicating that Hal had intended to make a gift of his interest in the stock, he stocks, at this point, will still be considered QCP at death and treated like CP for distribution purposes.

Second, Wilma transferred by valid gift (presumably through a straw to create the four unities) to herself and to Carl the XYZ stock as joint tenants with the right of survivorship. If this transfer had been valid, this would have destroyed the QCP aspect of the property. However, this was not a valid gift of Hal's interest in the property. Under California Law, a surviving spouse may set aside to the extent of one half any transfer or gift of quasi-community property at death when the decedent spouse died domiciled in California, that the decedent spouse did not receive substantial consideration for the gift, and the decedent spouse had retained an ownership or use interest in the property. Here, Wilma may have made the transfer, and at her death the joint tenancy may have passed her interest automatically over to Carl, but Hal will be able to set aside to the extent of ½ of the interest because it was a gift and she had retained an ownership interest in the property at the time of her death.

<u>The Effect of the Will</u>
Under the original will, Carl was able to be the taker of the XYZ stock. However, in 2004, Wilma executed a holographic codicil to the will that stated that Museum was not to take the XYZ stock instead. However, Museum will not take any interest in the XYZ stock.

First, Carl may argue that the codicil was invalid because it was not formally attested. However, under California law, so long as the material provisions of the will are in the testator's handwriting and the testator signs the will, this will be an effective holographic will, or in this case, a holographic codicil. Here, Wilma signed, dated, and in her own handwriting wrote that it was a change to the prior will and that Museum was not to take the XYZ stock. Therefore, the material provisions (who takes and what they take) are in Wilma's handwriting and she signed the codicil, which is al that is required under California law. As such, this was a valid codicil and did change her 2002 executed will (which was presumably attested).

Second, Carl will argue that the will was ineffective to evoke the joint tenancy and therefore he was entitled to the full XYZ stock (minus Hal's forced interest). The Museum will argue that the codicil did effectively sever the joint tenancy because it was drafted after the joint tenancy was entered and conveyed away Wilma's interest. However, in all likelihood, the court will reject this argument because while a will is interpreted (or a codicil for that matter) at the time of its execution, it is not actually given effect until when the will is probated (i.e., after the testator's death). Therefore, the actual gift, and therefore, the severance by conveyance, would not have occurred until after the death of Wilma. Unfortunately for Museum, there was nothing to convey at this point because the entire interest in the property had passed, as a matter of law, to Carl as having right to survivorship rights. Therefore, while Hal can set aside ½ of the

transfer for his forced share, Museum has no similar rights and will not take the stock because there was nothing left of it to devise.

Conclusion:

In the end, the court will likely grant the entire condominium proceeds to Sis, and then Hal will be allowed to force a ½ share in the XYZ stock under the California Probate Code, Carl will get the entire XYZ stock (subject to the forced share by Hal) by operation of law, and the Museum will take neither of the assets.

Feb 2008

California
Bar
Examination

Essay Questions
and
Selected Answers

February 2008

ESSAY QUESTIONS AND SELECTED ANSWERS
FEBRUARY 2008
CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2008 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

TUESDAY MORNING

California Bar Examination

Answer all three questions. Time allotted: three hours

Your answer should demonstrate your ability to analyze the facts in question, to tell the difference between material and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other. Your answer should evidence your ability to apply law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them. If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly. Your answer should be complete, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem. Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

Q1 Torts

Peter, a twelve-year old, was playing with his pet pigeon in a field near his home, which is adjacent to a high voltage electricity power substation. The substation is surrounded by a six-foot tall chain link fence topped with barbed wire. Attached to the fence are twelve 10 inch by 14 inch warning signs, which read “Danger High Voltage.”

Peter’s pigeon flew into the substation and landed on a piece of equipment. In an attempt to retrieve his pet, Peter climbed the surrounding fence, then scaled a steel support to a height of approximately ten feet from where the bird was stranded. When Peter grasped the bird, it fluttered from his hand, struck Peter in the face, causing Peter to come into contact with a high voltage wire, which caused him severe burns.

Peter’s father is contemplating filing a lawsuit on Peter’s behalf against the owner and operator of the substation, Power and Light Company (PLC), to recover damages arising from the accident.

What causes of action might Peter’s father reasonably assert against PLC, what defenses can PLC reasonably raise, and what is the likely outcome on each? Discuss.

Answer A

The following courses of action might reasonably be asserted against PLC by Peter's father on behalf of his son:

I. Strict Liability for Ultrahazardous Activity

A defendant (D) can be held strictly liable for damages caused to a plaintiff (T) where the D is engaged in an ultrahazardous activity. An ultrahazardous activity is one that is 1) inherently dangerous, 2) uncommon to the geographic area, 3) cannot be made safe and 4) whose risk outweighs its social utility.

A. Inherently dangerous. Electricity is inherently dangerous. In this case, the substation was a high voltage station. This element is met.

B. Uncommon to the geographic area. Substations are often located in neighborhoods or near them. In this case, the station was located in a field near T's house, not close where it might be uncommon, for example, next to his house. Arguably, a substation in a field near a residential community is not uncommon. This element weighs against finding an ultrahazardous activity. This element [sic.]

C. Cannot be made safe. Arguably, high voltage electricity cannot be made safe.

D. Social utility vs. risk. The social utility of providing electricity to homes is clear. People need electricity for everyday purposes. Moreover while the activity cannot be made safe, the related risks can be lessened. In this case, fences, razor wire and signs were posted and used to prevent people from coming into contact. Therefore the social utility outweighs the risks.

On whole, the factors weigh against finding an ultrahazardous activity and holding D strictly liable.

II. Negligence

In order to find D liable for negligence, T must prove duty, breach, causation, and damages.

A. Duty

1. Foreseeable T? Here, a child from the houses near the station is certainly within the zone of danger presented by a high voltage station.

2. Standard of Care. Absent a special relationship, the ☐ must use reasonable care. Here, there may be a special relationship with the T.

    a) Anticipated Trespasser. Where a landowner foresees trespassers, the landowner has a duty to warn of known artificial conditions that present serious risks of bodily harm. In this case, the high voltage electricity is an artificial condition that presents a risk of serious harm. Therefore, ☐ had the duty to warn. ☐ met this duty by posting 12 signs to the fence warning of danger.

    b) Attractive Nuisance. Where a landowner has an attractive nuisance on his land, the landowner may have the duty to make the artificial condition safe or have a greater duty than to just warn the trespasser.

        1. Foreseeable to have children trespassers. Since the station is near his home it is foreseeable that children might trespass.

        2. Unlikely to appreciate the danger. It is arguable that a 12 year-old boy is unlikely to appreciate the danger that high voltage electricity presents; however, younger children might not.

        3. The cost to make safe outweighs the risk of harm. The risk of harm in this case is death from electrocution. However, given the social utility of the activity and the steps taken by ☐ (fence, warnings, razor wire) one could argue that the appropriate actions were taken to satisfy the landowner's duty.

            Taller Fence? T might argue that a taller fence was not that costly in

comparison to the risk. Here the fence was only 6 ft. Arguably a taller fence may have prevented T from entering the station.

Assuming the special duties of a landowner were satisfied, □ only owed a duty of reasonable care to T.

B. Breach of Duty of Reasonable Care in Operating Substation

Here, □ posted danger signs, enclosed the station in a fence; however, it only used a 6 ft. chain link fence. Kids climb fences often; therefore, reasonable care would dictate that a higher fence made of something less "climbable" was necessary to prevent entry to the substation. Arguably, therefore, □ breached its duty to T.

C. Causation

1. Actual Cause. But for □'s failure to erect a more formidable barrier, T would not have been able to come into contact with the electricity.

2. Proximate Cause. Where another force intervenes, □ is only liable if the force is merely intervening and not superseding.

    a) Intervening. Here, the pigeon struck Peter in the face and caused him to make contact with the wire. This is intervening.

    b) Superseding. Acts of God, intentional torts, and crimes are intervening acts. Here, the flight of a pigeon could arguably be superseding, however, where □'s negligence creates the situation which gives rise to the act, □ can still be liable if it was foreseeable. Once a child is inside a substation, many acts could cause the child to become electrocuted. Therefore, perhaps this will be held to constitute proximate cause.

D. Damages

T sustained burns and undoubtedly related expenses. These damages were foreseeable, unavoidable, certain and [sic.]

E. Defenses

1. Assumption of the Risk. Here T scaled a fence posted with 12 warning signs and scaled a steel support. Arguably, a 12 year-old comprehended the risk of high voltage electricity and assumed that risk when entering the station. This would, if successful, preclude T's recovery.

2. Comparative/Contributory N. T could be held N. for failing to heed the warnings posted. This would preclude (contrib. N.) or reduce (comparative N.) his recovery.

Answer B

Strict Liability

Peter's father (Father) can assert a claim of strict liability against Power and Light Company (PLC) to recover damages arising from Peter's accident. To establish strict liability, (i) the defendant is engaged in abnormally dangerous activity, (ii) no amount of due care can eliminate the dangerous conditions, and (iii) the activity or conditions are not common in the community.

Abnormally Dangerous Activity

Father can argue that PLC is engaged in abnormally dangerous activity on its property. In this case, PLC operated a high voltage electricity power substation. Father can argue that the substation is a participial condition created by PLC that is inherently dangerous. The high voltage substation is continuously conducting high amounts of electricity. Upon contact with the electric substation, a person can be shocked with a deadly amount of voltage. Furthermore, the operation of a high voltage power substation is not a low risk activity. The possibility and likelihood of injury due to electric shock is extremely high. Therefore, regardless of the utility of the substation, the operation of the substation is an abnormally dangerous activity.

On the other hand, PLC can argue that the operation of the electric substation is not an abnormally dangerous activity. The substation, while producing high voltages of electricity, is in a controlled, secure environment. The electricity is used to power the community, and it is not being used for any type of dangerous purpose other than to provide electricity. PLC can argue that providing electricity to a community is not an abnormally dangerous activity. Furthermore, while the high voltage substation is inherently dangerous, it is not abnormally dangerous. The substation is operated safely by PLC, and the risk of harm or danger only arises when a third party fails to observe the danger warnings and acts without regard to their safety when near the substation.

The court will likely agree with Father and find that the operation of the high voltage electric substation is an abnormally dangerous activity. Simply operating such a substation carries with it the high risk of danger. PLC's argument that the power is being used to benefit the community will not outweigh the risk that the substation poses to the general public.

Due Care Will Not Eliminate Danger

Father can argue that regardless of the due care the PLC may have used in securing the high voltage electric substation, the danger of electric shock was not eliminated. Although there was a fence around the substation, and warning signs posted on the property, the substation was still producing high voltages of electricity. The dangerous conditions were still present even though there were warnings. Father can argue that the only way that the risk of electrocution could be eliminated was to shut down the substation so that it would no longer produce high voltages of electricity. Therefore, regardless of any amount of due care by PLC, the substation was still extremely dangerous and capable of electrocuting people who came in contact with the substation.

On the other hand, PLC can argue that the danger in operating the substation arose from third parties who ventured onto the property and came into contact with the substation. The substation was inside a fenced area. The fence was six feet tall with barbed wire on top. PLC can argue that it completely restricted access to the substation to third parties. Therefore, since the substation was in a secure area, the risk of harm to those outside of the secured area was eliminated. By eliminating free access and contact with the substation, the substation posed no harm to the third parties not authorized or legitimately inside the secured fenced-in area near the substation.

The court will likely agree with Father and find that regardless of the erection of the fence and warning signs on the property, PLC still could not eliminate the danger of electrocution to persons coming into contact with the substation. Therefore, no amount of PLC's due care could eliminate the danger posed by the high voltage electric substation.

Not a Common Activity

Father can argue that operating a high voltage electric substation is not a common activity that occurs in the community so close to a residential area. Father can argue that while electric substations are common, they are not erected and operating near residential areas. In this case, PLC operated the high voltage electric substation adjacent to Father and Peter's home. The substation should have been operated in a remote part of the community where it would not pose a danger to the public. Furthermore, if PLC was to operate a substation near a residential area, it should only operate low voltage substations that do not have deadly amounts of electricity being produced from them. Therefore, PLC's operation of the substation next to Father's home was not a common activity.

PLC can argue that it had numerous substations situated throughout the community. The only way PLC can deliver power consistently and reliably to the whole community is to have high voltage substations near residential areas, where power consumption is high. Furthermore, PLC can argue that power companies throughout the area commonly place high voltage substations near densely populated areas. PLC can argue that by placing the substation in a

remote area, it would defeat the purpose of providing electricity directly to the areas that have high power consumption and electricity needs. PLC may even argue that the residential area was constructed after PLC built and began operating its substation. Therefore, operating the substation next to Father's home is common practice in the power generation industry and PLC commonly practices placing such substations near residential areas.

The court will likely agree with Father that PLC's operation of the high voltage substation near a residential [community] was not a common activity. Furthermore, even if Father's home was built after PLC began operation of the substation, PLC's operation of the substation was still not a common activity, and the operation should have ceased.

Assumption of the Risk

PLC can argue that Peter assumed the risk of electrocution. PLC can argue that a 12 year-old child of like mind and intelligence would not have ignored the warning signs posted on the fence and attempted to climb a fence topped with barbed wire. PLC can argue that a reasonable 12 year-old can read and understand warning signs, and would appreciate the danger posed by the substation.

Contributory Negligence

Contributory negligence is not a valid defense in strict liability cases.

Conclusion

Father will not prevail against PLC for strict liability since Peter assumed the risk of electrocution by climbing onto the substation. However, if the court finds that Peter did not assume the risk of electrocution, then Father may recover on Peter's behalf since PLC was engaged in abnormally dangerous activity by operating the high voltage substation, no amount of care by PLC could eliminate the harm of electrocution to third parties, and the operation of the substation was not a common activity. Father can recover compensatory damages from the injuries sustained by Peter as a result of being electrocuted by PLC's substation.

Negligence

Father can assert a claim of negligence against PLC for negligently operating the substation. A claim of negligence requires that (i) the defendant owed a duty to the plaintiff, (ii) defendant breached this duty, (iii) the breach was a cause-in-fact of plaintiff's injury, (iv) the breach was a proximate cause of plaintiff's injuries, and (v) plaintiff suffered damages. In this case, Father is bringing a claim of negligence against his son and injured party, Peter.

Duty

A defendant is liable for negligence only to those plaintiffs to whom they owe a duty. Under the Cardozo test (majority view), a plaintiff has a duty to all foreseeable plaintiffs who may be injured as a result of defendant's negligence. Under the Andrews test (minority view), a plaintiff has a duty to all plaintiffs who are injured as a result of defendant's negligence. In this case, Peter was injured as a result of being electrocuted by PLC's high voltage substation. Under the Cardozo test, Father can argue that Peter is a foreseeable plaintiff because it is foreseeable that children living near the substation would climb on the substation or otherwise come into contact with the substation, and be electrocuted. PLC can argue that it is not foreseeable that someone would climb over the six foot high fence with barbed wire, and ignore all warning signs posted by PLC. The court is likely to find that Peter was a foreseeable plaintiff, since PLC was aware of the danger posed by the substation, and it is foreseeable that children in the residential area near the substation would sneak into the secured area and be harmed. Therefore, under the Cardozo and Andrews tests, Peter is a foreseeable plaintiff, and PLC owed a duty of reasonable care to Peter.

Attractive Nuisance

Father can argue that PLC's substation was an attractive nuisance, and PLC breached its duty of care to Peter by failing to eliminate the harm posed by the substation. For a defendant's activities to be an attractive nuisance, (i) defendant must know that children frequent defendant's property, (ii) defendant is aware of dangerous conditions existing on the property, (iii) defendant failed to eliminate the dangerous conditions, and (iv) the cost of eliminating the dangerous conditions is outweighed by harm.

PLC Must Know that Children Frequent the Property

Father can argue that PLC knew, or should have known, that children play on the substation. Father can argue that the substation is in a field adjacent to the residential area. Therefore, children from the area could easily play near the substation, or inside the fence by sneaking into the property. On the other hand, PLC argues that it was not aware that children have entered the fenced-in area of the substation. PLC has not received any warnings of children sneaking into the secured area, nor had there been any past incidents of children being harmed by sneaking into the fenced-in area. Furthermore, PLC can argue that it was not aware that children lived in the residential area. The court will likely find that absent any evidence that PLC knew children had been sneaking into the fenced-in area, or that PLC should have known that children live in the neighborhood and play near the substation, PLC did not know that children frequented the property and played near the substation. However, in the event that Father prevails in showing that PLC was aware that children snuck into the

fenced-in area of the substation, we can continue the analysis for attractive nuisance below.

PLC is Aware of the Dangerous Conditions

Father can argue that PLC was aware of the danger posed by the high voltage substation. PLC was aware of the danger since it had posted signs stating “Danger High Voltage.” PLC can argue that while it was aware that its substation posed the danger of electrocution to third parties, it was not aware of the danger being posed to any children in the area. However, Father will easily prevail since PLC did know that the substation was capable of electrocuting persons who came into contact with the substation.

PLC Failed to Eliminate the Dangerous Condition

Father can argue, as above with strict liability, that PLC failed to discontinue operating the substation. Thus, the risk of electrocution remained, despite the erection of a fence and posting of warning signs by PLC. The court will likely find that PLC did not eliminate the dangerous conditions since the harm of electrocution remained.

Cost Outweighed by Benefit

Father can argue that the benefit of eliminating the risk of death to children in nearby residential areas greatly outweighs any costs associated with discontinuing operation of the substation. Father can argue that PLC can simply move the substation operation to another less densely populated part of the community. On the other hand, PLC argues that the substation is strategically placed to provide reliable power to the community and its residents and businesses. The cost of discontinuing the substation would be great, and the adverse effects of unreliable power would be felt throughout the community by everyone. Furthermore, PLC would suffer a great financial hardship by having to shut down one of its high voltage substations.

Conclusion

The court will likely find that PLC was not aware that children frequented the property; thus, PLC did not breach any duties owed to Peter under the attractive nuisance doctrine. Even if Father proves that PLC was aware or should have known that children frequented the property, PLC may have a strong argument in showing that the cost of shutting down the substation is outweighed by the financial hardship it will face, as well as the hardship to the community for the loss of reliable power.

Breach – Reasonable Care

Father can argue that PLC breached a duty of reasonable care in failing to erect a more protective fence around the substation. In this case, the fence was six feet tall and had barbed wire around the top portion. Father can argue that since the substation was extremely dangerous since it produced high voltage power, a higher fence should have been erected. However, PLC can argue that it acted as a reasonable substation operator would have acted. It erected a high fence, with barbed wire at the top; thus, reducing the chance that even if someone climbed the fence, they would not be able to scale the top of the fence. Furthermore, the PLC posted conspicuous 10 inch by 14 inch warning signs which clearly stated "Danger High Voltage." The court will likely find that PLC acted reasonably, since it did construct a reasonable protective fence and posted warning signs advising of the danger posed by the substation.

Cause-in-Fact

Father can argue that but-for PLC's operation of the high voltage substation, Peter would not have been harmed. PLC can argue that but-for Peter chasing his bird into the substation area, Peter would not have been electrocuted. The court will likely find that PLC's operation of the substation was a cause-in-fact of Peter's injuries, since a defendant's conduct need only be one cause of the plaintiff's injuries.

Proximate Cause

Proximate is legal cause, and the plaintiff's injuries must have been a foreseeable result of the defendant's conduct. In this case, Father can argue that it was foreseeable that a child could sneak into the substation area, and be electrocuted while climbing the substation. On the other hand, PLC can argue that it is not foreseeable that a child would scale the six foot high wall, climb over the barbed wire at the top of the fence, then scale a ten foot high steel support in order to catch a bird, and in the process of doing so, be electrocuted by falling onto the substation. Father can argue that all that is necessary is that it was foreseeable to PLC that if someone was to enter the fenced-in area, they could be harmed by electrocution, regardless of how that electrocution came about. The court will likely find that Peter's electrocution by the substation was a foreseeable injury. Therefore, PLC's operation of the substation was the proximate cause of Peter's injury.

Intervening Cause

PLC may argue that Peter's chasing the bird was an intervening cause which cuts off PLC's liability. However, an intervening act must be unforeseeable

to cut off liability. In this case, Father can argue that it was foreseeable for a child to chase a pet into the fenced-in area. Thus, Peter's chasing his pet bird was not an intervening cause of Peter's injuries which cuts off PLC's liability.

Contributory Negligence

PLC can argue that Peter was contributorily negligent for chasing his bird into the fenced-in area, and that his injuries were due in part to his own negligence. PLC can argue that a 12 year-old child of like mind and intelligence would not have ignored the warning signs posted on the fence, and attempted to climb a fence topped with a barbed wire. PLC can argue that a reasonable 12 year-old can read and understand warning signs, and would appreciate the danger posed by the substation.

The court is likely to find that Peter was contributorily negligent since he failed to heed the warning signs posted by PLC. In a contributory negligence jurisdiction, Father will not recover at all since Peter's negligence cuts off recovery. In a pure comparative negligence jurisdiction, Father's recovery on behalf of Peter will be reduced by Peter's percentage of his own negligence. Finally, in a modified comparative negligence jurisdiction, Father will only recover on Peter's behalf if Peter's negligence is not more than 50%.

Assumption of the Risk

Similarly as above, PLC can argue that Peter assumed the risk by ignoring the warning signs and scaling the fence. Unless Peter could not read or was otherwise not mentally competent to appreciate the risk, Father will not be able to recover on Peter's behalf since Peter assumed the risk of electrocution.

Conclusion

The court is likely to find that PLC was not negligent in operating the substation. Furthermore, Peter most likely contributed to his own negligence, and he assumed the risk of electrocution. However, if they are found to be negligent, Father may recover damages for injuries sustained by Peter, including medical bills and pain and suffering.

Q2 Professional Responsibility

Acme Paint Company (Acme) was sued when one of Acme's trucks was involved in an accident with a car. June, an attorney, was retained to represent Acme. She has done substantial work on the case, which is about to go to trial.

Recently, June's three-year-old niece suffered lead poisoning after being in contact with lead-based paint. June became so upset that she joined a local consumer advocacy group, No Lead, which lobbies government agencies to adopt strict regulations restricting the use of lead-based paint. June also undertook to perform legal research and advise No Lead concerning its tax-exempt status.

In the course of reviewing Acme's records in preparation for trial, June found a memorandum from Acme's President to the company's drivers. The memorandum states:

> We know our paint contains lead and that it is a misdemeanor to transport it over roads abutting public reservoirs. The road our trucks have been using for many years runs alongside the City water reservoir, but it's the shortest route to the interstate, so you should, for the time being, continue to use that road.

June became outraged by the content of the memorandum. She believed that if an Acme truck were to have a mishap and paint spilled into the reservoir, lead could enter the public drinking water and injure the local population.

Because of her strong feelings, June anonymously disclosed the memorandum to No Lead and to the media. She also sent Acme a letter stating that she wished to withdraw from the representation of Acme. Acme objected to June's withdrawal. June filed with the court a petition for withdrawal.

1. What ethical violations, if any, did June commit by disclosing Acme's memorandum? Discuss.

2. What arguments for withdrawal from representation could June assert in support of her petition to the court, and how would the court be likely to rule? Discuss.

Answer according to California and ABA authorities.

Answer A

1. <u>Ethical Violations Committed by June in Disclosing Acme's Memorandum.</u>

<u>Duty of Confidentiality</u>
A lawyer owes their client a duty of confidentiality. This requires the lawyer not to disclose any of the client's information learned or discovered during their representation of the client. The confidentiality also extends to information gathered about the client in preparation of trial.

June, in violation of her duty of confidentiality, anonymously disclosed the Acme memorandum (from Acme president to company drivers) to No Lead and the media. She will be subject to discipline due to her disclosure because the material in the memorandum was confidential, meant for Acme employees only, and was only to be used by June in her preparation for trial.

Consent
A lawyer may disclose confidential materials if the client consents (in California ["CA"] the consent must be in writing). Here, there was no consent given by Acme because they didn't know of June's intention to disclose the memo and probably would not have consented anyway.

Prevention of a Crime/Fraud
A lawyer may sometimes disclose confidential information if it is to prevent a crime or fraud. Under the federal rules, a financial crime as well as a crime of bodily injury may be disclosed to prevent it from being committed. In CA, however, only a crime that would result in serious bodily injury may be disclosed, after the lawyer makes a good faith effort to try and prevent the harm from occurring.

Here, the crime that was committed was transporting paint containing lead over a road abutting a public reservoir, a misdemeanor. This would not invoke the status of a financial or injury crime so as to warrant disclosure to a court or public agency.

Therefore, June breached her duty of confidentiality to Acme by disclosing the memorandum.

Duty of Loyalty

A lawyer owes their client a duty of loyalty. She must act in the client's best interests and put the client before herself in making decisions that would affect the client.

When an event occurs that would make it difficult for a lawyer to represent the client, putting aside their feelings or position, this is called a conflict of interest. If the conflict is occurring then it is an actual conflict of interest. However, if there is a possibility of a conflict, then it is a potential conflict of interest. If an actual conflict of interest occurs, a lawyer may be forced to withdraw unless the conflict can be resolved effectively, the client is informed of all the potential negative effects of the conflict, and the client consents to the conflict. In the case of a potential conflict, the lawyer may continue if they feel they can effectively represent the client despite the conflict and the client consents after being informed of the potential conflict. In CA, [regarding] the consent for representation to continue after all conflicts, the consent must be in writing.

Actual Conflict of Interest

There is an actual conflict of interest due to the fact that June disclosed the memorandum intended for Acme company drivers. This is a breach of duty of loyalty because June has put her interest ahead of Acme's and has taken a position adverse to their interests by giving up confidential information of the company. In order for her to continue her representation, June must disclose that she was the one who put forth the letter to the media, explain all the negative repercussions of her continued representation (her outrage by the content of the memo, the fact that she has a niece who suffered lead poisoning, and her participation in a local advocacy group that advocates adoption of regulations restricting the use of lead-based paint), and obtain the consent of Acme officials. Although it is stated that Acme objected to June's withdrawal, the facts do not show that they were informed of the actual conflict, and, therefore, their objection to her representation may change after being informed of her breach of the duty of loyalty.

June is likely subject to discipline for her breach of the duty of loyalty.

Potential Conflicts of Interest

Intertwined in the actual conflict of interest with Acme are several potential conflicts of interest that will hinder June's future representation of Acme: her outrage by the content of the memo, the fact that she has a niece who suffered lead poisoning, and her participation in a local advocacy group that advocates adoption of regulations restricting the use of lead-based paint. These will be disclosed in trying to obtain Acme's consent to continue her representation. But, it should be noted that these may very easily result in actual conflicts, and possibly may already be actual conflicts that breach her duty of loyalty, without Acme's consent.

Participation in a Consumer Advocacy Group
A lawyer is permitted to affiliate with a local consumer advocacy group to express their views and be an active member of society. However, if their involvement is adverse to the interests of their client, then potential or actual conflicts may result, which they should be aware of.

2. Arguments for Withdrawal by June.

Mandatory Withdrawal – Crimes
A lawyer must withdraw if their continued representation of the client will facilitate a continued crime committed by the company. Here, June is not participating in the crime, misdemeanor for transporting lead-based paint, despite the fact that she knows about it. Therefore, this would not be enough for her withdrawal from her representation.

She may, however, be required to notify the court of the crime if it pertains to a lawsuit in existence and her participation would lead to suborn perjury or false statements to the court. Here, however, the lawsuit is about an accident, not the transportation of lead-based paint, so June would not be able to disclose the misdemeanor to the court.

Mandatory Withdrawal – Conflict of Interest
As stated above, Acme and June have a conflict of interest. If she could not effectively represent Acme and if Acme will not consent to her continued representation in spite of the conflict, then June must withdraw from representation of Acme. Here, Acme objected to June's withdrawal even after the media and No Lead knew about the memorandum. This may hint that Acme may not consent to the withdrawal due to the fact that June has done substantial work on the case, which is about to go to trial.

Permissive Withdrawal
June's Interests
The court will permit an attorney withdrawal if their representation of their client is repugnant/disgusting to the lawyer. However, in assessing permissive withdrawal the court will weigh such factors as the interests of the court and the client before deciding.

On these facts, June is outraged by the practices and is clearly disgusted by Acme's transportation of lead paint. She feels so strongly because of her outrage by the content of the memo, the fact that she has a niece who suffered lead poisoning, and her participation in a local advocacy group that advocates adoption of regulations restricting the use of lead-based paint. The court will take these into account in balancing them with the interests of Acme and the Court.

Acme's Interests
Acme's interests stem from the fact that June has done substantial work on the case, which is about to go to trial. This is a huge factor because Acme would be severely disadvantaged if they had to get new counsel to replace June at such a late stage in the trial process.

Court's Interests
The Court's interests are those of efficiency of the trail process, undue delay and fairness. Permitting June to withdraw would add more time to the trial process, which was about to happen. Also, the court might have to delay the case in order for new counsel to prepare adequately. And, if the trial commenced as scheduled with Acme obtaining new counsel, there is very little likelihood that they would adequately be able to represent their interests.

Therefore, unless Acme consents to the withdrawal by June, it is unlikely that she will be able to withdraw from her representation.

Answer B

1. An attorney owes duties of Confidentiality, Competence, Loyalty and Fiduciary duties to her clients.

Duty of Confidentiality

Under the ABA Model Rules and the California Rules of Professional Conduct, the duty of confidentiality requires that an attorney preserve her client's confidences and not reveal any information regarding the client, regardless of its source. The duty of confidentiality attaches at the moment that an attorney-client relationship is formed; however, an attorney may also be prevented from revealing any confidences gained in consultation even if an attorney-client relationship does not result. Further, the duty of confidentiality endures after the attorney-client relationship ends. Finally, the client is the holder of the privilege.

In this case, June has breached her duty of confidentiality to Acme. June was reviewing Acme's records in preparation for trial and June found a memo that she subsequently and anonymously disclosed to a third party, No Lead. An attorney may reveal a client's confidential information where the client consents; however, there are no facts to suggest that Acme was aware of, or consented to, June revealing Acme's memo to No Lead. Under the ABA Model Rules, an attorney may reveal a client's confidential information if the revelation is necessary to prevent death or bodily injury. The California Rules permit disclosure only if the disclosure is necessary to prevent an imminent risk of death or serious bodily injury. Under both rules, the attorney must take steps before the disclosure is made. First, the attorney must notify her client that the behavior is illegal and/or dangerous. Here, Acme's letter, by its own terms, indicates that Acme was aware that the [behavior was] illegal. Second, the attorney must try to persuade the client from continuing to engage in or threaten the behavior. Here, June did not attempt to discuss Acme's policy with Acme before the disclosure. Finally, the attorney must tell the client that she intends to make the disclosure. Here, not only did June not tell Acme that she intended to make the disclosure, June made the disclosure anonymously in an attempt to hide the fact that she made the disclosure. Finally, California Rules permit disclosure only where there is an imminent risk of seriously bodily harm or death. In this case, the risk was not imminent because there was no increased likelihood that Acme's truck drivers would have the kind of accident feared in the next day, week, or month or even that the accident would ever happen. Because June disclosed a client's

information to a third party without the client's consent or a privilege to do so, June has violated her duty of confidentiality to Acme.

Duty of Loyalty

The duty of loyalty requires that an attorney be vigilant to potential and actual conflicts that will prevent or impede an attorney from fully representing her client's interests. An attorney may not represent clients with actual adverse interests because of the danger that the attorney will purposefully or inadvertently reveal or use confidential information gained from one client against the other client. Under California Rules, an attorney may represent clients with potential conflicts so long as the attorney believes that she can adequately and fairly represent the interests of both parties and both clients agree to the continued representation in writing.

Here, June represented Acme Paint Company stemming from an Acme truck accident with another car. The original cause of action was likely to be negligent driving and respondeat superior liability and June's representation was not likely to be very involved in investigating the dangers of lead paint. However, June was aware of Acme's business when she decided to get involved with No Lead. No Lead is a group which lobbies government agencies to adopt strict guidelines restricting the use of lead-based paint. June formed an attorney-client relationship with No Lead, undertaking legal research duties and advising No Lead on its tax status. While legal research and tax advice do not pose actual conflicts with June's representation of Acme at the outset of June's relationship with No Lead, nonetheless, there are potential conflicts because Acme makes paint that contains lead and No Lead is an activist group that targets the kind of business that Acme runs.

Because the interests of Acme were potentially adverse with the interests of No Lead, June was obligated to disclose the potential conflicts to both parties and obtain their written and informed consent to continue with the representation. In this case, June did not inform Acme of her affiliation with No Lead and she did not seek Acme's consent to continue the representation. The facts also do not state that June disclosed her relationship with Acme to No Lead. Because June continued to represent Acme and No Lead, whose interests were potentially adverse, without disclosure or seeking consent to the continued representation, June breached her duty of loyalty to Acme and No Lead.

Duty of Competence

An attorney owes a duty of competence to a client. A duty of competence means that the attorney will use her legal knowledge, training, and skill to diligently represent the client's interests. In this case, June was diligently preparing for trial when she discovered Acme's memo. Up to that point, June had not breached any duty of competence owed to Acme. However, once June discovered the memo, it is probable that June will no longer act in a diligent manner to pursue Acme's goals. Here, June was outraged by the content of the memorandum and

she subsequently breached her duty of confidentiality to Acme, acting on her outrage that was likely fueled by the injuries suffered by her niece. Since June was willing to engage in a breach of one of the most important duties that an attorney owes a client, confidentiality, as a result of the memo, it is doubtful that June will be able to set aside her feelings in any way that is sufficient to allow her to adequately and competently continue to represent Acme.

2. June's Argument for Withdrawal

An attorney may withdraw from representation where the withdrawal will not unfairly prejudice the client. An attorney must withdraw from representation where the attorney becomes aware of actual conflicts of interest or where the continued representation would foster the commission of a crime.

In this case, June will make several arguments for her permissive withdrawal. First, June will argue that the withdrawal is proper and should be granted because the goals of the client have become repugnant to her. June will argue that Acme paint contains lead and that Acme engages in transportation policies that are unsafe and present a risk of injury to the community. Further, June will disclose to the court that June has been personally touched by this issue where her three-year old niece suffered lead poisoning after coming into contact with lead paint. Because of the emotional reaction to her niece's injuries that stirred June to act by joining and providing legal services to a lead paint activist group, June can no longer separate herself from the issue in a way that would allow June to adequately represent Acme. The court will likely point out to June that Acme has asked her to represent them in an action that has nothing to do with lead paint content or safety issues where children are concerned. The court will also note to June that Acme is likely to be very prejudiced by her withdrawal from the case because the case is already at the stage of trial preparation. If Acme is forced to retain new counsel at this stage of litigation, Acme will be exposed to enormous costs relating to getting a new attorney familiar with the case sufficient to go into trial. Consequently, with only the argument that June now finds Acme to be engaged in activities that she finds repugnant, the court is not likely to allow her withdrawal and expose Acme to the costs of hiring a new attorney.

June may argue that she should be allowed to withdraw because Acme is engaged in an illegal activity. Here, Acme's memo states that Acme paints contain lead and that it is a misdemeanor to transport lead paint over roads abutting public reservoirs. The court is not likely to accept June's reason because, in this case, June's services are not being used to further a crime. The case that June is involved in may or may not involve an Acme truck on a road near a reservoir, but that fact would not change the underlying cause of action in the case from the most likely negligence claim. Thus, the court is likely to reject June's argument.

June will continue to argue that her withdrawal is now mandatory because she now represents two clients with adverse interests. Acme manufactures and delivers lead paint and No Lead is an activist group trying to influence legislation of Acme's activities. The court will point out that June is representing Acme in what is most likely a tort case where the elements of the cause of action that June is currently working with will likely have no reasonable relationship to the kind of paint that Acme makes or to the amount of lead contained in the paint. Further, June's activities for No Lead have consisted only of legal research and tax advice. It is unclear whether the legal research relates solely to the tax advice or covers questions relating to the amount of lead in paint; however, her research is most likely directed at influencing policies rather than researching tort claims relating to transportation of paint. As a result, the court is not likely to view the representation of Acme and No Lead as sufficiently adverse to allow June to withdraw at such a crucial time in the proceeding.

However, if June discloses to the court that June has become so emotionally involved in the issue that she can no longer adequately represent Acme as a company regardless of the cause of action, then the court will likely allow June to withdraw. The court will certainly allow June to withdraw if June discloses that she provided the confidential Acme memo to No Lead. However, if June discloses this information, Acme would also likely drop their objection to June's withdrawal. Even where the court allows June's withdrawal, June will be subject to ethical sanctions and she may even face malpractice liability for her work on Acme's case.

Q3 Criminal Law and Procedure / Constitution

Dan's neighborhood was overrun by two gangs: the Reds and the Blues. Vic, one of the Reds, tried to recruit Dan to join his gang. When Dan refused, Vic said he couldn't be responsible for Dan's safety.

After threatening Dan for several weeks, Vic backed Dan into an alley, showed him a knife, and said: "Think carefully about your decision. Your deadline is coming fast." Dan was terrified. He began carrying a gun for protection. A week later, Dan saw Vic walking with his hand under his jacket. Afraid that Vic might be about to stab him, Dan shot and killed Vic.

Dan was arrested and put in jail. After his arraignment on a charge of murder, an attorney was appointed for him by the court. Dan then received a visitor who identified himself as Sid, a member of the Blues. Sid said the Blues wanted to help Dan and had hired him a better lawyer. Sid said the lawyer wanted Dan to tell Sid exactly how the killing had occurred so the lawyer could help Dan. Dan told Sid that he had shot Vic to end the harassment. Dan later learned that Sid was actually a police informant, who had been instructed beforehand by the police to try to get information from Dan.

1. May Dan successfully move to exclude his statement to Sid under the Fifth and/or Sixth Amendments to the United States Constitution? Discuss.

2. Can Dan be convicted of murder or of any lesser-included offense? Discuss.

Answer A

1. Dan's Motion to Exclude his Statement to Sid

5th Amendment

The 5th Amendment protection demands that Miranda warnings be provided to persons that are in the custody of government officials prior to any interrogation. The Miranda rights to remain silent and to counsel must be waived before any statement used against the person in court is obtained. Miranda is not offense-specific.

A person is in custody if they reasonably believe they are not free to leave. Interrogation is defined as conduct or statements likely to elicit an incriminating response.

In this case, Dan was in jail. He had been arraigned for murder and was being held, so he was clearly not free to leave. Thus, custody is satisfied.

As to interrogation, Dan was approached by Sid, and Sid informed Dan that he was a member of the Blues, a rival gang to the gang of Vic, and that the Blues had hired an attorney to assist Dan. He said that the lawyer needed Dan to inform Sid of what happened so that he could represent him. In fact, Sid was a police informant, who had been instructed by the police to try to get information from Dan.

Clearly, Sid was talking to Dan in such a way that was likely to elicit an incriminating response; he was asking him to give the details so that Dan would have better representation. He had lied to Dan and was tricking him into confessing.

However, the problem here is that Dan did not know that Sid was a police informant who was seeking a confession. The court has upheld the admissibility of statements obtained by police informants when the suspect did not know that the informant was working for the government. The rationale is that the coercion

factor is not so high, because the suspect does not know the police are involved. In other words, the suspect is free to not speak to the informant.

In this case, the court will have to weigh the fact that Dan did not know that Sid was a police informant against the devious nature of Sid's behavior in lying to Dan in determining whether the interrogation factor is met. Based on the prior cases admitting police informant confessions, interrogation is probably not satisfied and the confession will probably not be barred by the 5th Amendment.

6th Amendment

The 6th Amendment guarantees every person the right to counsel at all critical post-charge proceedings and events, including questioning. This right is offense-specific and must be waived prior to questioning.

In this case, the time frame for the 6th Amendment protection had been triggered, because Dan had been arrested, put in jail, and arraigned for murder, all before Sid approached Dan. In fact, Dan had been appointed an attorney by the court.

When Sid, a government informant posing to be a member of a rival gang interested in helping Dan, approached Dan and elicited the incriminating response, he violated Dan's 6th Amendment Right to Counsel. Sid initiated the conversation, and lied to Dan, tricking him into giving up the information. All the time, Sid was working as an informant. This equates to questioning by the government.

Because it was post-arraignment and the government sought to initiate questioning of Dan, Dan would have to first waive his right to have counsel present, or have his attorney present. Dan did not waive this right, because he did not even know Sid was a government informant, and his attorney was not present.

Because Dan's 6th Amendment right to counsel was violated, he can successfully move to exclude his statement to Sid from trial.

When he makes this motion, the government will have to prove by a preponderance of the evidence that the statement is admissible, a burden they will not be able to meet on the existing facts. Thus, the statement will be excluded.

2. Can Dan be Convicted of Murder or any Lesser-Included Offense

Murder is the unlawful killing of another human being with malice aforethought.

It requires actus reus, which in this case was Dan's act of shooing Vic.

It also requires causation, both actual and proximate. Actual cause is easily satisfied because "but for" Dan's act of shooting Vic, Vic would not have died. Proximate cause is the philosophical connection which limits liability to persons and consequences who [sic] bear some reasonable relationship to the actor's conduct, so as to not offend notions of common sense, justice, and logic. Proximate cause is also easily satisfied, because Dan shot and killed Vic without any intervening cause or unforeseeable event. If one shoots a human being, death is a logical and foreseeable result.

Malice is satisfied under one of four theories:

1. Intent to kill;
2. Intent to commit great bodily injury;
3. Wanton and Willful disregard of human life ("Depraved Heart Killing"); or
4. Felony Murder Rule.

Intent to Kill

Intent to kill can be satisfied by the deadly weapon doctrine: where the death is caused by the purposeful use of a deadly weapon, intent to kill is implied.

In this case, Dan used a gun, pointed it at Vic, shot Vic, and killed Vic. A gun is a deadly weapon, so intent to kill is satisfied.

Intent to Commit Great Bodily Injury

Even if intent to kill were not satisfied, intent to commit great bodily injury would be apparent because the least that can be expected to occur when one points a gun at a human being and pulls the trigger is great bodily injury.

Wanton and Willful Disregard

In addition, wanton and willful disregard for human life is satisfied because the use of a gun against another human being shows a conscious disregard for human life. Guns can, and frequently do, kill people. In fact, killing things is one of their main purposes. The use of a gun against another human being shows disregard for the human being's life.

Felony Murder Rule

The felony murder rule requires an underlying felony, that is not "bootstrapped" to the murder. In this case, Dan does not appear to have

committed any crime except for killing Vic, so the malice could not be implied under the felony murder rule.

Murder in the First Degree

Murder in the first degree at common law was the intentional and deliberate killing of another human being. It required deliberation, but deliberation can happen in a very short period of time.

In this case, Vic had "terrified" Dan, and Dan began carrying a gun for protection. Dan carried this gun for an entire week before he saw Vic. In obtaining the gun, or taking it from its storage place, putting it on his person, and carrying it around for an entire week, Dan acted intentionally and deliberately. When he saw Vic, he then pulled out the gun and shot and killed Vic.

These facts, especially the elapse of an entire week, are probably sufficient to show that Dan was intentional and deliberate in his use of the gun. It did not arrive there by chance, and once Dan saw Vic, he acted without pause.

Murder in the Second Degree

All murder that is not murder in the first degree is murder in the second degree.

If the prosecution was not able to establish Dan intentionally and deliberately shot Vic, because perhaps the jury believed that Dan did not deliberate before he shot Vic, then he could be convicted of second-degree murder.

Self-Defense

Self-defense is the use of reasonable force to protect oneself at a reasonable time. Deadly force may only be used to protect against the use of deadly force.

Dan will argue that he was engaged in self-defense when he shot Vic. Dan will point out that his neighborhood was run by two gangs, and as such it was very dangerous. He will testify that Vic was a Red, one of the gangs, and that he had tried to recruit Dan to the gang. When Dan refused, Vic said he "couldn't be responsible for Dan's safety," implying that Dan might be injured.

Vic then threatened Dan for several weeks, and finally backed him into an alley, showed him a knife, and told him that "Your deadline is coming fast." Dan will argue that the statement regarding Dan's safety, the threats, the knife and the deadline statement cumulate to show that Vic intended to kill Dan if he wouldn't join the gang, or at least that Dan reasonably believed Vic would do it.

Dan will argue that when he then saw Vic on the street, with his hand under his jacket, he was terrified and afraid that Vic might stab him with the knife he had threatened him with, and therefore he defended himself by shooting Vic.

The primary problem with Dan's defense is that he carried around a gun for a week before seeing Vic, and then when he saw Vic with his hand under his jacket he pulled out the gun and shot Vic, without Vic producing any weapon or making any threat at that time. The state will argue that Dan is not entitled to a self-defense defense because he was under no threat when he shot Vic.

Unreasonable Self-Defense

Unreasonable self-defense is a defense available to one who engages in good faith but unreasonable self-defense. It is a mitigating defense which takes a murder charge down to voluntary manslaughter.

Dan will argue that if self-defense was not appropriate because of the timing of the threats and the shooting, then he is at least entitled to an unreasonable self-defense defense. Dan will argue that he acted in good faith and really believed Vic would stab him.

This is a very colorable defense for Dan, because although the timing of self-defense was inappropriate, Vic had been threatening Dan for several weeks, and had recently shown him a knife and said "Your deadline is coming fast," so Dan's fear was likely reasonable.

Heat of Passion

Heat of passion is a defense when circumstances evoke a sudden and intense heat of passion in a person, as they would affect a reasonable person, without a cooling off period, and the person does not cool off. Heat of passion is a possible defense during a fight.

In this case, however, it is likely not viable because Dan had not seen Vic for an entire week before the shooting, which is sufficient time for a reasonable person to cool off from the last incident with the knife in the alley. For that entire week, Dan carried around a gun, and then when he saw Vic he shot and killed him, without any prior interaction on that occasion. It appears unlikely that Dan's response was "sudden" or "intense".

Involuntary Manslaughter

Involuntary manslaughter is established by a killing with recklessness not so egregious as to satisfy wanton and reckless disregard for human life, but more serious than common negligence.

Involuntary manslaughter could be established by the reckless use of a gun, but because Dan intended to kill Vic, Dan will be convicted of a greater crime, or, if his self-defense defense is effective, of no crime at all.

Conclusion

Dan will likely be tried for first-degree murder under the intent to kill theory, and will allege the defenses of self-defense and imperfect self-defense. Dan is likely to be found guilty of voluntary manslaughter, by use of an imperfect self-defense defense.

Answer B

Dan's Motion to Exclude

Exclusionary Rule

The exclusionary rule prohibits the introduction of evidence obtained in violation of defendant's 4th, 5th, and 6th Amendment rights, and under the "fruits of the poisonous tree" doctrine, also prohibits any evidence found as a result of violating defendant's 4th, 5th, and 6th Amendment rights, with limited exceptions. Thus, if Dan's confession violated his 5th or 6th Amendment rights, the statement cannot be admitted.

5th Amendment Right

The 5th Amendment provides that a defendant should be free from self-incrimination. The right applies to testimonial evidence coercively obtained by the police. Under the 5th Amendment, before the police conduct custodial interrogation, the police must give the defendant his Miranda warnings. Miranda warnings inform the defendant of his right to remain silent and the right to an attorney. The 5th Amendment right is non-offense specific, meaning that even if the defendant exercises his rights, the police can question him about an unrelated offense. If the defendant asserts his right to remain silent, the police must abide by defendant's right, although they can later question him after a reasonable amount of time has passed. If the defendant unambiguously asserts his right to an attorney, the police cannot question him without either providing an attorney or obtaining a waiver of the right to counsel.

The 5th Amendment right to remain silent and to counsel only applies in custodial interrogation. A person is in custody if he or she is not objectively free to terminate an encounter with the government. A person is subject to interrogation if the police engage in any conduct that is likely to elicit a response, whether incriminating or exculpatory.

Dan will argue that he was subject to custodial interrogation because (1) he was in prison and not free to leave, and (2) the informant was planted in order to elicit statements from Dan. Clearly, Dan was in custody, as he was in jail. Dan may have a harder time proving he was subject to interrogation. Typically,

interrogation only occurs when the person is aware that he is in contact with a government informant. The prosecution will argue that Dan was not aware that Sid was a government informant, and believed that Sid was a gang member who was trying to help him. Thus, the prosecution will argue, the police were not required to give Dan his Miranda rights before commencing the questioning. The prosecution will argue that if Dan trusted Sid and willingly spoke to him, he cannot now claim that the statement constituted interrogation or was coercively obtained.

As Dan did not know that Sid was a government informant, he will likely fail in arguing that he should have received his Miranda rights before Sid questioned him. Thus, he will not be able to exclude his statement on 5th Amendment rounds.

Impeachment Purposes

Even if Dan's statement violated his 5th Amendment right, the statement may still be used to impeach Dan's testimony if he testifies at trial.

Fruits of Miranda

If the police obtained any evidence as a result of Dan's statement to the informant, these "fruits of Miranda" may be admissible. The Supreme Court has not conclusively determined whether such fruits are admissible, but they likely are.

6th Amendment Right

The 6th Amendment provides the right to counsel at all criminal proceedings. It applies once the defendant has been formally charged with a crime, and prevents the police from obtaining an incriminating statement after formal charges have been filed without first obtaining the defendant's waiver of counsel. The right is offense-specific, meaning it only attaches for the crime(s) for which the defendant has been formally charged. It does not prevent the police from questioning the defendant about unrelated offenses.

Here, Dan had been [under] arraignment on a charge for murder, so formal charges had been filed by the government. Thus, Dan was entitled to counsel at any post-charge police interrogation. Dan will argue that by subjecting him to interrogation by a police informant after formal charges had been filed without obtaining a waiver of his right to counsel, the police violated his 6th Amendment right.

The police will argue that Dan was not aware that Sid was a government informant, but this awareness is not necessary for a 6th Amendment violation. Once Dan's rights to counsel attached at his arraignment, Dan had a right to counsel during police interrogation to prevent the police from deliberately eliciting

an incriminating statement. The police used a government informant who lied to Dan about his identity, made a promise of a better attorney, and asked him about his involvement with the crime, in order to obtain a confession from Dan. The police did all of this without waiving Dan's right to have his attorney present during the interrogation. Dan's right to counsel under the 6th Amendment has been violated, and Dan is entitled to exclusion of the statement at his trial.

Like a violation of Dan's 5th Amendment right, the prosecution may use a coercively obtained confession to impeach Dan's testimony at trial.

Conclusion

Dan's statement to Sid likely violated his 6th Amendment right to counsel at any post-charge interrogation, because he had already been arraigned. The police should have obtained a waiver of Dan's right to counsel before sending Sid in, and it should not matter that Dan did not know that Sid was a police informant. However, because Dan did not know that Sid was working for the government, the questioning and subsequent statement did not likely violate Dan's 5th Amendment rights to Miranda warnings.

Thus, Dan will likely be successful in his motion to exclude his statement under the exclusionary rule as a violation of his 6th Amendment right.

Dan's Conviction for Murder or any Lesser-Included Offense

Murder

Murder is the unlawful killing of another human being with malice aforethought. Malice aforethought exists if there is no excuse justifying the killing and no adequate provocation can be found, and if the killing is committed with one of the following states of mind: intent to kill, intent to inflict great bodily injury, reckless indifference to an unjustifiably high risk to human life, or intent to commit a felony.

The prosecution will argue that Dan is guilty of murder because no excuse existed (duress is not an excuse to homicide), no adequate provocation exists, and he had any one of the three following states of mind: intent to kill, intent to inflict great bodily injury, or a reckless indifference to an unjustifiably high risk to human life.

The prosecution will argue that no excuse existed for Dan to kill Vic. The prosecution will argue that even though Dan may have felt he was under duress imposed by Vic, this does not justify the killing of Vic, for two reasons: (1) the duress was to join the Reds, not to kill Vic, and (2) duress cannot be used as an excuse for homicide. The prosecution will also argue that no excuse existed from Vic's actions toward Dan during the incident where he was killed that would

give Dan the reasonable belief that he was about to be killed or seriously injured. The prosecution will note that there is no evidence that Vic was even aware of Dan's presence, that Vic did not confront Dan with unlawful force, and that it was unreasonable that Dan thought he was about to be stabbed.

The prosecution will be required to show that adequate provocation did not exist for Dan's killing of Vic, and that Dan had one of the required states of mind here. Adequate provocation is discussed in detail below, but the prosecution will argue that even if Dan was subjected to a serious battery, he had a week to cool off from the provocation of that battery, and thus was not still under the direct stress imposed by that battery when he killed Vic.

The prosecution will also argue that Dan had any of the states of mind listed above. By pulling out his gun and pulling the trigger, Dan intended to kill Vic. This intent was evidenced by an awareness that the killing would occur if he pulled the trigger, and a conscious desire for that result to occur. The prosecution can also argue that if he did not intend to kill Vic, he knew or acted recklessly as to whether Vic would suffer great bodily injury as a result of the shooting. Finally, the prosecution can argue that by pulling the trigger, Dan was acting with a reckless disregard to the unjustifiably high risk to Vic's life that would occur from his actions. Dan, the prosecution will argue, clearly did not care whether Vic lived or died as a result of the shooting, and thus Dan had the requisite intent to be convicted of murder.

Because the prosecution can show that no excuse or adequate provocation existed, and that Dan acted with one of the states of mind required for murder, Dan can likely be convicted of murder unless he has a valid defense. In addition, if the prosecution can show that the killing was deliberate and premeditated, Dan may be guilty of first-degree murder. The prosecution will show that the killing was deliberate and premeditated because Dan was carrying a gun and shot Vic almost immediately after seeing him in the street.

Self-Defense

Self-defense is a complete defense to murder. Self-defense is justified when the defendant reasonably believes that the victim is about to kill him or inflict great bodily injury upon him. Deadly force may be used in self-defense if the defendant is not at fault, is confronted with unlawful force, and is subject to the imminent threat of death or great bodily harm.

Dan will argue that the defense of self-defense should completely bar his conviction for murder. Dan will point to the history between the parties as well as Vic's actions at the scene of the crime to establish that he was justified in using deadly force against Vic. Dan will argue that Vic had subjected him to a serious battery when he pushed him into the alley, showed him a knife, and threatened him. Dan will argue that this battery made Dan aware that Vic was a serious

criminal (and that Dan already had knowledge of Vic's criminality because he was involved in a gang), and that Vic would stop at nothing to injure Dan if Dan refused to join his gang.

With this history, Dan will argue that it was reasonable for him to believe that Vic was about to shoot him, because Vic was walking with his hand under his jacket, Dan will argue that the history between the parties and Vic's suspicious behavior made it reasonably likely that he was about to be stabbed, and thus he was justified in using deadly force in self-defense.

The prosecution will argue that even if the history between the parties made Dan afraid of Vic, that Vic had not confronted Dan with any unlawful force before Dan shot him. There is no evidence that Vic even saw Dan walking down the street. In addition, the prosecution will argue that even if Vic had plans to harm Dan, he wanted Dan to join his gang and would have only injured him if Dan refused to join the gang once again. While Dan was obviously not required to join the gang, this evidence will support the prosecution's defense that Dan's belief that he was about to be subject to immediate harm was unreasonable. At the very least, Vic probably wanted to talk to Dan one more time before inflicting harm upon him, so Dan was not subject to an immediate threat of death or bodily harm. The prosecution will argue that Dan should have waited until Vic produced the knife before shooting, or, at the very least, approached Dan in a threatening manner. Because Vic did not do these things, Dan cannot use the defense of self-defense.

Duress

Dan may argue that he was under duress, and this resulted in his killing of Vic. Duress is a good defense when the defendant is coercively forced under threats from another to commit a criminal act. Duress may have been a good defense if Dan was forced to join the gang and commit criminal acts. However, duress cannot be used to defend against homicide. Thus, this defense will fail.

Voluntary Manslaughter

Dan may try to get his charge lessened to voluntary manslaughter. Voluntary manslaughter is a killing that would be murder but for the existence of adequate provocation. Adequate provocation will be found where: the provocation is such that it would provoke a reasonable person, the defendant was in fact provoked, the facts suggest that the defendant did not have adequate time to cool off, and the defendant did not in fact cool off.

Dan will argue that Vic's repeated threats to him constituted adequate provocation. He will argue that being shoved into an alley, being shown a knife, and given basically a death threat is enough to provoke anger in the mind of a reasonable, ordinary person. Courts typically use an aggravated battery, as Vic

has committed here, as existence of adequate provocation. Dan will also argue that he was provoked, evidenced by carrying a gun for protection and living in fear of Vic.

However, Dan will have a harder time showing that a reasonable time to cool off could not be found, and that he did not in fact cool off. A week existed between Vic's aggravated battery of Dan and Dan's killing of Vic. While Dan may have still been frightened of Vic, a week is likely too long to find that Dan was still acting under the provocation supplied by Vic during the aggravated battery. Rather, Dan likely had cooled off, but was still upset by the incident and repeated threats.

It is likely that the prosecution can successfully argue that adequate provocation did not exist here because Dan was not acting under the direct stress imposed by the serious battery committed by Vic when he shot and killed Vic. However, if Dan can show such adequate provocation, his charge should be reduced to voluntary manslaughter.

Manslaughter

Dan may try to get his charge lessened to a manslaughter charge under the 'imperfect self-defense" doctrine. Dan will argue that even though he may be ineligible to use the self-defense as a valid defense because Vic had not confronted him with unlawful force, he reasonably believed that it was necessary to shoot Vic to avoid being killed or subject to serious bodily harm. It is more likely that a court will accept Dan's argument for a lesser charge of manslaughter under the imperfect self-defense doctrine, rather than accepting Dan's total defense of self-defense, because Vic did not do anything during the incident where he was shot to suggest that he was about to kill Dan or subject Dan to great bodily harm.

Thus, Dan may likely be convicted of murder, voluntary manslaughter, or manslaughter.

THURSDAY MORNING
FEBRUARY 28, 2008

California Bar Examination

Answer all three questions. Time allotted: three hours

Your answer should demonstrate your ability to analyze the facts in question, to tell the difference between material and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other. Your answer should evidence your ability to apply law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them. If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly. Your answer should be complete, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem. Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

Q4 Trusts / Wills

In 2001, Wilma, an elderly widow with full mental capacity, put $1,000,000 into a trust (Trust). The Trust instrument named Wilma's church (Church) as the beneficiary. Although the Trust instrument did not name a trustee, its terms recited that the trustee has broad powers of administration for the benefit of the beneficiary.

In 2002, Wilma's sister, Sis, began paying a great deal of attention to Wilma, preventing any other friends or relatives from visiting Wilma. In 2003, Wilma reluctantly executed a properly witnessed will leaving her entire estate to Sis. Following the execution of the will, Wilma and Sis began to develop a genuine fondness for each other, engaging in social events frequently and becoming close friends. In 2005 Wilma wrote a note to herself: "Am glad Sis will benefit from my estate."

In 2007, Wilma named Sis as trustee of the Trust, which was when Sis found out for the first time about the $1,000,000 in the Trust. Without telling Wilma, Sis wrote across the Trust instrument, "This Trust is revoked," signing her name as trustee.

Shortly thereafter, Wilma died, survived by her daughter, Dora, who had not spoken to Wilma for twenty years, and by Sis.

Church claims that the Trust is valid and remains in effect. Sis and Dora each claim that each is entitled to Wilma's entire estate.

1. What arguments should Church make in support of its claim, and what is the likely result? Discuss.

2. What arguments should Sis and Dora make in support of their respective claims, and what is the likely result? Discuss.

Answer question number 2 according to California law.

Answer A

1. What arguments should Church make in support of its claim?

A. Attempted creation of the trust

A private express trust is created when the following elements are met: (1) a settlor with capacity, (2) intent on the part of the settlor to create a trust, (3) a trust res, (4) delivery of the trust res into the trust, (5) a trustee, (6) an ascertainable beneficiary, and (7) a legal trust purpose. In this case, each of these elements have been met, and Wilma successfully created a valid inter vivos express trust.

(1) The facts state that Wilma had full mental capacity.

(2) The facts indicate that a trust instrument was created, which is evidence that Wilma intended to create a trust, and not some other type of instrument or conveyance.

(3) The res here is the $1m that Wilma put in the trust.

(4) According to the facts, Wilma put the $1m into the trust, so the delivery element is satisfied.

(5) The trust instrument here did not name a trustee. However, courts will not allow an otherwise valid trust to fail for want of a trustee. Rather, courts will appoint a trustee. So, notwithstanding the lack of a trustee, the trust was validly created. In this case, the lack of a trustee was cured later by Wilma, when she named Sis as the trustee in 2007. So, at the time of Church's assertion that the trust is valid and in effect, there is a trustee and the court need not appoint one. (However, given Sis's conduct in attempting to revoke the trust, which is likely a violation of her fiduciary duty as trustee, the Church should consider moving the court to dismiss Sis as trustee and appoint a new trustee.)

(6) The beneficiary in this case is Church. Beneficiaries can be natural persons, corporations, or other organizations. So, Church is a valid beneficiary. Because the beneficiary is Church, it can argue that the trust set up by Wilma is a charitable trust. Charitable trusts have as their purpose the specific or general charitable intent to benefit some social cause. Religion is considered a legitimate purpose of a charitable trust. Thus, this trust can be considered a valid trust.

(7) There is no illegal or otherwise improper purpose for Wilma's trust, so this element is satisfied.

B. Attempted revocation of the trust

Inter vivos trusts are revocable unless otherwise provided. The facts do not state whether the trust instrument had a provision making it irrevocable, so it is assumed that the trust is revocable.

A trust cannot unilaterally be revoked by the trustee. Typically, only the settlor (if she is alive and has mental capacity) can revoke an inter vivos trust. In some circumstances, a trustee and the beneficiaries may petition the court to terminate (or modify) a trust, but no such circumstances exist here. Thus, Sis's attempt to revoke the trust unilaterally, without telling Wilma and without involving the court, by writing across the instrument "This Trust is revoked," was ineffective. The trust therefore remains in effect.

Had Wilma written across the Trust instrument "This Trust is revoked," it might have operated as a valid revocation by physical act. However, such a revocation must be done by the settlor or by someone at the direction of the settlor and in her presence, which is not what happened here.

C. Survival of the trust after Wilma's death

Sis might argue that the trust should pass to her under Wilma's will, which left her the entire estate. However, there are no facts to suggest that Wilma only intended the trust to continue for her lifetime. Rather, the creation of the charitable trust by Wilma is assumed to be a valid will substitute, which disposes of the settlor's property outside of probate.

2. What arguments should Sis and Dora make in support of their respective claims?

A. Sis's Arguments

For Sis to succeed in arguing that she is entitled to Wilma's estate under the terms of her will, she must establish that the will is valid. A valid will requires (1) a testator with capacity, (2) testamentary intent, and (3) valid compliance with the applicable formalities.

(1) Capacity: To have sufficient capacity to execute a will, a testator must (1) know the nature and extent of her property, (2) understand the natural objects of her bounty (i.e., her relatives and friends), and (3) understand that she is making a will. The facts here state that in 2001 Wilma had full mental capacity. In 2003, when Wilma executed the will, it is presumed that she still had such capacity.

(2) Testamentary intent: Here, the facts state that Wilma executed a will, although she did so "reluctantly." Mere reluctance on the art of a testator is insufficient to defeat the existence of testamentary intent. However, if the

testator's intent was the product of undue influence, then true testamentary intent will not be found, and the will will be set aside to the extent of the undue influence. In this case, Dora will argue that Sis cannot take Wilma's estate under the will because she exerted undue influence on Wilma.

Undue Influence:

Undue influence exists when the testator was influenced to such a degree that her free will was subjugated. A prima facie case of undue influence is established by showing the following: (1) the testator had some sort of weakness (e.g., physical, mental, or financial) that made her susceptible to influence, (2) the person alleged to have exerted the influence had access to the testator and an opportunity to exert the influence, (3) there was active participation by the influencing person in the devise (the act by the person that gets them the gift), and (4) an unnatural result (i.e., a gift in the will that is not expected).

(1) In this case, there is no evidence that Wilma suffered from any particular weakness that made her susceptible to Sis's influence. She had capacity. She presumably was in good physical health, as she attended social events frequently. And she presumably was of comfortable means, as she was able to give away $1m to a charitable trust.

(2) Here, Sis did have access and opportunity to influence Wilma. She began "paying a great deal of attention" to her, and she prevented any other friends or relatives from visiting her. This element of the prima facie case is therefore established.

(3) It is unclear from the facts whether Sis actively participated in Wilma's drafting of her will, or somehow suggested in some other way that Wilma leave her estate to her. Dora would need to present evidence on this point to succeed in challenging the will on the basis of undue influence.

(4) The result here is not unnatural. Wilma is survived only by Sis and her daughter Dora. However, Wilma had not spoken to Dora for twenty years. Wilma is a widow, and leaves no surviving spouse or domestic partner. The facts do not suggest that Wilma had any close non-relative friends to whom she might naturally leave part of her estate. Wilma had already provided generously for Church in the trust. Therefore, it is natural that she would leave her estate to her sister. Moreover, Sis can argue that the "naturalness" of the result is further proven by the fact that she and Wilma genuinely became close friends in the years following the execution of the will. This friendship is evidenced by the note that Wilma wrote in 2005, which stated that she was "glad Sis will benefit from my estate."

(3) Formalities: In this case, the facts state that Wilma "executed a properly witnessed will," so the last element is satisfied.

Because all of the elements of a valid will are present, and because it is not likely that Dora can prove that the gift to Sis of Wilma's entire estate was the product of undue influence, Sis will take Wilma's entire estate under the will.

B. Dora's arguments

1. Dora's rights if undue influence is found

If Dora can prove that the gift to Sis is the product of undue influence, the will will be set aside to the extent of that undue influence. If there is a residuary clause in the will, the gift to Sis will pass into it. If there is no residuary clause, then the gift to Sis – which in this case is the entire estate – will pass as if Wilma died intestate. Because Dora is Wilma's only other surviving relative, the estate would pass to her.

2. Dora's rights as an omitted child

In California, if a child is pretermitted, she has certain rights to take from her parent's estate. A pretermitted child is one who is born after a will and all other testamentary instruments have been executed, and who is not provided for in the instruments. In this case, however, Dora was already born when Wilma executed her will in 2003 and the Trust in 2001. So, Dora is not pretermitted. (Had she been pretermitted, Dora would have been entitled to claim her statutory share of the estate passing through the will, plus a statutory share of any revocable inter vivos trusts.)

California does not provide protection for omitted children. An omitted child is one who was born at the time a testamentary instrument is drafted, but not provided for in the instrument. Therefore, Dora does not have any rights to Wilma's estate by mere virtue of being omitted from Wilma's will.

Answer B

1. Arguments Church should make in support of its claim

Whether a valid trust was formed

A trust is a fiduciary relationship relative to property, where a trustee holds legal title to such property (corpus) for the benefit of a beneficiary, and which arises from the settlor's manifested present intention to create such a trust for a valid legal purpose. In the case of a private express trust, the beneficiary must be an ascertainable person or group, while for a charitable trust the beneficiary must be society at large.

Corpus

The corpus of a trust must be a valid currently existing type of property, and may not be a mere expectancy [of] future profits or any other illusory property. In the case of a trust set up during the settlor's lifetime (inter vivos), a trust with a third person as a trustee will be under transfer in trust, with delivery of the property being actual, symbolic (some item representing ownership) or constructive (presenting the means to access the property, or, modernly, doing everything reasonably possible to put the trustee in possession, without raising suspicion of fraud or mistake).

In this case, the corpus existed and was validly delivered, because it was $1 million in money, which Wilma actually put into the trust.

Beneficiary

If the beneficiary is an ascertainable group or person, a private express trust may form. If an unascertainable group that is for the benefit of society in general, even if some individuals incidentally benefit, that is a charitable trust. For a charitable trust, the rule against perpetuities does not apply to invalidate the trust.

In this case, it could be argued that the church is an ascertainable, definite legal person, in which case Wilma may have formed a private express trust. It could alternatively be said that the real benefit is in the present and future members of the church, which advances a social interest in having religious institutions. In that case, it could be a charitable trust, and even though under the trust some people might take a benefit more than 21 years after a present life [is] in being, there is no rule against [a] perpetuities problem and the trust is valid. Therefore, there was a valid beneficiary.

Trustee

A trustee, who is appointed to administer the trust, is necessary for a trust; however, a trust instrument will not fail because a trustee is not named. In this case, even though Wilma never named a trustee, a court can appoint a trustee to fulfill the duties of a trustee, and the trust is not invalidated.

Resulting trust

A resulting trust is an implied in fact trust that occurs when a private express trust or charitable [trust] fails by means other than wrongdoing by the settlor. Under a resulting trust, the court-appointed resulting trustee's sole duty would be to convey the corpus back to the settlor or, if dead, her estate.

It might be argued against the church that Wilma created the trust in 2001, and did not appoint a trustee until 2007, that presumably the trust had no trustee for a full six years, during which there was no trustee. Therefore, it may be argued that during that time, the trust should have turned into a resulting trust. It might also be argued that in certain states, there is a statute of uses that creates a resulting trust when there is a passive trust of real estate property where the trustee has no active duties. It might [be] argued that, equitably, this principle should also apply to where the corpus is money, and that having no trustee for six years is equivalent to having a passive trustee, and that the money should have gone into a resulting trust.

However, because courts have explicitly stated that trusts do not fail for want of a trustee, the trust by Wilma will likely not fail.

Manifestation of intent

For there to be a valid trust, the settlor must have made a clear manifestation that she was delivering the property with the present intention of creating a trust. In this case, Wilma clearly showed her intent to do so. While she failed to name a trustee, she provided for there to be a trustee by naming his broad powers, and actually delivered the money into the trust. Finally, because Wilma, although elderly, had full mental capacity, there is no questioning that her ability to intend to create a trust was compromised. Therefore, Wilma clearly showed a showing of intent to create the trust, and it will be valid.

Legal purpose

Any purpose that is not illegal is allowed. In this case, Wilma clearly intended that the church and/or its members benefit in carrying out its activities on an ongoing basis, and there was nothing illegal about that. Therefore, she had a valid legal purpose.

Therefore, a valid trust was formed in 2001.

Termination of the trust

A trust may terminate by its own express terms. It may also terminate by the settlor's express revocation, where she has reserved the right to do so (in a majority of states). Finally, a trust may terminate by initiation of the beneficiaries, if all of them join and consent (any unborn remaindermen must be represented by an appointed guardian ad litem). If the settlor also joins in, the termination may proceed. If the settlor does not or has died, then the beneficiaries may only terminate if all material purposes of the trust have been fulfilled.

Revocation by express terms
Here, there is no indication that Wilma provided for the trust to have ended at any point. Therefore, it was not revoked.

Revocation by settlor
Here, Wilma did not expressly reserve her right to revoke. Even in the minority of states where the right is implied, she never exercised such right. Sis may argue that Wilma's later making a note that she was glad that Sis would benefit worked to impliedly revoke the trust, since it showed an intent that Sis benefit from her estate, this will likely not be able to show Wilma's intent to revoke. Therefore, she did not revoke the trust.

Revocation by beneficiaries
As shown above, Wilma did not consent or join in any acts to terminate the trust. Furthermore, under the facts neither the church nor its members did anything to suggest that it wanted to revoke the trust; to the contrary, the church is suing to show the validity of the trust. Therefore, the beneficiaries did not revoke.

Therefore, no revocation occurred.

Powers of the trustee
A trustee has the powers expressly granted her in the trust instrument, plus any implied powers necessary to carry out her duties, such as the powers to sell, lease, incur debts on property, and modernly, to borrow.

Here, as of 2007 Sis was named trustee of the trust. The trust instrument provided that the trustee had "broad powers" to administer the trust for the benefit of the beneficiary. It spoke nothing of trustee's power or authorization to evoke, which is not traditionally a power implied to the trustee. Therefore, Sis had no power to revoke the trust by canceling it. Therefore, it was not revoked by her acts.

Duties of trustee
Furthermore, a trustee has duties of care and loyalty to the beneficiary. Under the respective duties, she must act as a reasonably prudent person handling her own affairs, and in the best interests of the beneficiaries at all times.

When Sis attempted to revoke the trust, intending to cut out the beneficiaries, this was expressly against the trust, and breached her duty of care. Also, because she was the taker under Wilma's will, she also breached her duty of loyalty because her act would have benefited her.

Therefore, Sis acted improperly, and her act of revocation was not valid.

Conclusion
Therefore, the trust was valid and was not revoked, and the church has a claim to it.

2. Arguments Sis and Dora should make in support of their claims

Dora's arguments
I: capacity
II: insane delusion
III: undue influence
IV: pretermitted

Capacity
A testator has capacity to make a will if she is over 18, can understand extent of her property, knows the natural objects of her bounty (family members, etc.) and knows that she is executing a will. If a testator lacks capacity, the entire will will not be probated and the property passes through intestacy unless there is a former valid will.

Dora may argue that because Wilma was elderly and a lonely widow, she lacked the true capacity to make a will, and that as Wilma's sole issue, she should take the whole estate under intestacy. However, Wilma was over 18. She was of full mental capacity, and knew what her property consisted of. She knew who the natural objects of her bounty were, because presumably she knew of Sis and Wilma. And finally, she executed a properly witnessed will with no signs that she did not know what she was doing. Therefore, Dora's argument will fail.

Insane delusion
A provision in a will [can] be denied probate if 1) it was based in a false belief, 2) which was the product of a sick mind, 3) there was not even a scintilla of evidence to support the belief, and 4) the belief actually affects the will (shown by the provision in question).

Here, Dora may argue that Wilma may have had some sort of sick mind causing her to believe that she would devise all her estate to Sis and leave Dora out. However, there is no evidence to support that view. Wilma's will was based in a genuine belief in and factual close relationship with Sis that had developed. There is no indication of Wilma's sick mind. Finally, no false belief affected the will. Wilma and Sis got along well, engaged in social events together, and were close friends. Therefore, Dora's argument will fail.

Undue influence
There are three bases for undue influence: prima facie case, presumption, and CA statute.

Prima facie UI

If a person has access to a testator, the testator was of a susceptible trait, the person had a disposition to induce the testator and there was an unnatural result, there will be a prima facie case of undue influence, and the relevant affected provision will not be probated.

Here, Dora can show that Sis had access (indeed, sole access to Wilma, through her own prevention of others). Dora will emphasize that Sis acted wrongfully in paying an unnatural amount of attention to Wilma suddenly, and preventing others from accessing her. However, Sis will show that her interest in Wilma was legitimate, as shown by their growing fondness for each other. However, she cannot show that Wilma was particularly susceptible in any way. She was likely lonely, but she did not have outward signs of feebleness to subjugate her testamentary intent.

Sis may have had the disposition to induce Wilma to make a will in her favor, because she was with her all the time, but it will also be hard to show that she did anything to manipulate her into making the will. Additionally, she made the will soon after Sis began paying attention to her, and it happened to leave everything to her. Dora will argue these points; however, she cannot show that Sis actually did anything to induce the will, and the two became genuine friends. Furthermore, the note from 2005 shows that Wilma was genuinely pleased to have provided for Sis. Even if Sis had exercised a disposition to coerce a will, it would be difficult to imply that she did so with an extrinsic note showing testator's intent. Therefore, Dora will have a tough time proving this element. Her best case is likely to argue that the note was not written until 2005, and in 2003, at the time of the will's execution, a disposition was exercised, which would be enough to satisfy.

Finally, giving all of her property to Sis was not an unnatural result, though Dora will claim that cutting out a child is unnatural. Wilma had not spoken to Dora in twenty years, long before Sis's interference. Therefore, it was not unnatural to cut Dora out.

Therefore, the prima facie case fails.

Presumption UI

If a person is in a certain type of close relationship with the testator (in CA, any position where the testator reposes trust in the person), and there is a disposition to cause the devise and there is an unnatural result, there will be a presumption of undue influence, and the will will not be probated.

Here, Dora can clearly show that Wilma reposed her trust in Sis, since they were close friends and Wilma even appointed her trustee over the trust to the church. However, as discussed above it will be difficult to show disposition, and more so to show an unnatural result.

Therefore, this branch of undue influence fails.

CA statutory UI

In CA, any donative transfer will be deemed invalid if made to a drafter of a testamentary instrument, of someone related to or in business with such drafter, a fiduciary of the testator who transcribed the instrument, or a care custodian. If found, the portion will not be probated, to the extent that it is above what the person would have received in intestacy.

In this case, there are no signs that Sis had a hand in drafting or transcribing a will. Dora may argue that Sis was Wilma's care custodian, since she was elderly and alone. However, no signs indicate that she was in need of care. In fact, they attended social events together in public, implying that Wilma was quite capable of taking care of herself. Therefore, there is no statutory basis for undue influence.

Fraud in the inducement

A portion of a will affected by a person's affirmative misrepresentations to the testator, the falsity of which the person knew about, and intended to induce reliance upon, will be denied probate if it was justifiably and actually relied upon by a testator in making such portion of the will. It will rather pass to the residuary of the will, if there is one, or to a co-residuary, if already in the residuary, or to intestacy. Alternately, the court may impose a constructive trust to deliver the property to the intended beneficiary of the testator, had it not been for the fraud.

In this case, there are not enough facts to determine whether Dora or any other person misrepresented any facts to Wilma, such that she would have been induced to make a will entirely leaving her property to Sis. Dora will argue that the court should imply it, since Sis was the only person with access to Wilma and there would be no way to know whether there were such misrepresentations. If there has been, the will may be refused probate, but Dora likely cannot show this.

Pretermitted child

A child born or adopted after all testamentary instruments (wills, inter vivos, revocable trusts), and not provided for in them, will be deemed to have [been] inadvertently left out, and can take a statutory share in intestacy as if the testator had no such instruments. Here, both the trust and the will were made after Dora was born. Therefore, she cannot argue this.

Conclusion

Dora does not have very solid bases to argue that she should take Wilma's estate. If she can show that Sis exercised a disposition to coerce Wilma's will, her "ratification" in 2005 with the note would not save the will, and it would be denied probate, such that Dora could take. However, because it is difficult to

time when the relationship between Wilma and Sis blossomed, Dora's arguments are likely no good.

Sis's arguments

Validly executed will

A will is valid if witnessed by two witnesses and signed in their simultaneous presence by the testator. An interested witness who would take under the will would be presumed to have exercised wrongful influence. In this case, however, we are told that the will was validly executed, and there is no indication that Sis was a witness.

Therefore, because the will was validly executed, Sis should be able to argue that she can take the entire estate. She can raise defenses to each of Dora's claims, as explained above, and should succeed on all of them.

Q5 Community Property

Harvey and Fiona, both residents of State X, married in 1995. Harvey abandoned Fiona after two months. Harvey then met Wendy, who was also a State X resident. He told her that he was single, and they married in State X in 1997. They orally agreed that they would live on Harvey's salary and that Wendy's salary would be saved for emergencies. They opened a checking account in both their names, into which Harvey's salary checks were deposited. Wendy opened a savings account in her name alone, into which she deposited her salary.

Harvey and Wendy moved to California in 1998. Other than closing out their State X checking account and opening a new checking account in both their names in a California bank, they maintained their original financial arrangement. In February 1999, Harvey inherited $25,000 and deposited the money into a California savings account in his name alone.

In 2004, Wendy was struck and injured by an automobile driven by Dan. Harvey and Wendy had no medical insurance. Wendy's medical bills totaled $15,000, which Harvey paid from the savings account containing his inheritance. In 2005, Wendy settled with Dan's insurance carrier for $50,000, which she deposited into the savings account that she still maintained in State X.

Very recently, Harvey learned that Fiona had died in 2006. He then told Wendy that he and Fiona had never been divorced. Wendy immediately left Harvey and moved back to State X. The savings account in State X currently contains $100,000. Under the laws of both State X and California, the marriage of Harvey and Wendy was and remained void.

1. What are Harvey's and Wendy's respective rights in:
    a) The State X savings account? Discuss.
    b) The California checking account? Discuss.
    c) The California savings account? Discuss.

2. Is Harvey entitled to reimbursement for the $15,000 that he paid for Wendy's medical expenses? Discuss.

Answer according to California law.

Answer A

California is a community property state. Property acquired during the marriage is community property (CP), while property acquired before marriage, after the end of the marital economic community or by gift or inheritance is separate property (SP). When couples who are not domiciled in California acquire property in a non-community property state and then later relocate to California, such property is treated as quasi-community property (QCP) if it would have been CP had the couple been domiciled in California at the time of acquisition.

In order to determine the character of any asset, the court will look at (i) the source of the asset, (ii) any actions of the parties that may have changed the nature of the asset, and (iii) any presumptions affecting the asset.

With these general principles in mind, I now turn to the specific items of property.

1. Harvey's and Wendy's Respective Rights

Prior to determining Harvey's (H) and Wendy's (W) respective rights in the various items, it is important to determine the nature of their marital relationship, as well as the effect of their oral premarital agreement. Putative spouses are entitled to "quasi-marital" property (QMP) rights, while unmarried cohabitants' property rights are governed by contract. QMP rights are treated the same as CP.

Putative Spouse

In order to be considered a putative spouse, the spouse must have a good faith reasonable belief that he or she is lawfully married. While H knew that he had never divorced Fiona prior to marrying W, W had a good faith reasonable belief that she was lawfully married to H because H told her that he was single, and it appears that they married in 1997. Thus, W qualifies as a putative spouse. The putative marriage, and QMP rights accrue, until such time as the putative spouse learns that he or she is not lawfully married. Here, the facts indicate that H only told W in 2006 that he and Fiona had never divorced, at which time she learned that she was not lawfully married. Thus, the putative marriage existed from 1997 until 2006, at which point it ended when W learned that she was not lawfully married, and QMP rights ceased to accrue.

Oral Arrangement between H and W

While generally parties may orally agree how to handle their affairs, premarital or marital agreements and agreements changing the character of marital property rights must be in writing. Thus, although H and W orally agreed that they would live on H's salary and save W's for emergencies, this "oral transmutation" of their QMP rights is invalid. Further, if their oral agreement was akin to a prenuptial

arrangement, it would only be valid if (i) it was in writing, (ii) each had disclosed to the other the full nature of his or her property, and (iii) [each] was represented by independent counsel. None of these elements appear to be present. W may try to argue that she should still get the benefit of the oral arrangement, however, because her savings account has $100,000, and she was the putative spouse and that H will benefit under QMP rights; however, the court can find that even if W's State X savings account was to be "saved for emergencies", this still indicates an intent to use it for the benefit of the putative marital economic community (and not keep it as W's SP). Thus, the court should not give effect to the oral agreement between H and W regarding the treatment of their QMP. All of the QMP should be treated as CP (for property acquired while domiciled in California) and QCP for property acquired while domiciled in State X.

a. The State X Savings Account

The source of the $100,000 State X savings account is W's earnings and [a] $50,000 settlement with Dan's insurance carrier (resulting from a 2004 injury W suffered when she was struck and injured by an automobile driven by Dan). Earnings during marriage are CP, which would be considered QMP in the present case. Further, the $50,000 settlement would also be considered CP, or QMP in the present case, because the cause of action arose during the putative marriage and H was not the tortfeasor. Thus, the entire State X savings account is QMP.

The court will then look to the actions of the parties to determine if they have changed the character of the asset. W may then try to argue that because the bank account is in her name alone that it is her SP. However, taking title in one spouse's name alone does not defeat the QMP interest. Nothing indicates that H intended the savings account to be W's SP, only that they intended it to be available for "emergencies." Plus, as discussed above, the court will not enforce the oral agreement regarding the treatment of the QMP. Thus, the State X savings account is QMP, and should be treated as QCP (for earnings deposited while not domiciled in California) and CP (for earnings and tort settlement deposited while domiciled in California).

Upon the end of the putative marriage (similar to divorce), QCP and CP are treated the same and each spouse generally has an equal undivided ½ interest in the QCP/CP. However, an exception to this general rule exists for tort settlements and judgments, which the court will award solely to the injured spouse unless the interests of justice require otherwise. Here, nothing indicates that it would be unfair to let W keep the $50,000 tort settlement, subject to reimbursing H for the $15,000 expended (see below). Thus, of the $100,000 in the State X savings account, W will take $50,000 (as the injured spouse taking the tort settlement), subject to reimbursement of $15,000 to H, and will take $25,000 as her QCP/CP interest and H will take the $25,000 as his QCP/CP interest.

b. The California Checking Account

The source of the California checking account is H's salary checks (and presumably the funds from their State X checking account, which were also H's salary checks). As noted above, earnings are CP and thus the source of the California checking account is CP/QCP and would qualify as QMP.

The court will then look to see if the parties have taken any actions to change the character of the assets. Here, H and W have done nothing to defeat the putative marital economic community interest in the property. As discussed above, the oral agreement will be given no effect. Moreover, even though the oral agreement of the parties won't be given effect, the oral agreement is evidence of an intent that H and W intended H's earnings to be used to benefit the putative marital economic community. Further, H and W took title to the checking account in both their names. Thus, the California checking account is QMP.

As noted above, as QMP will be treated like CP upon end of the putative marriage. Thus, each of H and W has an undivided ½ interest in the California checking account.

c. The California Savings Account

The source of the California savings account is H's $25,000 inheritance. Inheritance is SP. Thus, the California savings account is H's SP. Because the parties have taken no actions that would change the nature of H's SP to CP (or QMP in this case), the California savings account remains his SP. This is further evidenced by the fact that H took title to the account in his name alone. Upon the end of H's and W's putative marriage, H takes the remaining funds in the California savings account as his SP and W has no rights in the California savings account.

2. Reimbursement to Harvey of $15,000 for Wendy's Medical Expenses

When a spouse (or putative spouse) expends SP on the medical expenses of the other spouse, he or she is entitled to reimbursement to the extent that the community had sufficient funds available or that the debtor spouse had sufficient SP available at such time. Here, it appears that H expended $15,000 of his SP, while the putative marriage may have had sufficient QMP funds to handle the "emergency" medical expenses in the State X savings account (which now has $100,000 [only $50,000 of which is the insurance settlement]), or even in the California checking account (QMP), for which we have no information. To the extent that there was sufficient QMP available or that W had sufficient SP available at the time H paid the $15,000 of medical expenses out of his SP, H is entitled to reimbursement.

Answer B

General community property rules

California is a community property state. Under California law, all property acquired during marriage is presumed to be community property (CP). All property acquired before marriage, after marriage, or during marriage through inheritance, bequest, or devise is presumed separate property (SP). Three factors determine the characterization of property as CP or SP: the source of the asset; what actions the parties took that may have changed the asset's character; and what special presumptions apply, if any, that might change the asset's character.

Quasi-community property

Under California law, quasi-community property (QCP) is any property acquired during marriage that would have been CP had the acquiring spouse lived in California at the time of acquisition. The QCP designation generally only becomes relevant at divorce or death. At divorce, QCP is treated like CP; at death, the surviving spouse has a ½ interest in the deceased acquiring spouse's QCP, but a nonacquiring spouse who predeceases an acquiring spouse has no rights to QCP.

Here, because H and W acquired property while married but living outside California, any such property that would otherwise be designated as CP will be designated as QCP.

W's status as putative spouse

California does not recognize common-law marriage, but recognizes putative spouses. For a party to claim putative spouse status, the aggrieved party must have been acting under the good faith belief that she was married during the period claimed. As soon as the party becomes aware that the marriage is invalid, or upon dissolution of the relationship, her rights as a putative spouse terminate. California treats all property acquired during putative marriage as quasi-marital property (QMP), which is treated the same as CP for purposes of disposition at death or divorce.

Here, W was under the mistaken good-faith belief that she and H were validly married. H told her he was single, and they had some kind of marriage that led W to believe they were married. Thus, between 1997 and "very recently," W will have putative spouse rights from their putative marriage through the time she found out that H and Fiona had never been divorced. Thus, all property acquired by W and H during this period that would otherwise be QCP or CP under California law will be designated as QMP.

It should be noted that while some states bar a non-innocent putative spouse from any recovery of QMP, California law permits both spouses to recover their respective shares of QMP notwithstanding fraud or bad faith of one of the parties. Thus, if QMP should be treated as CP, H will recover his share accordingly.

1. Harvey and Wendy's rights

a. State X savings account

Source: W's QMP earnings

W opened a savings account in State X during her putative marriage to H. She deposited her salary earned during her putative marriage into this account. Because all earnings acquired during marriage are presumptively community property if the couple lives in California, this property would be QCP/QMP and treated as CP for purposes of divorce.

Form of title

W would argue that because she opened the savings account in her name alone, the form of title should make the deposits her SP, rather than community earnings. If W could prove that H knew that she took title in her name alone and consented to it, such a showing could strengthen a presumption that H intended to make a gift to W of community earnings. However, H would successfully rebut any potential gift presumption through evidence of their oral agreement that the earnings were to be used "for emergencies"; i.e., this was intended to be a community nest egg in the event of an emergency.

Oral transmutation

A transmutation is an agreement by a married couple to change the form of property from SP to CP or vice versa. Any oral agreements by a married couple before 1985 are admissible to prove transmutation; however, after 1985 a writing is required. Here, because the oral agreement is one that supports an argument for CP, W would not be able to use this evidence to strengthen her SP assertion. Additionally, because the property is presumptively CP under California law, H would not need to introduce this oral agreement as evidence of transmutation.

Married woman's special presumption

The married woman's special presumption states that any property taken in a married woman's name alone before 1975 is presumed to be her SP. However, here, no married woman's special presumption applies, because the property was taken in W's name after 1975. Additionally, the presumption does not apply to bank accounts.

Personal injury award

As a general rule a personal injury settlement for a cause of action that arose during the marriage is considered CP unless the other spouse was the tortfeasor.

However, upon divorce, the proceeds are awarded to the injured spouse unless the interests of justice require otherwise.

Here, W was injured by Dan, a non-spouse, and ultimately received a $50,000 settlement, which she deposited into the State X savings account in 2005. H would argue that the settlement was QMP, and thus should be split equally between H and W. However, as noted, at divorce, the $50,000 will be awarded to W unless the interests of justice require otherwise. Here, no facts indicate that the interests of justice require otherwise, so W should be entitled to the $50,000.

Disposition

Thus, W should be entitled to $50,000 of the State X savings account unless the interests of justice require otherwise. W and H each have a ½ QMP/CP interest in the remaining $50,000, so they should get an additional $25,000 each.

b. The California checking account

State X earnings

H's earnings in State X occurred during his putative marriage to W; thus, these earnings would be considered QCP under California law, characterized as QMP, and treated as CP upon dissolution of his relationship with W.

California earnings

H's California earnings also occurred during his putative marriage to W; thus, these earnings would be considered CP under California law, characterized as QMP, and treated as CP upon dissolution.

Form of title

Here, there is no form of title to rebut the presumption that all marital earnings are CP. The bank account was in joint and equal form, and as such, strengthens the presumption that his was a community asset.

Presumptions

No special presumptions apply.

Disposition

Because all of the contents of the California checking account were either QCP or QMP under California law, they will be treated as CP upon dissolution to the extent the money was earned during H and W's putative marriage. Thus, H and W are entitled to a ½ share each of the balance of the account as of the date of W's departure/the dissolution of the putative marriage.

c. The California savings account

H's inheritance

H inherited $25,000, which he deposited in the California savings account. Property acquired during marriage through inheritance is considered the inheriting spouse's SP; thus, the $25,000 is considered H's SP.

Form of title: In H's name alone

H kept his inheritance separate in an account in his name only and did not commingle any QMP earnings during the putative marriage. Thus, the form of title combined with the source of the account funds will be sufficient to sustain a finding that the property remained H's SP at all times.

H's expenditures for W's medical bills

H expended $15,000 of his SP for W's benefit during their putative marriage. The effect of this expenditure on H's potential rights to reimbursement is discussed below. For purposes of the remainder of H's California savings account, this expenditure will have no effect on the characterization of the asset.

Presumptions

No special presumptions apply.

Thus, H retained an SP interest in the California savings account and is entitled to the entire contents. Because H expended some of his SP for community benefit, he may be entitled to reimbursement from the community. Regardless, H takes the remaining $10,000 as his SP.

2. H's potential right to reimbursement for W's medical expenses

As a general rule, all debts incurred during marriage are community obligations. Where one spouse expends SP to pay a community obligation, he may be entitled to reimbursement from the community if he did not intend a gift and there were sufficient CP funds available at the time, and no other special presumptions apply.

Here, H expended $15,000 of his SP to pay W's medical expenses. H will argue that he is entitled to reimbursement from the community because W's expenses were a community obligation.

To the extent CP funds were available at the time to pay W's medical expenses, H will be entitled to reimbursement from the community.

However, a spouse's SP may be reached to the extent the other spouse incurs expenses for "necessaries" during marriage. The contributing spouse remains liable for expenses for "necessaries" until the dissolution of the marriage.

Here, H would argue that because W's savings account was expressly created as a community asset "for emergencies," and because the balance after receiving W's settlement deposit was $100,000, sufficient CP funds existed at the time W incurred her medical expenses and he should be reimbursed for his SP expenditures.

In the alternative, H would argue that because W subsequently received a $50,000 settlement, which was considered QMP during marriage and which would more than cover her direct medical expenses, the interests of justice should require that $15,000 of that $50,000 should be treated as the community's property to pay her medical expenses and he should be reimbursed.

Thus, under either argument, because sufficient QMP funds existed at or near the time of W's medical expenses, H should be entitled to reimbursement for his $15,000 payment of W's medical expenses.

Q6 Business Associations / Professional Responsibility

Albert, an attorney, and Barry, a librarian, decided to incorporate a business to provide legal services for lawyers. Barry planned to perform legal research and draft legal memoranda. Albert intended to utilize Barry's work after reviewing it to make court appearances and argue motions on behalf of other attorneys. Albert and Barry employed Carla, an attorney, to prepare and file all of the documentation necessary to incorporate the business, Lawco, Inc. ("Lawco").

Carla properly drafted all required documentation to incorporate Lawco under the state's general corporation law. The documentation provided that: Lawco shares are divided equally between Albert and Barry; Lawco profits will be distributed equally to Albert and Barry as annual corporate dividends; Barry is president and Albert is secretary.

Albert and Barry opened their business in January, believing that Lawco was properly incorporated. In February, they purchased computer equipment in Lawco's name from ComputerWorks. The computer equipment was delivered to Lawco's office and used by Barry.

Carla, however, neglected to file the articles of incorporation until late April.

In May, Albert, without consulting anyone, contracted in Lawco's name to purchase office furniture for Lawco from Furniture Mart. On the same day, also without consulting anyone, Barry contracted in Lawco's name to purchase telephones for Lawco from Telco.

1. Is Lawco bound by the contracts with:
    a. ComputerWorks? Discuss.
    b. Furniture Mart? Discuss.
    c. Telco? Discuss.

2. Has Albert committed any ethical violation? Discuss.

Answer question number 2 according to California and ABA authorities.

Answer A

1A) Lawco's Contract with Computer Works

Status of the Corporation

The first defense Lawco might raise against enforcement of this contract is that while it was entered into by Lawco, Inc., no such entity existed at the time the contract was formed. They might argue that because no corporation existed, the corporation is not liable on the contract. There are three scenarios under which a corporation might be bound.

If the corporation is a de jure corporation, it has been validly created by observing the formalities of incorporation and receiving its articles of incorporation from the state. While the second and third contracts discussed below were entered into by a de jure corporation, this first one was not, as attorney Carla had neglected to file the articles of incorporation with the state until April, two months later.

A corporation is a de facto corporation where the formalities have been entered into, and the corporation had a good faith belief that it is a corporation, but the paperwork has not been processed and the state has not actually issued corporate status. A corporation can rely on its de facto status in such a situation to enforce a contract that it might not otherwise be able to enforce. Here, A and B both believed that Lawco had been properly formed, though it had not yet been so. If they wanted to enforce the contract, they would depend on their de facto status. If they are trying to avoid being bound by it the de facto characterization might be considered, but the doctrine of corporation by estoppel is probably more appropriate.

Corporation by estoppel results when a corporation holds itself out to the public as a corporation, acts as such, and enters into contracts under that banner, but is not actually a corporation at the time. Such an entity is estopped from claiming that it was not in fact a corporation when it entered into those contracts, as it benefited from claiming that it was.

Adoption of Pre-Incorp Contract

Even if none of the doctrines above are successful, ComputerWorks (CW) will argue that the contract was a pre-incorporation contract and that Lawco adopted it by accepting and using the computers that it delivered. It will argue that such actions demonstrate its intent to profit from the contract.

Quasi-Contract

If no contract is found, CW will argue that Lawco benefited from the use of its computers after holding itself out as ready to contract and that under the doctrine of quasi-contract, should not be unjustly enriched. Under such a theory, CW will receive the value conferred upon Lawco.

Sue A and B personally
If none of the above work, CW can sue whomever signed the contract (A, B, or both) and claim that it was a pre-incorporation contract which was not adopted by the corporation and hold them personally liable.

1B) Lawco's contract with Furniture Mart (FM)
As described above, Lawco was a validly formed corporation when it entered into a contract with FM for furniture. The issue is whether or not Albert, by himself, had authority to enter into such a contract, or whether B's consent was required. This issue is best analyzed under the law of agency.

Agency
If FM can establish that A was acting as an agent of Lawco when he entered into the contract, then Lawco will be bound. An agent can have actual or apparent authority.

Actual Authority
Actual authority can be either express or implied. Actual authority is express when the agent and principal have agreed that the agent will act on behalf of the principal in a certain capacity. Authority can be implied to the extent that an agent's express authority requires it to do certain other acts as a matter of course in order to perform its functions as an agent.

In this case, A entered into the contract with FM. Under the articles of incorporation, A is the secretary of Lawco. While there is no evidence of express authority for A to purchase for Lawco, a corporation is not an individual and so must act through agents by necessity. Lawco will argue that as a 50% shareholder, A needed to have approval of B in order to enter into a contract to purchase assets for the corporation and that he was not an agent. It is much more likely that B will possess actual authority than A will, and this argument will probably fail.

Apparent Authority
If the argument for actual authority fails, FM will argue that, instead, A had apparent authority to act for Lawco. Apparent authority is authority that results from 1) an agent's position or title with respect to the principal, 2) where the principal has held the agent out in the past as its agent and has not published the revocation of authority, or 3) the principal ratifies the agent's actions after the fact.

In this case, FM will argue that because of his position as secretary of the corporation, even if A did not have actual authority to contract, they relied on his apparent authority to do so as the secretary of the corporation. This will be a weak argument, as the secretary is not usually expected to enter into contracts for a corporation. Although the facts are silent as to what happened after the contracts were entered into, if Lawco accepted the benefits of the contract with

FM, they will also argue that Lawco ratified the contract entered into by A when they accepted the furniture and used it.

Lawco will argue that A's role in the corporation was a 50% shareholder and secretary. It will argue that there was no express agency agreement, nor did it ever act in a manner that might hold A out as its agent. Futhermore, A's shareholder status grants him no right to enter into contracts on behalf of the corporation as that is a job for the officers and directors. Finally, A's role as a secretary is to take notes at meetings, and perhaps oversee documents. It is not to make unilateral decisions for the corporation or spend money.

Unlike the situation of B below, FM will not have access to some of the more persuasive arguments of apparent authority. Unless there is some manifestation of express authority in the corporate records, absent a decision by the officers or vote of all shareholders, they will probably not be able to bind Lawco under A's contract, unless Lawco takes some action after the fact to ratify A's actions. They may, however, be able to go after A personally for any damages due to breach on a contract he signed as a purported agent.

1C) Lawco's Contract with Telco (TC)

As described above, Lawco was a de jure corporation when B entered into the contract with TC on its behalf. As above with A, the issue will be whether B qualifies as an agent who might bind Lawco as the principal. Unlike A, however, who was the secretary of Lawco, B was the president. The president arguably has actual or apparent authority to enter into contracts for the corporation where the secretary is less likely to have such.

The same principles will be applied as above, but in this case, the facts probably dictate a different outcome. The president of a corporation is arguably an agent thereof by [the] very nature of his position. FM will argue that for a necessary business expense of the corporation, like securing furniture, the president had actual or at least implied authority to secure them. They will argue that the corporation cannot act on its own and that its president is the obvious choice to enter into contracts on behalf of it. They will also argue that Lawco accepted the benefit of B's actions and that in doing so it ratified B's actions.

TC will have access to more persuasive arguments than FM had above due to B's apparent authority as president, and will have a much stronger case to enforce its contract against Lawco than FM did.

2) Albert's Ethical Violations

Albert's Duty Not to Aid in the Unauthorized Practice of Law

A has a duty not to help a nonlawyer practice law. The practice of law includes advising or counseling clients, as well as arguing before the court. In this case, the facts state that B's duties are to perform legal research and to draft legal memoranda. A intends to review this work and use it to make court appearances

and argue motions. While B's legal research is probably not prohibited, his drafting of legal memoranda may be. The fact that A intends to review this work and basically attach his name to it after verifying its contents makes it a close call. Law clerks are able to engage in such activity before graduating from law school and passing the bar as long as they are appropriately supervised. A will argue that B's work is almost identical to that of a law clerk and that with proper supervision there is no breach of his duty.

Albert's Duty Not to Go Into Business With a Nonlawyer

A has a duty not to incorporate with a nonlawyer when he plans to practice law. Lawyers are allowed to form partnerships with each other, but they cannot form partnerships or corporations with another type of professional or nonlawyer such as a CPA. Here, A will argue that the actuality of the relationship is exactly like a lawyer – experienced paralegal. He is mistaken, however, in that the liability of Lawco, the ownership interests, and the division of power between A and B are almost exactly equal. A should not allow himself to enter into a business transaction with a nonlawyer like B who may try to exert influence on his decisions in legal matters as a result of his partial ownership in the venture. The fact that B is the president and A is the secretary makes this arrangement particularly suspect. B arguably has a persuasive role in determining the direction of the venture due to his office. Furthermore, he is the face of the venture that is in its very name offering legal services, yet he is not himself a lawyer. A has violated this duty.

A's Duty Not to Share Profits with A Nonlawyer

A has a duty not to share profits with a nonlawyer in his practice of law. Lawyers may hire paralegals or research assistants for salary, but arrangements under which a nonlawyer is entitled to a preset ratio of the profits is forbidden. In this case, Lawco's articles provide that Lawco's profits are to be distributed equally to Albert and Barry as annual corporate dividends. The form the profit sharing takes is not nearly as important as the fact that it exists. A will not be able to hide behind the fact that the distribution scheme is couched in dividends rather than an outright sharing. A has violated this duty.

Answer B

1A) Contract with ComputerWorks

In [order] for Lawco to be bound, (i) the corporation must be validly incorporated, (ii) the doctrines of de facto corporations or corporations by estoppel must apply or (iii) the contract must have been adopted by the corporation after incorporation.

Valid Incorporation

A corporation is formed when the incorporator validly complied with the requirements of the state's general incorporation law. This typically requires the filing of the articles of incorporation. Since the articles were not filed until April and the contract was entered into in February, Lawco was not validly incorporated at the time of the contract.

Generally, a corporation is not liable for contracts entered into before it was incorporated until it adopts the contract. It can adopt the contract through (i) express adoption, such as a writing, or (ii) implied adoption, which may be accomplished by accepting the benefits of the contract without protest.

De facto Corporation

ComputerWorks could argue that Lawco is still liable on the contract since it was a de facto corporation. A de facto corporation may be found where (i) there is a valid general corporation law, (ii) the incorporation made a colorable good faith attempt to comply with the statute, (iii) the incorporator was not aware that the attempt to comply with the statute was invalid and (iv) the corporation took some action indicating that it considered itself a corporation.

In this situation, Carla properly drafted all the required documentation to incorporate Lawco. The state does have a general corporation law. Albert and Barry entered into the contract with ComputerWorks believing that the corporation was valid. The corporation took an action typical of a corporation by purchasing computer equipment in the corporation's name and having the equipment delivered to the corporation's office and used by a corporate employee.

This question of de facto corporation will revolve around whether Carla's neglect in delaying the filing of the articles negates her "good faith, colorable" attempt to comply with the corporation statute. Since Carla is a lawyer and knew her job was to prepare and file all the documentation necessary to incorporate Lawco, it is likely that this is not a good faith, colorable attempt to comply with the statute, and there is no de facto corporation.

Corporation by Estoppel

ComputerWorks can argue that Lawco should be estopped from denying the corporation existed since it received a benefit under the contract and would be unjustly enriched if the contract were not enforced. ComputerWorks can argue that there was (presumably) a promise to pay. ComputerWorks can argue that Lawco received a benefit by accepting and using the computers. It would be unjustly enriched by retaining the computers without paying for them. ComputerWorks can argue that it was foreseeable that it would expect to be paid for the computers and it was reasonable that it should be paid for the computers.

Adoption of the Contract

Finally, ComputerWorks could argue that Lawco should be bound on the contract since it adopted the contract after formation. A corporation adopts a contract after formation when it impliedly accepts the benefits of the pre-incorporation contract after incorporation. Here, Lawco retained the computers and probably continued to use them after formation in April.

The result is that the court would likely find that Lawco adopted the contract, or if not, that it should be estopped from denying the contract.

1B) Contract with Furniture Mart

In order for Lawco to be bound, (i) the corporation must have been validly incorporated at the time of the contract and (ii) the action taken must validly bind the corporation.

First, since the articles were filed in April, and it is presumed that all other requirements of the statute have been complied with, Lawco was validly in existence at the time of its contract with Furniture Mart in May.

Express Authorization by Articles

Second, there is the issue whether Albert validly bound Lawco when he contracted in Lawco's name with Furniture Mart. Albert is the secretary of the corporation and is thus a senior officer. The articles of the corporation would likely delineate the powers of the officer, and so Albert may be authorized under the articles.

Implied Authorization under Agency Law

If not, Albert may also be authorized under general principles of agency law to bind the corporation. Generally, an agent may bind a principal if he has express authorization, implied authorization or apparent authorization to do so. There is no evidence that Albert received express authorization to enter into the contract.

Albert would have implied authorization if (i) it was customary for someone in his position to bind the corporation, (ii) he reasonably believed, based on past behavior and actions, that he had the power to do so, or (iii) it was necessary for the performance of his duties that he be able to bind the corporation. It is also necessary that Albert acted within the scope of the authorization.

Since it is probably necessary for Albert's position as secretary that he be able to bind the corporation on such routine contracts as buying office furniture, he probably had implied authority.

He may also have had apparent authority if (i) the corporation "cloaked" him with the apparent position of being able to enter into the contract and (ii) Furniture Mart relied on this position.

In conclusion, even though he did not consult anyone, it is likely that the contract is valid since Albert had implied and apparent authority to enter into the contract. Since the contract is valid, Lawco is bound on the contract.

1C) Contract with Telco

In order for Lawco to be bound, (i) the corporation must have been validly incorporated at the time of the contract and (ii) the action taken must validly bind the corporation.

First, since the articles were filed in April, and it is presumed that all other requirements of the statute have been complied with, Lawco was validly in existence at the time of its contract with Telco in May.

Please see part (1)(B) for detailed discussion of agency law. Below is the application of the discussed legal principles to this situation:

Express Authorization by Articles

As President, it is likely that Barry was expressly authorized by the articles to enter into routine contracts, such as the purchase of telephones, for the corporation.

Implied Authorization under Agency Law

If not, Albert may have validly entered into the contract by express, implied or apparent authority. The facts give no indication of express authority. However, it is probably necessary for the president of a corporation to enter into contracts for routine items, so he probably had implied authority. It is also perfectly reasonable for another corporation to believe that the president has the power to bind the company, so Barry definitely had apparent authority.

In conclusion, even though he did not consult anyone, Barry had apparent and implied authority to enter into the contract, and Lawco is thus bound by the contract.

3. Possible Ethical Violations by Albert

Unauthorized Practice of Law

An attorney may be disciplined for aiding a nonlawyer to practice law. The practice of law consists of making decisions which require the exercise of legal judgment by the lawyer. However, activities related to law, which do not involve the "practice of law," may be performed by any nonlawyer. Also, under the ABA Rules and California law, a nonlawyer may practice law under certain very specific circumstances. For example, under ABA Rule, a nonlawyer may practice law under the direct supervision of a practicing lawyer who is licensed in that jurisdiction.

Albert is an attorney, and he knowingly decided to incorporate a business in which Barry, who is not an attorney, would perform legal research and draft legal memoranda. Not only did Albert know that Barry would be doing these things, he intended to use Barry's work to make court appearances and argue motions. There is no mention of Albert supervising Barry or reviewing his work before using it. Therefore, Albert can be disciplined for assisting Barry in the unauthorized practice of law.

Partnering with Nonlawyers

A lawyer is permitted to partner with a nonlawyer in a business providing legal services. A lawyer may hire a nonlawyer to work in such a business as long as they are not practicing law in an unsupervised way.

Here, Albert, a lawyer, and Barry, a nonlawyer, incorporated to form a business together. The business was specifically to provide legal services. The shares of business would be divided equally between Albert and Barry. Therefore, Albert may be disciplined for partnering with Barry to perform legal services, in a corporation in which they have equal shares.

Splitting Fees with Nonlawyers

A lawyer is not permitted to split fees with nonlawyers, except in certain very specific circumstances, such as employee benefit plans. Albert could argue that he was not splitting fees with Barry, and that fees for his services would be paid to the corporation. However, profits are distributed equally to Albert and Barry as corporate dividends. Therefore, Albert would be disciplined for splitting fees with Barry since his argument that fees are not split is illusory.

Jul 2007

California
Bar
Examination

Essay Questions
and
Selected Answers

July 2007

ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2007 CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2007 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

Q1 Real Property

Larry leased in writing to Tanya a four-room office suite at a rent of $500 payable monthly in advance. The lease commenced on July 1, 2006. The lease required Larry to provide essential services to Tanya's suite. The suite was located on the 12th floor of a new 20-story office building.

In November Larry failed to provide essential services to Tanya's suite on several occasions. Elevator service and running water were interrupted once; heating was interrupted twice; and electrical service was interrupted on three occasions. These services were interrupted for periods of time lasting from one day to one week. On December 5, the heat, electrical and running water services were interrupted and not restored until December 12. In each instance Tanya immediately complained to Larry, who told Tanya that he was aware of the problems and was doing all he could to repair them.

On December 12, Tanya orally told Larry that she was terminating her lease on February 28, 2007 because the constant interruptions of services made it impossible for her to conduct her business. She picked the February 28 termination date to give herself ample opportunity to locate alternative office space.

Tanya vacated the suite on February 28 even though between December 12 and February 28 there were no longer any problems with the leased premises.

Larry did not attempt to relet Tanya's vacant suite until April 15. He found a tenant to lease the suite commencing on May 1 at a rent of $500 payable monthly in advance. On May 1, Larry brought suit against Tanya to recover rent for the months of March and April.

On what theory could Larry reasonably assert a claim to recover rent from Tanya for March and April and what defenses could Tanya reasonably assert against Larry's claim for rent? Discuss

Answer A

Larry v. Tanya

In the lawsuit between Larry and Tanya regarding their lease of the office building that commenced on July 1, 2006, the following are the salient points that Larry will assert and Tanya will defend.

First, the lease was a tenancy for years. Second, there were no Breach of Covenants to give rise to a right of termination. Third, the termination was ineffective because it was not in writing.

Each of these points and defenses are addressed in detail.

I. The Tenancy

The first issue is to determine the tenancy created.

Tenancy by Years

Under this type of tenancy there is a fixed date of termination with no notice required to end the arrangement. It expires at a specified time.

In this case, the lease between Larry and Tanya simply stated that a rent was to be paid monthly in advance. There is no mention of a fixed date of termination.

Therefore, a tenancy by years was not created.

Periodic Tenancy

A periodic tenancy is one that continues for a specific period – week/week; month/month – until it is effectively terminated.

Termination requires written notice of at least one month prior in case of a month-month lease and the lease must end at a natural lease period.

In this case, a periodic tenancy was created since the lease called for payment of a monthly rent of $500 in advance and did not have a fixed termination date.

Therefore, the lease is a periodic tenancy.

II. Termination

The next issue is to determine whether the termination of the lease by Tanya was effective on February 28. If it was then she will not be liable for rent for March and April.

Tanya can assert termination based on 1.) Valid notice, 2.) Breach of Covenants, 3.) Constructive education.

Valid Notice

To terminate a month-month lease valid notice of at least one month is required in writing. The lease must also end at a natural lease period.

In this case, Tanya orally told Larry she was terminating her lease on February 28. She did this on December 12. While the length of the notice was sufficient because it was given at least a month prior to the termination, Larry will argue that it was effective since it was not given in writing.

As such, Larry will argue that since the notice was ineffective to terminate the lease Tanya could not have moved out on February 28 and remains liable for the rent of March and April.

In conclusion, there was no valid notice.

Surrender

Surrender occurs when a tenant abandons the tenancy and the landlord takes possession and control of the premises.

However, a landlord may move in and attempt to relet the premises on behalf of the tenant, which will not result in a surrender.

In this case, Tanya will argue that Larry accepted surrender due to his delayed attempt in finding a substitute tenant. Larry did not move in and try to relet the premises immediately, but let six weeks elapse, after which he decided to relet.

However, Larry will argue that he did nothing to accept surrender since he did not exercise control enough and was simply reletting on Tanya's behalf.

In conclusion, surrender will not likely work.

Constructive Eviction

Constructive eviction occurs when:

1. there is a condition on the premise that makes it uninhabitable.
2. the landlord knows or should have known about the condition.
3. the landlord fails to remedy the condition.
4. the tenant moves out within a reasonable time.

Conditions

In this case, Tanya will point out to the following conditions that made habiting the premises unreasonable.

First, interruption of water. This is an essential service that Larry agreed to provide that was interrupted frequently. This happened once in November and during the week between December 5 and December 12 the interruption lasted for one entire week.

Second, interruption of elevator service. Tanya is on the 12th floor of a 20 story office building which makes the elevator service essential to the lease since trekking twelve floors is an unreasonable condition in a commercial building.

Third, interruption of heat and electricity. These services were interrupted frequently and once for as long as one whole week.

These constant interruptions of services made it impossible for Tanya to conduct her business.

Larry's Knowledge

Additionally, Tanya informed Larry immediately about the conditions and he admitted he was aware about them and doing everything he could to repair.

Larry Remedied the Situation?

However, Larry will argue that he fixed the problems and therefore Tanya no longer had a claim to constructive eviction. Ever since December 12 up to February 28, for an entire six weeks there were no longer any problems in the leased premises.

Did Tanya move out in a reasonable amount of time?

Furthermore, Larry will point out that Tanya did not move out within a reasonable time since she waited six weeks.

She gave herself this amount of time to give herself ample opportunity to locate alternative office space.

This behavior is contrary to the contention that the premises were in such bad condition and that Tanya moved out within a reasonable time.

Implied Warranty of Habitability

This doctrine only applies to residential leases. Under this doctrine a landlord warrants that the premises are suitable for human habitation.

However, the lease between Tanya and Larry is for an office suite, which is commercial in nature, and as such this doctrine is inapplicable.

Breach of Covenants – Right to Termination of Lease

Tanya could also possibly terminate the lease if the breach of any covenants gives her the right to do so under the terms of the lease.

Usually, the covenants between the landlord and tenant are independent, making the breach by one giving rise simply to damages, and not a right to terminate.

However, in this case, Larry breached his covenant to provide essential services, by failing to supply running water, heat, electricity for a period as long as one week. Therefore, under the terms of the lease Tanya may have a right to terminate.

III. Damages

Finally, if Tanya is unsuccessful in arguing that she had a right to terminate the lease she will try and lessen her damages by pointing that Larry did not mitigate his damages.

A landlord has a duty to mitigate damages by promptly reletting the premises.

In this case, Larry knew that Tanya was going to be gone by February 28. However, he did nothing to relet the premises until April 15, which is a duration of six weeks.

It only took Larry two weeks to find a new tenant when he decided to relet.

If he had done so earlier he could have relet the premises for April.

Therefore, Tanya should not be liable for rent for April.

Answer B

1. Larry's claim against Tanya for March and April rent Rental Agreement

Larry and Tanya entered into a written lease agreement. A periodic tenancy is a lease agreement in which the tenancy is for periods of time as determined by the cycle of payments. A periodic tenancy can be created expressly, by written agreement, or by implication. Moreover, a periodic tenancy can be terminated by providing the landlord with notice of intent to terminate the lease, in which the notice is given to the landlord at least one period in advance.

Here, Larry and Tanya entered into a lease agreement for a month-to-month lease, with rent payable at $500 monthly. Moreover, although the landlord need not assume general repairs for the tenancy space, here Larry agreed to provide essential services to Tanya's suite. This lease agreement is valid.

Tanya's proper termination?

To terminate a periodic tenancy, the tenant must provide a reasonable period of notice, at least one period in advance. The termination notice must be in writing. Larry argues that Tanya's attempt to terminate the lease was improper because she orally terminated the lease, rather than provided written notice of her intent to terminate the lease. As a result, if the termination notice should have been in writing, Tanya's termination was improper.

Failure to pay rent – Abandonment

Larry will argue that he is entitled to the rent. A tenant has a duty to pay rent. Where a tenant fails to pay rent and abandons the premises, a landlord my treat the abandonment as a subrent, relet and sue the tenant for damages, and in some minority jurisdictions can ignore the abandonment and sue for damages without attempting to relet the apartment. Here, Tanya failed to pay the rent for the months of March and April. Therefore, Larry will claim that Tanya breached the lease agreement.

2. Tanya's Defenses

Implied warranty of habitability

Tanya may first attempt to argue that the landlord has breached the implied warranty of habitability. The implied warranty of habitability warrants that the premises are suitable for human habitation and basic needs. Where this warranty has been breached, the tenant can choose to move out, repair and deduct the rent from future payments, remain on the premises and sue for damages, or reduce the rent payments. However, the implied warranty of habitability has been held to apply only to residential leaseholds. Here, Tanya is renting a four-room office suite on a 20-story office building. As a result,

because this is clearly not a residential lease but instead a commercial lease, this defense will not resonate with the courts.

Implied warranty of quiet enjoyment

Constructive Eviction

Tanya will argue that Larry breached the implied warranty of quiet enjoyment. The implied warranty of quiet enjoyment is an implied warranty that the landlord will not interfere unreasonably with the tenant's use and possession of the premises. This warranty can be breached by both an actual and a constructive eviction. To make a claim for a constructive eviction, and for this warranty to be breached, there must be substantial interference caused by the landlord (or of which the landlord had noticed but failed to act), the tenant must provide notice of the interference and problems, and then the tenant must move out immediately. Where this warranty is breached and a constructive eviction has occurred, the tenant may leave immediately and terminate all future payments of rent.

Here, Larry's failure likely reached to the level of substantial interference with Tanya's use. Tanya for many days did not have running water, clearly an essential service. In fact, this occurred at least more than once and occurred for periods of up to one week. Moreover, Tanya was deprived of heat during the winter months of November and December, making it difficult to use the premises without Tanya making substantial sacrifices for warmth. The electrical services were interrupted on three occasions, sometimes lasting for a week: in a commercial office building, failure to have electrical services clearly makes running an office or other commercial space difficult. She would likely have been unable to run the computers, printers, and other important office equipment necessary for the functioning of a viable office environment. As a result, it is likely that there was substantial interference with Tanya's use and possession. Larry may attempt to point out that Tanya did not leave the apartment until months after these problems, suggesting that Tanya was okay with the interference and that it did not disrupt her business substantially. Nevertheless, on this prong, it is clear that weeks without heat and services are clearly substantial interference.

Here also Tanya made complaints to Larry. They were timely: she made them immediately. And she made them in each instance after each particular problem. Larry was clearly on notice. Although Larry will attempt to claim that he "was doing all he could to repair them," and that he was therefore not responsible for the failures, the facts nevertheless suggest (as in the paragraph before) that Larry's failure to take action or improve the situation resulted in a substantial interference.

As mentioned above, the tenant must move out immediately. Here, Larry may attempt to claim that Tanya did not move out within a fast enough period of time. Tanya was apparently fed up with the failures to provide essential services on December 12, yet she failed to leave her office suite until February 28, 2007. This suggests that perhaps the interference was not that substantial. Moreover, it also suggests that there was not indeed a constructive eviction. However, Tanya will point to the need to find alternative office

space. She will argue that, although there was substantial interference with her ability to use her commercial space, still having some space was better than not having any at all. Nevertheless, Larry may have a good claim that this was not indeed a constructive eviction because this element was not met. Tanya did not leave her apartment immediately, and therefore cannot claim a constructive eviction.

As a result, given Tanya's failure to move out immediately, a court may find that Tanya cannot defend that she was constructively evicted.

Breach of Contract

Tanya will claim that by failing to provide essential services, Larry breached his lease agreement, which is a breach of contract. A landlord and his tenant are in contractual privity. Although a landlord at common law did not have duty to repair the leased office space, a landlord can specifically contract to provide such repairs. Where the landlord provides such repairs, he will be liable for any unreasonable failures to do so. Where the express promise to repair does not occur, the failure will be deemed a breach, especially where the tenant to receive her benefit of the bargain.

Here, Larry contractually agreed in the lease agreement to provide essential services to Tanya's suite. Larry failed to provide essential services as required. Given that Tanya was on the 12th floor of the office building, clearly elevator service would be essential to running an office in a commercial space. Moreover, heat (especially in the winter months of December and November) and running water are essential services, as they are necessary for mere basic human habitation. These failures occurred regularly and for extensive periods of time. As a result, Tanya will be able to claim a breach of the contract.

Independent Conditions?

However, promises in the lease agreement are deemed to be independent. As a result, a breach of one condition generally does not relieve the tenant or landlord of the other obligations in the rental agreement. Here, Larry will argue that although he may have failed to provide some of the essential services, this does not in and of itself relieve Tanya of her obligation to pay rent. Instead, Larry will argue, Tanya had a responsibility to continue to pay rent and sue for any damages she may have suffered.
If Larry is successful on this argument, and indeed Tanya should have continued to pay rent, then Tanya will claim that Larry failed to mitigate his damages.

Failure to Mitigate

Tanya will claim that, even if she had a duty to continue to pay rent, Larry failed to mitigate his damages. Damages for failure to pay rent will be awarded where the damages are foreseeable, causal, unavoidable, and certain. Unavoidable requires that the non-breaching party take reasonable steps to mitigate any losses he may have suffered. Where a person has abandoned the premises and fails to pay rent, the landlord must

attempt to relet the apartment. Then, it will be appropriate for the landlord to sue for the difference between the initial lease payments and the payments made by the reletter, as well as any incidental damages.

Here, Tanya will claim that Larry failed to take reasonable steps to mitigate. Although Larry was aware on December 12 that he would need to find a new tenant on February 28 – more than a month and a half away – Larry still failed to attempt to relet Tanya's vacant suite until mid-April. Therefore, although Larry had substantial lead-time, he waited more than a month after Tanya vacated to even attempt to find someone else. Moreover, the second he attempted to find someone else, he was able to, as evidenced by the fact that between April 15 and May 1, he had already found a new occupant. Given the immediacy with which he was able to find a new tenant, and given the fact that he also had a month and a half of lead time before Tanya moved out, Tanya will win on her claim that Larry failed to mitigate his damages.

As a result, even if Tanya is liable for some of the rent on the arguments above, Tanya will not be required to pay the full rental price.

Q2 Torts

Manufacturer designed and manufactured a "Cold Drink Blender," which it sold through retail stores throughout the country. The Cold Drink Blender consists of three components: a base that houses the motor, a glass container for liquids with mixing blades inside on the bottom, and a removable cover for the container to prevent liquids from overflowing during mixing. A manufacturer's brochure that came with the Cold Drink Blender states that it is "perfect for making all of your favorite cold drinks, like mixed fruit drinks and milk shakes, and it even crushes ice to make frozen drinks like daiquiris and piña coladas," and cautioned, "Do not fill beyond 2 inches of the top."

Retailer sold one of the Cold Drink Blenders to Consumer. One day, Consumer was following a recipe for vegetable soup that called for thickening the soup by liquefying the vegetables. After deciding to use her Cold Drink Blender for this purpose, Consumer filled the glass container to the top with hot soup, placed it on the base, put the cover on top, and turned the blender on the highest speed. The high speed rotation of the mixing blades forced the contents to the top of the container, pushed off the cover, and splashed hot soup all over Consumer, who was severely burned by the hot soup.

Consumer filed a lawsuit against Manufacturer and Retailer, pleading claims for strict products liability and negligence. In her complaint, Consumer stated that the Cold Drink Blender was not equipped with a cover that locked onto the top of the container in such a way as to prevent it from coming off during operation and that the failure to equip the blender with this safety feature was a cause of her injuries.

Manufacturer moved to dismiss the complaint against it on the following grounds:

(1) Consumer's injury was caused by her own misuse of the Cold Drink Blender which, as implied by its name, was intended for mixing only cold substances.

(2) Consumer's injury was caused by her own lack of care, as she overfilled the Cold Drink Blender and operated it at high speed.

(3) The design of the Cold Drink Blender was not defective since It complied with design standards set forth in federal regulations promulgated by the federal Consumer Products Safety Commission, which do not require any locking mechanism.

Retailer moved to dismiss the complaint against it on the following ground:

(4) Retailer played no part in the manufacture of the Cold Drink Blender and therefore should not be held responsible for a defect in its design.

How should the court rule on each ground of both motions to dismiss? Discuss.

Answer A

Strict Liability Claim

A strict liability claim requires: (1) the defendant to be a merchant, (2) the product was not altered since leaving the defendant's control, (3) the product has a defect, (4) the plaintiff was making foreseeable use of the product, and (5) the defect caused the injuries and damages.

Merchant:

A defendant is a merchant if he is in the regular business of producing or selling the product sold.

In this case, the Manufacturer is in the business of producing and selling the blenders in question. The Retailer is in the business of selling the blenders. Thus, both the Manufacturer and the Retailer are merchants.

Not Altered:

There is no evidence to indicate that the blender was altered or tampered with since leaving either the Manufacturer's control of the Retailer's control.

Defect:

There are three types of defects: manufacturing defect, design defect, or failure to warn.

A manufacturing defect is a defect that makes the particular unit defective compared to all other produced units. In this case, there is no evidence that Consumer's unit is any different from other units.

A design defect is a defect that is inherent in the design of the product. It can be shown through the existence of an alternative design that can be implemented effectively to reduce the risk without adding too much cost to the product.

In this case, Consumer has shown that there is a design for a locking mechanism on the cover that can prevent the injuries here. Thus, unless the cost of producing the locking mechanism is prohibitively high, Consumer has established a design defect.

Failure to warn is a defect that occurs when a merchant knows of a defect, but fails to warn of it.

In this case, Manufacturer can argue that it has provided warning in the instructions to not fill the blender to within 2 inches of the top. However, Consumer can argue that the warning is not conspicuous such that a reasonable person would be able to see it. Further, the warning is not adequate to warn of the consequences of the action. Lastly,

while the manufacturer knows that the design is unsafe for hot content, it did not warn specifically against hot content. There, there is a good case for failure to warn also.

Foreseeable Use:

The plaintiff must be using the product in a foreseeable fashion, but need not be using the product in a manner as the producer intended to be used.

In this case, while Manufacturer intended to produce the blender for cold drinks only, Consumer can argue that it is entirely foreseeable that someone may use it for hot contents as well.

Causation:

Causation requires both factual causation and proximate cause.

There is factual causation for injuries based on the defects. Consumer can argue that "but-for" the lack of adequate warning or the lack of a hatch on the cover, Consumer would not be injured.

As for the proximate cause, Manufacturer can argue that the causation was not liable because Consumer was not making foreseeable use of the product. Therefore, Consumer's own negligence is an unforeseeable intervening cause.

On the other hand, Consumer can argue that it is entirely foreseeable that a consumer may want to use the blender for hot contents, or that the consumer may fill the blender to near the top. Most other blenders on the market are designed for use with both hot and cold content, so it is foreseeable that someone would use it that way even if it was not intended to be used that way.

Because Consumer's use is foreseeable, there is proximate causation also.

Damages:

Consumer showed that he has suffered damages in being severely burned.

Negligence:

Negligence requires: (1) duty, (2) breach of duty, (3) causation, and (4) damages.

Duty:

Under the majority Cardozo ("zone of danger") theory, duty is owed to all who may be foreseeably injured. Under the minority Andrews theory, duty is owed to everyone in the world.

In this case, by producing the blender and selling the blender, it is foreseeable that a consumer could be injured. Therefore, Manufacturer and Retailer owe a duty to Consumer under either theory.

Breach:

The standard of care is that of a reasonably prudent person. In cases where a reasonable person has superior knowledge of a fact not known by others, that person is held to the standard of a reasonable prudent person with the superior knowledge.

In this case, Manufacturer has the knowledge that the blender may cause danger if filled too close to the top. Therefore, Manufacturer is held to the standard of a prudent person with this special knowledge.

Retailer is held to the standard of a reasonably prudent person, assuming that he has no special knowledge.

Causation and breach are similar to those above for strict liability and not repeated here.

Manufacturer's Motions:

Typically, for a motion to dismiss, the evidence is viewed in the light most favorable to the non-moving party. With this principle in mind, and the general elements for strict liability and negligence in mind, I will analyze each of Manufacturer's motions.

(1) Motion to dismiss because of the Consumer's misuse:

For the strict liability claim – as discussed above in the elements for the strict liability claim, strict liability is attached when the defendant is making foreseeable use of the product. As discussed above, Consumer's use of the blender – filling it to the top and using hot contents – is foreseeable even if it is not intended by Manufacturer. Since consumers of blenders typically use it for both hot and cold contents, and some models allow contents to be filled to the top, it should be foreseeable that Consumer would use it that way. Therefore, Consumer's misuse does not relieve Manufacturer of the strict liability claim.

For the negligence claim: Duty is owed to all those who may be injured. Therefore, Consumer's misuse of the product does not relieve Manufacturer for its duty towards Consumers. As discussed above, the injury was caused by the blender and the injury was foreseeable. Therefore, the causation element is satisfied as well. Hence, as discussed above, whether Manufacturer is liable depends on if breached its duty towards Consumer, judged by the reasonable person standard with similar specialized knowledge. Hence, Consumer's misuse by itself does not relieve of the negligence claim.

Defense of Contributory Negligence:

In jurisdictions following the contributory negligence rule, any negligence on the plaintiff's part relieves the defendant of liability. If the case is tried in such a jurisdiction, Manufacturer could argue that Consumer was negligent in using a blender for cold drinks, as implied by its name, for hot soup. Thus, if the jury finds the consumer to be negligent, this would relieve Manufacturer of liability.

It is noted that Manufacturer is moving for dismissal here. Hence, Consumer's contributory negligence is a question of fact to be tried. Consumer is not negligent per se for using a blender with a name implied for cold drinks for hot soup. Therefore, even if they are in a contributory negligence jurisdiction, Manufacturer is still not entitled to dismissal.

It is also noted that this is only a defense for the negligence claim. The strict liability claim is strict liability, thus is not open to contributory negligence defenses.

Assumption of Risk:

The manufacturer can argue that consumer assumed the risk by operating the blender in a dangerous fashion, in contrary to common sense and the instruction. Therefore, the consumer assumed the risk of injury, and this relieves Manufacturer of liability.

In this case, while the Manufacturer implied that the blender is good for cold drinks by naming it the "Cold Drink Blender" and specifying that it is "perfect for cold drinks", Manufacturer has not warned that the blender could cause injuries if used for hot drinks. Further, while Manufacturer said it is perfect for cold drinks, it did not specify it cannot be used for hot drinks.

Therefore, Consumer can argue that since there is no warning of the risk while using the blender for hot drinks, and the warning is not apparent to a reasonable person, Consumer has not assumed the risk by using the blender for hot soup.

Defenses of Comparative Negligence:

In a comparative negligence regime, the liability of the defendant is reduced through the relative negligence of the plaintiff.

In this case, even if the plaintiff is negligent, this would only amount to a reduction of damages. This defense does not entitle Manufacturer to dismiss the claim.

(2) Motion to dismiss because of the Consumer lack of care:

Consumer's lack of care would amount to evidences used to establish that Consumer was negligent in operating the Blender.

For the strict liability claim: Under the strict liability claim, Manufacturer is strictly liable if all the elements are proven. (See elements above). Thus, Consumer's own lack of care, amounting to negligence on the consumer's part, is irrelevant to Manufacturer's liability under the strict liability theory. The assumption of risk doctrine is applicable, but fails here. (See discussion above.)

For the negligence claim: See discussion above for contributory negligence, comparative negligence, and assumption of risk. As discussed above, none of these theories allow Manufacturer to dismiss the claim.

(3) Motion to dismiss because there is no defect:

For the strict liability claim: As discussed above in the elements for strict liability, there is evidence that could lead a jury to believe there is a design defect or a failure to warn defect.

In this case, while evidence that Manufacturer's design complied with regulations could be evidence towards proving there are no defects in the locking mechanism, it does not establish conclusively there is no defect. Further, this does not resolve the question over the failure to warn defect (whether the warning was conspicuous enough).

As discussed above, in a motion to dismiss, the evidence is viewed in light most favorable to the non-moving party. Thus, because there is some evidence of defect, and the evidence of compliance with regulation is not conclusive on the question of defect, the motion to dismiss should be denied.

For the negligence claim: As discussed above, the standard of care is measured by a reasonably prudent person with similar specialized knowledge. Therefore, compliance with regulation does not relieve Manufacturer of either the duty or the standard of care.

It is noted that if the regulation is violated, Manufacturer could be held as negligent per se. However, the inverse is not true. Therefore, motion to dismiss for the negligence claim should be denied also.

(4) Retailer's Claim:

For strict liability: As discussed above (see above), the claim of strict liability just requires Retailer to be a merchant that put the article in the stream of commerce. There is no requirement for the Retailer to take part in designing or manufacturing. Thus, the motion to dismiss should be denied.

It is noted that Retailer could get indemnification from Manufacturer if they are held jointly liable, and Manufacturer is the negligent party.

For negligence: As discussed above, the standard of care for Retailer is that of a reasonably prudent person. Thus, under this standard, whether or not Retailer took part

in the design, whether it is negligent or not depends on what other reasonably prudent persons would have done (such as inspection and testing). Thus, the fact that Retailer took no part in the design or manufacturing does not relieve it of its negligence claim. Therefore, motion to dismiss should be denied also.

Strict Products Liability

Answer B

Consumer's lawsuit against Manufacturer seeks to recover on a strict products liability theory. In order to establish such a claim, the consumer must demonstrate that (1) the defendant is a merchant, (2) there was either a design or manufacturing defect in the product, (3) the product was not altered after leaving the merchant, (4) the product caused the plaintiff's injury, and (5) the customer was using the product in a foreseeable manner.

In this case, the Manufacturer was a merchant because it was the company that designed and manufactured the product at issue. It then sold this product to retail stores. The Retailer was also a merchant because it presumably made its business by selling these types of appliances to consumers. There is nothing in the facts that indicate that the retailer was not a merchant of similar products in the course of its business.

Consumer must also assert that this product had a defect. A design defect is a flaw in the design of a product that makes it unreasonably unsafe. If there is a way to reasonably make the product more safe without lessening the utility of the product or prohibitively raising costs, then it may have a design defect. Additionally, the presence of the design defect must be the cause of the plaintiff's injury. Here, Consumer argues that there was a design defect because the blender did not include a locking cover. The absence of this safety feature was the cause of her injury, because if it had been in place, the top would not have come off and she would not have been burned by the hot soup. Consumer must demonstrate that installing such a lock would have been reasonably feasible, and would not impinge on the utility or costs of the blender. She could point to other blenders that have similar safety devices of the development of such devices in similar small appliances. Since installing a small lock would not be unduly costly and is generally available on blenders, then the product was defective because it lacked this reasonable safety feature. Additionally, the causation element is met because but for the omission of this feature on the blender, Consumer would not have been injured in this way. The lock would have prevented her injury.

Consumer must also demonstrate that the product was not altered once it reached her in the chain of commerce. There is nothing in the facts to indicate that upon leaving the manufacturer or the retailer, the blender was changed in any way, thereby satisfying this element.

Consumer will have the most difficulty in proving that she was using the product in a foreseeable manner. A plaintiff may recover if she can demonstrate that her use was foreseeable, even if it was not the use intended by the manufacturer. The defendants in this case will argue that they should not be liable because Consumer's use of liquefying vegetables for a hot soup was not foreseeable. The product was clearly called the "Cold Drink Blender" and marketed itself as a tool for making cold drinks and crushing ice. Consumer will counter this by pointing out that although the regular use of all blenders may be to crush ice or make daiquiris, it is certainly foreseeable that a person may also

decide to make other uses of the blender. There is no reason why a person would think that the blender was not fit to handle hot soups, and so she should not then be deemed to be using the product outside of its foreseeable use.

Under the above analysis, the Consumer can properly allege a prima facie case of strict products liability against both the Manufacturer and Retailer. The specific items in each motion to dismiss will be further discussed below.

Negligence

Under a negligence action based on products liability, a plaintiff must allege that there was a (1) duty of care, (2) that was breached, (3) the breach was the actual and proximate cause, of (4) harm suffered.

The standard duty of care is that of a reasonably prudent person in similar circumstances. Under the majority view, a person or entity owes a duty of care to those foreseeably harmed by their actions. Consumer will argue that the defendants breached this duty because it was unreasonable to manufacture and then sell a blender that did not have a locking feature. She will try to point out that a reasonably prudent manufacturer would not create a blender that did not have a lock, relying on evidence of commonly-held expectations of the marketplace when people make, sell, and buy blenders.

In order to show actual cause, the Consumer must show that but for the defendants' breach of duty, she would not have suffered her injury. She will argue that if they had not breached their duty and had included a lock, she would not have been burned. Additionally, she must show that the breach was the proximate cause of her injury. A breach is the proximate cause of an injury when a person is in the zone of danger created by the breach. It was foreseeable to the manufacturer or retailer that upon buying a blender without a safety lock, the top could fly off and a person could be injured. Consumer was in the zone of danger since it was foreseeable that her injury would be caused in this manner due to the lack of the safety device.

Finally, Consumer must show that she suffered damages as a result of the defendants' negligent act. Here, Consumer was severely burned by the hot soup. She suffered a personal injury.

Under the above analysis, the Consumer can likely establish a prima facie case of negligence. Specific defenses and the issues of each motion to dismiss are addressed below.

Manufacturer's Motion to Dismiss

1. Consumer's Injury Caused by Her Own Misuse

The manufacturer argues that it should not be liable because the Consumer herself misused the product. This argument goes to the prong of strict products liability requiring that a consumer's use be foreseeable. Under the above discussion, it was

foreseeable that a person who buys a blender would use it for many different blending purposes, not solely mixing cold drinks. Simply because you purchase an item that is labeled as a cold drink blender would not make a reasonable person believe that they could only use the product to blend cold items. Blenders are multi-purpose appliances and generally used to mix and blend a variety of products, including vegetables for a hot soup. Accordingly, it would be foreseeable that the Consumer would use the product in this way, and so the Manufacturer cannot rely on her misuse to avoid liability. Under the same analysis, the manufacturer would not prevail if it claimed that its breach was not the proximate cause of her injury because the injury was unforeseeable. It would be foreseeable that a person would use this blender for hot and cold products, so a person being burned by the contents leaking out when the top flies off would not be so unforeseeable as to defeat a finding of proximate cause.

The Manufacturer will also argue that the misuse of the product was negligent by the consumer. Under the traditional rule, contributory negligence could serve as an absolute bar to recovery on a negligence of products liability action. If the plaintiff herself was even slightly negligent, then all recovery could be barred. Under the modern rule of comparative negligence, recovery can be reduced proportionally according to the amount of negligence on the part of each party. If it was negligent for Consumer to use the product with hot soup, then Consumer's recovery may be limited. It will point out that even if it is foreseeable to use the blender for things other than cold drinks, pouring in hot soup that had the ability to severely burn a person was itself an unreasonable act.

Under the modern rule, this argument could successfully limit the amount of damages recovered by Consumer. However, the court should deny the motion to dismiss based on this ground because it does not negate the elements of strict products liability, negligence, or serve as an affirmative complete defense.

2. Consumer's Injury Caused by Her Own Lack of Care

The Manufacturer also asserts that consumer was negligent in that she overfilled the blender and then operated it at a high speed. The blender came with a warning cautioning a user not to fill beyond two inches of the top. The manufacturer will argue that by failing to observe this warning, the consumer was herself not making a foreseeable use of the product and was herself negligent.

A warning on a product cannot completely shield a manufacturer from a products liability claim. It would be foreseeable that despite this warning, a user would fill a blender close beyond two inches from the top, and then use it at the highest speed set on the machine. Such a use is likely common, and therefore should have been foreseen by the manufacturer. Accordingly, the Manufacturer cannot discharge all of its liability by claiming that the warning shielded it from an injury caused by this use. It was foreseeable that a consumer would use the product in this way, meaning that this use does not discharge the elements of a products liability or negligence action.

Again, the Consumer's lack of care may limit the amount of damages recovered on a

comparative negligence theory. Under the discussion above, since it was likely unreasonable for the Consumer to fill the blender to the brink with hot soup, then under the modern rule, her recovery should be proportionately reduced due to her negligent actions. The court should deny a motion to dismiss on this ground.

3. Design Not Defective

The Manufacturer finally asserts that the design was not defective since it complied with federal regulations. Compliance with government regulations is evidence of lack of a defect, but it is not conclusive. A manufacturer may still be liable for a design defect or negligence even if it comports with regulations. Even though the Consumer Products Safety Commission may not at this point require any locking mechanism, it may be unreasonable for the Manufacturer not to include the lock, on the basis of the current knowledge in the industry. A manufacturer cannot hide behind official regulations to avoid liability. If it was minimally costly to include the lock and did not effect the utility, then the lack of a lock can be deemed a design defect. Also, if it was a breach of duty to consumers not to include the lock, then its failure to provide one may be a negligent act by the Manufacturer.

Accordingly, the court should deny a motion to dismiss on this ground.

Retailer's Motion to Dismiss – No Part in Manufacture

The Retailer asserts that it should not be liable to the Consumer because it was not the party who manufactured the blender. In a strict products liability action, any link in the distribution chain may be liable. The fact that the Retailer did not design or make the blender will not shield it in this action. The Consumer need only establish the elements of a strict products liability are met and the Retailer may be held equally as liable as the Manufacturer.

Here, the Retailer was a merchant because it regularly dealt in the sale of these kinds of goods. The design was defective, under the analysis above. The machine was not altered once it left the Retailer's premises. Finally, the Consumer's use of the product was foreseeable. Accordingly, the court should not dismiss the strict products liability suit against the Retailer.

If the Retailer is held liable in the strict liability suit, it may seek indemnification from the Manufacturer. Indemnification is available when a party is held liable for injuries suffered by a plaintiff, but another party's actions are actually the cause of the injury. Since the Retailer was not responsible for the design defect and the Manufacturer was responsible, the Retailer should be able to recover any amount of damages it owes to the Consumer from the Manufacturer.

Retailer must also argue that it was not negligent, so that claim should be dismissed. Consumer may argue that Retailer breached its duty by not inspecting the item and discovering its defect, that failure to inspect was unreasonable, and that it caused her injuries. This is a more attenuated theory than the negligence action against the

Manufacturer. A Retailer should not be held responsible for inspecting every product that is properly packaged and labeled for sale in its own store. Although it may be held liable on a strict liability theory, there was likely no actionable negligence by the Retailer. Accordingly, the claim of negligence against the Retailer should be dismissed.

Q3 Evidence

Dave brought his sports car into the local service station for an oil change. While servicing the car, Mechanic checked the brakes and noticed that they needed repair. The following events occurred:

(1) Mechanic commented to Helper, "Dave had better get these brakes fixed. They look bad to me."

(2) Mechanic instructed Helper (who did not himself observe the brakes) to write on the work order: "Inspected brakes — repair?", which Helper then wrote on the work order. However, Helper currently does not remember what words he wrote on the work order.

(3) Many hours later when Dave picked up his car, Helper overheard Mechanic say to Dave, "I think your brakes are bad. You'd better get them fixed."

(4) Dave responded, "I am not surprised. They've felt a little funny lately."

(5) Later that day, when Helper was walking down Main Street, he heard the sound of a collision behind him, followed by a bystander shouting: "The sports car ran the red light and ran into the truck."

The sports car involved in the accident was the one that Dave had just picked up from Mechanic. Polly owned the truck. Polly sued Dave for negligence for damages sustained in the accident. Polly's complaint alleged that the accident was caused by the sports car running the red light because the sports car's brakes failed. Polly's theory of liability is that Dave knew or should have known that his brakes were bad and that driving the car under those circumstances was negligent.

Polly called Helper as a witness to testify as to the facts recited in items **(1)** through **(5)** above, and she also offered into evidence the work order referred to in item number **(2)**. Assume that in each instance, appropriate objections were made.

Should the court admit the evidence offered in items numbers **(1)** through **(5)**, including the work order referred to in item number **(2)**? Discuss.

Answer A

Polly v. Dave

(1) "Dave had better get these brakes fixed"

Logical Relevance

Only relevant evidence is admissible. Evidence is logically relevant when the evidence has some tendency to make a fact of consequence to the litigation more or less probable than it would be without the evidence.

Here, Polly alleges that her accident with Dave was caused by his car's brake failure. Thus, a statement that the brakes looked bad would be relevant for purposes of establishing that the brakes were bad. However, because Polly's theory of liability is negligence, and that Dave knew or should have known that the brakes were bad, anything that Mechanic said to Helper is irrelevant for showing that Dave had knowledge. Thus, the logical relevance of the statement is minimal.

Legal Relevance

Otherwise legal evidence may be inadmissible where the probative value of the evidence is substantially outweighed by the risk of unfair prejudice to the defendant, confusion of the jury or the issues, or waste of time.

Nothing about this evidence would be prejudicial. However, it may confuse the jury, again because Polly's claim is in negligence and thus any statement that Dave did not hear would have no bearing on his knowledge of the defect of the brakes.

Personal Knowledge

A witness can only testify about that which they have personal knowledge. This is true for the testifying witness, as well as for the declarant in any hearsay statement.

Here, Mechanic had personal knowledge of the condition of Dave's brakes, because he was conducting the inspection. Further, Helper heard Mechanic's comment, and so had personal knowledge of what Mechanic said.

Hearsay

Hearsay is an out-of-court statement, admitted for purposes of the proving the truth of the matter asserted. Hearsay is inadmissible unless exempt or unless an exception applies.

Mechanic's comment to Helper was made out of court, and is being introduced for purposes of showing that the brakes were bad. Thus, the statement is hearsay.

Present Sense Impression

A statement made concerning one's observations or impressions, made while or immediately after the observation or impression, is admissible as a hearsay exception.

Here, Mechanic made the statement while servicing Dave's sport car. Thus, the "They look bad to me" statement, which concerned his impressions of Dave's brakes, was made simultaneous to his visual inspection and thus admissible as a present sense impression.

State of Mind

A statement made concerning one's then present state of mind is admissible as a hearsay exception.

Here, because Mechanic was a mechanic, he was aware of the dangers posed by faulty brakes. Thus, when he said that "Dave had better get these brakes fixed, "he likely had the mental thought that they posed a risk to Dave and other drivers, and was speaking as to his knowledge that Dave needed to get the brakes fixed.

Thus, the statement should probably not be admitted, because the probative value is low because the statement has nothing to do with Dave's knowledge or lack thereof of the condition of his brakes.

(2) Work Order – "Inspected brakes – repair?"

Logical and Legal Relevance

Assuming that Dave received the work order, the "Inspected brakes – repair?" language would have a great tendency to make it more relevant that Dave had knowledge of the defective brakes than it would be without the work order. There is no risk of unfair prejudice to Dave, because there is nothing prejudicial about a work order. Further, given the highly probative value of the statement, there is no risk of confusing the jury or wasting judicial resources.

Totem Pole Hearsay

Where a piece of hearsay evidence contains other pieces of hearsay evidence, each statement must fall within an exception in order to be admissible. Here, because both the work order and Mechanic's statement to helper, which was recorded on the order, were made out of court and are being admitted for their truth, they are hearsay. If either statement is inadmissible, the whole piece of evidence is inadmissible.

Business Record Exceptions / Work Order

Information recorded in a business record is admissible under a hearsay exception where the information was recorded by somebody under a duty to record or report such

information, by somebody with personal knowledge of the information, and when the record was kept in the ordinary course of business (that is, the record may not be prepared in anticipation of litigation).

Here, Helper was assisting Mechanic, and Mechanic instructed Helper to write on the work order, "Inspected brakes – repair?," and Helper did. Thus, Helper was under a duty to record such information. Given that this was a mechanic shop, preparing work orders is likely a part of the ordinary course of business. Further, Helper had personal knowledge of Mechanic's statement, because he heard Mechanic say it himself and did himself record it in the work order.

Thus, if Mechanic's statement meets an exception, the whole piece of evidence will be admissible.

Present Sense Impression / "Inspected Brakes – Repair?"

Because Mechanic made the statement as or immediately after his inspection of the brakes, it would fall under the present sense impression, because his impression was that the brakes needed repair.

State of Mind / "Inspected Brakes – Repair?"

Additionally, Mechanic would have been speaking as to his knowledge that the condition of Dave's brakes was bad and that they required repair.

Recorded Recollection

A writing that was prepared by one with personal knowledge of the events contained in the writing, or at the instruction of the person with personal knowledge and adopted by them, and made soon after the event occurred and that was a true and accurate depiction of the events that transpired, is admissible as a recorded recollection.

Here, because Helper prepared the work order the same time as he heard Mechanic speak, the work order was likely a true and accurate record of what was said, and thus the writing will be admissible as a recorded recollection.

Best Evidence Rule

Where a witness is testifying as to the contents of a writing, and those contents are in fact at issue, the best evidence rule requires that the writing be admitted into evidence unless it has been lost or destroyed not due to any intentional misconduct of the party seeking to introduce the evidence.

Here, because Helper is testifying as to the contents of the work order, if the work order is available it should be admitted into evidence as the best evidence. If the work order that was provided to Dave is being introduced for purposes of showing that he knew or should have known that his brakes were bad, the best evidence rule is definitely

implicated. However, if it is unavailable, Helper would be permitted to testify as to the contents of the work order, if he remembered the words that were written (which he does not here remember).

Refreshing Recollection

If a witness did before have personal knowledge about something, and is simply unable to recall the specifics while on the stand, anything may be shown to the witness for the purposes of refreshing their recollection. Once the witness's memory is refreshed, the item that was shown to them must be taken away, and the witness must then testify from their refreshed memory. The item shown must be provided to the other party at their request.

Here, if the work order is available, it may be shown to Helper for purposes of refreshing his recollection as to the words that he wrote on the work order.

Thus, the work order should be admitted. Helper's testimony as to what Mechanic said should not be admitted, because it is not relevant for purposes of showing that Dave did or should have known of the condition of his brakes.

(3) "I think your brakes are bad."

Logical and Legal Relevance

Information that Mechanic told Dave that his brakes were bad would be extremely probative for purposes of establishing that Dave knew or should have known that his brakes were bad, which is the basis for Polly's complaint against Dave. Whether or not Dave had actual notice is very much a fact of consequence, because Polly's entire negligence claim will turn on Dave's knowledge of the conditions of his brakes. Thus, given the highly probative value, there is no likelihood of confusing the jury or wasting judicial resources.

Personal Knowledge

Because Helper heard the statement to Dave, he has personal knowledge of the contents of the statement.

Hearsay

Mechanic's statement to Dave is being admitted for purposes of establishing its truth, that Dave's brakes were bad. Thus, the statement is hearsay.

Effect on Hearer

One non-hearsay use for out-of-court statement is to show effect on the hearer – the statements are thus not admitted for the truth of the matter asserted. Here, even if

Mechanic's statement were not being admitted for its truth, it would be admissible as non-hearsay for purposes of demonstrating its effect on the hearer, or the effect on Dave, to show that he had been told that his brakes may be bad.

Thus, this statement should be admitted.

"I am not surprised. They've felt a little funny lately."

Logical and Legal Relevance

Against, because Polly's claim against Dave is in negligence, any evidence that Dave knew or should have known that his brakes were defective is highly probative of establishing that Dave was negligent, as the ordinary reasonable prudent person would either have their brakes inspected by another mechanic, have their brakes repaired, or cease driving the vehicle upon learning that their brakes were bad. Further, that Dave was not surprised to hear that Mechanic thought his brakes were bad and actually felt that the brakes felt funny himself, he had actual knowledge that they may be bad and thus any statement from Dave that they were bad should only have made it more apparent to Dave that he needed to have them repaired.

Although this statement is extremely bad evidence for Dave's position and extremely good for Polly, the mere fact that evidence is bad for one's case does not make the evidence unfairly prejudicial.

Personal Knowledge

Because Helper heard Dave's statement to Mechanic, he had knowledge of its contents.

Hearsay

The statement is hearsay because it is being admitted for its truth. If Dave was not surprised to hear that Mechanic thought his brakes were bad and actually felt that the breaks felt funny, he had actual knowledge that they were bad.

Admission of a Party Opponent

An admission is a statement made by a party to the litigation being admitted into evidence against the speaker, by the opposing party to the litigation. It is non-hearsay as an exemption under the Federal rules of evidence.

Here, because Dave is a party to the litigation, and because his adversary in the litigation, Polly, is admitting the statement against him, it is an admission of a party opponent.

Circumstantial Evidence of State of Mind

Circumstantial evidence of the speaker's state of mind, such as knowledge of circumstances, is non-hearsay under the Federal rules.

Here, the statement shows that Dave had knowledge that his brakes were or may be bad. Thus, the evidence is admissible for purposes of demonstrating Dave's state of mind at the time he made the statement to Mechanic.

Thus, this statement should be admitted.

(5) "The sports car ran the red light and ran into the truck."

Logical and Legal Relevance

That Dave ran the red light and crashed into Polly's truck is extremely probative for purposes of establishing that Dave was at fault in the accident. The evidence is extremely probative for that purpose. However, it does not appear to be a very important fact of consequence that Dave ran through the red light or crashed into Polly, because in fact it seems that these facts have been established. As the real issue here is Dave's negligence, and particularly whether he knew or did not know that his brakes were bad, it may confuse the jury to introduce evidence as to the cause of the accident.

Personal Knowledge

Because Helper heard the bystander's exclamation, he has personal knowledge of its contents.

Further, based on the contents of bystander's exclamation, it is apparent that he had personal knowledge of the facts exclaimed to.

Hearsay

Because of the bystander's exclamation is being admitted for purposes of showing that Dave ran through a red light and crashed into Polly's truck, it is hearsay.

Excited Utterance

A statement made while or immediately after an exciting event, while the declarant is still under the stress of the exciting event, is admissible under a hearsay exception.

Here, witnessing an accident is an exciting event, because it is extremely loud; whenever a person hears an automobile accident, they jump up to see if there is anything that they need to do to help those involved in the accident. As the statement was made immediately after Helper heard the sound of the collision, the declarant was likely under the stress of the event and thus is admissible as an excited utterance.

Present Sense Impression

Additionally, the bystander was attesting as to what he had visually witnessed moments before his exclamation, and the statement would be admissible as a present sense impression because it related to something that the bystander had just moments before witnessed.

Thus, this statement should be admitted, because although there is a chance of confusing the jury, Polly is entitled to prove that Dave did run into her with his car and not simply litigate the matter of his negligence with regard to the brakes.

Answer B

Polly v. Dave

Proposition 8 is a Victim's Bill of Rights that is incorporated into the California Constitution. Therefore, in all criminal cases, all relevant evidence will be admitted, subject to a few exceptions. Here, because this is a civil case, the rules of Proposition 8 are inapplicable.

1. Mechanic's comment to Helper, "Dave had better get these brakes fixed. They look bad to me."

Relevance
In order for evidence to be admitted, it must be logically and legally relevant to the case.

Logical Relevance
Under the FRE, evidence is logically relevant if it tends to make any fact of consequence more or less probable than without the evidence. Thus, Mechanic's comment to Helper is logically relevant because it tends to show that the brakes were defective. Under CA rules, evidence is logically relevant if it tends to prove or disprove any fact in dispute. Here, it is unclear whether or not Dave disputes that the brakes were defective. If Dave does dispute that the brakes were defective, then Mechanic's comment to Helper does tend to prove that the brakes were defective. However, if Dave admits that the brakes were defective, but rather is arguing only that he did not know they were defective, then under California rules, this statement would not be logically relevant because it does not prove or disprove a disputed fact.

Legal Relevance
Evidence is legally relevant if its probative value outweighs undue prejudice or undue delay. Here, this evidence is probative to showing that the brakes were broken. And it outweighs any undue prejudice because, even if the brakes were defective, Dave may still argue that he did not know they were defective.

Lay Testimony
Here, Helper's testimony is being introduced as lay testimony rather than expert testimony, because he is testifying to what he heard, not to any observations or work he did on the brakes. Lay testimony must be helpful and based on personal observations. Here, this testimony is helpful to showing that the brakes were broken and Helper did personally hear Mechanic's comments. However, in order to admit this testimony, Helper must take an oath, and in California, this requires Helper to know that he has a legal duty to tell the truth.

Hearsay
Dave will argue that this is hearsay, not admissible under any exception. Hearsay is any

out-of-court statement offered for the truth of the matter asserted. This is hearsay because it is an out-of-court statement made from mechanic to helper, offered to prove that the brakes were broken.

Not for Truth of Matter Asserted

Out-of-court statements are not offered for the truth of the matter asserted, and thus admissible, when they are offered to show: a) effect on the hearer; b) the declarant's state of mind; c) impeach; d) legally operative language; or e) to refresh recollection. Here, there is no indication that Polly is introducing the evidence for any of these purposes.

Offered for Truth of Matter Asserted, but Hearsay Exception

Additionally, out-of-court statements may be offered for the truth of the matter, but be exempt hearsay (in California, all of these are hearsay exceptions, not exemptions): a) prior inconsistent statement, under oath; b) prior consistent statement; c) prior identification; or d) admission by party opponent. Here, none of these are applicable.

Offered for Truth of Matter Asserted, and Out-of-Court Declarant is Unavailable

Furthermore, hearsay may be admissible if it falls into one of the many hearsay exceptions. One category of exceptions is when the out-of-court declarant is unavailable. "Unavailable" means that the out-of-court declarant (Mechanic) is a) beyond the subpoena power of the court; b) invokes privilege; or c) is dead. Under the FRE, there are two additional times when an out-of-court declarant is considered "unavailable": a) lack of memory; and b) refusal to respond to subpoena. Here, there is no indication that Mechanic is "unavailable", thus, these hearsay exceptions do not apply.

Offered for Truth of Matter Asserted, and does not matter if Out-of-Court Declarant is Unavailable

Additionally, there are categories of hearsay exceptions regardless of whether an out-of-court declarant is available. Here, Polly may argue that Mechanic's statement should be admitted as a present sense impression.

Present Sense Impression

An out-of-court statement is hearsay within an exception when it is a present sense impression. A present sense impression is a statement describing an event contemporaneously or immediately thereafter. In California, this exception is narrowly construed to only statements made by someone "engaging in" the activity. Here, Mechanic is not describing any event that he is engaging in or observing. Rather, he is making a comment regarding the state of Dave's brakes. Thus, it is not hearsay within any exception.

2. Mechanic's Instruction to Helper to write on work order: "inspected brakes – repair?"

Relevance

Here, the work order is logically relevant because it tends to show that the brakes were broken. Again, if this was in dispute, then in California this would also be logically

relevant. For the same reasons discussed above under section 1, this is also legally relevant.

Best Evidence

Here the best evidence is arguably the work order. This is especially true since Helper is having difficulty remembering what words he wrote on the work order.

Hearsay

Here, this is hearsay within hearsay because 1) Helper did not himself observe the brakes and therefore he was simply writing down what he was instructed to do; and 2) Helper's statement in the work order is an out-of-court statement.

Mechanic's instruction to helper

Again, there is no evidence that Mechanic was unavailable to testify.

Present Sense Impression

Polly may argue that this was a present sense impression. If this was made immediately following Mechanic's inspection of the brakes, they may qualify as a present sense impression. However, in California, they would not because this comment was not made while Mechanic was engaged in fixing the brakes.

Helper's writing in the work order

Helper's writing in the work order "Inspected brakes – repair?" is hearsay within hearsay.

Past Recollection Refreshed

Polly may be able to introduce this as past recollection refreshed. Parties can use anything to refresh the recollection of witnesses. Here, Polly could show Helper the work order to refresh Helper's memory. However, the work order could not be read into evidence. If Helper's memory is refreshed from looking at the work order, then he can testify independently and that will be introduced. However, if Helper's memory is not refreshed by looking at the work order, Polly's counsel may look to past recollection recorded.

Past Recollection Recorded

Past recollection recorded may be admitted if it was made at or near the time of the event while the event was still fresh. Here, it appears that the work order was made immediately after Mechanic inspected the brakes, and Helper immediately wrote it in the work order, and thus it was at or near the time of the event. Therefore, the work order can be read into evidence, but not introduced as evidence.

Business Record

If Polly's attorney wants to actually introduce the work order into evidence, the best way to do so is as a business record. A business record may be introduced if it is made by one with a business duty, it is recorded in the regular course/practice of business, at or near the time of the event, by someone with knowledge, and it is trustworthy. Here, this record was made by Helper, who has a business duty. Additionally, it is likely that these

work orders are made in the regular course and practice of the business. This work order was not made in anticipation of litigation. Helper made the work order per Mechanic's instructions, and therefore it was made by one with knowledge. And there is an overall element of trustworthiness, since neither Helper nor Mechanic were the negligent party.

Therefore, the work order should be admitted as a business record.

3. Mechanic to Dave, "I think your brakes are bad. You'd better get them fixed."

Relevance

Here, Mechanic's statement to Dave is relevant because it tends to prove that Dave knew about his defective brakes. And in California, it would be admitted because it is in dispute whether or not Dave was aware of his bad brakes. Additionally, this is legally relevant because its probative value is very high (it shows that Dave knew his brakes were bad) and its chance for undue prejudice or delay are low.

Lay Opinion

Here, Helper may testify regarding this because this is helpful to the jury and because Helper was present and contemporaneously overheard Mechanic make this comment to Dave.

Hearsay: Effect on Hearer

Here, Dave will argue that this is hearsay not within any exception. However, Polly will counter argue that this is not hearsay at all. Rather, Polly will argue that this is not offered to prove the truth of the matter asserted (that the brakes were in fact bad and that Dave should get them fixed). Rather, this is offered to show the effect on the hearer (Dave). Polly will argue that this is offered to prove that Dave knew (or should have known) that his brakes were defective, and was negligent in driving his car without fixing the problem. Thus, this testimony is not hearsay and should be admitted.

4. Dave to Mechanic, "I'm not surprised. They've felt a little funny lately."

Relevance

This comment is relevant because it tends to show that Dave knew that his brakes were defective and was therefore negligent in driving the car. Additionally, this is logically relevant in California, because it is likely disputed whether or not Dave knew his brakes were defective. Additionally, it is legally relevant because its probative value outweighs any prejudice.

Hearsay

Not for Truth of Matter Asserted

First, Polly will argue that this is not offered for the truth of the matter asserted, but rather to show the declarant's state of mind (that Dave knew that the brakes were defective). Additionally, Polly may want to introduce this later on as impeachment evidence against

Dave if he testifies that he did not have any idea that his brakes were defective.

Offered for Truth of Matter Asserted, but Hearsay Exemption/Exception
Additionally, Polly may try to argue that this is within a hearsay exemption (FRE)/exception (CA) of a) prior inconsistent statement or b) admission by party opponent.

Prior Inconsistent Statement
Here, if Dave testifies that he never knew that his brakes were acting up, Polly may be able to introduce this as a prior inconsistent statement. In California, this would be permitted as a hearsay exception because California does not require that the prior inconsistent statement be made under oath. However, under the FRE, this would not be admitted because it was not made under oath.

Admission by Party Opponent
Here, Polly will try to introduce this as an admission by a party opponent (Dave) that his brakes were defective. As such, it would fall under a hearsay exemption (or exception in California). Here, this is Dave's own admission that he knew that the brakes have been acting oddly, and therefore should be admitted as a hearsay exception.

Offered for Truth of Matter Asserted, and Out-of-Court Declarant is Unavailable
Additionally, Polly may argue that this is a declaration against interest (against Dave's pecuniary, penal, or social interest (California only)). However, this hearsay exception is only available if the out-of-court declarant is unavailable, and here, Dave is available.

Offered for Truth of Matter Asserted, and does not matter if Out-of-Court Declarant is Unavailable
Additionally, this may be offered as current state of mind as a hearsay exception.

5. Bystander, "The sports car ran the red light and ran into the truck."

Relevance
Here, this statement is relevant because it shows that Dave was the one that ran the red light and hit Polly. This is likely an issue in dispute, so should also be logically relevant in California. Additionally, this is legally relevant because it has a high probative value that is not outweighed by any undue prejudice.

Offered for Truth of Matter Asserted, and does not matter if Out-of-Court Declarant is Unavailable

Present Sense Impression

A present sense impression is one that was made contemporaneously or immediately after an event that describes an event. In California, it is required that the out-of-court declarant be engaged in the event. Here, Bystander made the statement immediately after

the collision and the statement is describing what Bystander saw. However, in California this would not be admissible because the bystander was not engaged in the activity. However, under the FRE, this would be admitted.

Excited Utterance

An excited utterance is one regarding a startling event, relating to the startling event, and made while the out-of-court declarant is still startled. Here, the bystander was discussing a startling event (a car accident), and it was likely made while the bystander was still startled (certainly, it is startling to see a car accident and one would be startled immediately after observing one). Furthermore, the bystander's comments are related to the startling event – the bystander is saying what happened.

Therefore, this statement should be admitted as hearsay within an exception.

.

Q4 Criminal Procedure / Constitution

Dan stood on the steps of the state capitol and yelled to a half-dozen people entering the front doors: “Listen citizens. Prayer in the schools means government-endorsed religion. A state church! They can take your constitutional rights away just as fast as I can destroy this copy of the U.S. Constitution.”

With that, Dan took a cigarette lighter from his pocket and ignited a parchment document that he held in his left hand. The parchment burst into flame and, when the heat of the fire burned his hand, he involuntarily let it go. A wind blew the burning document into a construction site where it settled in an open drum of flammable material. The drum exploded, killing a nearby pedestrian.

A state statute makes it a misdemeanor to burn or mutilate a copy of the U.S. Constitution.

It turned out that the document that Dan had burned was actually a copy of the Declaration of Independence, not of the U.S. Constitution, as he believed.

Dan was arrested and charged with the crimes of murder and attempting to burn a copy of the U.S. Constitution. He has moved to dismiss the charge of attempting to burn a copy of the U.S. Constitution, claiming that (i) what he burned was actually a copy of the Declaration of Independence and (ii) the state statute on which the charge is based violates his rights under the First Amendment to the U.S. Constitution.

1. May Dan properly be found guilty of the crime of murder or any lesser-included offense? Discuss.

2. How should the court rule on each ground of Dan’s motion to dismiss the charge of attempting to burn a copy of the U.S. Constitution? Discuss.

Answer A

1. Murder or Any Lesser-Included Offense

Elements of a Crime

The four elements of a crime consist of (i) a guilty act, (ii) a guilty mind, (iii) concurrence, and (iv) causation.

For a person to be found guilty of a crime, the guilty act must be voluntary. Here, Dan appeared to only want to burn the document, not let it go and have it drift away. On the facts, it seems like he only let the document go involuntary when the heat of the fire burned his hand. So it appears that Dan may not have committed the requisite guilty act. However, if we frame Dan's actions on a broader level, Dan did voluntarily burn the document and set into motion the chain of events leading to the ultimate killing of the pedestrian. The element of a guilty act is satisfied.

As to concurrence and causation, Dan's intentional act of igniting the parchment document set into motion a chain of events: he let go of the burning document, it settled in an open drum of flammable material, and it caused the drum to explode and kill a nearby pedestrian. On the one hand, it appears that there is no proximate causation because it is arguably unforeseeable for someone to die from an explosion as a result of burning a document. On the other hand, courts are generally flexible when it comes to foreseeability, and there is a viable argument that the result was foreseeable because playing with fire is a dangerous activity. A court will probably find causation.

However, what we need to establish is whether Dan possessed the requisite guilty mind. The discussion below addresses this element.

Murder

At common law, murder is the unlawful killing of a human being with malice aforethought, which is established by any one of the following states of mind: (i) intent to kill, (ii) intent to do serious bodily harm, (iii) reckless indifference to an unjustifiably high risk to human life (i.e., depraved heart murder), and (iv) intent to commit a felony underlying the felony-murder rule.

Intent to Kill

From the facts, it does not appear that Dan knew any of the following facts: the nearby presence of the open drum with flammable material, the pedestrian's presence near the drum, or the pedestrian's identity. Therefore, he could not have formed a specific intent to kill the pedestrian. Dan cannot be found guilty of intent to kill murder.

Intent to Do Serious Bodily Harm

On the facts, Dan did not intend to do any harm, let alone serious bodily harm. He was merely burning the document as a form of symbolic speech and probably did not even want to let go of the document.

Reckless Indifference to an Unjustifiably High Risk to Human Life

Dan's act of igniting the document and letting it go did not reflect reckless indifference to an unjustifiably high risk to human life. No reasonable person would think that a burning document could ultimately kill someone. For example, Dan did not carry a dangerous weapon such as a gun and fire it into a crowded room.

Felony Murder

Under the felony-murder rule, a person can be found guilty of a killing that occurs during the commission of an underlying felony that is inherently dangerous, usually burglary, arson, rape, robbery, or kidnapping. Dan did not have the intent to commit any of these felonies.

Lesser Included Offenses

Voluntary Manslaughter

Voluntary manslaughter is an intentional killing committed with adequate provocation causing one to lose self-control. We have already established above that Dan cannot be found guilty of an intentional killing, so we need not determine whether it can be reduced to voluntary manslaughter. In any event, Dan was not even provoked to begin with.

Involuntary Manslaughter

Involuntary manslaughter is an unintentional killing that results either from (i) criminal negligence or (ii) misdemeanor-murder, which is a killing that occurs during the commission of a misdemeanor that is malum in se or inherently dangerous.

Criminal negligence exceeds tort negligence but is less than the reckless indifference of depraved heart murder. Significantly, for a person to be criminally negligent, he must have been aware of the risk. Here, Dan could have been aware of a general risk that results from a fire, which is an accidental burning of another object that occurs from a strong wind carrying the flame. On the other hand, Dan was not aware of the particular risk that an open drum of flammable material was nearby, which could kill someone. Dan cannot be found guilty of criminal negligence.
On the other hand, Dan may be found guilty of misdemeanor-murder, because he committed the misdemeanor of burning or mutilating a copy of the U.S. Constitution, and the commission of the misdemeanor caused the ultimate death of the pedestrian. On the other hand, the misdemeanor was not malum in se and not inherently dangerous. Dan should not be found guilty of involuntary manslaughter.

Conclusion: Dan cannot be found guilty of the crime of murder or any lesser-included offense.

(2) Dan's Motion to Dismiss the Charge of Attempting to Burn a Copy of the U.S. Constitution

(ii)What he burned was actually a copy of the Declaration of Independence

Dan is being charged with attempting to burn a copy of the U.S. Constitution, but what he actually burned was the Declaration of Independence. At common law, factual impossibility is not a defense for attempting a crime. For example, if a person intends to shoot another with a gun and the gun happened to be out of bullets, the man is still guilty. However, legal impossibility is a defense to attempt. That is, if what the person was attempting to do was actually not a crime even though he thought it was, then he could not be found guilty of attempt.

Here, Dan's assertion that he actually burned the Declaration of Independence is a claim of factual impossibility. From the facts, we know that he had the specific intent to destroy a copy of the U.S. Constitution, so even though it was factually impossible for him to do it because he was holding the Declaration of Independence, he can still be found guilty of attempting to burn a copy of the U.S. Constitution.

Conclusion: The Court should deny Dan's motion to dismiss based on this ground.

(iii) The state statute on which the charge is based violates his rights under the First Amendment of the Constitution

The First Amendment protects free speech, and it is applicable to the states through the Fourteenth Amendment. The state action requirement is easily met here because it is a state statute making the act of burning or mutilating a copy of the U.S. Constitution a misdemeanor.

Symbolic Speech

Dan's act was a form of symbolic speech. For a regulation of symbolic speech to be valid and not violative of the First Amendment, the law must have a purpose independent of and incidental to the suppression of speech and the restriction on speech must not be greater than necessary to achieve that purpose.

Here, the state statute does not appear to have a purpose independent of and incidental to the suppression of speech. For example, the burning of draft cards was upheld, because it was found that the government has a valid interest in facilitating the draft, and that the suppression of the speech was incidental and no greater than necessary. Here, preventing the burning of the Constitution does not appear to serve any significant government interest other than to prevent people from showing their anger toward the government, which is within their rights under the First Amendment.

Unprotected Speech

The government may attempt to frame Dan's acts as unprotected speech that presents a clear and present danger. Such speech is intended to incite imminent unlawful action and is likely to result in imminent unlawful action, so that the state can regulate it. On the facts, Dan stood on the steps of the state capitol and yelled to a half dozen people entering the front doors while destroying what he thought was a copy of the U.S. Constitution, so arguably, he was trying to incite those people and get them enraged. On the other hand, there was no indication of encouraging harmful acts in his statement and burning a document in and of itself does not promote violence.

Moreover, even if the government can show that what Dan was specifically doing was inciting imminent unlawful speech, the government still cannot show that the state statute at issue is designed to restrain this kind of unprotected speech. The state statute merely bans burning the Constitution, but does not, for example, limit such acts to the steps of the state capitol, where the state might have an argument that doing such acts so close to government activity is dangerous and disruptive. The statute is overbroad and does not strive to only limit unprotected speech that is likely to incite imminent unlawful action.

Conclusion: The Court should grant Dan's motion to dismiss based on this ground.

Answer B

Murder Charges Against Dan ("D")

The first issue is whether Dan may properly be found guilty of murder or any other lesser included offense.

Murder

Murder is defined as the killing of another human being with malice aforethought. In order to be found guilty of murder a Defendant must have committed a voluntary act and must have possessed the requisite mental state at the time of the act. A defendant will be guilty of murder if he committed the act (1) with the intent to kill, (2) with the intent to inflict great bodily injury, (3) if he acted in such a way as to demonstrate a reckless disregard for human life (often termed as having an "abandoned and malignant heart"), (4) or if the murder resulted during the commission of a highly dangerous felony.

Here, D's act of igniting the document constituted a voluntary act. The fact that the heat of the fire had burned his hand, and caused him to involuntarily let it go does not negate the fact that his act of burning the document in the first place was voluntary. However, an act, in and of itself, is not sufficient to convict D of a crime. The State must also prove that, at the time D committed the act of burning the document, he had the intent to commit murder.

On these facts, it is clear that Dan did not set the document on fire with an intent to kill. While an intent to kill may be inferred in cases where the D uses a deadly, dangerous weapon against a victim (a gun, knife, etc.), that is not the case here. Additionally, D did not act with an intent to inflict great bodily injury on anyone. Instead, his act of burning the paper was done to make a political point to those that were present nearby.

The State may try and argue that Dan's acts were done with an abandoned and malignant heart because, by igniting the document around individuals, he acted in a way that demonstrated reckless and unjustifiable disregard for human life. The State will not be able to meet their burden of proof under this theory either. Here, D's act of burning the paper is not the type of act that an individual could expect would lead to someone's death. The law demands more in order to show a reckless disregard for human life.

Felony Murder Rule

The state may try and argue that D should be convicted of murder based on the Felony Murder Rule ("FMR"). Under this rule, a D is liable for all deaths that occur during the commission of a highly dangerous felony, whether he intended to cause them or not. Instead, the intent is inferred from his intent to commit the underlying felony. In addition, the deaths caused during the commission of the felony must be foreseeable and must result before D has reached a point of temporary safety. Generally, the FMR has been reserved for deaths that occur during highly dangerous felonies, such as rape, arson,

kidnapping, robbery, and burglary.

Here, the issue is whether D can be found guilty of one of these underlying felonies so that the FMR applies. The only one that would be applicable would be the crime of arson. In order to show that D is guilty of arson, the State must prove that D (1) acted with the intent, or was at least reckless, (2) in burning, (3) the dwelling, (4) of another. Here it is clear that D did not intend to burn the nearby construction yard. Instead, the fire resulted because a wind blew the lit paper into an open drum of flammable material. However, the State may try and argue that the act of igniting a document on fire and allowing the wind to carry it away constituted a reckless act. However, the State will also have to prove that D burned a dwelling. Here, the paper did not cause a dwelling to burn, but rather flew into a construction site.

Thus, D could not be convicted of the murder of the Pedestrian based on the Felony Murder Rule because he did not commit a highly dangerous felony.

Voluntary Manslaughter

Voluntary Manslaughter is a killing of another human being while acting under the heat of passion. Voluntary Manslaughter is generally reserved for cases in which the D kills another because of an "adequate provocation". Here, Voluntary Manslaughter does not apply because there was no provocation which would have caused D to act the way that he did.

Involuntary Manslaughter / Misdemeanor Manslaughter

The remaining consideration is whether the State could properly convict D of involuntary manslaughter. Involuntary manslaughter is appropriate where the D is criminally negligent. Criminal negligence is a higher standard than is used in the tort context for negligence cases. In the criminal context, while D may not have been acting with an intent to kill, he nonetheless acted in a way that was so extremely unreasonable that a reasonable person in his shoes would have recognized that such actions are performed with a reckless disregard for the life of others. Here, the State will have to prove that not only was D's act criminally negligent, but also that the Death was caused by D's actions.

The State will likely fail on these facts because D's act of burning a document does not rise to the level of a criminally negligent act. D's conduct was not reckless in the sense that a reasonable person could have contemplated that burning a document could eventually lead to another person's death. Moreover, the State will have a tough time meeting the causation requirement because, while D was the but-for cause in P's death, the death was not foreseeable. Here, the death was caused by the explosion when the paper settled into an open drum of flammable material at the construction site. Thus, D could not, nor could a reasonable person foresee that such an act would result in a death due to such an explosion.

The State may also try and argue for misdemeanor manslaughter, which is appropriate

when a death is caused during the commission of a lesser-included felony or by those specified by state statute. Here, it is highly doubtful that the burning of the Constitution is the type of misdemeanor that would be included under such a rule. As a result, the State will not succeed on these grounds.

2. Dan's Motions to Dismiss

Attempt Charges vs. Dan

In order to prove attempt, the State must show that (1) D intended to commit the crime, and (2 he took a substantial step towards completing the crime. Regardless of the underlying crime, attempt is always a specific intent crime.

Here, the State will be able to show that D's burning of a document that he believed to be the U.S. Constitution demonstrates his intent to commit the crime. Additionally, because he actually ignited the document, the second element is also satisfied. The issue thus is whether D has any valid defenses to the charge.

Mistake of Fact

D's motion to dismiss is based on a mistake of fact defense. Namely, he is arguing that, because he actually burned a copy of the Declaration of Independence, not the U.S. Constitution as he thought, he should not be found guilty for attempt.

D will fail in this defense because mistake of fact is not a good defense to attempt. That is because, here, if the circumstances had been as D believed (to burn the Constitution), he would have been guilty of the misdemeanor. By way of analogy, a thief who attempts to receive stolen goods may not later argue that, because the police had secured the drugs and transferred them to him undercover, he cannot be guilty because the goods were no longer "stolen". The fact remains that, had the circumstances been the way he believed them to be, he would have been guilty of the crime of receipt of stolen goods. Here, D's mistake of fact may be a defense to the actual misdemeanor itself, but will not provide a defense to attempt.

First Amendment

The First Amendment protects an individual's freedom of speech. However, included in the First Amendment is a protection of expressive activities that constitute speech. Here, it is clear that D's act of burning the Constitution was an act of expression as it was intended to convey his political views regarding the problems inherent with government-endorsed religion and the commingling of church and state.

Statutes my limit expressive activity if they are unrelated to the expression that constitutes speech and are narrowly tailored to serve such goals. Here, the State may have a difficult time proving that this act is unrelated to expression because it seems to want to prevent individuals from burning or mutilating the Constitution as a way of

expressing their political views.

The State would likely try and analogize to the U.S. Supreme Court case of O'Brien. There, a statute made it a crime to burn draft cards. When the defendant burned his draft card as a way of protesting against the war, he was prosecuted under the statute. The Court held that the statute was constitutional because it was not aimed solely at curtailing individuals' ability to express their viewpoints. Instead, the County had an interest in the administrative matters of the draft and that draft cards were essential to the country keeping track of its draft members, soldiers, etc. Thus, because this statute was content-neutral, the Court applied intermediate scrutiny and found that the statute was narrowly tailored to a compelling state interest.

However, as noted above, no such interest appears to exist for the state's statute in this case.

D will likely point to the flag burning cases, such as Johnson, where the Court has held that statutes making it a crime to burn the U.S. flag are unconstitutional because they restrict speech under the First Amendment. In the flag burning cases, the Court has noted that these statutes are aimed at curbing an individual's right to express his views and thus warrant strict scrutiny. Because they are not necessary to advance a compelling interest, they are violative of the First Amendment.

The present case seems much closer to Johnson than O'Brien because the statute is aimed at expression rather than activities unrelated to expression. As such, it is unconstitutional because it impermissibly burdens the freedom of speech under the First Amendment. The State will have to meet a very high burden because strict scrutiny would be applied and thus it would have to show that the statute is necessary to advance a compelling state interest. Because no compelling interest appears to exist, the statute will be struck down.

Q5 Remedies

Paula, a recent art-school graduate, was trying to establish a reputation as an art acquisition agent, i.e., one who finds works of art for collectors interested in buying particular works. It is a business where reliability and confidentiality are critical.

Paula's first commission was to find for City Museum ("Museum") any one of the three originals in a series of paintings by Monay, titled "The Pond." Museum agreed to pay as much as $300,000 for it and to pay Paula $15,000 upon acquisition. The works of Monay are rare and held by private collectors, and none had been on the market in recent years.

Paula eventually tracked down Sally, a private collector who owned the three originals of Monay's "The Pond." After some negotiations, in which Sally expressed offhandedly how proud she was that she only sold to private collectors, Sally orally agreed to sell to Paula for $200,000 whichever of the three paintings she selected. Paula agreed that, as soon as she could make the selection, she would transfer the purchase money into Sally's bank account. Paula immediately called the curator at Museum, who told her to select the first of the three in the series, and the curator immediately caused Museum's bank to wire-transfer $200,000 into Sally's account to cover the purchase.

The next day, when Paula went to tell Sally which painting she had selected and to pick it up, Sally declined to go through with the sale. Sally accused Paula of deceit, saying it was only when she learned that the money for the purchase had come from Museum, that she realized the painting would no longer be held privately. Sally tendered to Paula a certified check, which she had signed and drawn from her bank account, refunding the $200,000. In the notation line of the check, Sally had written, "Refund on 1st of Monay Pond series."

Paula refused to accept the check and insisted on getting the painting. She explained that she had not disclosed her principal's identity because she was bout by confidentiality and that, unless she could deliver the painting to Museum, her budding career as an art acquisition agent was over. Sally told Paula, "That's too bad. Our contract wasn't in writing, so you can't force me to sell the painting. Besides, you deceived me about why you wanted to buy it."

Can Paula obtain specific performance of Sally's agreement to sell Paula the painting? Discuss.

Answer A

Applicable Law

The common law governs contracts for the services and the sale of real property. The Uniform Commercial Code (UCC) governs contracts for the sale of goods. Because this contract was for the sale of a painting, it is governed by the UCC. The UCC also has provisions that apply only to merchants. Merchants are those who regularly deal in the goods that are the subject of the contract. Here, Sally is not a merchant because she is a private collector who does not appear to regularly sell her paintings; however, Paula is likely becoming a merchant (she just started).

Specific performance is an equitable remedy and for the court to award it, which requires that (1) The Contract is Valid; (2) The Terms are Certain and Definite; (3) Any Conditions are Satisfied; (4) A Remedy at Law is Inadequate; (5) There is Mutuality in Enforcement; and (6) There are no Defenses.

(1) The Contract is Valid

A contract requires a valid offer, a valid acceptance, consideration, and certain and definite terms, which are discussed below. Assuming the terms are sufficient, a valid contract was formed between Sally and Paula when Sally agreed to sell Paula whichever of the three paintings for $200,000.

Statute of Frauds

The statute of frauds requires that a contract for the sale of goods of $500 or more must be in writing. Here, the contract between the parties was only oral, thus the SOF is not satisfied. Thus, Sally will assert the SOF as a defense to the enforcement of the contract.

Exceptions to the SOF

Full Performance

Full performance by one party can also serve as an exception to the SOF. Here, Paula would argue that she performed by selecting the painting she wanted and transferring the money into Sally's account.

However, the UCC has tended to apply full payment when the performance is the delivery of the goods, not just mere payment. The rationale is that if payment alone could satisfy the SOF, then most parties could likely get out of the requirement by making a payment; whereas, delivery of goods is more indicative that a contract actually existed between the parties. Thus, the court would likely not find that full payment by Paula was sufficient to waive the writing requirement.

Judicial Admission

The UCC also recognizes a SOF exception when one party admits the contract in a judicial proceeding or writing. While P may attempt to argue that Sally recognized the contract by writing "Refund on 1st of Monay Pond series," this writing was merely on a check, not in any judicial proceeding.

Estoppel

Some courts allow estoppel as a valid defense to SOF, which requires that the party detrimentally rely on the other party's promise. Here, Paula would argue that she relied on Sally's promise to sell the painting and the reliance was detrimental because she told the museum she could get the painting. More specifically, the reliance was detrimental to Paula because reliability is critical in her line of work; thus Paula would argue that by telling her client that she obtained the painting, then informing them that she no longer could get it, her reliability and career would be damaged.

As Paula is seeking an equitable remedy, a court might be more willing to apply estoppel; however, the contract clearly does not satisfy the SOF and the detriment to Paula requires a series of inferences; thus a court may also decline to apply it.

Merchant's Confirmatory Memo

The UCC also recognizes an exception to the SOF when one party sends a confirmatory memorandum that is signed. However, this provision only applies to merchants. Thus, because Sally is not a merchant, P could not argue that her writing on the check suffices as a confirmatory memorandum.

(2) The Terms are Certain and Definite

Even more so than with regular contracts, the remedy of specific performance requires that the contract terms be definite and certain. Under the UCC, the contract must specify the quantity. Here, this term is satisfied, because the parties agreed that Paula could select one painting.

Sally would argue that the terms are not definite and certain because the parties did not agree on the actual painting that would be sold and Paula had complete discretion in selecting the painting. However, if the parties have agreed to the price, the UCC allows other terms to be agreed upon and the parties will be expected to do so in good faith. Moreover, because the paintings are part of a series and appear to be equal in value, it does not appear that the lack of specificity as to which painting would be purchased negated the parties from reaching a meeting of the minds.

(3) Any Conditions are Satisfied

A condition is an event, the occurrence or non-occurrence of which must occur, if it occurs at all, for a performance to be done. Conditions are strictly construed and a failure

of a condition does not result in breach, but merely excuses performance. A condition precedent is one which must occur before performance from another party is due.

Here, Paula selecting the painting she wanted was a condition precedent to having to pay. Moreover, Paula's payment of the $200,000 is a concurrent condition, as the payment and exchange of the painting each would give rise to the other performing.

Paula will argue that she satisfied all of the conditions because she made the payment and she decided which painting she wanted and went to tell Sally. Sally, however, will argue that Sally declined to go through with the sale before Paula told her which painting she wanted because the facts are unambiguous as to whether Paula in fact told Sally (it merely states that "she went to tell Sally which painting she wanted"). However, even if this was the case, Sally cannot assert her own preventing of a condition to assert failure of a condition. Moreover, it appears that Paula did tell Sally because Sally wrote "Refund on 1st of Monay Pond series" on the check. Thus, all of the conditions were satisfied.

(4) A Remedy at Law is Inadequate

Because specific performance is an equitable remedy, the courts require that a remedy at law must be inadequate.

Unique Goods

Normally, a remedy at law is adequate with breach of contract because the parties can seek expectancy damages. However, the courts have held that specific performance is available when it is a contract for real estate or unique goods.

Here, the Monay painting would clearly be considered a unique good because Monay's works are "rare," "held by private collectors," and "none had been on the market in recent years." Thus, specific performance would be proper under these circumstances.

Uncertainty of Damages

Moreover, a remedy at law would be inadequate because, to recover legal damages, a party must prove: 1) foreseeability; 2) certainty; 3) unavoidability; and 4) causation. If Paula sought legal damages, she would have an extremely hard time proving certainty because she had just started in the business. Thus, while her failure to perform on a contract after informing her client that she could would invariably affect her future business and relationship with that client, the damages she would suffer are extremely speculative. In this sense, Paula's business is a new business and courts have traditionally held that a new business cannot recover future lost earnings because they are too speculative. For example, Paula might have turned out to be the best acquisition agent or the worst and, while some courts will now allow use of comparable businesses to prove lost future profits, a court would likely be more hesitant when it is a business such as art acquisition, where the success is heavily dependent with the individual agent.

Feasibility of Enforcement

Additionally, the courts will not specifically enforce contracts when the judgment would not be feasible to enforce, such as in personal services contracts. Here, this contract would be simply to enforce and does not require continued oversight because the judgment would require: 1) Sally to deliver the painting to Paula; and 2) Paula to ensure the $200,000 was delivered or return the refund check if she eventually accepted it.

(5) There is Mutuality in Enforcement

Courts traditionally require that, for a party to seek specific performance, the party they are seeking it against must also be entitled to specific performance. Here, it is less likely that Sally would be able to seek specific performance because her damages would have been her lost profits on the sale. Still, a court will award specific performance despite the mutuality requirement if it is confident the plaintiff will perform. Here, Paula wants to perform, thus the court would likely be confident she will and the court could also require her performance in the judgment.

(5) There are no Defenses

Sally will assert several defenses to enforcement of the contract:

Unclean Hands (UH)

Unclean hands is an equitable defense that applies to equitable remedies when the plaintiff has acted unjustly with regard to the specific transaction, thus resulting in the maxim that the court will not use equity to aid a person with "unclean hands." Here, Sally will argue that by making Sally believe that Paula was a private buyer when Paula knew Sally did not want to sell to a private buyer, Paula acted unjustly.
Paula will claim that she owed a Duty of Confidentiality to her principal because confidentiality is critical to the business. Whether a court would agree with Paula on this issue is debatable because, unlike lawyers, art agents do not automatically owe a Duty of Confidentiality to their principals. However, agents do owe a Duty of Loyalty to their principals and also must follow the directions of the principal, thus if the museum had made clear that it wanted its identity confidential, then the court would likely determine that Paula was not acting unjustly in following her duty as an agent.

Misrepresentation

A misrepresentation is a negligent statement of material fact or a fraudulent statement of fact that is said to induce an action in the other party, which the other party does actually rely on and suffers damages because of reliance. While Sally will argue that Paula's silence amounted to a misrepresentation, nondisclosure does not amount to a misrepresentation unless there is a duty to disclose facts. Thus, Paula did not have a duty to correct Sally's misunderstanding and, therefore, misrepresentation would not be an

adequate defense.

Unilateral Mistake

Unilateral mistake, where one party is materially mistaken about a term of the contract, is usually not a defense; however, it can be a defense when one party is mistaken and the other party knew or had reason to know of that party's mistake. Here, Sally could successfully assert unilateral mistake because Paula knew that Sally only wanted to sell to a private buyer and Paula knew that Sally thought she was selling to a private buyer because Sally expressed "how proud she was that she only sold to private collectors." Paula, however, will argue that this statement was only "offhandedly" and never referred to the actual transaction. Still, especially because Paula is seeking equity, a court would likely find that this means that Paula should have known that Sally thought she was selling to a private buyer because Sally said she only sold to private buyers.

Frustration of Purpose

Lastly, frustration of purpose is a defense where both parties know of the purpose of the contract at the time of the contract and the purpose is frustrated by an unforeseeable event. Sally could assert this, however she did not make it clear that her purpose was to sell to a buyer, thus her better defense is under unilateral mistake because, under that defense, she can argue that Paula "should have known" of her mistake; whereas she cannot argue that Paula "should have known" of her purpose to assert frustration of purpose.

Answer B

Specific Performance for Paula

Type of Contract

The UCC applies to the sale of goods, whereas the common law applies to all other contracts. Here, the contract between Sally and Paula was for the sale of a painting, which is an item of tangible or intangible personal property. In other words, a painting is a good. Therefore, the UCC applies.

Standard for Specific Performance

In order for a plaintiff to receive specific performance under a contract, the following elements have to be met: there must be a valid contract, the plaintiff must have performed or be ready to perform any required performance under the contract, the remedy at law must be inadequate, there used to be a requirement of mutuality but it is no longer required, and there must be no valid defenses to enforcement of the contract of specific performance.

Valid Contract – Offer, Acceptance, Consideration

In order to form a valid contract, there must be an offer, an acceptance, and consideration. An offer requires that the offeror communicate to the offeree, the terms of the offer are clear and definite, and a reasonable person in the offeree's position would believe that the offeror intends to be bound if the offeree accepts. Acceptance is a manifestation on the part of the offeree to accept the offer. Under the common law, this required the offeree to accept the offer exactly as is. Under the UCC, additional terms can be mentioned in the acceptance, although where there is at least one non-merchant, the additional terms must be separately accepted.

Here, Sally orally agreed to sell to Paula the first of the three Monay paintings for $200,000. Sally agreed to sell and Paula agreed to buy, which illustrates an intent by both to be bound. The terms are clear because they agreed that Paula could pick one of the three paintings for the amount of $200,000. Although the painting was not already picked out, it was Paula's choice when the time came, and Sally will be bound to that provision. Therefore, there has been a valid offer and acceptance between the parties.

There is also valid consideration. Consideration requires bargained-for legal detriment, which can involve both performance and forbearance. Here, both parties are promising to perform. Sally's legal detriment being suffered is giving up the painting, and Paula's legal detriment being suffered is the payment of money. Therefore, there is a valid contract, unless one of the defenses to formation discussed below applies.

All Conditions of Performance Satisfied

Paula must have satisfied any performance that she is required to perform. Or, if she

cannot yet perform or the other party refuses to perform, she must be ready and willing to perform.

Here, Paula has already performed her end of the contract because she transferred $200,000 to Sally. Sally has tried to return the money, but Paula did not take the money and stated that she wants the picture. This illustrates that Paula wants to continue with the contract and has the money to do so, even if the money is returned to her.

Therefore, this requirement has been met.

Inadequate Remedy at Law

A remedy at law may be inadequate if the item at issue is unique, the damages are too speculative, or there will be a multiplicity of suits. In addition to evaluating the inadequacy of the remedy at law, the courts are also concerned with the feasibility of enforcing the contract. Generally, specific performance is not granted very often in contracts unless it's real estate. In the sale of goods, specific performance will often only be granted if the item is unique or custom made.

Here, the item is a one-of-a-kind Monay painting. The museum informed Paula that most Monay paintings are held by private collectors and are extremely rare. In this case, Paula was looking for one of three paintings that were all held by the same person, which means Paula could not go elsewhere to find them. This is also evidenced by the fact that one of the paintings has been on the market for years. Because the painting is so unique and the original will not be found anywhere else, the court will be willing to grant specific performance. Using its contempt power, it can force Sally to give up the painting.

Since the contract could be feasibly enforced by the court and the item is unique, there is an inadequate remedy at law and Paula could recover by specific performance.

Mutuality

The common law used to require mutuality of performance to ensure that the court could make everyone perform. However, this requirement is no longer needed. Therefore, Paula could recover through specific performance regardless of mutuality.

Defenses

Statute of Frauds

The Statute of Frauds requires any contract for the sale of goods that is $500 or more to be in writing and signed by the party against whom it is being enforced.

Here, Sally will argue that the contract is not enforceable because it is for the sale of goods worth $200,000 and there is no writing. Paula would argue that either part performance has satisfied the statute of frauds or that estoppel applies.

In the sale of goods, full performance will always satisfy the Statue of Frauds. However, part performance will usually only satisfy the Statute of Frauds to the extent of the performance. This generally means that there will be an enforceable contract to the extent of any goods delivered. Here, Paula will argue that she transferred $200,000 to Sally, which means that she has fully performed her portion of the contract. Paula also arrived at Sally's house where she was supposed to pick up the painting. Paula could argue that Sally had satisfied her end of the bargain because once the money was transferred, Sally's delivery obligation had been performed since Paula had to come and pick it up. This is a weak argument, however, because there is no evidence that Sally wanted to give the painting or that the parties had agreed, which is why part performance through delivery of goods generally works. The seller would not have sent the goods if a contract did not exist. Most likely, Paula's part performance argument would not work.

Paula would also argue that estoppel applies and satisfies the Statute of Frauds requirements. Estoppel is the reasonable, foreseeable and detrimental reliance of the representation of the other party. Paula had already informed the Museum that she had obtained the picture and had transferred the money to Sally. If she had known she could not get the picture, she would not have told the Museum. Due to Sally's retraction, Paula's reputation will be tarnished and the Museum will most likely not want her services any longer. The business of art acquisition requires reliability and confidentiality. Specifically, the requirement of reliability will be negated if Paula is not able to enforce the contract, which puts her in a much worse position than if the contract had not been made. Sally would argue that Paula has not changed her position in reliance on the contract in any way because Paula still has the same amount of money that she had before and has not made any preparations for the painting that would amount to detrimental reliance.

Due to Paula's transfer of the money and her representations to the Museum that she had bought the piece, Paula's estoppel argument will most likely be upheld and Paula will be able to overcome the Statute of Frauds.

Misrepresentation

A misrepresentation is any false assertion or intentional concealment of material information. The assertion can be made knowingly or not.

Here, Sally expressed a desire during negotiations only to sell to private collectors. Paula made no reply to this comment and continued with the negotiations. Sally would argue that since Sally had made it clear that she only wanted to sell to private collectors, Paula was knowingly concealing a material assertion underlying the negotiations. On the other hand, Paula would argue that Sally never asked Paula if she was a private collector nor did she make it a term of the contract. Paula did not conceal any information from Sally,

but the parties simply negotiated without ever discussing Sally's desire to only sell to private collectors.

Paula's argument will most likely win and Sally will be unable to void the contract on the grounds of misrepresentation.

Unilateral Mistake

Generally, unilateral mistake by one party does not make a contract unenforceable. However, if the other party knew or should have known of the mistake, the contract is void.

Here, Sally will argue that Paula knew that Sally wanted only a private collector to buy the painting. Because Paula knew Sally's intent, Paula knew that Sally had the mistaken belief that Paula was a private collector. One of the material underlying assumptions of the contract in Sally's mind was that Paula was a private collector. Paula will argue that the mistake was not material to the contract because Sally never made it a part of the contract. In addition, Sally made the comment offhand, which means that Paula did not know that Sally had mistaken Paula for a private collector.

Under the circumstances, the court would most likely find that there was a unilateral mistake that was known by the other party. Therefore, the contract is not enforceable and therefore not specifically enforceable.

Unclean Hands

Sally will also argue that Paula has unclean hands, and therefore, cannot get specific performance. Unclean hands applies when the plaintiff has acted unlawfully or in bad faith in retaliation to the same contract.

Here, Sally would argue that by not asserting that she was there on behalf of the Museum, Paula had acted in bad faith before Sally repudiated the contract. By failing to tell Sally that she was only acting as an agent, Paula misrepresented who she was and the purpose of the contract.

This argument will most likely not win, since once the contract was formed, Paula did nothing to impede the contract. Parties are free to contract for the terms and Sally did not require that Paula be a private collector.

Overall, Paula will be able to get specific performance as long as unilateral mistake does not apply.

Q6 Community Property

Husband and Wife married in 1997 in California. Neither of them brought any significant assets to the marriage, and they were both employed. Husband and Wife agreed that Husband should go to law school after they had saved up some money. Husband put his earnings in a savings account in his name alone. Wife deposited her earnings into a joint checking account in both of their names, which was used for their living expenses. Husband had a child support obligation from a previous marriage. Every month, Husband paid his child support by check from the joint checking account.

Husband began law school in 1998. Wife continued to work to support the couple. Husband took out a student loan to pay his tuition. Husband graduated in 2001 and obtained his law degree. He passed the bar exam and got a position with a large law firm.

In 2004 Husband became a partner in the firm. Husband's partnership earnings were substantial. He paid off his student loan using these earnings. Although the actual value of Husband's share of the firm's goodwill was substantially greater, the partnership agreement provided that its value was $3,000 for purposes of valuation as marital property in the event of a dissolution of a partner's marriage.

In 2006, Husband and Wife filed for dissolution of marriage.

1. Is the community entitled to reimbursement for
(a) The child support? Discuss.
(b) The payments on the student loan? Discuss.

2. Does the community have an interest in
(c) Husband's law degree? Discuss.
(d) The goodwill in Husband's law firm and, if so, is the community bound by the firm's valuation? Discuss.

Answer according to California law.

Answer A

California is a community property state. All amounts earned through the community labor of married California residents are presumptively community property, which means that they are owned together, equally, by the husband and wife (or by the domestic partners). All items earned through gift, bequest or devise to an individual spouse remain that spouse's separate property. Community property continues to accrue until the end of the economic community, which occurs with physical separation and an intent not to resume the marriage. Certain presumptions arise from form of title, and CP may be transferred to separate property and vice versa.

Community's Reimbursement Claims

Child Support

The community remains liable for all credit obligations of each individual spouse, whether acquired before or during the marriage. Thus, Husband's ("H") child support obligations, although they arose before marriage, may still be satisfied from the community property jointly owned by the couple. However, by statute, the community is entitled to reimbursement for child support payments that arise from a prior marriage of one of the spouses, if that spouse's separate property was available at the time to satisfy the obligation. Here, H and W married when neither of them had any significant assets, although they were both employed. If H had no available separate property at the time he made the child support payments, those obligations were legitimately paid out of community funds, and the community has no right to reimbursement. The payments were made from H and W's joint checking account, which is funded entirely with W's earnings. Since W's earnings are CP, the payments on the child support were made with CP (by H writing checks drawing on the joint checking account).

Savings account in H's name alone

The fact that H opened a savings account in his name alone does not defeat the presumption that his earnings remain community property. Title in one spouse's name, if the name on the bank account can be considered title, does not prohibit tracing to the source of the funds. It may, in certain circumstances, be evidence of a gift from the community to that spouse. However, when the spouse takes title in his or her own name, no inference of a gift will arise. Also, it may serve as a bar to the other spouse's premarital creditors, if the non-debtor spouse's CP earnings are placed in the separate account and the debtor spouse has no access to it. However, here it is H who has the obligation. Thus, because the separate savings account was funded only with H's earnings, it will be deemed to be community property, since the earnings of one spouse through labor are community property. And, because any profit from community property remains community property, whatever interest H has earned will remain CP. Of course, the facts do indicate that H and W were both employed when the entered the marriage. Thus, it is possible that some of the earnings H used to fill the savings account were his premarital earnings. H might attempt to trace some of the value of the savings

account to those funds. However, where assets have been commingled, they are presumptively community property and W will have a hard time asserting the amount of separate property in H's account. If she were able to trace, the community would be reimbursed to the extent that those separate property funds (if any) were available to pay for the child support.

Transmutation and the savings account

In order for the separate account to constitute a transmutation of CP to H's separate property, the agreement would need to be in writing, with W (as the adversely affected) spouse expressly conveying the interest to H and signing the writing. Here, H's name on the bank account does not constitute a transmutation.

Thus, community property was properly used to pay for the child support payments, even if they were a premarital obligation of H. Because H had no apparent separate property available when the payments were made, the community is not entitled to reimbursement.

Payments on student loan

A loan constitutes community property to the extent that the lender relied on community property in making it. Here, H decided to go to law school and take out loans while he was married to W. The lender presumably relied on the future earnings of H and W's current income, all community property at the time. Thus, the "intent of the lender" makes this a community loan. Moreover, H used his earnings as a lawyer to pay off this loan, thus it was paid for entirely with community property. By statute, the community is entitled to reimbursement, with interest, when community funds are used to pay for the education of one spouse which greatly enhances that spouse's earning capacity. Here, H's law degree has resulted in him becoming a lawyer at a large law firm, with a presumably generous salary. Thus, the degree has greatly enhanced H's earning capacity. The community is therefore entitled to reimbursement for the amount of the student loan used for the education itself (not for the amount used for ordinary living expenses), with interest. However, if H can establish an equitable defense, reimbursement will not apply.

Equitable defenses to community reimbursement

Where the community has already substantially benefited from the increased earnings due to one spouse's education, there will be no reimbursement to the community at divorce. Substantial benefit is presumed where the community has benefited from the increased earnings for 10 years. Here, H began working in 2001, as an associate presumably, and became a partner in 2004. The couple is now seeking a divorce in 2006. Thus, at most, it has benefited from H's earnings for 5 years, which does not constitute a substantial benefit.

Also, where community funds have been used to pay for an education for the other spouse as well, the community is not entitled to reimbursement. Here, W worked the entire time H was in law school, and did not benefit from an education. Thus, this

defense will not apply.

Finally, where the degree has lessened the obligations of one spouse to pay for support of the educated spouse post-divorce, reimbursement may not apply. Here, it is unclear what W's earning capacity is. If she is extremely well paid (a CEO perhaps) then she might still be under an obligation to pay spousal support to H post-divorce, and this obligation might be lessened by H's ability to earn a lawyer's salary. However, there are no facts indicating what W makes, so this defense presumably does not apply.

Community's Interest in H's Law Degree and the Goodwill of H's Law Firm

Law degree

By statute, professional degrees earned by one spouse during the marriage are not community property, although as noted above the community may be entitled to reimbursement for the cost of acquiring that education. That one spouse worked to pay for the education is irrelevant to the ownership of the degree. The reimbursement interest does not amount to a community interest in the degree itself – meaning an interest in the present discounted value of the future earnings attributable to the degree. Thus, the law degree remains H's separate property going forward, and the community is entitled only to reimbursement with interest for the cost of acquiring the degree.

Goodwill

Goodwill is the value of a business over the expected normal rate of return on the capital invested in that business. In essence, it constitutes the intangible value of the business' reputation above and beyond the raw liquidation value of the business. When the goodwill is generated by community labor, it is a community property asset. Here, H's share of the goodwill was earned entirely while he was married to W. Thus, the goodwill itself is a community property asset.

Valuation and the Partnership Agreement

The valuation of goodwill occurs by one of two methods. First, it can be valued by capitalizing the future stream of income to a present fixed sum (according to varying calculations). Second, it can be valued by looking to the "market price" of the interest. The latter is established by bona fide offers to purchase the business or concern. Here, the partnership agreement of H's firm specifies that the value of H's share in the firm's goodwill is valued at $3,000, but only "in the event of a dissolution of a partner's marriage." However, the community is not bound by this valuation, because it does not constitute a valid market valuation of H's goodwill interest. Buy/sell options in a partnership agreement created by the relevant spouse's firm will not control the valuation of that spouse's interest at divorce. This is because of the obvious risk of abuse inherent in such a valuation. The partner-spouse could agree with his or her other partners to create a very low valuation only for purposes of divorce, in order to deprive the non-partner spouse of his or her rightful share of the partner spouse's interest. Here, that seems to be exactly what has occurred, especially given that the agreement expressly provides that it only applies when one of the partners gets divorced. Thus, the $3,000

valuation will not control, and the court will apply the capitalization (or some other) method.

Valuation of a SP business

The Van Camp and Pereira doctrines would not apply here, since H did not enter into the marriage with a SP business interest. Thus, to the extent the law firm is considered a business, and H considered an owner, H's interest will be entirely community property, as noted above.

Answer B

Community Property

California is a community property state. All property acquired during marriage is presumed to be community property (CP). All property acquired before marriage or after legal separation is considered separate property (SP). Further, all property acquired by either spouse during marriage by gift, bequest or devise is that spouse's separate property. Upon dissolution of marriage, all community property assets are subject to equal division in kind unless statute or policy requires otherwise.

(1)(a) Is the community entitled to reimbursement for the child support payments?

Child Support

Child support obligations from a previous marriage are considered the separate property obligation of the acquiring spouse. However, during marriage, community funds may be reached to satisfy any payments. Upon divorce, the community is entitled to reimbursement for any child support payments made with community property funds when separate property funds were available.

Here, H had a child support obligation from a previous marriage. Every month he paid his child support by check from the joint checking account held in both H and W's names. The checking account contained W's earnings during marriage; thus the checking account contained community property, because all earnings during marriage are considered community property. The issue is whether H had separate property funds available at the time the payments were made.

Bank Account titled in H's name alone – transmutation?

The fact that a bank account is titled in one spouse's name alone does not automatically rebut the community property presumption. Any change to the character of a community property asset after 1985 is required to be in a signed writing, specifically indicating that the nature of the asset is being transmuted.

Here, H opened a bank account in his own name in 1997; however, he deposits into that account his earnings. All earnings during marriage are presumed to be CP. There is no indication that there was a written transmutation of these funds from CP to H's SP; thus the CP presumption cannot be rebutted and all of H's earnings in his savings account will be considered CP.

Also, neither H nor W brought any significant assets to the marriage. Thus, it does not appear that H had any SP assets available at the time the CP funds were used to pay the child support payments. As such, the community will not be reimbursed for any payments made.

(1)(b) Is the community entitled to reimbursement for the payments on the student loan?

Debts

Generally, all debts acquired during marriage are considered community property. However, if it was the intent of the lender to only look to satisfaction of the debt by one spouse's SP, then the debt will be a SP debt.

Here, H took out educational loans to obtain a law degree. Any educational debt acquired during marriage is CP; however, upon divorce, it will be assigned to the acquiring spouse. Thus, it is likely that the lender only looked to H's SP to satisfy the debt knowing that if H and W were divorced, only H would be liable on the debt. However, there are no specific facts to support this argument.

Education

Any education acquired during marriage is the SP of the acquiring spouse. However, upon dissolution of marriage, the community is entitled to reimbursement for any payments made to finance the education if the education substantially increased the spouses' earning capacity unless (1) the community has already substantially benefited from the education; (2) the other spouse also received a community funded education; or (3) obtaining the education offset the need for spousal support.

Here, H obtained a law degree. H began law school in 1998 and W continued to work to support the couple. H took out a student loan to pay his tuition. H graduated in 2001, passed the bar and got a job with a big law firm. Being a lawyer substantially enhanced his earning capacity because in 2004, he became a partner and his earnings were substantial. H paid off his student loan using these earnings. Because H used his earnings during marriage to pay off the loan, the loan was paid off with community funds. Thus, the community financed H's education. As such, the community is entitled to reimbursement unless an exception applies.

Has the community already benefited?

If the spouse has had the education for more than 10 years, there is a presumption that the community has already benefited from the education and no reimbursement is required. Here, H got his law degree in 2001 and H and W filed for dissolution in 2006. Thus, H has only had the job for 5 years at the time of dissolution and the presumption will not apply.

On the facts, no other exception applies. W did not receive a community funded education, and there is no indication that without the education, H would have needed substantial child support. Thus, the community is entitled to reimbursement of the community funds spent to pay off H's student loan.

(2)(c) Does the community have an interest in H's law degree?

Education
Any education acquired during marriage is the SP of the acquiring spouse. As discussed above, the community is only entitled to reimbursement for any community funds spent to finance the education if the education substantially enhanced the spouses' earning capacity. Further, educational debt remaining at the time of dissolution is assigned to the acquiring spouse.

Here, there is no debt remaining on H's education. The community will take no interest in H's education, but as explained above, will be reimbursed for the funds expended to pay off H's loans.

(2)(d) Does the community have an interest in the goodwill of H's law firm and, if so, is the community bound by the firm's valuation?

Goodwill
All assets acquired during marriage by the labor and efforts of a spouse are community property, and goodwill is no exception. The goodwill of a professional practice is a community asset. Goodwill is the value of the continued patronage to the practice. It is the value of the business that is not derived from personal skill or the value of the assets of the business. It can be valued by expert testimony or by capitalizing the excess earnings of the practice.

Here, H will argue that no valuation is necessary because the partnership provides that its value was $3000 for purposes of valuation as marital property in the event of a dissolution of a partner's marriage. However, this argument is likely to fail. In a similar case, the California Supreme Court held that any valuation provided for in a partnership agreement may be considered in valuing the goodwill of a professional practice, however, it is not conclusive as to the value. Further, the court indicated an unwillingness to let partners contract with each other in order to defeat the community property system.

Thus, the court may consider the agreement as evidence of value, but ultimately will allow W to put on evidence of an expert to explain what the goodwill of the business is really valued at. This will be considered CP and subject to equal division in kind.

Feb 2007

California Bar Examination

Essay Questions and Selected Answers

February 2007

ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2007 CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2007 California Bar Examination and two selected answers to each question.

The answers selected for publication received good grades and were written by applicants who passed the examination. These answers were produced as submitted, except that minor corrections in spelling and punctuation were made during transcription for ease in reading. The answers are reproduced here with the consent of their authors.

TUESDAY MORNING

California Bar Examination

Answer all three questions. Time allotted: three hours

Your answer should demonstrate your ability to analyze the facts in question, to tell the difference between material and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

Q1 Real Property / Torts

Builder sold a shopping mall to Owner. The recorded deed from Builder to Owner conveyed the mall and parking lot where the parking spaces were numbered 1 to 100. The deed reserved to Builder the exclusive right to use parking spaces 15 through 20 as a place to set up a stand to sell sports memorabilia and sandwiches on Sundays. The shopping mall was located adjacent to an existing residential neighborhood.

Owner entered into a written 30-year lease with Lois leasing to her a store in the mall and parking spaces 1 through 20. Under the lease, Lois agreed to pay rent monthly and not to assign the lease without Owner's prior written approval. After occupying the leased premises for five years, Lois subleased the store and parking spaces to Fast Food for a term of ten years without first having obtained Owner's written approval.

Fast Food occupied the premises and paid rent to Owner. Fast Food, which operated a take-out restaurant on the premises seven days a week, used state-of-the-art equipment and operated in compliance with all local health ordinances. Notwithstanding this, on warm days when Fast Food was particularly busy, unpleasant cooking odors were emitted from Fast Food's kitchen. The unpleasant odors caused discomfort to many of the homeowners living in the adjacent neighborhood.

On the first Sunday after Fast Food opened its take-out restaurant, Builder set up his memorabilia and sandwich stand in parking spaces 15 through 20. Fast Food, not aware of the provision in the deed, complained to Builder about the competition of Builder's sandwich sales and the occupancy of parking spaces allocated to Fast Food. Builder ignored Fast Food's complaints. Fast Food then informed Owner that it would cease paying rent until Owner took steps to prevent Builder from using the parking spaces. Owner explained to Fast Food that there was nothing he could do about it, but Fast Food insisted that it would not pay further rent until Owner stopped Builder from setting up his stand. Thereupon, Owner hired a locksmith, who changed the locks on the space occupied by Fast Food, thus denying Fast Food access to the premises.

1. Did Lois violate the "no-assignment" provision in her lease with Owner? Discuss.

2. If Fast Food brings an action in trespass against Builder for his use of parking spaces 15 through 20, is Fast Food likely to prevail? Discuss.

3. Did Owner have the right to change the locks on Fast Food's premises? Discuss.

4. Can the homeowners establish a claim for nuisance against Fast Food? Discuss.

Answer A

1)

1) No Assignment Provision

"No assignment" provisions in leases are enforceable; however, they are strictly construed as restraints on alienability. An assignment is the transfer by a tenant of all their remaining interest in a leasehold, whereas a sublease is a transfer of something less than the full interest remaining. In this case, Lois and Owner entered into a 30-year term of years lease, which, at the time of sublease, had 25 years remaining. Lois's sublease to Fast Food was therefore not an assignment, but a sublease, because Lois only subleased to FF for 10 years, and Lois and Owner remained in privity of estate and privity of contract. Owner would therefore be entitled to seek damages against Lois (who could then look to Fast Food for indemnification), but since the clause at issue was a "non-assignment" clause, the sublease of the premises to Fast Food did not violate the clause.

Owner will argue that the power to prevent an assignment includes the power to prevent a lesser transfer of interest, in this case the sublease. Although Owner is correct that an assignment confers a greater interest than an assignment, this argument is unlikely to be persuasive because of the fact that the court will strictly construe the non-assignment clause as prohibiting only assignments and not subleases.

Lois will be able to advance another argument in defense of her assignment to Fast Food: she will claim that Owner is estopped from arguing that an actionable violation occurred. Generally, a party who could otherwise assert a claim for violation of an agreement will be estopped from bringing the claim where he or she acquiesced in the violation. Here, even if Owner had a right to bring an action for damages or eviction based on violation of the non-assignment clause, he likely forfeited that right by accepting rent from Fast Food. Acceptance of Fast Food's rent indicates acquiescence and waiver of the right to enforce the clause, and since Fast Food (and, by extension, Lois) likely reasonably relied on Owner's acquiescence, Owner should be estopped from bringing an action for breach of the non-assignment.

2) Fast Food v. Builder

Fast Food's rights against Builder depend on whether the covenant in the original deed created an express easement in favor of Builder.

An easement is an interest in land that allows the holder to use the land for some designated purpose. Easements can arise from proscription, by express writing, or by implication. In this case, the deed form Builder to Owner expressly reserved the right of Builder to use spaces 15 through 20 for his commercial activities on Sundays. Since this easement benefits Builder alone, separate from his interest in land, it is an easement in gross rather than an easement appurtenant. Easements in gross generally do not run with

the land, except when the easement relates to economic or commercial activity. In this case, the use of the parking spaces for selling merchandise and food on Sundays relates to economic activity, and will therefore be valid even as against subsequent owners or interest-holders.

FF can bring an action against Builder for trespass, which is the physical invasion of one's land by another without consent or privilege to do so, but Builder will assert that he has been expressly granted the right to do so in the deed to Owner. Although FF was not a party to this deed, he will be bound by the easement so long as the easement has not been extinguished. Extinguishment of an easement can occur by several different means, including condemnation, proscription, express agreement, estoppel, end of necessity out of which the easement was created, merger of two parcels of land where an easement appurtenant is involved, and abandonment combined with physical actions indicating intent to never use again. None of these circumstances seem present here, and thus FF will be bound by the easement. Binding FF to this easement will not be unjust, as he had notice of Builder's reservation of his rights in the original deed. The deed was recorded, and even if FF did not have actual notice of the easement, he will nonetheless be bound because easements run with the land and FF had record notice of the easement.

3) Owner's Changing the Locks

Owner's rights against FF are determined by landlord-tenant law. The issue is whether a landlord may engage in self-help and evict a tenant who has breached a duty.

A tenant has a duty to pay rent. If FF actually refused to pay rent (rather than simply stating that it would not pay), FF is in breach of his duty. However, the remedies for a landlord with respect to a tenant in possession that has breached a duty are limited to a) initiating eviction proceedings, and b) allowing the tenant to remain while suing for damages. Self-help is strictly prohibited. By changing the locks, landlord has evicted FF without engaging in the required formalities of eviction proceedings, and therefore did not have the right to change the locks.

Whether Owner had a right to evict or sue FF for damages isn't clear from the facts of the question. If FF merely stated that he would not pay rent (but was otherwise current with his rental payments and had breached no other duty), Owner's rights as against FF would not have ripened. Owner would be required to wait until an actual breach occurred prior to initiating eviction proceedings or suing for damages. On the other hand, if FF was in actual present breach of his duty to pay rent, Owner would be permitted to seek relief in one of the two ways mentioned above, but never by engaging in self-help by causing the actual eviction of FF.

4) Homeowners v. FF

A public nuisance is defined as activity by the defendant in the use of his land that

causes interference with the health, safety, or well-being of the public at large. A private individual may only bring action based on a theory of public nuisance if he has suffered some particular injury to his property as a result of defendant's conduct. Since the facts indicate discomfort, but not threats to health or safety, public nuisance doctrine is not likely applicable to the claims of homeowners.

Private nuisance claims can be brought where defendant's activity in connection with the use of his land create a substantial and unreasonable interference with plaintiff's use and enjoyment of his land. Unpleasant odors might create a close factual case as to whether the interference with the use of homeowners' land was "substantial" enough, especially because they only emanated from FF on warm days when FF was particularly busy; that question would be for the trier of fact. While it seems pretty questionable that the interference was substantial enough, assuming for the purposes of this question that it is, homeowners would also be required to show that the interference with their land was unreasonable.

That inquiry involves weighing the utility of FF's conduct, as well as considering the general neighborhood conditions. Another factor the court would consider is FF's compliance with the local health ordinances, although that evidence would not be conclusive. A final factor the court would consider is FF's investment in the property, which in this case seems substantial. In total, this presents a close case. The utility of a restaurant located close to a residential neighborhood is high. FF's conduct has been approved by local health codes, and only occasionally interferes with homeowners' use of their land. FF has invested in the restaurant by obtaining state of the art equipment, a factor that also indicates that this cooking cannot be performed in any less annoying or interfering manner. However, if the court were to determine that the hardships balanced in favor of the homeowners, they could obtain (under the strict minority view) an injunction against FF's cooking conduct that created the odor, and would further be entitled to damages for the interference with their use and enjoyment of their land. But given that this is a close call, and the high utility of FF's conduct to the residential community, homeowners would likely be required to compensate FF for the expense of relocating their operations.

Answer B

1)

Assignment

Lease is valid. Under the Statue of Frauds, a contract such as a lease, that conveys an interest in land for a period longer than a year must be in writing and signed by the person to be charged. Therefore, in order for O to enforce the lease provisions against L, the lease between O and L must have been in writing and signed by L. We know that L and O entered into a 30-year lease. Therefore the SOF applies. Further, we know that the lease was in writing. However, it is unclear if the written lease was signed by L. If the lease is signed by L then the written terms of the lease are enforceable against L.

Assignment is valid. As a general matter, a lease is assignable unless the lease agreement specifically states that the lease cannot be assigned. Courts do not favor complete limitations on assignments so these provisions are interpreted narrowly. In this case, the term is not a complete limitation on assignment. The lease term permits assignment with the prior written consent of the owner. In this case, the limitation is in the written lease and allows for some flexibility. Therefore, upon reviewing the lease in an action between L and O, the limitation is [sic] in the written lease will be enforced by the court.

Sublease v. Assignment - An assignment occurs where a tenant assigns his rights and obligations to a subtenant for the entire term of the lease. A sublease occurs where the tenant transfers his rights and obligations to a subtenant for a portion of the term of the lease. The important difference between the two types of agreement is that the T has remaining rights to the property when an [sic] sublease occurs and does not have remaining rights when an assignment occurs. In this case, T entered into a lease agreement with FF for a period of 10 years. T had only occupied the property for 5 of the 30 years of the lease term. Therefore after the 10 years given to FF is [sic] completed, T will still have the rights under the lease for 15 more years. Therefore, T entered into a sublease with FF.

The lease agreement specifically stated that an assignment of the lease is prohibited without the consent of the landlord. However, the lease was silent as to subleases. The lease agreement in this matter involved commercial vendors likely with business experience. In such cases, the court would be unlikely to imply that the prohibition against assignments prohibited subletting. Therefore, because the agreement between L and FF is a sublease (as discussed above) the prohibition does not apply and L is not in breach of the lease agreement.

Estoppel - However, an L can be found to have approved an assignment/sublease where the owner accepts rent from the subtenant without objection. This is true even where the lease requires that the lease is in writing. In this case, the L accepted rent from

FF. Therefore, L is estopped froom alleging breach of the assignment provision by L. Essentially, by taking the rent, L approved the sublease.

Trespass

In order to bring an action for trespass, the landowner of the person with exclusive right to the land brings an action against a person who without permission physically invades the land. In this case, FF will assert that B is invading the land by erecting the Sunday business on the property. However, a landholder cannot bring an action for trespass where the alleged trespasser has a right to use the land under an easement. Therefore, in this case, if B has a right to use the land, FF cannot bring an action for trespass.

Express Easement - In this case, B and O entered into an express easement as part of the deed when B sold the property to O. An express easement occurs where the owners of the benefited land and the owners of the burdened land expressly agree in writing giving a property interest in the other. In this case, the deed expressly conveyed the right to use parking spaces 15-20 for a once a week shop. This is an express easement because it was recorded in the deed.

Easement in Gross/Easement Appurtenant - An easement in gross occurs where a person grants an easement to another landowner that is specific to the person and not specific to the land of that person. An easement appurtenant is an easement that is granted by the owner of one parcel of land to another land owner that specifically relates to the land. In this case, the property right owned by B and held by deed is an easement in gross. Generally, an easement in gross is not transferable by the holder. However, the easement burden will transfer.

Notice - An express easement is enforceable against future owners when it is properly recorded. In this case, O leased the land to L. L's lease included the right to spaces 1-20. L occupied the property for 5 years. Presumably, B operated his shop on 15-20 during this time period. Therefore, L had notice of the operation. L then sublet the property to FF. Apparently, FF took the lease without notice of the easement. However, because the easement is recorded, FF cannot sue for trespass.

Change the Locks

Duty to pay rent - When a sublease occurs, the original T remains obligated to pay the rent unless there is a written agreement with L stating otherwise. In this case, L remained obligated to pay rent to O even though there was a valid sublease. As a result of the sublease, FF was also liable to pay rent to O. In this case, FF refused to pay rent to O.

Constructive Eviction - Constructive eviction occurs where a (a) the tenant notifies the landlord of a condition on the property that constitutes a substantial interference with

tenants' use and enjoyment of the property, (b) the landlord does not fix the problem after notice, and (c) the tenant leaves the premises. A constructive eviction eliminates a tenant's obligation to pay rent. In this case, FF was not subject to a constructive eviction. FF did notified [sic] B of the problem; there was no indication that he notified either O or L. Second, FF did not leave the premises. Therefore, constructive eviction did not release FF from its obligation to pay rent.

Self-Help Eviction - A L cannot evict a T through self-help eviction. Self-help eviction occurs where the L takes action to limit the T's ability to access or use the property without going through the judicial process. In this case, FF was subject to eviction for failure to pay rent. O changed the locks and evicted the tenant without going through the legal process. O did not have the right to change the locks without going though the judicial process.

Nuisance

A nuisance occurs where a person/entity ("offender") uses their land in such a manner that unreasonably interferes with another landowner's ("injured") quiet enjoyment of their land. A nuisance is different from a trespass. A trespass involves the physical invasion of the property: a nuisance involves no invasion. There are two types of nuisance: Private and Public. A private nuisance is where the activities of the offender's use interferes with one or a small number of injured's specific use of their land. A public nuisance occurs where the offender's activities unreasonably interferes with the property rights of the general public. In order for a person to recover damages for a public nuisance, the injured must show actual damages. In this case, the homeowner's [sic] are complaining of a private nuisance because they are complaining about an injury that is occurring to a [sic] identifiable group of individuals. While the alleged conduct effects [sic] "many of the homeowners" the result is a private nuisance because it does not effect [sic] the public at large.

In order to state a claim for nuisance the injured must make two showings: (a) that the conduct of the offender interferes with some property right, and (b) that the conduct is unreasonable. An interference occurs where the offender uses their property in a manner that is an annoyance and would be considered offensive or burdensome to a reasonable person. In this case, the nuisance complained of is that on warm days offensive cooking odors are emitted from the FF business and those odors cause discomfort to many of the homeowners in the adjacent neighborhood. A nuisance will not be found if the injured is hypersensitive. In this case, we know that many of the homeowners are effected [sic]. Because there is a large group that find the conduct offensive, the injured in this case is not hypersensitive. Further, in order to determine whether or not this conduct constitutes an interference, it would be important to know how many "warm" days there are in a given year. If there are only a few, then this is not likely to be a nuisance. However, if there are more than a few days in which the homeowners are subjected to the offensive smell, it is likely that a court would find that a reasonable person would be offended by the smell of unpleasant odors involved in this case.

However, even where the offender's conduct is found to interfere with the property right of the injured, the court must determine if the interference is unreasonable. Unreasonableness is determined by balancing the hardships - balancing the interests and needs of the homeowners against the interests in having the business continue operating. During this process, the court will look at many factors including: whether the homeowners purchased their land at a discount because of its near location to the shopping center (coming to the nuisance), the offender's right to use his property as he wishes, the value of the business to the community including the number of employees, whether the nuisance can be abated by modifications of the offender's business, the length of time the offender has been in business, the possibility of using the property for some other purpose, the offender's investment in the business, etc.

In this case, certain factors indicate that the use by FF will be considered unreasonable. The offender has only been in business for a short period of time. It is unclear from the facts whether HO purchased at a discount based on nearness to the shopping center, but because the business is new the court is unlikely to find that HO came to the nuisance.

However, other factors indicate that the use by FF will not be considered unreasonable: FF has a right to use his property as he sees fit; FF has a right to use the shopping center property for a restaurant. Further, FF has put considerable investment into the operation as a FF establishment by purchasing top of the line equipment. This is not an unusual use for such a property. Further, it does not appear that the business could be abated. We know that FF is complying with all health ordinances and that the business is operated using the best equipment.

While the facts of this case will present a close call, the court is unlikely to find that there is a nuisance that should be abated. This is particularly true if there are a few number of warm days. The interest in allow [sic] FF to operate its business outweighs the interest of the homeowners for the reasons discussed above. As such, the court will not grant an injunction. However, if the court finds that there is some level of nuisance, the court may require FF to pay some measure of damages to HO to compensate them for their injuries arising from their nuisance.

Q2 Business Associations / Professional Responsibility

Rita and Fred wanted to form a corporation to be named “Rita’s Kitchen, Inc.” (RKI) for the purpose of opening a restaurant. They contacted 75 friends who agreed individually to become investors in RKI. Five of these investors also agreed to serve on the RKI Board of Directors with Rita and Fred.

Rita and Fred entered into a five-year lease with Landlord for restaurant space, naming “Rita’s Kitchen, Inc., a corporation in formation” as the tenant. They signed the lease as “President” and “Secretary,” respectively.

Rita and Fred retained Art as their attorney to form the corporation. They told Art that 75 of their friends had committed to invest and become shareholders of RKI. Irv was a duly appointed representative of the 75 investors. Rita, Fred and Irv met with Art, and they agreed that Art would represent Rita, Fred, and all the investors. After extensive discussions with Rita, Fred, and Irv about the operation of the proposed business, Art agreed to prepare the necessary documentation to incorporate RKI.

Later, outside of Irv’s presence, Rita and Fred asked Art to draft a shareholder agreement that would specifically designate Rita and Fred as permanent directors and officers of RKI and set Rita and Fred’s annual salaries at 12.5% of the corporate earnings. Without further discussion, Art properly formed the corporation. He then prepared the shareholder agreement, including the terms that Rita and Fred had requested.

The 75 investors each purchased their shares of stock and signed the shareholder agreement. RKI operated for one year but failed to make a profit. RKI ceased operations and currently owes three months of back rent under the lease.

1. Can Landlord recover the unpaid rent from Rita and Fred individually? Discuss.

2. Is the shareholder agreement valid? Discuss.

3. What ethical violations, if any, has Art committed? Discuss, including distinctions, if any, between the ABA Model Rules and California authorities.

Do not discuss federal and state securities laws.

Answer A

2)

1. Can the Landlord recover unpaid rent from Rita and Fred individually?

Liability of Promoters on Pre-Incorporation Contracts

Until such time as a corporation complies with all formalities of incorporation and files its articles of incorporation, it does not have a separate legal existence, and cannot enter into contractual obligations such as a lease. Prior to incorporation, it is typical for the corporation's promoters and/or founders to enter into contracts on its behalf. Here, Rita and Fred entered into the lease with the Landlord on behalf of Rita's Kitchen, Inc. ("RKI"), which had not yet been formed. Under the law, a promoter remains personally liable on a pre-incorporation contract unless there has been a subsequent novation (ie., all parties agree to substitute the corporation for the promoters as the party liable on the contract whereby the promoters are thereafter relieved of further personal liability) or unless the contract is explicit in providing that the promoter has no personal liability on the contract.

Here, there has not been a novation to relief [sic] Fred and Rita of liability. However, they would argue that they entered into the contract on behalf of RKI, a corporation in formation, and signed as officers, and therefore made it clear that it was only the corporation and not them personally who would be liable on the lease. Their arguments would not likely succeed because the lease was not explicit in stating that they would not be personally liable thereunder. In the absence of such explicit language, the most likely result is that the court would hold that Rita and Fred as promoters are and remain personally liable on the lease. Therefore, the landlord should be able to recover the unpaid rent from either or both of them.

Indemnification from Corporation

Note also that it is not clear where RKI has ever ratified the lease. If no corporate action was taken to ratify the lease, then the corporation would not be liable thereunder, unless it silently took the benefits of the lease. Here, if RKI did not ratify the lease, it could still be held liable because it took the benefit of the lease without objection.

Note that although Fred and Rita would be held liable for the unpaid rent on the lease, they would have a claim for indemnification against RKI for any amounts that they had to pay personally to the landlord. They will not be able to recover, however, if the corporation does not have sufficient funds to pay.

2. Is the shareholders agreement valid?

As a general matter, shareholders of a privately held corporation such as RKI can and often do enter into shareholders agreements dealing with their rights and obligations as shareholders. These types of agreements commonly provide for matters such as transfer restrictions, rights of first refusal, put and call rights, "tags and drags", preemption rights and registration rights in the event that the corporation becomes public in the future.

Shareholders agreements can also provide shareholders with certain veto rights regarding the overall management of the company. In the context of a closely held private corporation, shareholders can also enter into a shareholders agreement whereby they become the directors of the corporation by agreement, thus doing away with the need to have a separate board of directors. In such situations, the shareholders step into the shoes of the directors and owe each other and the corporation duties as fiduciaries.

It appears that the shareholders agreement in question is problematic for two main reasons. First, it prohibits shareholders from exercising their rights as shareholders to be able to elect and fire directors. Secondly, it prohibits the directors from being able to exercise their responsibility for setting their compensation and the compensation of officers in accordance with principles of prudence and good faith.

Rights of Shareholders to Elect and Remove Directors

Shareholders have the right to elect and fire directors, both with and without cause. An agreement that prohibits shareholders from being able to exercise these powers would be contrary to public policy and likely unenforceable. At the very best, shareholders must have the authority to fire directors for cause (ie, breach of duty of care, duty of loyalty, etc.). To the extent that the shareholders agreement prohibits shareholders for exercising their powers as shareholders by giving Fred and Rita permanent directorships, it is invalid. While shareholders can agree as to the election of directors, directors cannot make themselves permanent and unremovable by way of a shareholders agreement.

Rights and Duties of Directors

A director is a fiduciary, and obligated at all times to act in the best interests of the corporation. A director has certain powers and obligations granted under the corporation's code and at law.

Right to Appoint and Fire Officers

The Board of Directors has the power to appoint and fire officers. The shareholders agreement is problematic because it usurps the authority of the Board to make this determination by making Rita and Fred permanent officers. Officers owe a corporation duties of care and loyalty, and cannot by agreement be made unremovable. At the very least, they must be removable for cause. Therefore, the provision in the shareholders agreement which makes Rita and Fred unremovable as officers is invalid.

Duty of Care and Business Judgment Rule

A director owes the corporation the duty to act as a reasonably prudent person in the management of his of her own affairs, in good faith and in the best interests of the corporation. In exercising his or her duty of care, a director can rely on the business judgment rule if he or she acted in a reasonable, informed manner, with due care and diligence, in exercising his or her judgment.

Duty of Loyalty

A director owes the corporation a duty of loyalty as a fiduciary to act in the best interests of the corporation and to avoid self-dealing to his or her own benefit and/or to the detriment of the corporation.

Breach of Duty of Care and Loyalty

Under the law, directors cannot, as a general matter, agree in advance as to how they will exercise their powers as directors. Here, the shareholders agreement in essence does just that – it provides that the directors (recall that the Board of Directors is made up of five of the investors, plus Rita and Fred) agree in advance not to fire Rita and Fred as officers. This the directors cannot do and, for this reason also, this provision is invalid.

This provision is also likely in violation of the directors' duty of care, because it is improper to agree to never remove officers, as there may be good reason and justification to remove Rita and Fred at some point in the future. Likewise, directors have the duty and obligation to set their own compensation and officers' compensation in accordance with reasonable, good faith parameters, taking into account the needs of the corporation and ensuring that they do not commit a waste of corporate assets in setting compensation. Agreeing in advance to what Fred and Rita's compensation is going to be - at 12.5% of corporate earnings - may constitute a violation of this duty, because it is unclear whether this figure will or won't be a reasonable and proper amount as the corporation moves forward.

Likewise, making themselves unremovable and giving themselves a fixed salary as a percentage of earnings, regardless of whether it is appropriate in light of the corporation's then financial circumstances, constitutes a breach of Fred and Rita's duty of loyalty to the corporation, as they are clearly putting their personal interests ahead of those of the corporation.

For all of the foregoing reasons, the provisions in the shareholders agreement are invalid.

3. What Ethical Violations has Art Committed?

An attorney owes his clients various duties under the applicable rules of professional responsibility. Chief among these is the duty of care, the duty of loyalty and the duty of confidentiality. One of the chief difficulties Art faces is that he has not separately addressed or differentiated between the different clients he represents. He has acted to incorporate RKI, and is arguably counsel to the corporation, whereby he would owe the corporation itself duties of care and loyalty. He is also apparently counsel for Fred and Rita in their personal capacities as incorporators and as officers of the corporation. Finally, he has acted as counsel for the investors in drafting the shareholders agreement. Art's main ethical violation stems from failing to differentiate between the potential and actual conflicting interests of his various clients and failing to advise them to obtain separate counsel as appropriate.

Duty of Care/Competent Representation

Art clearly acted as counsel for the investors by meeting with Irv and representing the investors' interest in drafting the shareholders agreement. In so doing, he breached his duty of competence to exercise the skill, knowledge and diligence that would be expected of an attorney practicing in his community. As discussed above, the shareholders agreements contain provisions that are not in compliance with applicable corporate law and corporate governance principles. Art should not have drafted an agreement containing provisions that are invalid and, in so doing, likely committed malpractice. Likewise, in his role as counsel for Rita and Fred, he should have advised them that the provisions that they sought would not be enforceable, and breached his duty to them in this regard also.

Duty of Loyalty

An attorney is obligated to act in the best interests of his client and cannot take on representation that will result in him not being able to properly represent a client on account of conflicting duties and obligations owed to other clients (for example, where one client's interests are adverse to another's). If an attorney is of the view that he can competently represent all of his clients, he is required to disclose to all that he is representing everyone's interests and to seek the written consent of each client to such joint representation.

Here, Art failed to obtain the written, informed consent all parties to his joint representation of each of them and, in so doing, breached his ethical obligations. Moreover, he failed to seek further consent when it became apparent that Fred and Rita's personal interests as officers (ie, to be permanently appointed and to obtain a guaranteed percentage of corporate earnings) came into conflict with the investors' interests as shareholders in maximizing the return on their investment and fully exercising their rights as shareholders. When it became apparent to Art that Fred and Rita's interests were different than those of the investors (ie, when Rita and Fred spoke to him outside of Irv's presence), he should have alerted them to the fact that he was representing the investors and the corporation and that he could not separately seek to represent their interests. He should have advised Fred and Rita to seek separate, independent counsel to negotiate their compensation and tenure packages with the corporation. Art also failed to alert Irv, as he was arguably required to do, of the validity and desirability (or lack thereof) that Rita and Art had requested. Art therefore failed to fulfill his ethical responsibilities to all clients involved.

Answer B

1. Can Landlord recover unpaid rent form Rita (R) and Fred (F)?

Promoter Liability

A promoter is a person who works prior to the incorporation of an entity to secure contracts and services for the to-be-formed entity. A promoter has a fiduciary duty to the other promoters and to the entity to be formed. A promoter can enter agreements on behalf of the to-be-formed entity but can be subject to liability on those agreements.

Adoption and Novation

A corporation does not become liable on a contract entered by a promoter until it adopts the contract. A contract can be adopted expressly by the corporation agreeing to be bound or impliedly by the corp. choosing to accept the benefit of the promoter's contract. Here, there is nothing to indicate that RKI expressly adopted the terms of the lease entered into by their promoters - R and F. However, RKI did accept the benefit of the lease by using the space for its restaurant. Thus, RKI will be bound on the lease.

R & F are also bound

The corporation's act of adapting a contract does not absolve the promoters from liability unless there is an express provision in the contract or a novation in which the corp. and the other party agree that the promoter will not be liable. Here, there is nothing on the lease to indicate R and F would not be liable. It only says they signed as Pres. and Sec. of RKI, "a corporation in formation". Further, there is no evidence of an agreement or novation after RKI was formed absolving them of their liability. Thus, there is no novation and R and F will still be individually liable on the lease with Landlord for the unpaid rent because they were promoters who were not relieved of liability.

2. Is the Shareholder Agreement Valid?

To have a valid shareholder agreement, there needs to be approval from the shareholders. Here, we are told that each of the 75 investors signed the shareholder agreement. Thus, the shareholder agreement is presumptively valid but the terms of the agreement must be examined.

Election of Directors

Directors of a corporation are elected by shareholders at the corporation's annual meeting. Here, the shareholder agreement specifically designated R and F as permanent directors and officers of RKI. By having this provision in the shareholder agreement, the agreement purports to strip the shareholders of their ability to elect directors annually. In this regard, it is invalid.

Removal of Directors

Along with the ability to elect directors, shareholders also have the ability to remove directors with or without cause. The provision of this shareholder agreement indicates that

R and F would be permanent directors. Because shareholders have the ability to remove a director, no director can be permanent. Thus, to the extent the shareholder agreement purports to make R & F permanent directors, it violates the right of shareholders to remove a director and is invalid.

Shareholders Can't Have a Predetermined Agreement of How They Will Vote if Elected Officers [sic]

Shareholders may have agreements for how they will vote on shareholder elections but can't agree to how they will vote as directors. To the extent this shareholder agreement commits R and F along with the 5 other investors who agreed to serve on the RKI board to elect R and F as officers and to set R and F's annual salaries at 12.5% of corporate earnings, it takes away their ability to act in their fiduciary capacity as duly elected directors and is invalid.

Board Decides Its Own Salaries

A board of directors is charged with the management of the company and makes decisions for the company on things such as their salaries. Here, the SH agreements purports to set R and F's salaries. Because the board, and not the shareholders, have the power to manage the company, the shareholders cannot set director and officer compensation. To the extent the SH agreement tries to do this, it is beyond the shareholder's powers and invalid.

Board Elects Officers

Another power inherent in the board of directors is the power to elect officers. Shareholders may have the power to elect directors but they can't elect officers. Thus, to the extent that shareholder agreement elects R and F as permanent officers of RKI, it is invalid because the directors, not the shareholders, are responsible for electing officers.

Thus, while the shareholder agreement as signed by all shareholders is presumptively valid, it is invalid to the extent it improperly elects directors and officers, it does not provide for removal of directors, it binds shareholders to how they will vote as directors, and it improperly sets director and officer compensation.

3. Art's Ethical Violations

Who Does Art Represent?

The first issue in deciding whether Art (A) committed any ethical violations is to determine who Art represents. Here, Art was originally approached by R and F to form the corporation. Also, A met with R and F as well as Irv (I) who was the duly appointed representative of the 75 investors. After meeting with R, F, and I, A agreed to prepare the necessary documentation to incorporate RKI. As a result, A potentially represents R & F, Irv and two other investors, and RKI, the corporation he helped form.

Duty of Loyalty

An attorney owes his client the duty to exercise his professional judgment solely for

the client's interests. If the interest of the attorney, another client or a third person may materially limit the attorney's representation or becomes adverse to the client's interests there is an actual or potential conflict of interest. When an attorney is presented with a conflict, he can only accept or continue the representation if he reasonably believes he can effectively represent all parties, he informs each party about the potential conflict, and the client consents to the representation in writing.

Without consent, an attorney should refuse to take the representation or withdraw from the representation.

A representing R & F and Irv and the Investors

Here, A has a potential conflict by representing both R & F as well as Irv and the investors. While A can say that R, F, and I all had the same interests and wanted to incorporate RKI, because he was representing multiple interests, he needed to be aware of potential or emerging conflicts.

When R & F approached A to draft the shareholder agreement without Irv being involved, A should have been suspicious. When he learned that they wanted the agreement to designate them as officers and directors and set their salaries, their interests were potentially conflicting with I and the investors. At that point, A should have disclosed the proposal to Irv and obtained written consent from I to draft the agreement as requested by R and F. It is also unlikely that a reasonable attorney would believe he could adequately represent both R and F and the investors.

In any event, A should have sought written consent from Irv. Because he did not, he violated his duty of loyalty.

Duty of Confidentiality

A lawyer also has a duty not to reveal anything related to a client's representation without consent. Thus, A can argue that he couldn't tell Irv about his conversation with R & F outside of his presence without violating his duty of confidentiality to R & F. If this is the case, A should have withdrawn from his representation of Irv and the investors and advised them to seek independent counsel re: the shareholder agreement.

Duty of Competence

A lawyer owes his client the duty to use the legal skill, thoroughness, preparation, and knowledge necessary and reasonable for the representation. Here, A had a duty to competently draft the shareholder agreement. For all the problems pointed out above about the shareholder agreement, A violated this duty.

Duty to Communicate

An attorney owes his client a duty to communicate about the matters of the case. Here, A had a duty to tell Irv about the provisions he was drafting in the agreement. Again, A would claim he could not communicate this to I without breaking his duty of confidentiality to R & F. As mentioned above, this again meant A should have withdrawn from the

representation of at least Irv and possibly R & F and urged the parties to seek independent counsel.

Art's Defense

Art will argue that any potential problems were avoided because the investors signed the agreement with the term R & F requested. However, the ends do not justify the means. A had ethical obligations to his client during the representation that he breached. Their later approval of the agreement does not equal informed consent to his breaches throughout.

Q3 Criminal Law

Dan has been in and out of mental institutions most of his life. While working in a grocery store stocking shelves, he got into an argument with Vic, a customer who complained that Dan was blocking the aisle. When Dan swore at Vic and threatened to kick him out of the store, Vic told Dan that he was crazy and should be locked up. Dan exploded in anger, shouted he would kill Vic, and struck Vic with his fist, knocking Vic down. As Vic fell, he hit his head on the tile floor, suffered a skull fracture, and died.

Dan was charged with murder. He pleaded not guilty and not guilty by reason of insanity. At the ensuing jury trial, Dan took the stand and testified that he had been provoked to violence by Vic's crude remarks and could not stop himself from striking Vic. Several witnesses, including a psychiatrist, testified about Dan's history of mental illness and his continued erratic behavior despite treatment.

1. Can the jury properly find Dan guilty of first degree murder? Discuss.

2. Can the jury properly find Dan guilty of second degree murder? Discuss.

3. Can the jury properly find Dan guilty of voluntary manslaughter? Discuss.

4. Can the jury properly find Dan not guilty by reason of insanity? Discuss.

Answer A

3)
1. Guilty of First Degree Murder

First degree murder is a specific intent crime typically statutorily provided for. Typically, first degree murder consists of: (1) intentional killing of a human, (2) with time to reflect upon that killing, and (3) doing so in a cool and dispassionate manner.

Here, while there appears to be no statute that provides for first degree murder, it is unlikely that Dan would be guilty of first degree murder just the same.

Intentional killing
An intentional killing is one done with specific intent to take the life of another.

Here, the prosecutor will argue that Dan expressed a specific intent to kill Vic when he yelled he would kill Vic, which was accompanied by a striking of Vic with Dan's fist.

Therefore, it is likely given Dan's express words of intent, the prosecutor will meet her burden of proving a killing by intent.

Time to Reflect Upon the Killing
First degree murder requires time to reflect upon the killing. This is commonly known as premeditation. Premeditation, not in keeping with the lay person's understanding of it, however, requires merely a moment's reflection upon the killing.

Here, the prosecutor will argue that Dan reflected upon the killing of Vic when he took the time to say to Vic, "I'm going to kill you." However, Dan will argue that there was no time to reflect upon the killing of Vic because he "exploded" and then hit Vic. Such an intense anger coupled with a spontaneous statement "I'm going to kill you" will likely not be construed as sufficient time to reflect.

Therefore, a jury should not properly find this element of the crime established.

Cool and dispassionate manner
The defendant must have committed the killing in a cool and dispassionate manner. That means that the defendant killed another person in a calm and calculated manner without passion.

Here, the prosecutor will argue that Dan's action of striking Vic with his fist without an expression of sadness or fright may amount to cool and dispassionate. However, such an argument is tenuous.

Dan will successfully show that his actions were the result of an explosion, regardless of the reasonableness of those actions. Dan "exploded." This could hardly be construed as

"cool."

Therefore, a jury should not properly find this element of first degree murder established.

In sum, a jury would not properly find Dan guilty of first degree murder.

Defenses
Even if a jury could find Dan guilty of first degree murder, such an offense will be subject to the defense of insanity (discussed below).

2. Second Degree Murder

Second degree murder or common law murder is the intentional killing of a person with malice aforethought. Malicious intent will be implied by: (1) the intent to kill a person, (2) the intent to inflict a substantial bodily harm on someone, (3) an awareness of an unjustifiably high risk to human life, and (4) the intent to commit a felony.

Intent to kill a person
As discussed earlier, Dan could be found to have intentionally killed Vic as evidenced by his expressed words "I'm going to kill you." While words alone are sufficient to manifest intent, this is a subjective standard and a jury will be allowed to look to the totality of the circumstances. The jury will be able to consider that Vic told Dan that he was crazy and should be locked up, which aroused such anger that would negate a malicious intent.

However, a jury could find that Dan intended to kill Vic by using words of that intent, coupled with an action that indeed killed Vic.

Therefore, Dan could properly be found guilty of second degree murder, malicious intent implied by the intent to kill Vic.

Intent to Inflict Substantial Bodily Harm
If Dan is not found to have the intent to kill, the prosecutor will argue that he did manifest the intent to inflict substantial bodily harm on Vic.

Here, Dan used his fist to strike Vic. The striking of another person could inflict substantial injury on another, depending upon where the person made the strike. Dan used his fist to strike Vic on the head, causing a fracture to his skull. The prosecutor will argue that Dan must have intended substantial bodily harm because striking a person in the head is a place of extreme vulnerability.

On the other hand, Dan will argue that people get into fistfights all the time, whether it be on the streets or boxing. He will argue that fistfights are a common way for people to work out their arguments and no substantial injury is intended. This argument has little merit given the high susceptibility to injury from striking someone in the head.

Therefore, a jury could properly find that Dan intended to inflict substantial bodily harm.

Awareness of an Unjustifiably High Risk to Human Life
Again, the prosecutor will argue that even if Dan did not intend to inflict death or substantial bodily harm, surely Dan was aware of the high risk of human life.

Here, the prosecutor will argue that Dan was aware of this unjustifiably high risk because striking another on the head with the force of fracturing his skull is a high risk of which Dan could be aware.

Therefore, a jury could properly find that Dan had an awareness of an unjustifiably high risk to human life.

Felony Murder
There is no evidence that Dan was intending to commit a felony, the intent from which can be implied to the killing of Vic.

Therefore, there would be no second degree murder based on an intent to commit a felony.

In sum, a jury could properly find Dan guilty of second degree murder.

3. Voluntary Manslaughter

An intentional killing will be reduced to voluntary manslaughter by a provocation that arouses a killing in the heat of passion. Voluntary manslaughter consists of: (1) a provocation that would arouse intense passion in the mind of an ordinary person, (2) the defendant in fact was provoked, (3) no reasonable time for the defendant to cool between the provocation and the killing, and (4) defendant in fact did not cool [sic].

Sufficient provocation
Sufficient provocation to commit a killing is one that would arouse intense passion in the mind of an ordinary person.

Here, Dan will argue that shouting to someone that they are crazy and should be locked up is sufficiently inciting to induce anger. This is subjectively true where Dan had spent so much time in and out of mental institutions. He will argue that he was highly vulnerable to such insults.

On the other hand, the prosecutor will rightfully point out that this is a reasonable person standard that does not take into consideration the surrounding circumstances. A reasonable person would not be incited to kill simply by an insult of insanity.

Based on this argument, the prosecutor will successfully refute Dan's attempt to reduce his killing to voluntary manslaughter.

That being said, the other elements appear to exist.

Dan in fact provoked.
Dan was in fact provoked when he "exploded" and simultaneously killed Vic.

No reasonable time to cool between provocation and killing
Dan immediately struck Vic on the head after the insult. There was no reasonable time to cool and Dan did not in fact cool [sic].

4. Insanity

In order to be convicted of a crime, the defendant must complete a physical act (actus reus) contemporaneously with the appropriate state of mind (mens rea). Insanity is a defense to all crimes except strict liability because insanity negates the requisite intent necessary to be convicted of murder in all forms.

Insanity is a legal defense that must be set out by applying the requisite elements as opposed to expert testimony of a psychiatrist. There are four theories of insanity a defendant may set forth and will depend upon which theory a jurisdiction adopts. All four theories will be discussed below to determine which, if any, are proper.

M'Naughten Test
Insanity under this test is defined as the defendant was unable to understand the wrongfulness of his conduct and lacked the ability to understand the nature and quality of his acts.

Here, Dan testified that the crude remarks were so incitant that he was unable to stop himself. However, the prosecutor will argue that Dan showed his ability to understand the wrongfulness of his conduct because he shouted he would kill Vic. In addition, the mere fact of being unable to stop yourself implies that you indeed know it to be wrong but were unable to control yourself.

Based on this evidence, Dan would not successfully raise a defense under this issue.

Irresistible Impulse Test
Under this test, the defendant may prove a defense of insanity if he shows he lacked the capacity for self-control and free will.

Dan will probably be more successful to claim a defense of insanity under this test. As mentioned above, Dan "could not stop himself." This specifically evidences his inability to control himself. His will was subjugated by the insanity.

Based on this evidence, Dan will likely successfully claim a defense of insanity under this test.

Durham Test

The Durham Test subscribes to the theory that a defendant will have an insanity defense if his unlawful conduct was the product of a sick mind.

Dan will argue that he has spent much time in and out of mental institutions. Indeed, several witnesses testify as to Dan's history of mental illness. Such a history suggests that his conduct was a product of a sick mental condition rather than the product of his own free will.

Dan will likely succeed in bringing a defense of insanity under the Durham test.

Model Penal Code Test

Finally, under the test adopted by the Model Penal Code, a defendant's actions may be defended by way of insanity if he was unable to conform his actions to the requirements of the law.

Here, Dan will offer his history of mental illness and continued erratic behavior despite treatment as a way to prove that he lacked the ability to conform himself to the requirements of law, i.e. not to kill. This, however, seems to be a less compelling argument as Dan has been able to conform himself to the requirements of law in other aspects of his life. He was able to work in a grocery store and successfully stock the shelves.

Because Dan appears to have the ability to conform his actions to the requirements of law in all other instances, the prosecutor will likely defeat Dan's claim of an insanity defense.

Answer B

3)

1. 1st Degree Murder

Murder is the killing of another human being with malice afterthought. The crime of murder is subdivided into degrees based on the intent of the accused. First degree murder is the most serious of the degrees of murder. A person is guilty of first degree murder if the prosecution can show beyond a reasonable doubt that he killed someone with deliberation and premeditation; or, in jurisdictions that recognize the felony murder rule, if someone was killed as the foreseeable result of his act, or of the act of a coconspirator, during the course of an enumerated felony. This is the felony murder rule.

Felony Murder

Dan will not be found guilty of first degree murder under the felony murder rule because he did not commit one of the underlying felonies. To be guilty under the felony murder rule at common law, the accused must have committed either rape, burglary, robbery, kidnapping, or arson, and the victim must have been killed during the commission of the crime (before the accused had reached a place of safety). The facts indicate that this killing occurred as the result of either no crime, if he was insane, or a battery, because he struck Vic. Battery is not an enumerated felony. Hence Dan cannot be guilty of first degree murder under this theory.

Premeditated and Deliberate

Premeditation requires that decision to kill have arisen when the accused was acting in a cool, composed manner, with sufficient time to reflect upon the killing. Deliberateness requires that the accused had the intent to kill when he engaged in the act that resulted in the death.

The facts indicate that Vic [sic] was stocking shelves before Vic encountered him. There is nothing to indicate that he had any animosity towards Vic prior to the incident, or even knew Vic. The facts indicate instead that Dan punched Vic after he exploded in anger in response to a comment Vic made. Vic's death resulted from a skull fracture caused by his impact with the ground. At no time do the facts indicate that Dan calmly and cooly reflected on killing Vic. In addition, it is not clear that he had the intent to kill Vic, as he only hit him once, an act that does not usually cause death. Although he shouted that he would kill Vic right before he killed him, the jury could likely not find that this shouting alone immediately before throwing the punch was enough. Moreover, it does not evidence a cool dispassionate manner, but instead, evidences the opposite. Therefore, because Dan's actions appear neither premeditated nor deliberate, he will likely not be found guilty of first degree murder.

Dan will also have the defense of insanity, discussed below, and the defense of diminished capacity if the jurisdiction recognizes it. Under diminished capacity, Dan will have to show that a disease of the mind prevented him from forming the intent required, even though it

did not raise to the level of insanity.

2. 2nd degree murder

Second degree, at common law, murder is the killing of a human being with malice afterthought. The mens rea of malice is satisfied when the accused intended to kill, intended to cause great bodily injury, showed a reckless disregard for an unjustifiably high risk of death, or killed during the commission of a rape, burglary, robbery, kidnapping, or arson. Because there is no issue as to the cause of Vic's death, the prosecution's issue will be in proving that Dan killed with malice and not in the heat of passion, as discussed in section 3 infra, then it cannot convict him of murder because he will have lacked the intent, and therefore must instead convict him of manslaughter. Again, Dan will also have the defense of insanity, discussed below.

Intent to kill - As discussed above, the jury will likely not be able to find that the facts show that Dan formed the intent to kill Vic because the facts indicate that Dan was in a rage when he punched Vic. Although Dan's testimony that he had been provoked to violence does not absolutely show that he lacked the intent to kill, if the provocation would have caused a reasonable person to become enraged, and did cause him to become enraged, and there was not enough time for a reasonable person to calm down, and Dan did not in fact calm down, then the jury will not be able to conclude that he had formed the intent to kill at the time he punched Vic. However, if the jury finds that Dan's passion was not reasonable, or he was not in the heat of passion, it could conclude that he intended to kill Vic because he shouted that he would kill Vic right before he killed him. However, Dan's actions are not consummate with the intent to kill. He only hit Vic once. He did not stomp his head in when he hit the ground or hit Vic with a weapon. Consequently, even if Dan was not in passion, it is likely that the jury would not find he had the intent to kill.

Intent to cause bodily harm - As discussed above in the intent to kill, it is likely that the jury would not find that Dan had formed the proper intent to cause bodily injury at the time he hit Vic because of his passion. Because it is the formation of the intent that matters, if Dan did not have the state of mind necessary to formulate the intent to cause substantial bodily injury because he was in the heat of passion as a result of the provocation, he cannot be found guilty under this theory either. However, if the jury does not find that the he [sic] satisfies the requirements for finding heat of passion, then it is likely that they will convict him for murder under this theory of malice. Not only did Dan yell that he intended to kill Vic, but Dan punched Vic, which is an act that presented the likely result of causing serious bodily harm. Thus, unlike above where he did not take an act that was likely to kill, Dan took the requisite act here. Thus, the jury could more reasonably find that he intended to cause great bodily harm when he punched Vic and because Vic died as a result of that action, Dan is guilty of murder.

Reckless disregard for an unjustifiably high risk to human life - To convict Dan under this theory, the jury would have to conclude that Dan appreciated the high risk of death caused by his actions, and that he proceeded to engage in reckless conduct in the face of it. As discussed above, if Dan was in the heat of passion, the jury cannot find that he

appreciated the unjustifiably high risk of his actions, and thus cannot convict under this theory. However, if the jury does not find that he acted in the heat of passion, then it would be possible to convict under this theory because Dan should have known that punching Vic could cause him to die, and Dan engaged in the actions anyway.

Felony murder - As discussed above, battery is not one of the crimes that satisfies felony murder, so he cannot be found guilty under this theory.

Dan will have the defense of insanity, discussed below.

3. <u>Manslaughter</u>

To find Dan guilty of voluntary manslaughter, the jury will have to find that Vic's provocation would have caused a reasonable person to become enraged, that it did cause Dan to become enraged, that there was not enough time for a reasonable person to calm down between the time the comment caused Dan to be enraged and the time he hit Vic, and that Dan did not in fact calm down during that time.

Although manslaughter is sometimes thought of as a defense, it is not Dan's burden to prove these elements. Instead, the prosecution must show the lack of a heat of passion killing in order to establish the necessary intent to convict Dan of either 1st Degree or 2nd Degree murder, as discussed above.

Reasonable person - The first test is whether a reasonable person would become enraged. The typical instances are when someone finds his spouse in bed with another. Here, there was a simple altercation between Dan and Vic. Vic complained that Dan was blocking the aisle. Dan swore at Vic in response and threatened to kick him out of the store. Vic told Dan that he was crazy. Dan flew into a rage and punched Vic. Vic died. The jury would likely find that these facts do not meet the requirement for a heat of passion killing because a reasonable person does not fly into a rage because someone else tells them [sic] they [sic] are crazy during an altercation that they [sic] escalated. A reasonable person would expect the other party to make a snide comment in response to being sworn at by a store employee who might have been blocking an aisle. If the jury finds that a reasonable person would not have become so enraged as to have punched Vic under the circumstances, then Dan will not be convicted of the lesser crime of manslaughter and will instead likely be convicted of 2nd degree murder, as discussed above.

Dan's particular mental issues or state of mind is [sic] irrelevant for this test. This is an objective test; it is based on what the reasonable person would do. Thus it is irrelevant if Dan is particularly sensitive to comments about being crazy; he only gets this defense if the comments would have engendered passion in a reasonable person.

Dan's passion - If the jury finds that a reasonable person would have been enraged by Vic's actions, then the next issue is whether Dan did. The facts are pretty clear on this point. They state that Dan exploded in anger, shouted he would kill Vic, and then punched him. This is exemplary of enraged behavior; therefore, the jury will almost certainly find

that Dan was enraged.

Cooling off time for a reasonable person - If the jury finds the first two elements are satisfied, they must also find that there was not enough time for a reasonable person to cool off between the provocation and the act. The facts indicate that the entire event occurred in a very short period of time, although it does not specify how long. Had Vic or Dan left the scene of the altercation, or had someone else intervened such that there was a delay between the exchange of words and the punch, then the jury could find that there was time to cool off. However, because the facts do not show any appreciable time lapse, the jury will likely conclude that a reasonable person would not have had time to cool off.

Dan did not cool off - Finally, the jury must find that Dan did not cool off. The facts are pretty clear on this as well, since he punched Vic immediately after going into his rage. Thus the jury will likely find this is the case.

Dan will have the defense of insanity here as well, discussed below.

Insanity

All jurisdictions recognize an affirmative defense of insanity, although there are four different theories across the various jurisdictions. Because it is an affirmative defense, the accused has the burden of proving by preponderance of the evidence that he met the test for insanity at the time in question. His sanity at the time of trial is not an issue. The evidence that supports Dan's defense of insanity is that he has been in and out of mental institutions most of his life, that he has erratic behavior, and that he could not stop himself from striking Vic. These facts tend to show that he has a mental disease that affects his ability to conform to the law, which is at the heart of all four of the insanity tests.

M'Naughten Rule - Under the M'Naughten Rule, an accused is not guilty by reason of insanity if, because of a disease of the mind, he lacks the capacity to understand the wrongfulness of his acts or cannot appreciate the character of his actions. This is basically a test of whether the defendant's mental disease prevents him from understanding right from wrong. The facts indicate that the jury could find that Dan has a disease of the mind because he has a history of mental illness and engages in erratic behavior. Dan's testimony explaining the punch, however, was that he could not stop himself from striking Vic. He did not indicate that he did not understand that he was striking Vic, or that striking Vic was wrong. Instead, he struck Vic because he could not control himself. Consequently, if the jurisdiction uses this test, then it cannot find him not guilty by reason of insanity.

Irresistible Impulse Test - Under this test, an accused is not guilty by reason of insanity if, because of a disease of the mind, he cannot exercise the self-control to conform his actions to the requirements of the law. The facts indicate that the jury could find that Dan has a disease of the mind because he has a history of mental illness and engages in erratic behavior. Dan also testified that he could not stop himself from striking Vic; in other words, he struck Vic because he could not control himself. Consequently, if the jurisdiction uses

this test and the jury believes that Dan could not stop himself from striking Vic, and that the reason he could not do so was because of his mental illness, then it should find him not guilty by reason of insanity.

Durham Rule - Under the Durham Rule, an accused is not guilty by reason of insanity if the mental disease is the actual cause of the criminal act. In other words, if the act would not have been done "but for" the disease, then he is not guilty. The facts indicate that the jury could find that Dan has a disease of the mind because he has a history of mental illness and engages in erratic behavior. Consequently, if the jurisdiction uses this test and the jury believes that the reason Dan could not stop himself from striking Vic was because of his disease of the mind, then it should find him not guilty by reason of insanity. However, if it finds that the mental disease was unrelated to the reason he could not stop himself from striking Vic, then it should not find him not guilty by reason of insanity.

Model Penal Code Test - Under this test, an accused is not guilty by reason of insanity if, because of a disease of the mind, he is unable to appreciate the criminality of his conduct, or to confirm his actions to the requirements of the law. This is basically a blend of the M'Naughten Rule and the irresistible impulse test. As discussed above with regards to the latter, if the jurisdiction uses this test and the jury believes that Dan could not stop himself from striking Vic, it should find him not guilty by reason of insanity.

Therefore, if the jury uses the irresistible impulse test, the Durham rule, or the MPC test, it could properly find Dan not guilty by reason of insanity. If it uses the M'Naughten rule, it could not.

THURSDAY MORNING
MARCH 1, 2007

California Bar Examination

Answer all three questions. Time allotted: three hours

Your answer should demonstrate your ability to analyze the facts in question, to tell the difference between material and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

Q4 Wills

In 2001 Tom, a resident of California, executed a valid typewritten and witnessed will. At that time, Tom was married to Wynn. Tom also had two nephews, Norm, and Matt, who were the children of his deceased sister, Sue.

Tom's will made the following dispositions:

> Article 1: I leave $10,000 to my friend Frank.
> Article 2: I leave my shares in Beta Corp stock to my friend Frank.
> Article 3: I leave $80,000 to my sister Sue's issue.
> Article 4: I leave the residue of my estate to my wife.

The $10,000 figure in Article 1 was crossed out and $12,000 was handwritten in Tom's hand above the $10,000 figure. Next to the $12,000 Tom had handwritten, "Okay. 2/15/02."

In 2003 Tom and Wynn had a child, Cole.

In 2004, Matt died in a car accident. Matt was survived by his children, Lynn and Kim.

Tom died in 2005. Tom was survived by Wynn, Cole, Norm, Frank, and his grandnieces, Lynn and Kim. At the time of his death, Tom owned, as separate property, $500,000 in cash. He also had 100 shares of Beta Corp stock, titled in Tom's name, which he had purchased with his earnings while married to Wynn. The Beta stock was valued at $1.00 per share at the time of Tom's death.

What rights, if any, do Wynn, Cole, Norm, Frank, and his grandnieces Lynn and Kim have in Tom's estate? Discuss.

Answer according to California law.

Answer A

4)
1. Separate v. Community Property

The distributions amongst Tom's heirs is [sic] going to be governed, at least in part, by the classification of his property at death as either being his separate or community property.

a. The Beta Stock

The 100 shares of Beta stock was [sic] titled in Tom's name alone, and typically creates a presumption that the stock was his separate property. However, the stock was purchased with his earnings while married to Wynn, which are [sic] community property. The 100 shares of Beta stock, therefore, are community property. Because Tom only has the power to devise his ½ portion of the community property, he can only devise ½ of the Beta stock shares, or 50 shares, to Frank.

b. The Cash

The $500,000 owned by Tom at the time of his death is labeled as his separate property in this fact pattern. There are no facts present that would indicate that the $500,000 should be considered community property. Therefore, Tom is free to devise his separate property as he sees fit.

2. Frank

The will, on its face as noted in 2002, leaves Frank $12,000 and all 100 shares of the Beta stock. As noted above, the 100 shares of Beta stock are community property and because Tom cannot give away Wynn's ½ interest in community property, the most he can give away is 50 shares of the stock. And, although Tom indicated a desire to devise all 100 shares, something he cannot do, the devise will be treated as if Tom devised only his ½ community property interest in the shares. Therefore, Frank will receive 50 shares of Beta stock. Note that although the Beta stock has a cash value, because it is a specific bequest, i.e. it identifies specific property, Frank will receive the actual shares and not their cash equivalent.

Frank's will in its original form provided for a $10,000 cash bequest to Frank, which he later attempted to increase in 2002. Typically, a testator can partially revoke even just a portion of a will. One of the methods by which a testator may accomplish this is by obliteration, or crossing out the portion of the will that he intends to revoke. However, a testator cannot increase a provision in a will without adhering to the required formalities, i.e., the signature of acknowledgment of the testator's signature in the presence of two uninterested witnesses at the same time, who also sign the will. And, although California recognizes a holographic will, which does not require a witness and requires that a testator sign the will and that the material terms be written in the testator's own handwriting, this attempted

increase will not qualify as a holographic will as there is no signature by Tom to correspond with the 2002 change. The increase is therefore invalid.

However, in this situation the doctrine of dependent relevant revocation (DRR) is applicable. DRR applies where a testator revokes his will or a provision of his will with the belief, although mistaken, that a subsequent bequest is valid. Here, it is clear that Tom believed that the increase from $10,000 to $12,000 was valid and there is nothing to indicate that Tom had any intent of revoking the $10,000 bequest. In applying DRR, courts should look to the true intent of the testator and, in this case, Frank should receive $10,000 from Tom's estate, in addition to the 50 shares mentioned above.

3. Sue's issue

The disposition of Tom's $80,000 bequest is determined based on the representation of those issue. Sue had two children, Norm and Matt. Prior to Tom's passing in 2005, Matt died leaving two children, Lynn and Kim. Norm, Lynn and Kim are all Sue's issue. However, the distribution of the $80,000 will not simply be split between the three of them. Norm, Lynn, and Kim are issues of different degree. When confronted with issues of different degree, the bequest must be distributed by representation and the representation is determined at the closest to the decedent that qualifies for the bequest. Here, Norm and Matt are closer in degree than Lynn and Kim, and Norm is still alive; therefore, the $80,000 bequest must be distributed at that level. Therefore 50%, or $40,000, will be distributed to Norm. The remaining 50%, or $40,000, will be split between Lynn and Kim, based on Matt's representation, and they each will therefore receive 25% of the total, or $20,000.

4. Cole

Cole is what is referred to as a "pretermitted heir", which means he was born after Tom executed all of his testamentary documents. The rule generally is that, unless there is an unequivocal expression that the testator intended to disinherit the child, the child is entitled to receive the share that he would have received had his father died intestate (without a will). If Tom had died intestate then Cole would have been entitled to a of Tom's separate property. However, there is an exception to the general rule for pretermitted heirs where the will leaves substantially all of the estate to his spouse who is the child's parent. Here, Tom left the residue of his estate to Wynn, his wife and the mother of Cole. Because, as discussed below, Wynn is entitled to $410,000 of his separate property, Cole is not entitled to any share as a pretermitted heir.

5. Wynn

Because Wynn was Tom's spouse at the time of his death, she is entitled to ½ of all community property, and Tom cannot devise her half, unless he put her to a "Widow's election" and she consented. In this case there are only two pieces of property, the 100 Beta shares and the $500,000. As discussed above, the 100 Beta shares were community property and Tom only had the power to devise his ½ interest. Therefore, ½ of the 100

shares that Tom attempted to devise to Frank are actually Wynn's and Tom could not devise that half to Frank. Wynn is therefore entitled to 50 shares of the Beta stock.

As for the $500,000, it is Tom's separate property and he can devise it as he wishes. The residuary clause of Tom's will provides that the residue of his estate passes to Wynn. In this case, the residue of his estate is $410,000 ($500,000 - $80,000 - $10,000), and it all goes to Wynn.

In Summary

Frank: $10,000 + 50 shares of Beta stock
Norm: $40,000
Lynn: $20,000
Kim: $20,000
Wynn: $410,000 + 50 shares of Beta stock
Cole: $0

Answer B

Wynn

The first issue with Wynn is to determine the nature of the Beta Corp's stock.

California is a community property state; thus it is necessary to decide the nature of the assets of the parties. Community property (CP) is any property obtained by either of the spouses during marriage by their labor. Separate property (SP) is any property owned by a spouse before marriage, acquired after permanent separation or by gift, devise, or bequest.

The nature or characterization of the property depends on the source of the property, acts by the parties that would change its characterization and any statutory presumptions.

Here, the Beta stock was acquired by Tom using his earnings while married to Wynn. Since, earnings gained during the marriage come from the spouse labor and earnings during marriage are presumptively CP. Since, the earnings are CP anything purchased using these funds would also be CP; hence, the stocks purchased by Tom are CP. Since the stocks are CP, and there was no action by either party showing that they were not supposed to stay that way, the stocks would be ½ Tom's and ½ Wynn's.

Thus, Wynn would be entitled to ½ of the Beta Corp stock, which is 50 shares.

Residuary

The residuary is the remainder of the property of a testator that has not otherwise been disposed of in the will. Under Tom's will Wynn is entitled to the residuary, which, if all the gifts in Tom's will are valid, would be $410,000 of his separate property cash.

Cole

Cole was left nothing under the will and will have to claim as a pretermitted child.

Pretermitted Child

A pretermitted child is one who is born or adopted after all testamentary documents have been executed. If a child is pretermitted they may collect a share equal to that they would have received had there been no will, i.e. intestacy. However, a pretermitted child may be prevented from claiming a share if they were intentionally left out of the will as demonstrated on the face of the document, they were provided for outside of the testamentary documents, or the bulk of the testator's estate was left to the other parent of the pretermitted child.

Here, Cole would be considered pretermitted as Tom executed his will in 2001, and Cole

was not born until 2003. Since there is no mention of other documents it is presumed that the will was the last testamentary document. Thus, Cole is pretermitted because it was executed before he was born, meaning Cole could be entitled to an intestate share of Tom's SP.

However, it is necessary to look at whether the exceptions apply. There is no evidence that Tom intended to intentionally leave out or disinherit any future born children. Thus, Cole is not blocked under this exception. Further, there is no proof or mention of a child being cared for in any way outside the testamentary instrument. However, since Tom's will leaves his residuary to Wynn, Cole's other parent, Cole may not collect under pretermitted child. This is because the residue of Tom's estate equals the bulk of his estate and he left it to Wynn. The presumption is that Wynn will use those assets to care for Cole; thus, he does not need an intestate share.

Thus, Cole has no rights in Tom's estate.

Norm - Lynn - Kim

Tom's will left a gift of $80,000 to the issue of his sister Sue. The issue here is how those issue will take under the will. Where a testamentary document is silent on the issue of distribution among issue, than [sic] in California the distribution is made per capita.

Per Capita Distribution

Per capita means that assets are divided at the first generation where there is a living beneficiary and then split. The assets are split evenly between the number of living descendants at that level, and the number of deceased descendants who have issue.

Here, since the will merely stated to Sue's issue, it would go per capita. Thus, it would split at the first generation with a live beneficiary, which is Norm. Since Norm is alive it will split evenly between him and Matt, his deceased brother, who left 2 children. This means that Norm will get ½ of the $80,000 gift, equal to $40,000 and the other half will go to Matt's issue.

Kim and Lynn will take per capita representation, meaning they will take their father's share in his place and split it equally among those at that level of descent. Since there is only Lynn and Kim each will receive ½ or $20,000.

Frank

Frank is Tom's friend who is to take $10,000 and Tom's shares in Beta Corp under Tom's will.

$10,000

Under the original will Tom left Frank $10,000; this amount was later crossed out and changed, raising the issue of cancellation.

Cancellation - Interlineation

Cancellation is where a provision of the will is crossed out of the will. Where there is writing above or between the lines and occurs with a cancellation, there is interlineation. Here, Tom has crossed out the $10,000 amount and written above it $12,000; thus there has been a cancellation of the $10,000 gift and interlineation of $12,000. Since there is a cancellation there is a question of whether the gift is still valid or not. To determine what if anything Frank gets there is a need to discover if the change is valid.

Holographic Codicil

A holographic change may be made if the material terms are in the writing of the testator and so is the beneficiary name. Here, Tom has crossed out the amount of $10,000 and in his own handwriting changed the amount to $12,000. However, Tom did not write out Frank's name in his own handwriting as well. Since Tom failed to put material provisions and person's name in writing, it is irrelevant that he wrote okay and dated it. It may show Tom's intent but does not meet the requirements for a valid holograph. Thus, the change to $12,000 fails. Frank will try to keep his gift using Dependant Relative Relocation.

Dependant Relative Relocation (DRR)

Here, a testator mistakenly revokes a will or gift under the will under a mistaken belief that another testamentary disposition would be valid. Further, the testator would not have revoked the first disposition but for the mistaken belief.

Here, Tom believed that by crossing out the amount $10,000 and writing $12,000 he would be validly changing the amount of the gift to Frank. This is demonstrated through the fact that Tom went so far as to write okay and date it. Thus, Tom obviously intended for Frank to receive a gift under the will, and would not have revoked the $10,000 if he had not thought that the change to $12,000 would be valid. Further, since the amount was an increase rather than decrease DRR may be applied to effect [sic] testator's intent. Here, since it is obvious Tom wanted Frank to receive at least $10,000, DRR will be applied to save the gift.

Beta Corp Stock

As mentioned with Wynn, Frank would only be entitled to those shares of stock that belonged to Tom. Since the stocks were determined to be CP and be ½ Wynn's and ½ Tom's, Frank could only collect 50 shares of stock or ½ of the total.

Frank is entitled to the ½ because Tom is able to pass by devise his ½ CP to anyone he

wants. Since the will said “my shares of Beta Corp to Frank” than [sic] Frank receives them. Further, by stating “my shares” in Beta Corp, Tom was only giving Frank the right to claim what belonged to Tom; meaning that Tom was only giving Frank a claim to his ½ CP interest in the stocks, and not attempting to give away Wynn’s ½ CP interest. (Thus, no widow’s election.)

In conclusion, Wynn has a right to ½ of the Beta Corp stock as CP and $410,000. Cole has no rights as Wynn received that bulk of the estate. Norm has a right to $40,000, Kim and Lynn each have a right to $20,000 and Frank has a right to $10,000 & ½ of Beta Corp stock (i.e. 50 shares).

Q5 Constitution

City has adopted an ordinance banning tobacco advertising on billboards, store windows, any site within 1,000 feet of a school, and “any other location where minors under the age of 18 years traditionally gather.”

The purpose of the ordinance is to discourage school-age children from smoking. The likely result of the ordinance will be to cause the removal of tobacco advertising from the vicinity of schools, day care centers, playgrounds, and amusement arcades.

The Association of Retailers (AOR) was formed to protect the economic interests of its member retailers. AOR had unsuccessfully opposed the adoption of the ordinance, arguing that it would cause hardship to store owners by depriving them of needed advertising revenue. AOR believes that the best way to discourage young people from smoking is by directly restricting access to tobacco rather than by banning all tobacco advertising.

AOR is considering filing a complaint for injunctive relief against City in federal district court claiming that the ordinance deprives its members of rights under the Free Speech Clause of the First Amendment.

What arguments could AOR reasonably make to show that it has standing, and that its First Amendment free speech claim has merit, and would it be likely to succeed? Discuss.

Answer A

5)
I. Standing

The Association of Retailers (AOR) is an organization seeking to enforce the putative rights of its members. Normally, courts do not allow plaintiffs to represent the rights of third parties. Organizations, however, fall under an exception to this general rule (as do doctors suing on behalf of patients, or accused criminals suing to enforce potential jurors' right not to be peremptorily stuck due to their race). An organization will have standing to sue on behalf of its members if: (1) the organization's suit is related to an issue that is germane to the organization's purpose; (2) the organization has members that would themselves have standing to sue; and (3) it is not necessary that the organization's members themselves be party to the case.

Applying this test, it appears likely that the AOR could reasonably show that it has standing. As to the first requirement, the AOR "was formed to protect the economic interest of its member retailers." The AOR hopes to enjoin the application of the ordinance because it will lead to a diminution of retailers (shopkeepers) advertising revenue. The amount of advertising revenue lost due to tobacco advertising prohibition directly affects AOR members' economic interest, and thus the subject of the suit is sufficiently related to the organization's purpose.

As to the second requirement, it appears that at least certain of AOR's members would have the standing required to bring suit themselves. Standing generally requires (1) an injury, (2) causation, and (3) redressability. Courts will not find standing when plaintiff has not suffered a harm (or is not imminent danger of suffering a harm), the matter at issue cannot be considered to have caused the harm to plaintiff, or, if judicial action occurred, the harm could not be prevented/cured. Here, AOR members who run shops with windows that once featured tobacco advertisements have clearly suffered a harm–the City has passed the ordinance requiring them to remove the ads, and they have (presumably) lost the revenue they once earned from displaying said ads. It is beyond dispute that the City ordinance caused the harm, as but for the ordinance, the advertisements would remain in the storefront windows. Finally, injunctive relief granted by the Court would redress the harm–if it prevented the City from enforcing the ordinance, then AOR members could display the advertisements and resume collecting advertising revenue.

As to the third requirement, there does not appear to be any particular reason why any specific AOR member would have to be party to the litigation. The harm complained of is not particular to any one member, but rather to all members who had tobacco advertisements displayed. The organization itself could represent the aggregate harm to its various members. This is not a situation, such as fraud, where particular facts as to a particular member would play such an important role that the Court should not proceed without that member.

With these arguments, it is likely that the Court would find that AOR has sufficient standing.

II. First Amendment Free Speech Claims

At the start, AOR can predicate its Free Speech claims on the fact that the First Amendment applies to the states (and thus to municipalities) because of incorporation through the Fourteenth Amendment. To have a First Amendment Free Speech claim, AOR must show that there has been state action limiting its members' right to free speech. Again, that is not an issue here because the City (which is certainly a state actor) passed the ordinance at issue.

AOR has three options open to it in challenging the City's ordinance–it can claim (1) that it violates the intermediate scrutiny that Courts apply when the state regulates commercial speech; (2) that the ordinance is void for vagueness; and (3) that the ordinance is void for overbreadth. As we address these three options, we will determine why other avenues, though alluring, are unlikely reasonable.

A. Commercial Speech

The ordinance clearly regulates commercial speech, in that it only bans tobacco advertising (as opposed, say, to tobacco-related art) and cites store windows and billboards as primary locations of regulation.

While the state can outright ban false advertising, or advertisement for illegal purposes, neither is applicable here. There is no evidence that the tobacco advertising is in any way false or misleading, nor is there any evidence that tobacco is illegal in City. As such, the commercial speech at issue is subject to constitutional protection. Unlike non-commercial speech, the state can enact subject-matter based regulations for commercial speech (such as banning tobacco advertising) without triggering strict scrutiny (a showing of a compelling government interest and means necessary to achieve said interest).

Instead, the City must show: (1) that there is an important government purpose unrelated to the suppression of speech; (2) that the regulation directly advances that government purpose; and (3) that the regulation is narrowly tailored to achieve the purpose. If the City meets all three requirements, it can regulate commercial speech even by subject matter.

The City will argue that the health of children, and preventing the detrimental effects of smoking, is an important government purpose. That is essentially inarguable, and AOR should not contest it.

The City will further argue that the regulation directly advances that interest by decreasing children's media exposure to tobacco–that what children do not see, they will not be tempted to buy. AOR can challenge this by arguing that, in fact, the regulation only indirectly advances the government's purpose and that restricting actual access, rather than commercial references, to tobacco would directly advance the government's interest.

However, it cannot credibly be gainsaid that limiting the advertisements would diminish children's exposure to tobacco and directly advance the City's interest. Thus, the AOR will likely not be successful contesting this prong.

AOR's best argument is that the ordinance is not narrowly tailored, and that the ordinance prohibits more advertising than substantially required to achieve its purpose. AOR, however, cannot argue that the City can only regulate so far as necessary to achieve the purpose–that would be applying strict scrutiny rather than intermediate scrutiny. The City will respond that it has "narrowly tailored" the ordinance by limiting it to billboards, store windows, proximity to schools, and "locations" where minors "traditionally gather." That is not the most restrictive means of accomplishing its purpose, but it is more narrow than a blanket prohibition against tobacco advertising. This is a closer call, mainly because of the latter clause, but at least as to the billboards, store windows, and ads near schools, the ordinance is likely narrowly tailored enough. These places are either out in the open or particularly susceptible to children's presence, and thus a Court will likely apply the ordinance as to the specifically identified locations.

AOR is unlikely to prevent the application of at least parts of the ordinance on the grounds of commercial speech.

B. Void for Vagueness and/or Overbreadth

What AOR will be able to do, however, is have the ordinance enjoined in regards to the clause concerning "any other location where minors...traditionally gather." This is unconstitutional both because it is unduly vague (other than bars, offices and funeral homes, where don't minors traditionally gather?) and overbroad (even to the extent that there are more identifiable traditional gathering places, this language included far more than just playgrounds and fairs). This clause will be unconstitutional as applied to at least some of AOR's retailers, and thus the Court will likely consider enjoining enforcement of the non-specified places for advertisements.

Answer B

5)

I. Does AOR have organization standing?

Standing requires that the claimant have an actual stake in the controversy. To assert standing, the claimant must have an injury in fact, the injury must be caused by the activity complained of, and the court must be able to redress the injury.

An organization may have standing if certain criteria are met. The organization must show that 1) its individual members have standing to assert a claim; 2) the claim is germane, or, related to the purpose of the organization, and 3) the individual members are not necessary to adjudicate the claim.

1. Do Members have standing in their own right?

Here, the members have standing in their own right because they have an injury in fact, can show causation, and the court can redress their problem. The members have standing in their own right because the ordinance prevents them from engaging in advertising, depriving them of revenue. Therefore, they have an injury in fact. Moreover, the loss of revenue is a direct cause of the City's ordinance. Finally, if the court finds that the ordinance is invalid, it will redress the injury.

2. The claim is germane to the purpose of the organization.

The AOR was formed to protect the economic interests of its member retailers. Here, the ordinance arguably is causing economic hardship to AOR members depriving them of needed advertising revenue. Therefore, the effect of the ordinance is to create the type of harm AOR was formed to protect against - harm to the economic interests of the member retailers. Therefore, it is germane to the purpose of the AOR to fight the ordinance as a violation of free speech that harms economic interest of its members.

3. The individual members are not needed for the court to decide the claim.

AOR is challenging a city ordinance on First Amendment free speech grounds. The court can decide whether the ordinance is a violation of the First Amendment and related issues of vagueness and overbreadth without need for the participation of the individual members of AOR.

Because AOR can show that its members have standing in their own right, that the complaint seeking injunctive relief against the City for enforcement of the ordinance is

related to AOR's purpose of protecting the economic interests of its members, and the members are not necessary to decide the matter, AOR can assert organizational standing.

II. First Amendment Speech Arguments

The protections of the First Amendment apply to the states and local governments through the 14th Amendment. Therefore, as a state actor, City may not violate free speech rights. Generally, a state must have a compelling interest in regulating the content of speech. However, commercial speech is afforded less protection by the First Amendment.

a. Commercial Speech

AOR may first argue that the ordinance does not meet the requirements for restraints on commercial speech. The City may regulate commercial speech if it is false or misleading. Here, there are no facts suggesting that the advertisements are false or misleading.

However, the City will likely argue that the very purpose of the ordinance was to protect minors because the advertisements for cigarettes were inherently misleading [sic] youth into believing that smoking is bad. AOR, however, will note that there is nothing misleading at all about advertisements for a certain product that say nothing aimed at minors, and that the State has offered no evidence showing that there is some attempt by the retailers to mislead youth into buying cigarettes.

Therefore, AOR has a strong argument that the City cannot regulate the advertisements as false or misleading.

i. Regulation of commercial speech generally

Where commercial speech is not false or misleading, the City may regulate the speech only if it meets the three part test set forth by the Supreme Court for calibrating the City's interest and the Retailers' commercial interests. The Supreme Court has applied an intermediate level of scrutiny to commercial speech regulation:

Any regulation of commercial speech must be 1) substantially related to an important government interest; 2) it must directly advance the interest, and 3) there must be no less restrictive means.

Is the ordinance substantially related to an important government interest?

The City will persuasively argue that there is an important government interest in discouraging school-age children from smoking. The state will note the fiscal costs of dealing with health related problems and the addictive nature of nicotine in relation to the maturity and intelligence of school-age children. Moreover, the City may try and analogize

the broad discretion given to the states under the Constitution to regulate the sale and distribution of alcohol.

AOR will argue that the state has an important government interest in regulating school-age smoking, but that the ordinance is not substantially related to that interest. However, AOR will not likely be able to show that an ordinance that is aimed at advertisements within 1,000 feet of a school is not substantially related to the interest of protecting minors from the dangers of smoking because there is a high concentration of youth near schools, particularly youth of young ages.

AOR may argue, however, that the provision in the ordinance prohibiting advertising at any location where youth under the age of 18 gather is not substantially related to an important government interest. AOR will argue that the City's interest is strong in protecting areas around schools where there is a definite and concentrated population of youth who are sent to that location for education. But, AOR will note that this interest decreases when the government is trying to protect gatherings of youth who are free to move about in public.

Does the Ordinance directly advance the government's interest in protecting youth?

By prohibiting the advertisement of tobacco near schools and other public places where minors gather, the ordinance directly advances the interests of the government's interest in discouraging school-age children from smoking. Assuming that the State can draw connections between the advertising and its effect on children, the ordinance directly advances the state's interest.

Is the ordinance the least restrictive means?

AOR has a strong argument that the ordinance is not the least restrictive means for promoting the state's interest in discouraging school-aged children from smoking. Specifically, AOR has already argued that the best way to discourage young people from smoking is by directly restricting access to tobacco rather than by banning all tobacco advertising. Moreover, AOR will argue that there could be regulations of the types of advertisements or size that would not prevent all advertising in windows or other locations where minors gather. Specifically, AOR will argue that the provision banning advertisement at "any other location where minors under the age of 18 years of age" is not the least restrictive means and that the portion should be struck from the ordinance.

b. Any regulation of speech, even if a valid regulation of commercial speech, still must not be overbroad, vague, or give unfettered discretion to enforcement agencies to be constitutionally valid.

Is the Ordinance overbroad?

A restriction on speech cannot prohibit substantially more protected speech than it may legitimately restrict. If the ordinance is found to prohibit substantially more speech than the City may constitutionally prohibit, then the ordinance will be found invalid and will not apply to any speech.

AOR will argue that the restriction on advertising at "any other location where minors under the age of 18 years traditionally gather" will prohibit substantially more speech than the City may constitutionally prohibit under the commercial speech clause. Specifically, AOR will argue that the City does not have an important interest in preventing advertising of tobacco at all places where minors gather. AOR will argue, as noted above, that while the City may have a strong argument that its interest in [sic] important in regards to advertising near school zones, the City's interest substantially decreases as the concentration of children goes down. However, this argument will bleed into AOR's stronger argument that the restriction banning advertising in areas where minors gather is vague, and, therefore, unconstitutional.

Is the Ordinance Vague?

A regulation is vague if it does not put the public on reasonable notice as to what is prohibited. Here, AOR has a strong argument that the ordinance is vague because it prohibits advertisements at any location where minors under the age of 18 traditionally gather. While the provision limiting advertisements within 1,000 feet of a school on billboards or store windows is specific, places where minors gather is not defined.

There is nothing in the ordinance that either specifies places where children traditionally gather or defines how to determine what in fact is a "gathering." How many children constitute a gathering? Therefore, AOR will likely be able to assert that the ordinance is unenforceable because of a vague provision.

Does the ordinance give unfettered discretion to enforcement?

A regulation restricting speech must be defined and clear. And, if it gives unfettered discretion to whoever enforces it, it will be found invalid.

Because the ordinance offers no guidance as to what constitutes a place where minors traditionally gather, it gives unfettered discretion to enforcement agencies to make their own definition. Therefore, AOR can make a strong argument that the ordinance gives unfettered discretion to City officials in determine [sic] who is in violation, and therefore, the ordinance should be invalidated.

Conclusion

Because AOR can show that the ordinance is vague in part, gives unfettered

discretion, and is not the least restrictive means of promoting the state's interest, it is likely to prevail in its claim to enjoin enforcement of the ordinance.

Q6 Evidence

Officer Will, a police officer, stopped Calvin, who was driving a rental car at five miles an hour over the speed limit. Calvin gave legally valid consent to search the car. Officer Will discovered a substantial quantity of cocaine in the console between the two front seats and arrested Calvin. After being given and waiving his Miranda rights, Calvin explained that he was driving the car for his friend, Donna. He said that Donna was going to meet him at a particular destination to collect her cocaine, which belonged to her. Hoping to obtain a favorable plea bargain, Calvin offered to cooperate with the police. The police then arranged for Calvin to deliver the cocaine. When Donna met Calvin at the destination, she got into the car with Calvin. She was then arrested. Each was charged with and tried separately for distribution of cocaine and conspiracy to distribute cocaine.

Donna's trial began while Calvin's case was still pending.

At Donna's trial, the following occurred:

(2) The prosecutor called Officer Will, who testified to Calvin's statements after his arrest concerning Donna's role in the transaction.

(3) The prosecutor then called Ned, an experienced detective assigned to the Narcotics Bureau, who testified that high level drug dealers customarily use others to transport their drugs for them.

In the defense case, Donna testified that she was not a drug dealer and that she knew nothing about the cocaine. She stated that she was merely meeting Calvin because he was an old friend who had called to say he was coming to town and would like to see her.

(4) Donna further testified that when she was in the car with Calvin, she found a receipt for the rental car, which showed that Calvin had rented it six months prior to his arrest. She offered a copy of the receipt into evidence. The court admitted the document in evidence.

(5) On cross-examination, the prosecutor asked Donna whether she had lied on her income tax returns.

The prosecutor had no evidence that Donna had lied on her income tax returns, but believed that it was likely on the basis that drug dealers do not generally report their income. Donna denied lying on her income tax returns.

Assuming that, in each instance, all the appropriate objections were made, should the evidence in numbers **1**, **2**, and **3** have been admitted, and should the cross-examination in **4** have been allowed? Discuss.

Answer A

6)

Q6

(1) Should Officer Will's Testimony Have Been Admitted?

Relevance

In order for Officer Will's testimony to be permitted it must be relevant. Federal Rules of Evidence (FRE) 401 provides that relevant evidence is evidence having any tendency to make a fact of consequence to the determination of the action more or less likely to be true than without the evidence. Officer Will's testimony was relevant because Calvin's statements, that he was driving the car for his friend Donna and that she was going to meet him at a particular destination to collect her cocaine, had a tendency to make the fact of consequence that he was a coconspirator with Donna for distribution of cocaine more likely. Therefore, the evidence was relevant.

FRE 403

Although relevant, Donna may argue that it should have been excluded on FRE 403 grounds. FRE 403 provides that relevant evidence should be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, waste of time, confusing/misleading the jury, or cumulative evidence. Donna will argue that there are no reliable ways of showing that this statement was true and therefore the probative value of the evidence is substantially outweighed by risk of unfair prejudice because a jury will hear the statement and automatically want to convict her. However, witnesses or convicts are often allowed to testify and any evidence against the truthfulness of the statement would be go to [sic] weight of Officer's testimony.

Hearsay

Donna will argue that the testimony was impermissible hearsay. Hearsay is an out-of-court statement made by the declarant, while not present in court, offered for the truth of the matter asserted. A statement is defined as an oral/written assertion or assertive conduct. Officer Will is testifying about Calvin's comments to him when he was arrested. The statements that he was driving the car for his friend Donna and that he was going to meet her at a particular destination to collect her cocaine are all offered to prove that indeed the car was being driven for Donna and he was meeting her because it was her cocaine. So it is an out-of-court statement offered for the truth of the matter asserted because it is an oral assertion by Calvin out of court. Therefore, it is hearsay and is not admissible unless it comes in under an exception.

Coconspirator Admission

Prosecutor would argue that the statement was a valid party-opponent admission. Party-

opponent admissions are categorically non-hearsay and are exempted from the hearsay rule's exclusionary effect. A party-opponent admission can be done by a statement by a coconspirator during the course of the conspiracy and in furtherance of the conspiracy. Donna would argue that Calvin had already been arrested and therefore this was not made in furtherance of the conspiracy. Therefore, Calvin's statements could not come in under this exemption, 801(d)(2).

Statement Against Interest

The prosecutor could also have argued that this was a statement against interest and hence is an exception to the hearsay rule. Statement against interest comes in under FRE 804, which requires unavailability of the witness, which can include witnesses not testifying because of self-incrimination. Here Calvin would not be testifying because of such self-incrimination and he is not present at the trial, so therefore he is considered unavailable. Statement against interest excepts statements from the hearsay rule that are so contrary to declarant's criminal liability that a reasonable person would not have made such a statement unless it were true. The prosecutor would argue that a reasonable person would not admit his involvement in the transportation of cocaine unless it were true and therefore this falls within the exception since Calvin would be subject to criminal liability. Therefore, the evidence could potentially be admitted under this exception.

Confrontation Clause

Donna would argue that regardless the statement should not be introduced because it violates the confrontation clause. The 6th Amendment Confrontation Clause provides that an accused has the right to confront his accusers. For this reason, hearsay testimony used against an accused is often not permitted. The Supreme Court has determined that testimonial evidence can in no circumstance be used against an accused without the right to cross-examination at trial or a prior proceeding with the same motive to develop such testimony. Testimonial evidence are all [sic] statements made that a reasonable person would believe would be used by the prosecution against another at trial. Usually there requires at least statements to the police. So when Calvin spoke to the police officer and made statements about the culpability of Donna, he was giving testimonial evidence since it could have been foreseen by telling the police it could be used against her. Furthermore, he did so in hoping to get a plea bargain and hence it shows that it was testimonial. Therefore, since he cannot testify because of self-incrimination/presence in court and Donna had no opportunity at any time to cross-examine him, the police officer's statement regarding Calvin's statements should be excluded.

(2) Should Ned's Testimony Have Been Admitted?

Relevance

It must be determined whether Ned's testimony was relevant to the case. Federal Rules of Evidence (FRE) 401 provides that relevant evidence is evidence having any tendency to make a fact of consequence to the determination of the action more or less likely to be true than without the evidence. Ned's testimony was relevant because it had a tendency to show that Donnawas

potentially a high level drug dealer because she had someone else transport the cocaine and hence it is more likely that she should be convicted of distributing cocaine. Therefore, it should be allowed in as relevant.

Expert Testimony

Although relevant, the testimony must be valid expert testimony in order to be allowed in. Pursuant to FRE 104, a court must make the preliminary fact determination of whether an expert is qualified to give expert testimony. Under 104, evidence is not relevant if dependent on a conditional fact unless that condition is found to exist. A judge need only find sufficient evidence to show existence of the condition to allow the question to go to the jury for credibility and weight. Here the judge would consider the Daubert factors that were incorporated into the FRE on expert testimony in order to determine whether it should be allowed in.

The factors require that the expert testimony be based on the knowledge, experience, and training of the expert, be beyond the normal experience of an average lay juror, be helpful to the determination of the action, and based on proven and reliable data and methods, and be an application of such methods and data to the underlying facts of the case. Here Ned was an experienced detective in the Narcotics Bureau and hence had the knowledge, experience and training. His testimony was beyond the normal lay juror because it involved high level drug dealers' actions. Furthermore, it was relevant and helped to determine what Donna was guilty of. Finally, it was based on reliable data of customary experience in the field that high level drug dealers customarily use others to distribute the drugs. Therefore, the testimony should be allowed in.

(3) Should Donna's Testimony and Receipt Be Admitted?

Relevance

Federal Rules of Evidence (FRE) 401 provides that relevant evidence is evidence having any tendency to make a fact of consequence to the determination of the action more or less likely to be true than without the evidence. Donna will argue that the evidence is relevant because it makes the existence of the fact that Calvin had control over the cocaine more likely here and hence she was not involved. Therefore, it will be allowed in as relevant, unless there are other problems.

Best Evidence

Prosecutor will argue that this is not the best evidence. The Best Evidence Rule requires that one cannot testify to the contents of a writing unless the writing is presented. However, a copy is permissible. Therefore, since Donna brought a copy of the receipt that she found in the car, it should be allowed in.

Hearsay

Prosecutor will object on grounds of hearsay. Hearsay is an out-of-court statement made by the declarant, while not present in court, offered for the truth of the matter asserted. A statement is defined as an oral/written assertion or assertive conduct. Therefore since the document asserts that Calvin rented the car, it is offered for the truth of the matter and must come

in under an exception.

Business Records

Donna will argue this is a business record and should be admitted. Business records are records or documents made during the normal course of business with guarantees of trustworthiness. There needs to be some type of testimony demonstrating that this was in the normal course of business, and hence Donna would have needed some type of custodian or the person who entered the information testify to those facts. Therefore, the evidence will be excluded.

(4) Should the Cross-Examination Have Been Allowed?

Relevance

Prosecutor would argue that the question was relevant as to whether Donna was telling the truth. Federal Rules of Evidence (FRE) 401 provides that relevant evidence is evidence having any tendency to make a fact of consequence to the determination of the action more or less likely to be true than without the evidence. If Donna had lied in the past on her income tax then it would be more likely that she would lie at trial because she is dishonest. Therefore, it is relevant to the case.

Character Evidence of a Witness

Donna would initially argue that this is improper character evidence. Character evidence is evidence of a trait or character offered to prove action in conformity therewith. Character evidence is not allowed unless it falls under one of the exceptions to character evidence. Here this falls under the exception to character of a witness. Therefore, it is governed by 607 and 608 of the FRE.

FRE 607 allows an opposing party to generally impeach to show bias or lack of credibility of a witness. FRE 608 allows a party to use character evidence for the purpose of impeachment. However, if one wants to impeach by specific instances of conduct one can only do so by inquiring on cross-examination and not through extrinsic evidence.

Furthermore, it must bear on the truthfulness of the witness. The prosecutor's question about whether Donna lied on her tax return was valid because it was merely a question, and no extrinsic evidence was offered. It beared [sic] on whether she was telling the truth at trial after saying she knew nothing about cocaine and only met Calvin in order to see an old friend. Therefore, it was proper use of specific instances of conduct through cross-examination of a witness.

Answer B

6)

1. Will's testimony of Calvin's statements were NOT properly admitted.

(a) Relevance

Evidence is generally admissible if it is relevant, meaning that it tends to make a material fact more or less likely to be true. Here, Will's testimony of Calvin's statements would make Donna's alleged involvement more likely to be true, and thus is logically relevant. However, evidence should not be admitted under Federal Rules of Evidence (FRE) 403 if its prejudicial effect substantially outweighs its probative value. Setting aside the Confrontation Clause question (discussed below), this evidence is prejudicial against Donna but is also very probative as to the central issue of the trial – whether Donna is guilty of distribution of cocaine and conspiracy to distribute. As such, the prejudicial effect does not substantially outweigh the probative effect, and testimony should be admitted absent other reasons for preclusion.

(b) Competence

A witness's testimony is admissible if he is competent to testify. A witness is competent if (1) he had personal knowledge of the fact he is testifying to, and (2) he takes an oath or affirmation to tell the truth.

Here, Will was present when Calvin made the statement about Donna's role in the transaction, and thus has the required personal knowledge. Assuming he took the proper oath at trial, Will is competent to testify as to what Calvin had said.

(c) Hearsay

Hearsay is not admissible unless an exemption or exception applies. Hearsay is an out-of-court statement offered for its truth. Here, Calvin's statement about Donna was made outside the court proceedings and was offered by the prosecution to prove that Donna indeed was involved in the cocaine transaction. Thus, it is hearsay. This issue here is whether a proper exemption or exception applies.

The prosecution will argue that this declaration is (1) a coconspirator admission and (2) a statement against interest. Coconspirator statements are exempted from the hearsay rule under FRE 801(d), and can be admitted as substantive evidence. Here, Calvin was allegedly a coconspirator with Donna. If the judge finds by a preponderance that the two were indeed coconspirators, Calvin's statement against Donna can be admitted, subject to the Confrontation Clause limitations, discussed below.

On the other hand, a statement against interest is a hearsay exception, allowing admission for a statement made by an unavailable declarant which was against the declarant's own penal, proprietary, or other interest. To apply, the declarant must be unavailable by reason of privilege, absence [sic] from the jurisdiction, illness, death, or stubborn refusal to testify. However, if the declarant's "unavailability" is procured by the party seeking to offer his statement, or if the party acquiesced in a plan to make the declarant unavailable, with the result that he is in fact made unavailable, the right to use such declarations is forfeited. Here, Calvin has the Fifth Amendment privilege against self-incrimination to refuse to testify in Donna's trial, and, assuming he exercised that privilege, and that his absence from Donna's trial is not encouraged or induced by the prosecution,

Calvin is properly deemed unavailable. Nevertheless, Calvin's statement identifying Donna's role in the transaction was made with the intent to push responsibility onto Donna, in an attempt to either secure a favorable plea bargain with the prosecution, or convince the arresting officer that Calvin was not in fact involved in the transaction at all. Statements like these which are made for the purpose of currying favor with the prosecution are not against the declarant's penal interest and cannot properly be admitted under the "statement against interest" exception.

(d) Confrontation Clause

Even though Calvin's statement is exempted form the hearsay rule as a coconspirator admission, it may not be admitted against Donna in her trial without Calvin actually testifying. Under the Sixth Amendment, the [sic] criminal defendant has a constitutional right to confront witnesses against him. In a recent Supreme Court case, Crawford v. Washington, the court held that hearsay statements that are testimonial in nature cannot be admitted against a criminal defendant unless the defendant had either (1) a prior opportunity to cross-examine the declarant, or (2) a present opportunity to cross-examine the declarant at trial as a witness. A statement is "testimonial" if the declarant reasonably could foresee that it would be used against the criminal defendant in her prosecution. Here, Calvin told a police officer that Donna was the person who owned the cocaine, and thus could reasonably foresee his statement would be used to prosecute Donna, making it testimonial. If Calvin is not now produced as a witness at Donna's trial, and subjected to Donna's cross-examination, his out-of-court statement could not be constitutionally admitted against Donna.

2. Ned's expert testimony WAS properly admitted.

As per the discussion on relevance, Ned's testimony is generally admissible because (1) it would make the prosecution's theory that Donna used Calvin to transport her cocaine more probable, and (2) its probative value is great, and not substantially outweighed by the risk of prejudice to Donna.

In addition to taking a valid oath, an expert witness is permitted to give expert testimony where (1) the subject matter is one where expert opinion would be useful to the fact finder, (2) the witness is properly qualified as a witness, (3) the judge finds that the expert opinion is reliable, and (4) the expert opinion has proper bases.

Here, whether or not drug dealers usually use others to transport drugs for them is a matter outside most average people's ken, and thus is a subject matter where expert opinion would be useful. As an "experienced detective assigned to the Narcotics Bureau," Ned has specialized knowledge and experience in the matter of drug dealers' behavior patterns, and would probably qualify as an expert.

The judge must also find, by a preponderance, that the expert opinion is reliable – that is, that the methodology the expert used to reach his conclusions were reliable, and that the methodology "fits" the facts in the case. Under the Daubert case, the judge can consider these following factors in considering reliability of an expert's methodology: (1) Existence of peer review, (2) the error rate of the expert's methodology, (3) the testability of the methodology, and (4) whether the methodology were [sic] generally accepted by experts in the field. Here, Ned's methodology in reaching the conclusion that drug dealers

customarily use others to transport drugs was probably his experience in dealing with narcotics cases, and perhaps an analysis of the rate of "using others" narcotics cases to other narcotics cases. The methodology should be explained to the court, and if the judge finds it to be reliable, and that it properly "fits" with the facts of this case (alleged use of others to transport drugs for the dealer), the court will find the expert opinion reliable.

Finally, expert opinion must have a proper basis – it must be based on either facts already in evidence, or facts not in evidence that are generally relied upon by experts in the field. Assuming that the data set [sic] from which Ned drew his conclusion was not admitted into evidence, it must be shown to be data relied upon by other drug dealer behavior experts in the field.

3. The copy of Calvin's rental car receipt was NOT properly admitted.

Because the evidence sought to be admitted here is a piece of writing (receipt), it must not only be relevant, but also be authenticated as the thing it is purported to be, satisfy the Best Evidence Rule, if applicable, and shown not to be barred by the hearsay rule.

Here, if the receipt was believed, it would tend to make the prosecution's theory that Donna rented the car and had Calvin drive it to distribute drugs less likely. Thus, it is relevant. Moreover, the prejudicial effect to the prosecution is not substantially outweighed by the probative value of the receipt as to who in fact rented the car.

Because the receipt's relevance is dependent upon it being the receipt recovered from Calvin's car, it must be authenticated as such, meaning that defense must present sufficient evidence for a reasonable jury to decide that the receipt in court was the one recovered from the car. Donna can do this by establishing a substantially unbroken chain of custody, testifying that she had kept the receipt in a safe place since she personally retrieved it from Calvin's car, that no one had the opportunity to access and materially alter it, and that the contents of the receipt were in fact substantially unaltered from when she retrieved it from the car.

The best evidence rule also applies here because defense is offering the receipt for its contents. Under the rule, an original or mechanically made duplicated [sic] must be presented into evidence. Here, if Donna can show that the copy presented was mechanically made from the original receipt, the rule is satisfied.

Finally, because the receipt is an out-of-court statement offered for its truth (that Calvin rented the car six months before his arrest), it is hearsay and inadmissible unless an exemption or exception applies. Here, the receipt might be admitted under the "business record" exception; if Donna could show that the receipt was made in the regular course of the car renter's business, made in the manner such records are usually kept and at or around the time the car was rented, then the exception applies. However, this requires that a record custodian form the car rental company testify at trial as to these elements. Assuming that the defense did not present a custodian from the car rental company, the receipt cannot be deemed a business record, and cannot be properly admitted.

4. The cross-examination question to Donna probably should NOT be allowed.

As discussed above, a piece of fact or, in this case, a question, that tends to make a material fact in case more or less likely to be true is relevant and generally admissible. Here, if Donna lied in [sic] her income tax return, it would make her a less credible witness, and more likely a drug dealer. Thus, the question is generally allowable as relevant.

Character evidence is generally inadmissible for the purpose of showing that a

person acted on the particular occasion according to her propensity to act a certain way. However, character evidence on [sic] a witness's veracity, including specific prior bad acts committed by the witness, may be used to impeach her credibility, provided that the cross-examining party has a good faith basis to believe that such prior bad acts in fact took place.

Here, whether Donna lied on her tax return goes to her veracity, and thus is character evidence. The cross-examination question was presented for the purpose of impeaching Donna's credibility, but the prosecution did not have actual evidence to believe that Donna had lied on her income tax returns. Instead, the basis for this question was a general impression that drug dealers usually do not report their income. While this impression was honestly held by the prosecution, its basis is weak as it relates to Donna, who has not even been proven to be a drug dealer. Moreover, the question creates a prejudicial effect on the jury's mind, making them doubt the veracity of the defendant herself. As such, the prejudicial effect of this question substantially outweighs its weak probative value, and should therefore not be allowed.

Jul 2006

California Bar Examination

Essay Questions and Selected Answers

TUESDAY MORNING
JULY 25, 2006

California Bar Examination

Answer all three questions. Time allotted: three hours

Your answer should demonstrate your ability to analyze the facts in question, to tell the difference between material and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

Q1 Torts

After paying for his gasoline at Delta Gas, Paul decided to buy two 75-cent candy bars. The Delta Gas store clerk, Clerk, was talking on the telephone, so Paul tossed $1.50 on the counter, pocketed the candy, and headed out. Clerk saw Paul pocket the candy, but had not seen Paul toss down the money. Clerk yelled, "Come back here, thief!" Paul said, "I paid. Look on the counter." Clerk replied, "I've got your license number, and I'm going to call the cops." Paul stopped. He did not want trouble with the police. Clerk told Paul to follow him into the back room to wait for Mark, the store manager, and Paul complied. Clerk closed, but did not lock, the only door to the windowless back room.

Clerk paged Mark, who arrived approximately 25 minutes later and found Paul unconscious in the back room as a result of carbon monoxide poisoning. Mark had been running the engine of his personal truck in the garage adjacent to the back room. When he left to run an errand, he closed the garage, forgot to shut off the engine, and highly toxic carbon monoxide from the exhaust of the running truck had leaked into the seldom used back room. Mark attributed his forgetfulness to his medication, which is known to impair short-term memory.

Paul survived but continues to suffer headaches as a result of the carbon monoxide poisoning. He recalls that, while in the back room, he heard a running engine and felt ill before passing out.

A state statute provides: "No person driving or in charge of a motor vehicle shall permit it to stand unattended without first stopping the engine, locking the ignition, removing the key from the ignition, setting the brake thereon and, when standing upon any perceptible grade, turning the front wheels to the curb or side of the highway."

1. Can Paul maintain tort claims against (a) Clerk for false imprisonment and (b) Mark for negligence? Discuss.

2. Is Delta Gas liable for the acts of (a) Clerk and (b) Mark? Discuss.

Answer A

1)

1.

Paul v. Clerk

False Imprisonment of Paul

False imprisonment is an intentional tort. The elements for false imprisonment are that the tortfeasor must have intended to confine the victim in a bounded area and that the victim have no reasonable means of leaving the bounded area. The extent of the false imprisonment is usually not [of] importance[;] mere seconds can amount to false imprisonment. Courts often will forgo the intent requirement in regards to the tortfeasor if the victim suffered harm as [a] result of the confinement.

Here the facts indicate that Clerk intended to keep Paul in a bounded area until Mark, the store manager[,] was able to come back from his errand. Clerk had the requisite intent to confine Paul. Clerk will argue that the area was not bounded as he did not lock the door. Clerk will attempt to argue that Paul had a reasonable means of leaving the area[;] thus he cannot be guilty of false imprisonment.

Paul will reply that Clerk had the requisite intent and that it is not relevant whether the door was locked or not. The area was confined[;] Paul did not have a reasonable means of leaving as Clerk threatened to call the police on him. Paul will argue that even though the door was not locked, he was still confined for purposes of false imprisonment. Furthermore, Paul will argue that even with [sic] Paul did not have the requisite intent to confine him, the harm he suffered will be construed by the Courts as a substitute for intent.

Paul should succeed in his assertion of false imprisonment against Clerk barring any defense, discussed below.

Clerk's defense of Shopkeeper's Privilege

A defense to the tort of false imprisonment is that a storekeeper or his employees are allowed to detain an individual if they reasonably suspect that person of stealing. They are then allowed to detain that individual for a reasonable period of time in order for them to ascertain the validity of the theft. Courts have often held that reasonable usually cannot exceed 30 minutes, at time[s] have held 15 minutes was not reasonable, depending on the circumstances.

Clerk will argue that he was reasonable in his belief because he did not see actually see [sic] Paul pay for the candy, thus allowing him to assert the right. Clerk will also argue he

acted reasonably in taking Paul to the back room, and that leaving him for 25 minutes was not unreasonable. Clerk will argue the 25 minute stay was reasonable because he had to wait for the store manager to come back.

Paul will reply that Clerk's belief was unreasonable because Clerk was not paying attention in the first place, and that all Clerk had to do was look on the counter to see if the $1.50 was there. If nothing else, Clerk could have simply checked the register. Paul will then argue that the 25 minute detainment was unreasonable because of the type of room he was placed in. Paul will argue that putting him in a [room] that was full of carbon monoxide was unreasonable, even if it was only for one minute.

Paul should succeed in rebutting Clerk's defense of SP b/c it was not a reasonable suspicion and the time constraint was unreasonable.

Clerk's unlawful arrest of Paul

For purposes of demonstrating intent and unreasonable belief, Clerk's arrest of Paul can be analyzed. It has been held that when a citizen arrests another citizen, for purposes of a misdemeanor (which these facts indicate as the candy was only $1.50), require that the Clerk had been reasonable in his belief that the individual conducted the act, that act was done in his presence, and it had to be a breach of the peace.

Clerk may try to argue that it was done in his presence, and it technically was, but Clerk never actually saw it. Clerk may argue that regardless of [whether] he actually saw it, his belief was reasonable. Clerk may attempt to argue that a theft amounts to a breach of the peace and that he did not unlawfully arrest Paul.

Paul will argue that even if Clerk was reasonable in his belief, this was not a breach of the peace. Paul took $1.50 worth of candy from a gas station and threw the money on the counter. This simply cannot amount to a breach of the peace, no matter how strict a state's law might be.

Therefore, Clerk unlawfully arrested Paul.

Conclusion

Therefore, because Clerk intended to confine Paul, and did indeed confine Paul (and caused an injury[,] no less), that Clerk did not satisfy the elements of shopkeeper's privilege as the belief was unreasonable, as was the time constrained. Finally, Clerk's unlawful arrest of Paul also goes towards the intent of illegal confin[e]ment. Thus, Paul should succeed in a false imprisonment claim again[s]t Clerk.

Paul v. Mark

Negligence

Negligence is a tort that requires the following factors: Duty, Breach of Duty, Foreseeability (Actual/Proximate Causation), and Damages.

Negligence per se

Negligence per se occurs when there is a[n] ordinance that prohibits some type of conduct that occurred. If it's intended to cover the type of occurrence it speaks to, one may be guilty of it without demonstrating all the elements of negligence.

Here, the statute refers to stopping a car on the curb/highway, and turning the wheels. This would indicate it's to prevent cars from sliding if the parking brakes don't work. Thus, this statute was not intended to protect people from carbon monoxide poisoning.

Thus, negligence per se doesn't work.

Duty

Duty requires that the tortfeasor have some duty to victim. Generally speaking, we all have a duty not to act negligently. Essentially this is requiring that we act in a reasonable manner that does not put others in a[n] unnecessary state of harm. In order to make out a case for negligence, Paul needs to show that Mark owed him a duty.

Mark will argue that he has no general duty to everybody in the world. To hold him to such a high duty is improper. In addition, Mark will argue that the medicine he was taking made him forgetful, thus absolving [him] of his duty.

Paul will argue that nobody's asking Mark to have a duty toward the whole world, just those who enter his store[.] Paul will state that shopkeepers are held to a much higher degree than normal guys just walking on the street. Paul will also argue that Mark's tendency to forget while taking the medicine does not absolve him because he knows that the medicine makes him forgetful. Thus Mark must act in accordance with that knowledge.

In order to properly examine duty, it's necessary to look at the duties owed to a trespasser, licensee and invitee.

Trespasser

An undiscovered trespasser is owed no duty under the common law. Anticipated trespassers need to be warned of active operations and artificial conditions that are unreasonably dangerous.

Mark will try to argue that Paul was a trespasser because (b/c) Mark was being held for alleged shoplifting. Mark will argue that Paul was in an area that is not generally open to members of the public, thus his duties will amount to that owed to a trespasser only. Mark will argue that he was not aware of Paul's presence[;] therefore, he owned Paul no duty.

Paul will reply that holding him as an undiscovered or unanticipated trespasser makes no sense. He was discovered and most likely anticipated, although the facts do state the room was seldomly used. Paul will argue that he was owed, at worst, a duty that's granted to an anticipated/discovered trespasser. Thus, Mark will argue that he was entitled to a warning in regards to the carbon monoxide.

Licensee

A licensee is one who is invited onto the land of another as a social guest. They are owed to [sic] warnings regarding unreasonably dangerous conditions involving active operations, hidden but discovered dangers, artificial and natural conditions.

Because Paul was not invited as a social guest, whether into the gas station or the back room, the licensee standards do not apply to him and need not be discussed here.

Invitee

An invitee is one who has been invited onto the land of [sic] property of another for the property owner's benefit. The rule for invitees is that the property owner owes all the same duties that is [sic] owed to licensees, plus the owner needs to make reasonable inspections for unreasonable dangerous conditions existing on the premises.

Mark will argue that Paul was not an invitee because he had allegedly stole [sic]. Mark will argue that while Paul may have started off as an invitee, by stealing, he exceeded the scope of the invite and became a trespasser. Mark will argue that because of that, Paul is not entitled to the protections of an invitee.

Paul will argue that he was an invitee as he went to the station to buy gas. He was there for the benefit of Delta. Paul will argue that just because he allegedly stole, that does not change his status because he did not in fact steal, that Clerk false[ly] imprisoned him, and the false imprisonment cannot change the scope of duty owed to him.

Paul will then argue that because an invitee is entitled to have the owner inspect the premises for dangerous conditions, this means that there was a duty to inspect the back

room before sticking him in there. Paul will argue that carbon monoxide is an unreasonably dangerous condition.

Was there duty?

The duty owed to Paul was most likely that of a[n] invitee. He was there for Delta's benefit. The fact that Clerk thought he stole does not change that fact b/c Clerk's defenses do not work. Further, the medicine making Mark forgetful cannot be construed against Paul because Mark knew the medicine makes him forgetful[;] thus he had a duty to act extra carefully when on the medicine.

Breach of Duty

This examines whether the tortfeasor breached the duty that's was [sic] owed to the victim in this case.

Mark will argue no duty was breached because he had no duty in the first place. Mark will make the same arguments regarding duty as above. Mark will argue that if he had no duty, he cannot be guilty of breaching it.

Paul will argue that duty [existed] for the same reasons as above. Paul will argue that Mark owed him a duty because he was the store manager and further that Mark owed a duty b/c he knew the medicine made him forgetful.

Thus, there was breach of duty of [sic] Mark's part.

Foreseeability

There are two inquiries in regards to foreseeability/causation: 1) actual (but-for), and 2) legal (proximate cause). But-for cause can be quite broad and is usually easy to satisfy. Proximate cause is a bit more difficult as it requires that the victim be foreseeable. The most prominent test if [sic] the "zone of danger" (or Cardozo test), while the less used one is the Andrews test.

A but-for cause simply asks: but-for defendant's actions, would the injury have occurred? In this case, but-for is easy to satisfy. But-for Mark's actions of leaving the exhaust on, Paul would not have been injured. This test is extremely broad and almost anything can qualify as a but-for cause. Perhaps that is whythe courts instituted a legal cause as well.

The Cardozo Test will consider proximate cause satisfied only if the individual was in the zone of danger. Thus, it requires that the chain of events leading up to the injury was

reasonably foreseeable to the defendant. It requires that there not be some superseding (i.e. extremely unnatural consequences that comes in the middle) cause.

The Andrews [test] is extremely broad. It merely says that as soon as a negligent act is done, the zone of danger basically expands to everyone and everything.

Using the Cardozo test, Mark will argue that Paul was not within the zone of danger (ZOD) because Mark simply had left the exhaust on his truck. Mark will argue that by leaving the exhaust on, it was not foreseeable that Clerk would take Paul into a seldom-used backroom and have the Carbon Mono leak into that room. Mark will further argue that Clerk's actions were a superseding cause because if Clerk hadn't taken Paul into the room, there would be no injury.

Paul will reply that he was in the ZOD because the backroom was next to the garage. Paul will say that leaving the exhaust was a legal cause because he was a foreseeable plaintiff. Paul will argue that it is foreseeable that an exhaust, which everyone knows emits carbon monoxide, will seep into an adjoining room. Paul will further argue that while Clerk did falsely imprison him, this does not amount to a superseding b/c generally unless it's an Act of God or crime by 3rd party[,] many acts by another 3rd party do not amount to superseding causes.

Under the Andrews test, Mark really had no arguments b/c it's essentially another but-for test.

Paul should succeed in demonstrating foreseeability/caus[a]tion because it seems pretty clear he was in the ZOD. Paul was placed in a room adjoining the garage[;] most people should have the knowledge that it's dangerous activity. Further, the acts of the Clerk probably will not be construed as a superseding cause, even though it is an intentional tort.

Damages

Damages here would amount to Paul's medical expense and whatever suffering that has occurred.

Defenses

Paul will attempt to argue that he was not contributorily negligent or did not assume the risk.

Contributory negligence requires that the victim do something that contributed to the negl[ig]ence, thereby depriving of his right to damages (in a c/n jurisdiction).

Mark will argue that Paul was c/n because he should have realized the[re] was CO and that any reasonable person would have ran [sic] out the door or at least pounded on the door.

Paul will reply that CO cannot be smelled, that it simply knocks a person out. Paul will reply that there was no way for him to know that there was CO[;] therefore he cannot be contributorily negligent.

Assumption of risk requires that the victim voluntarily assume the risk of whatever occurred to him.

The facts do not indicate that Paul voluntarily assumed any risk. While the door was unlocked, he could not have voluntarily assumed the risk that there would be CO leaking from the garage. Therefore, AOR is a bad defense for Mark to assert.

Further, comparative negligence will only serve to decrease some of Mark's liability. In some jdx's, one who is over 50% negligent cannot recover. In pure jdxs, P can always recover something, unles[s] she is 100% negligent. The facts do not seem to indicate any negligence on Paul's part[;] therefore Mark will be responsible for 100% of the negl[ig]ence, as it relates to Paul.

2. Vicarious Liability/Respondeat Superior

Vicarious Liability/Respondeat Superior

Generally, an employer is guilty for the acts of his employees, provided that it is within the scope of his employment.

In the case, Clerk was acting within the scope of his employment. He was trying to protect the store from being robbed. The store may try to argue by falsely imprisoning Paul, Clerk was acting outside of it. Further, store will try to argue that b/c Clerk was talking on the phone, he was also acting outside the scope of employment.

The store's arguments probably will not work because Clerk undoubtedly in [sic] given the privilege by his employer to detain those he believes is stealing. It would appear from the facts that Clerk was acting within the scope of his employment[;] surely his job entails detaining those who he believes was [sic] stealing from the store. Thus, the store cannot relieve itself of Clerk's false imprisonment tort.

Mark, on the other hand, left his truck on while running on a personal errand. The store will try to claim he was acting outside the scope of employment because he was on a detour. The general rule is that when an employee detours from his employment functions, the employer might not be held responsible.

The store will argue b/c Mark left on a personal errand, his actions cannot be attributed to them. This argument probably will not work b/c Mark left his truck at work. Mark did not take his truck on a personal errand and run somebody over. It is given that people

generally take their cars to work, and if that car poses a problem and causes injury to a customer, that is within the scope of the employment.

Therefore, the store will be held under the vicarious liability/respondeat superior theories.

Trespasser/Licensee/Invitee

All of the rules and arguments above apply to the Employer as well.

Since Paul was a[n] invitee, the Store (or its employees) owed a duty to inspect the premises and by failing to do so, Store is liable for the employer's acts.

Defenses

All the same defenses from above apply.

Answer B

1)

I. Can Paul maintain tort claims against Clerk for false imprisonment?

In order to prevail under a claim of an intentional tort, such as false imprisonment, the plaintiff must show an action of the defendant, made with requisite intent, causation and damages. False imprisonment specifically requires the following: (1) an act or omission of the defendant that causes the plaintiff to be restrained to a bounded area. This can be done through a physical act or under an imminent threat. There must be no reasonable means of escape.

(2) The defendant must have acted with specific intent to confine or general intent, meaning he acted with substantial certainty that he was acting in the proscribed manner. (3) It was the actions of the defendant that caused the harm to the plaintiff. The action must have been at least a substantial factor. (4) Damages. The plaintiff had to suffer some harm so he must have known of the restraint or suffered damage because of it.

Action of the defendant (C)

In this case, C did ask P to go with him to the back of the store, which P did. Though C may argue P was free to leave, P should argue that he only went to the back room under threat of having trouble with the police. He knew C had taken down his license number, and P arguably was willing to go into the back room so he could have a chance to explain himself. P was put into the room and C closed, though did not lock [,] the only door to the room, which contained no windows. This should be enough to meet the requirement that there be no reasonable means of escape. Even though P could have physically opened the door and may have been able to walk out, he was being held there under threat of having to deal with the police.

M may argue that the threat of calling the police should not be considered to be a threat that confined the P. If P was truly innocent, all he would have to do is give his story to the police. Plus, P should have known that his money was still on the counter, and if he could convince C or the police to look for [it], this story would

be shown to be true. Therefore, C would argue, P did not really have to stay in this back room [;] it was only P's desire to avoid dealing with the cops that caused him to be back there. This is probably not going to work because the [sic]

Intent

Here, P should argue that C acted with the specific intent to hold P in the bounded area. The facts do support this argument, because C did specifically tell P to go into the back room to wait for Mark, the store manager. C also intentionally made the statement that caused P [to] feel that he had to stay in the back room. Therefore, this element is met.

Causation

The causation element is also met because there is a direct link from C's actions to P being held in the store room. The facts state that P went into the back room after hearing C threaten to call the police.

C may try to argue that, while his action may have caused P to be bounded to the room, it did not cause P's harm because of the intervening force of M. This is discussed below in the section on defenses.

Damages

The facts state that as a result of being held in the back room for 25 minutes, P was knocked unconscious from carbon monoxide poisoning. Therefore, he did suffer actual physical harm at the time. He also continues to suffer headaches as a result of that, so he has ongoing damage. He also may have suffered damage even before being knocked unconscious. The facts state that he recalls feeling ill even before he passed out, so he may have been afraid or suffered emotional distress.

Defenses

Because P does not seem to have met the above elements for a claim of false impri[s]onment against C, C will need to offer up some defenses if he is to shield himself from liability. The following defenses should be considered by C:

Storekeeper privilege

Tort law does permit storekeepers to retain customers suspected of shoplifting. The idea is that storekeepers are permitted to try to recapture their chattels by using reasonable means and holding the suspected thief for a reasonable amount of time. The shopkeeper is protected against making reasonable mistakes as to whether or not the suspect actual stole anything.

In this case, C should argue that he was reasonable to suspect P of shoplifting. There are facts to support this claim [.] C did witness P pocked [sic] the candy and was not aware that P had paid. It is true that P had tossed money on the counter to cover the cost of the candy, but it was reasonable for C not to have seen this. This is because it is customary for customers to pay for items by going up to the cash register and being rung up by the cashier, and giving money directly to the cashier. Clerks are not used to having to look for money dropped on counters to be sure if someone has paid or not. Therefore, C was reasonable to think P was shoplifting, so he was covered by the privilege.

However, P has a very good claim to shoot down this defense. The detention by a shopkeeper asserting this privilege must be reasonable. Here, C hold [sic] P in the back room for 25 minutes while he was waiting for Mark (M) to arrive. Arguably, this is too long to hold someone in a windowless back room by themselves to discuss stealing a candy bar that cost $1.50. C will of course argue it was reasonable for C to make P wait for the manager, and that 25 minutes really is not that long. However, he was held in the back room and was never once checked on to be sure he was okay. This is arguably unreasonable. Also, the harm that came to P as a result of being in the room was clearly not reasonable. Therefore, C was outside the bounds of the storekeeper privilege and this defense is not available to him.

Superseding force

As discussed above, C may also want to argue that it was not his tortious act that caused the harm, but rather it was Mark's supervening actions. C would argue that if M had not left his truck running in the garage for so long, the exhaust would have not leaked into the back room and P would not have

suffered any damages. Therefore, it is M's negligence (either in merely running the engine or in failing to take his medication) that was the real cause of the harm.

The rule for causation in tort cases is that the defendant's act was a substantial factor. P should easily be able to show that C was a substantial factor in the harm, because C left him there by himself for long [sic]. Therefore, the superseding force will not absolve his liability.

Consent

C may also try to argue that P consented to the imprisonment. Consent is a valid defense against intentional torts. C would argue that P went to the back room of his own volition, because he made the choice to go back there rather than have the police be called by C.

The problem with this defense, P will argue, is that consent must be given voluntarily, and the actions of the defendant must not exceed the bounds of the consent. Here, the consent was not voluntary, because P was acting under threat of having the police be called, even though he did pay for his item. Also, even if P did arguably consent to going into the back room, he surely did not consent to being held for 25 minutes by himself and to suffer such physical harm.

Conclusion

Based on the above, it appears that P does have a tort claim against C for false imprisonment. Though there are defenses that C will try to argue, he will probably not succeed with any of them.

II. Can P maintain a tort claim against M for negligence?

A basic cause of action for negligence requires a showing of the following elements: (1) existence of a duty with an accompanying standard of care; (2) a breach of that duty; (3) defendant's actions were the but [-] for and proximate cause of the plaintiff's injury and (4) the plaintiff was actually damaged. Therefore, P must show all of these elements in order to prevail against M for negligence.

Duty and Standard of Care

A duty of care is not owed to all. However, a duty of care is owed to all people who can forseeably be injured by the actions of the defendant. In this case, the vicinity of P to the area of where M was running his engine would make him a foreseeable plaintiff. M may argue that no duty of care is owed to P because M had no idea P was back there, and had no reason to know because the store room was seldom used. However, this probably will not absolve M of his duty of care, because it is foreseeable that someone will be in the back of the store or garage at some point, and that leaving an engine running for so long in a closed area will cause harm to someone.

The standard of care owed is usually that of a reasonable person acting under similar circumstances and with ordinary prudence. This will be the standard of care applied in this case.

Breach

Now it must be determined if M's conduct fell below the standard of care. There are several ways that P can argue that it does. First, P could argue that M was negligent merely in leaving the engine running for so long in the closed area. Certainly, reasonable people know that they should not allow highly toxic carbon monoxide to fill a small space, especially when the small space is so close to a public business where it is certain people will be found. Second, P could argue that M was negligent because M failed to take his medication. A person who knows that they are likely to forget doing things that would make their actions safe (like, in this case, turning off [the] engine of his truck) arguably should not be engaged in those actions. Here, M must have known of his likelihood of forgetting such things, since he has a prescription for short-term memory impairments. Therefore, he was negligent in failing to remember to take the medication in the first place that would have allowed him to avoid putting P at risk. P should be able to show breach on both of these points, since no

reasonable person would leave their car on when it[']s confined to such a small place.

Finally, P may argue that M's action is negligence per se. Negligence per se may arise when there is a statute that provides for penalties, that states the conduct that is required, that is meant to address the sorts of injuries caused [by] the defendant, and that is meant to protect peo[p]le in the plaintiff's position. In this case, P would argue that the state statute is meant to protect people from suffering carbon monoxide poisoning, by requiring everyone to shut off their car before leaving it unattended. Therefore, M's action was covered by the statute, and P's injury was meant to be addres[s]ed by the statute. However, M should be able to strike down this argument fairly easily. M should argue that the point of such statute is to prevent vehicles from causing accidents because the vehicle rolls while being unattended. The language of the statute makes it pretty clear that this is the injury the statute is meant to protect against, since the statute specific[a]lly addresses setting the brake on the vehicle and curbing wheels so the vehicle does not roll. Nothing indicates the statute is meant to protect against carbon monoxide poisoning.

Causation

C will have to show M's actions were both the but[-]for cause and the proximate cause of his harm. It is the but[-]for, or legal, cause, because were it not for the negligence of the defendant, P clearly would not have suffered any injury. Nothing indicates that he would have suffered such harm just by being in the room. Also, it is the proximate cause. There is a direct link from the actions of the defendant to the harm suffered by P.

M will certainly try to argue that there were superseding forces that were the actual cause of P's harm. His best argument would be that it was C's false imprisonment of P that was the true cause of P's injury. However, superseding forces will not absolve a defendant of negligence unless they are unfor[e]seeable. Here, it should have been foreseeable [to] M that someone, at

some point, would go into the back room or even into the garage. The facts do state that the back room is seldom used, which may seem to support M. However, this does mean that the back room is sometimes used. Therefore, the superseding force was foreseeable and will not break the chain of causation.

Damages

As discussed above, P did suffer damages. These damages can be attributed to M's actions just like they can be attributed to C's intentional tort. The likely result is therefore that P will be able to collect from both C and M, as joint and several tortfeasors.

III. Is Delta Gas (DG) liable for the acts of (a) Clark and (b) Mark?

Though the facts do not specifically say it, C and M both appear to be employees of DG. Therefore, if DG is liable for the acts of C or M, they would be liable under the theory of vicarious liability. Vicarious liability states that an employer is liable for the torts of an employee if that employee is acting within the scope of the employment. The court will consider the time and place of the employee's act, and will also consider if the employee is acting for the benefit of the employer. In general, the scope is broad.

Liability for the tort of C

In this case, DG would argue that C was not acting within the scope of the employment. Certainly, DG would not authorize its employees to commit intentional torts, such as false imprisonment, against its customers.

However, the mere fact that DG did [not] authorize this action will not get it off the hook. All P would have to show to hold DG liable for C's act is that C was acting in the interests of the employee. It is clear that C held P only because he thought P had stolen something from DG. Therefore, C was acting to held [sic] the employer. This is going to be consider[e]d within the scope of employment, even though it was not specifically authorized. Therefore, is [sic] C is going to

be liable, so too will DG. P should also point out that C was on the clock and was at the place of employment when the tort occur[r]ed, strengthening the argument that this is within the scope.

Liability for the tort of M

The same rules will apply to determine if DG is liable for the torts of M. M's tort occurred when he was running the engine of his personal truck in the back room of the garage. Nothing indicates that M was on the clock at this time. Also, nothing indicates that M was doing this with any intention of helping employer. Rather, it appears he was doing this only for himself. Therefore, it is unlikely that DG will be liable for the act of M.

The best argument P could make to hold DG liable would be the close proximity of M to the place of employment. However, this probably will not overcome the facts that he was not on the clock and was not acting to benefit the employer.

Independent contractors?

If for some reason C and M are ICs and not employees, then a different standard would apply. Employers of ICs are generally not liable for the torts of ICs. However, they are liable if the tort involves a non-delegable duty, such as the duty of care owed to an invitee. In this case, P would be an invitee of the business, so he would be owed a very high standard of care. The employer would be charged with warning him of any latent dangers that the employer knows or should have known about. Clearly, carbon monoxide is a latent danger, since it is one that is not immediately apparent and cannot be seen. Also, P would argue that the defendants should be charged with knowing when there are gas leaks in the store. It would not matter that they did not have actual knowledge. The standard is that they should have known. Failing to warn of the latent danger would therefore be a breach, and DG would be liable for the torts of

M and C, even if they are construed as independent contractors and not employees.

Q2 Constitution

In an effort to “clean up Columbia County,” the County Board of Supervisors recently passed an ordinance, providing as follows:

> “(1) A Review Panel is hereby established to review all sexually graphic material prior to sale by any person or entity in Columbia County.
> (2) Subject to subsection (3), no person or entity in Columbia County may sell any sexually graphic material.
> (3) A person or entity in Columbia County may sell an item of sexually graphic material if (a) the person or entity first submits the item to the Review Panel and (b) the Review Panel, in the exercise of its sole discretion, determines that the item is not pornographic.
> (4) Any person or entity in Columbia County that fails to comply with subsection (2) or (3) is guilty of a misdemeanor, and is punishable by incarceration in jail for one year or by imposition of a $5,000 fine, or by both.”

Videorama, Inc., a local video store, has brought an action claiming that the ordinance violates the First Amendment to the United States Constitution.

What arguments may Videorama, Inc. reasonably make in support of its claim, and is it likely to succeed? Discuss.

Answer A

The First Amendment protects the freedom of speech. It is imputed to the states through the Fourteenth Amendment.

Facial Attacks

Prior Restraint

Under the 1st Amendment, speech cannot be enjoined before it occurs. With regard to licenses & review panels, which determine whether speech should be allowed befor[e] it occurs, they may be valid under certain circumstances. They do not violate the 1st Amendment when they: 1) are based on definite criteria and are not left up to the discretion of certain persons; and (2) are appealable.

Here, the statute mandates that sexual material may only be sold if it is first submitted to the panel and the panel, in its sole discretion, determines the item is not pornographic. As indicated above, submission to a panel itself is not unconstitutional.

Howeve[r], the "sole discretion" of the panel is problematic. Sole discretion allows the panel to prohibit speech it does not like. It may even prohibit speech that it finds acceptable, but due to the person or business attempting to disseminate the material, deny it on those grounds. This discretionary review is inequitable and risks the danger of chilling speech. Because ther[e] is no set criteria for the review & it is left to the discretion of the panel, the section is unconstitutional as a prior restraint[.]

In addition, the statute does not mention any procedural safeguard. A person who is denied permission to sell must be able to appeal the decision. Because of the statute's lack of appellate review procedure, it is unconstitutional as a prior restraint.

Overbroad

A law is overbroad under the 1st Amendment when it prohibits more speech than is constitutionally allowed. Here, the statute prohibits "sexually graphic material." This would prohibit not only obscene material (which is unprotected & can constitutionally be prohibited – see below), but also the majority of R[-]rated movies which are released. Such R[-]rated movies may be sexually explicit at times, but they are protected under free speech. Therefore, the statute regulates too much & is unconstitutionally overbroad.

Vagueness

A law is vague under the 1st Amendment when one cannot tell which speech is prohibited & which is allowed. The speech prohibited under the statute – "sexually graphic material" – is unclear because you cannot tell what is allowed & what is not. For example, are nude

scenes in art films allowed? Nude scenes in pornographic films? A passage in a classic novel where the protagonist kisses his wife befor[e] going off to battle? Due to the vagueness of the statutory standard, it is impossible to discern which speech is allowed & what is prohibited. Therefor[e], the statute is likely to be found unconstitutionally vague.

Regulation of Speech

Content[-]Based Regulations

Again, the 1st Amendment protects the freedom of speech. Regulations based on the content of the speech – either its subject matter or its viewpoint – are subject to the highest standard of review, strict scrutiny. The content-based regulation must be necessary to achieve a compelling state interest, and must use the least restrictive means.

However, some content-based regulations concern unprotected speech and need not meet strict scrutiny.

Obscenity

Obscenity is a form of unprotected speech. It can be regulated, based on content, without meeting strict scrutiny.

There is a three-part test to determine whether material is obscene: 1) it appeals to the prurient interests of people in the community; 2) it is patently offensive to people in the community; and 3) based on a national standard, it lacks any redeeming artistic, literary, or scientific value.

Here, the statute may regulate obscenity without meeting the strict scrutiny test. The provision prohibiting the sale of "sexually graphic material" may be valid if "sexually graphic material" is defined as limited to obscene material as set forth above.

Profane & Indecent Speech

However, if the statute extends to all sexually graphic material, not merely the "obscene", the statute may be unconstitutional.

Under the 1st Amendment, profane & indecent speech is fully protected (with the exception of such speech disseminated on free broadcast media [like radio] & schools). Therefore, any content-based regulation is subject to strict scrutiny.

Here, the statute is regulating "sexually graphic material". This is a content-based regulation because it deals with the content[,] or subject matter, of the speech. Therefore, it must be necessary to achieve a compelling statute interest & use the least restrictive means.

Compelling State Interest

Generally, when indecent speech is involved, the interest is in protecting children from sexual material. This is of the utmost importance in providing a safe & moral environment in which to grow up. Therefor[e] it most likely qualifies as a compelling state interest. Note: merely regulating the morals of the community is not compelling.

Necessary & Least Restrictive Means

A law is necessary when it provides the only way to achieve the compelling state interest. Here, ther[e] are other ways to prevent the dissemination of indecent sexual material to children. For instance, the statute can limit the sale of sexual material to those over the age of 18. Or, a regulation can validly control the zoning & location of shops which sell sexual material so they are not near schools.

Therefor[e], because there are other options to achieve the compelling interest, least restrictive means have not been used. The law fails strict scrutiny and is therefore an unconstitutional violation of the 1st Amendment.

Punishment

The final issue is whether the provision of the statute which authorizes imprisonment and/or fines for the violation of the statute is valid.

First, for this provision to be valid, the substantive portions of the statute must be valid. Because the statute is unconstitutional as a prior restraint, overbroad & vague & does not meet strict scrutiny (unless the statute is limited to “obscene” material), the punishment clause is invalid.

However, the punishment clause raises the issue of compliance.

Collateral Bar Rule

The collateral bar rule applies when a person violates a statute. The rule states that if a person does not comply with a statute, the person cannot use the unconstitutionality of the statute as a defense in a criminal contempt proceeding. Therefor[e], even though the statute at issue is likely unconstitutional, a violation of the statute could result in punishment for contempt.

Thus, the best option is to comply with the statute for the time being, while appealing the decision of the panel and/or challenging the constitutional validity of the statute in court.

Answer B

Videorama v. Columbia County

State Action

To bring a First Amendment claim, the plaintiff must assert state action, because the First Amendment only applies to the government, not private action. State action is present here because the ordinance was passed by the Columbia County Board of Supervisors, an instrument of the local government.

First Amendment Freedom of Speech

The First Amendment, applicable to the states through the 14th Amendment, provides that no government shall interfere with the right to free speech.

The Columbia County ordinance interferes with the right to free speech because it restricts the ability of video stores and individuals to sell, and correspondingly to buy, sexually graphic material. The ordinance imposes monetary fines and imprisonment for violation. Thus, the ordinance must be scrutinized under the First Amendment.

Overbroad

A statute may violate the First Amendment if it is overbroad. A statute is overbroad if it restricts protected speech as well as unprotected speech. Even if some of the speech restricted is not protected by the First Amendment, the statute will fail if it also draws unprotected speech.

In this case, the ordinance restricts both protected and unprotected speech. Obscene speech is a category of unprotected speech, and enjoys no protection at all under the First

Amendment. Obscenity is speech that (1) appeals to the prurient interest, as defined by a local standard, (2) is patently offensive, as defined by local law, and (3) lacks serious scientific literary, artistic, or political value, as defined by a national standard.

Some of the speech restricted by the Columbia County ordinance may be obscene speech. The ordinance targets sexually graphic material, and obscene speech is probably included in that category. The obscene material restricted by this statute presents a First Amendment problem.

However, the problem is that the ordinance restricts a broader category of speech, including some speech that is protected speech. Sexually graphic material that has serious scientific, literary, artistic, or political value is not obscenity and therefore is protected speech. The ordinance does not adopt the three part obscenity test, or make an exception for material that has serious value. Therefore, the statute is overbroad.

Unfettered Discretion

The First Amendment is also violated where an official is given complete discretion on whether to allow or prohibit speech. Requiring an individual or entity to obtain a license or authorization to engage in certain speech, before engaging in the speech, is a prior restraint. Prior restraints are disfavored because they quell speech before it is even uttered. However, a licensing scheme, even though a prior restraint, can be constitutional if (i) no official has complete discretion over whether to grant a license, (2) specific, articulated standards are used to grant the licenses, and (3) judicial review or some other appellate process is available as a check.

The ordinance fails this test because it gives “sole discretion” to the Review Panel. The statute does not provide any standards whatsoever that the Panel should use to evaluate requests. The only standard given is that “sexually graphic material” may be prohibited by

the Panel. That is not a standard at all, because it does not articulate the factors the Panel will use to decide requests to sell such material.

Moreover, the ordinance requires potential vendors to get authorization from the Panel before selling any sexually graphic material. Thus, the ordinance is a suspect prior restraint. Without the procedural safeguards listed above – no sole discretion, articulated standards, and appellate review – the ordinance's authorization scheme is an invalid prior restraint.

The statute gives no indication of any type of appellate review of the Panel's decisions. The Panel has "sole" and apparently final discretion. This kind of unchecked power over free speech violates the First Amendment.

Vague

The First Amendment also requires that laws restricting speech not be overly vague. A vague law is one that does not give fair notice of what speech it prohibits and what it allows. As such, it will deter protected speech, speech that is not meant to be restricted by the law, because people will fear that such speech is in fact prohibited.

The ordinance here is vague because it gives vendors no fair warning about what kind of material is "sexually graphic" and what is "not pornographic." As stated above, the ordinance provides no standards or factors or definitions that enable anyone to determine what exactly is prohibited. Instead, only the Panel knows what is prohibited, and only after they have reviewed the material and decided that it is or is not sexually graphic.

Since material is not clearly "sexually graphic" until the Panel decides that it is, the ordinance does not enable individuals to predict their own liability. They cannot predict ahead of time whether selling certain material will violate the ordinance or not. Since

violation could lead to both a hefty fine and imprisonment, people will err on the side of restricting their own speech to make sure they are not in violation.

As a result, video stores, magazine stores, and often individuals and entities that sell graphic material will all have to censor themselves until they obtain Panel approval. Moreover, Panel approval is required for each individual item, not for each vendor, so the self [-] censorship will be ongoing.

Because the ordinance will end up restricting protected speech, since it does not give fair warning of what is prohibited, it is unconstitutionally vague.

Content-based Restriction

A content [-] based restriction on speech is one that restricts speech according to what is being said or depicted or expressed, instead of according to the manner of the speech, or its time or place. Content-neutral time, place, and manner restrictions need only pass intermediate scrutiny to be constitutional. However, content-based restrictions must pass strict scrutinity.

The ordinance here is content [-] based because it restricts speech according to what it depicts – sexually graphic material. Although it does regulate the manner in which this speech can be sold, that does not make it a time/place/manner restriction. Because the restriction or the manner of sale only applies to sexually graphic material, the ordinance is targeting certain content. Therefore, it must pass strict scrutiny.

Strict Scrutiny

For a content-based law to pass under the First Amendment, it must be necessary to achieve a compelling state interest. The government has the

burden of proving that it passes this test.

Compelling State Interest

Columbia County's purpose in enacting this ordinance is to "clean up Columbia County." Presumably this means to regulate the distribution of sexually explicit material in order to have a more civil, professional, family-friendly atmosphere. The County may have had problems with children being exposed to sexually graphic material in stores or on the streets. The County may be concerned that an excess of such material may deter new residents, cause businesses to leave, harm young children, and even hurt Columbia's tourist industry. All of these concerns are valid state interests, and probably rise to the level of compelling. Assuming Columbia can prove that it has a compelling interest, it will next have to show that the ordinance is necessary to achieving those interests.

Necessary to Achieve That Interest

This requirement is more than just narrow tailoring. It actually requires that the law be the least restrictive means available for achieving the state's interests. If less restrictive alternatives are available, the state must pursue those alternatives first.

Columbia County will not be able to show that its ordinance is the least restrictive means for protecting children, cleaning up the town's image, and preserving its business and tourist industries. These interests could be accomplished by the use of content-neutral time [,] place and manner restrictions, such as requiring people to keep the material they are selling off of the streets, indoors, during normal business hours. Then children walking on the sidewalk would not necessarily run into sexually graphic material. The County could also require stores that sell such material to post warnings at the front door or window, to announce to customers that such material is sold inside. This would be a less restrictive

ban, although still content [-] based, because it would allow stores to sell such material without pre-approval from a Panel. It would also accomplish the County's goals by enabling residents to avoid that material if they want.

The County could also use zoning laws to regulate where adult-themed book and movie stores can operate. The Supreme Court has upheld the use of zoning in this way to control the secondary effects of such businesses. Zoning would be less restrictive than Columbia's current ordinance because it would not ban all sales or require pre-approval by a Panel. It would still allow Columbia to "clean-up" by regulating where such businesses can operate, and keeping other areas of the County free of them.

Because less restrictive alternatives are available, the ordinance will fail strict scrutiny, and Videorama will win its suit against Columbia.

Q3 Contracts

On Monday, Resi-Clean (RC) advertised its house cleaning services by hanging paper handbills on doorknobs in residential areas. The handbills listed the services available, gave RC's address and phone number, and contained a coupon that stated, "This coupon is worth $20 off the price if you call within 24 hours and order a top-to-bottom house-cleaning for $500."

Maria, a homeowner, responding to the handbill, phoned RC on the same day, spoke to a manager, and said she wanted a top-to-bottom house cleaning as described in the handbill. Maria said, "I assume that means $480 because of your $20-off coupon, right?" The RC manager said, "That's right. We can be at your house on Friday." Maria said, "Great! Just give me a call before your crew comes so I can be sure to have someone let you in."

Within minutes after the phone conversation ended, the RC manager deposited in the mail a "Confirmation of Order" form to Maria. The form stated, "We hereby confirm your top-to-bottom house cleaning for $500. Our crew will arrive at your house before noon on Friday. You agree to give at least 48 hours advance notice of any cancellation. If you fail to give 48 hours notice, you agree to pay the full contract price of $500."

About an hour later, Maria sent RC an e-mail, which RC received, stating, "I just want to explain that it's important that your cleaning crew do a good job because my house is up for sale and I want it to look exceptionally good."

On Thursday evening before RC's cleaning crew was to show up, Maria accepted an offer for the sale of her house. The next morning, Friday, at 10:00 a.m., Maria sent RC another e-mail stating, "No need to send your crew. I sold my house last night, and I no longer need your services." By that time, however, RC's crew was en route to Maria's house.

At 10:30 a.m. on Friday, Maria received RC's Confirmation of Order form in the mail. At 11:00 a.m., RC's crew arrived, prepared to clean Maria's house. Maria explained that she no longer needed to have the house cleaned and sent the crew away.

RC's loss of profit was $100, but RC billed Maria for $500.

Maria refused to pay.

Has Maria breached a contract with RC, and, if so, how much, if anything, does Maria owe RC? Discuss.

Answer A

3)

Applicable Law

The common law applies to all sales of service contracts and the UCC applies to sale of goods. Here, the contract is for cleaning services (a service) so that it clearly falls within the ambit of the common law. As such, none of the rules under the UCC will be applicable.

Valid Contract Formed

Before addressing whether Maria breached her contract with Resi-Clean ("RC"), it must first be determined whether she had a valid contract to begin with. A valid contract requires: (1) an offer; (2) an acceptance of the aforementioned offer; (3) consideration from each party; and (4) no defenses to formation. Each will be discussed below.

Offer

For an offer to be valid there must be an intent to be bound, communicated to the offeree, with sufficient and definite material terms. Here, there are several points at which the parties may argue an offer was made. Whether or not a valid offer is made (i.e. whether above factors are met) is determined by looking at whether a reasonable person receiving the communication would feel that their acceptance of the offer would create a binding obligation.

First, it may be argued that the handbills placed on the doorknobs of the houses created an offer from RC to all of the houses. However, this argument is likely to fail. An advertisement that merely states the cost of services, a phone number, and possible coupons would not be construed by a reasonable person to evidence the intent of advertising to be bound to a contract upon acceptance.

Thus, this would not likely be construed as a valid offer. However, a court may accept an argument by Maria that the coupon attached that specified that the party would get $20 off if they called within 24 hours and ordered a top-to-bottom cleaning was a valid offer because it was specific with the terms of how it could be accepted, when it had to be accepted by, and a reasonable person would feel that the party giving the coupon would be bound by the offer. The effect of the binding effect of the coupon will be discussed further with respec[t] to the damages that Maria receives below.

A second possibility for the offer could be the phone call that Maria made to RC to order to the top-to-bottom cleaning service. She requested that they come and clean her house, as described on the handbill, and specified the $480 price ($500 less the $20 coupon). This would be construed by a reasonable person in RC's shoes to be [an] offer than [sic]

they could accept to form a binding contract so that it likely would be deemed to be an offer. Moreover, even if this offer was deemed rejected by RC's manager indicating that "they would be there Friday" because this was an additional term, that statement would be an [sic] counteroffer to Maria on the same terms but including the Friday cleaning provision.

If, for some reason, the court determines that the above was not an offer, then the confirmation order may also be deemed to be an offer to Maria. Thus, Maria would be free to accept that order at any point after receiving it. This is very unlikely to be the case, however, as Maria's phone call would almost certainly be construed to be the offer in this case.

Acceptance

A valid acceptance requires that a party who is able to accept the contract unequivocally accepts the offer and communicates that acceptance to the offeror. Of course, if and when a valid acceptance occurred would depend on when the offer occurred. Because the advertisement described above was not an offer (except to the extent of the coupon which was incorporated into Maria's offer) it will not be discussed here with respect to acceptance.

Assuming that Maria's phone call is deemed to be the offer then RC likely accepted the offer when its manager stated "[t]hat's right. We can be at your house on Friday." While Maria may argue that the statement "we can be at your house on Friday" was an additional term that did not create a valid contract but, rather, was a rejection and counteroffer, this argument would have little effect given that Maria promptly said "Great[,]" thereby accepting the counteroffer with the additional Friday term. Maria may also argue that by telling them to call her before they come [sic] so that someone is there to let them in she did not unequivocally accept their offer. However, this statement was not intended to modify the terms of the contract but, rather, just told [sic] them that they should call in advance to ensure someone would be home. Whether or not this amounted to a condition precedent will be discussed below. Thus, Maria's offer was accepted by RC (or Maria accepted RC's counteroffer on the same terms with the Friday provision) upon their phone call and a binding contract was completed at the time.

If the phone call was not deemed to be a valid offer so that the offer was the confirmatory memo, then Maria did not accept it and there would be no valid contract. Maria only received the memo on Friday morning and from that point on tried to send RC away. Thus, there would be no acceptance. However, this argument would be unlikely given that they almost certainly formed a valid contract during the phone call as described above.

Consideration

Here, Maria agreed to pay RC $480 and they agreed to clean her house from top-to-

bottom. This exchange of promises provides the required bargained[-]for exchange and legal detriment to each party for there to be valid consideration.

Thus, this element is met.

Defenses

Statute of Frauds

The Statue of Frauds does not apply to services contracts that will be completed in less than one year. Here, the contract was to be completed in its entirety by Friday so that the statute of frauds was inapplicable.

As no other defenses are applicable, a valid contract was likely formed at the time of the phone conversation between Maria and the manager of RC.

Terms of the Contract Formed

Once it is determined that a valid contract was formed between the parties, the next step is determin[in]g the terms of that contract. In this case, Maria called RC and stated that she wanted a "top-to-bottom" house cleaning "as described in the handbill." Moreover, she indicated (and the manager of RC agreed) that the price would be $480 once the coupon from the handbill was taken into consideration. The contract likely also contains the provision that RC will complete the work on Friday as that was agreed upon by the parties during the course of the phone conversation. Thus, the contract will certainly be for a top-to-bottom house cleaning at Maria's house on Friday for $480.

A question exists as to whether Maria's statement that they had to call her before their crew comes in order to be sure that someone was there to let them in. It is unlikely that this would become part of the contract given that the parties had already agreed on the contract before Maria made that statement. Moreover, the statement does not affect the performance of the obligation but was merely intended to ensure that the contract would move forward with no hassles. Thus, this is not likely to be considered part of the contract.

The provision in the "Confirmation of Order" memo sent by RC also does not likely become part of the contract. The contract was completed over the telephone and RC may not unilaterally make modifications to that contract (i.e. the 48 hour notice provision) without additional consideration provided by the other party. Here, RC gave no additional consideration to Maria for requiring the 48 hour notice provision). This does not mean, however, that Maria was free to cancel the contract at will[;] because the contract became enforceable over the phone, she is bound by the contract unless she has some excuse or defense to its enforcement or unless she is for some reason relieved of her duties under the contract.

Finally, for the same reasons as the 48-hour provision above, Maria's subsequent e-mail regarding the "exceptionally good job" would not become part of the contract. There was no additional consideration for the this [sic] provision and to require RC to do an "exceptionally good job" would deprive them of the benefit of the bargain their [sic] received when they negotiated for the $480 price. Thus, this would not become part of the bargain and RC would be required to do a reasonable job in good faith.

Thus, the contract was for a full house cleaning on Friday for $480 and it did not include the 48-hour notification provision or the "exception[al] job" provision.

Did Maria Breach or Does She Have Any Excuses/Defenses For Her Breach?

Because a valid and enforceable contract existed, Maria is liable to RC if she breached the contracted [sic] as [she] is not excused from performance.

Maria's Breach

Under the terms of the contract, Maria was required to pay RC $480 and allow them into her house in order to complete the cleaning to which she agreed. Here, rather than allowing RC to come and clean her house, she sent them an e-mail at 10 a.m. on the morning of performance indicating that she was repudiating the contract and, when they showed up to perform, she turned their workers away. Thus, Maria anticipatorily repudiated the contract which would allow RC to: (1) treat it as an offer to rescind the contract and rescind; (2) treat the contract as materially breached and sue for damages immediately; (3) suspend their performance and sue once the contract becomes due; or (4) do nothing and encourage performance.

Here, Maria breached the contract the morning of performance so that suspending their performance or encouraging Maria's performance would be infeasible. Moreover, RC would not want to rescind the contract because that is exactly what Maria wanted to do and it would cost them $100 in lost profits. Thus, RC would treat the contract as materially breached and Maria would be liable for damages unless she had a valid excuse for her breach.

Possible Defense/Excuses of Performance

Condition Precedent Not Met

Maria may argue that she had a valid excuse for not performing because in the course of their telephone call she indicated that the crew should call her before they come so that someone may be there. However, this argument would fail for a few reasons. First, as I indicated above, the provision that they call on Friday before they come was not likely part of the contract because they had already agreed on the terms of the agreement at that point and Maria's statement was only intended to make sure she could make arrangement

to let them into her house. Second, the purpose of the covenant was not breached because they showed up to clean her house when she was there (because she turned them away). Third, she repudiated the contract before they could make the phone call by sending them her repudiating e-mail that morning so that they could treat the contract as breached immediately without adhering to the condition precedent. Thus, this argument would fail to excuse Maria's material breach.

House sold (Impossibility, Impracticability, Frustration of Purpose)

Maria may also a[r]gue that the fact that she no longer owned the house at the time the contract came due excused her performance by way of: (1) impossibility; (2) impracticability; or (3) frustration of purpose. As will be shown below, all of these arguments would fail.

Impossibility - For performance to be excused by way of impossibility an unforeseeable and supervening event must render performance impossible for any person to perform. Here, Maria's sale of her house was not unforeseeable because she knew that [she] was trying to sell her house and it was not a supervening outside factor because it was entirely within Maria's control. Moreover, it was still possible for RC to complete performance – it just would not be as valuable to Maria now that she no longer owned the home that she contracted with them to clean. Thus, this argument would fail.

Impracticability - For performance to be excused by way of impracticability an unforeseeable and supervening event must render performance by one party inordinately difficult so as to create an injustice if the contract was enforced. Here, as noted immediately above, Maria controlled the event and it was foreseeable so this did not excuse her performance. Morever, paying $480 to have a house that you have just sold cleaned does not seem unduly difficult on Maria. Thus, this defense would fail as well.

Frustration of Purpose - For performance to be excused by way of frustration of purpose an unforeseeable and supervening event must intervene to render the entire purpose of the contract – known by both parties to the contract at the time the contract was formed – a nullity. Like the two arguments above, this would fail because the supervening event was in Maria's control and was entirely foreseeable so that Maria assumed the risk that her house would be sold by Friday. Moreover, at the time the contract was formed RC had no idea that she was selling her house so that the purpose was to fix the house up for its sale. Thus, the fact that this purpose was frustrated would not excuse Maria's performance because RC had no idea of that purpose at the time the the [sic] contract was formed.

Potential Damages that Maria Owes RC For Her Breach

In a contracts case where one party materially breaches the other party is entitled to damages to compensate them for their expectancy under the contract. They may also receive consequential and incidental damages as appropriate. However punitive damages

are typically unavailable in contract actions.

Expectancy Damages

For expectancy damages to be provided to a party they must be causal, foreseeable, certain, and unavoidable. In this case, providing RC with the full $500 for Maria's breach as is claimed in their bill to Maria would unjustly enrich them given that they only lost $100 in profit as a result of her breach. Their expectancy under the contract was to make $100 in profit so they should be entitled to the $100 from Maria. Note, however, that the "loss of profit" provided in the facts does not indicate whether this includes the $20 coupon or not[;] it it[sic] does not then [sic] they should only get $80 because their expectancy was only $80 profit but if it does then they should get the full $100. This $100 is causal because they lost the money as a result of her breach, certain because they clean places like this all the time and can likely show what they typically make, and foreseeable because Maria knew that by breaching they would not be able to find another customer right away. So long as RC made reasonable efforts to find another house to clean to make up for the lost profits so as to mitigate their damages the damages would also be unavoidable. Thus, RC would be able to recover their $100 (or $80) of expectancy damages.

Consequential Damages

Consequential damages are those damages that are causal, foreseeable, certain, and unavoidable but that do not stem directly from the breach. There is no evidence of such damages in this question.

Incidental Damages

In the course of finding a new customer to mitigate their damages if RC was forced to expend resources, they would be entitled to those reasonable costs as incidental damages. There is no evidence of such damages here.

Specific Performance

Here, because the $100 (or $80) lost profit damages are adequate to compensate RC for its losses, specific performance (i.e. by forcing Maria to allow them to complete the contract) would be unavailable.

Thus, RC would be entitled to $100 (or $80 if the $100 lost profit does not take the coupon into account because the coupon was enforceable as described above) for their lost profits as a result of the contract so long as they took adequate reasonable steps to mitigate their

losses.

Answer B

Maria v. Resi Clean

1. Applicable Law: The transaction between Maria and RC involved the purchase and sale of services. Accordingly, even though RC may have used tangible items (detergent, etc.) while performing services, the predominant aspect of the transaction involved services. Thus the common law (not the U.C.C.) controls.

2. The handbill constitutes an Offer: Many advertisements are merely invitations to negotiate. Here, under the objective theory of contract formation, the handbill would induce a reasonable person to conclude that RC had manifested an intention to perform the services at the stated price if Maria called "within 24 hours." By giving Maria the power to accept the offer with[in] 24 hours by calling, the handbill was not merely an invitation to negotiate – at least not with respect to a "top-to-bottom housecleaning." If someone had called with respect to some other service or bundle of services, the handbill might not be deemed an offer. Here, RC gave Maria the power of acceptance.

3.Maria's acceptance was a mirror image of the offer. First, Maria noted that she wanted a top-to-bottom cleaning as offered in the coupon. Accordingly, the subject matter of the offer and the acceptance was the same. Second, Maria did not attempt to negotiate or make a counterproposal that would have served as a rejection. Her request for clarification did not reject the offer. Having received clarification, her utterance "Great!" was an objective manifestation of her willingness to be bound to the terms of the offer, including the time for performance.

4.The Offer and Acceptance Created a Contract:
4.A. Consideration
Upon Maria's acceptance, both Maria and RC suffered a legal detriment. Both had exchanged promises to do something they were not otherwise legally obligated to do.

4.B. Essential Terms
Maria and RC agreed to all essential terms. RC agreed to perform a top-to-bottom cleaning consistent with the standards in its handbill. Maria agreed to pay $480 upon completion of the service. Although performance of the services within a reasonable time would have been a concurrent condition, RC agreed to perform the services on Friday and Maria agreed. RC's obligation to perform the services prior to payment would be a concurrent condition, filling in any gap concerning order of performance. All essential terms were established even though the term "top-to-bottom housecleaning" was not defined with specificity.

4.C. No writing required: A contract to perform $480 of services on Friday is not covered by any aspect of the statute of frauds. The oral agreement is enforceable without a writing.

5. There were no valid modifications to the Contract[.]
5.A. RC's confirmatory memorandum stated one inconsistent term and one additional term. Neither would be incorporated into the contract; both would be a unilateral attempt to modify the contract. Maria did not agree to the higher price, and she did not agree to the cancellation terms. Because the UCC does not apply, the consistent additional term between a merchant and consumer does not become part of the contract. Likewise, the inconsistent term regarding price is merely an offer for a modification that Maria did not accept. Maria had no duty to make a reasonable objection to the letter. She may have, but was not required to, request assurances of performances.

5.B. Maria's e[-]mail did not modify the contract. Maria's statement of the importance to her of RC's crew doing a good job does not alter, or purport to alter, RC's obligation to perform or her obligation to pay. Had RC performed, Maria would not have been justified in refusing to pay unless she was satisfied that RC did an exceptionally good job. Nor did it create an agreement about a basic assumption of the K.

6. Maria's cancellation was not excused: Maria will argue that the sale of her house on Thursday gave rise to a frustration of purpose. That "purpose", however, was not known to RC when the contract was formed. (Nor was it expressed as a condition: "I will pay you to clean my house if services are rendered before I sell it".) Maria's undisclosed purpose was not a basic assumption of the contract known to both parties. Further, a clean house between sale and closing is still valuable. Although under the UETA, Maria's e[-]mail is a proper mode of communication, it occurred after formation and does not relate back to formation.

7. Maria cancelled the contract after RC commenced performance. Although, as stated above, Maria did not accept RC's cancellation clause, Maria would still have the power, although not the right, to cancel before RC tendered performance. By dispatching the crew in accordance with the contract (i.e., before noon), RC commenced performance. [That would be a form of acceptance, were that needed.] Accordingly, Maria sent the crew away after RC partially performed.

8.Maria's cancellation excused RC's performance. Maria cannot defend her refusal to pay on the grounds that RC never performed. RC's performance was discharged by her breach.

9.Maria is liable to RC for damages caused by her breach: Given the late cancellation RC had no opportunity to mitigiate and thus sustained $100 in lost profits due to the breach.

RC would not be able to recover $480, the contract price[,] because it did not perform (although excused). It could only recover $100 plus incidental damages (cost of fuel, wages paid to the crew, supplies, etc.).

RC could not recover $500 because (a) Maria never agreed to the cancellation clause and

(b) $500 would be either an improper penalty or unjustified liquidated damages (in that the damages for lost profit would not be difficult to determine and $500 is not a reasonable amount).

Maria owes $100 plus incidental damages[.]

THURSDAY MORNING
JULY 27, 2006

California Bar Examination

Answer all three questions. Time allotted: three hours

Your answer should demonstrate your ability to analyze the facts in question, to tell the difference between material and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

Q4 Business Associations

Beth, Charles, and David are the directors of Web, Inc. (Web), a corporation that is in the business of creating websites.

Adco, Inc. (Adco), a corporation that markets computer advertising, had an urgent need for a complex website that would cost thousands of dollars to create. Adco approached Web about creating the website. Adco explained that it did not have the cash to pay for the work but claimed that it was a well-established corporation and asked Web to extend credit for the work.

Beth, Charles, and David unanimously agreed to take on the work, conditioned upon a prior review of Adco's financial statements and a determination of Adco's credit- worthiness. After learning this, Adco contacted David and told him that the sooner Web could start on the website, the sooner Adco would be able to pay Web.

David was anxious to obtain Adco's business. He falsely told Beth and Charles that he had obtained and reviewed Adco's financial statements and that, based on his review, "we should proceed with the work." Beth and Charles, without further inquiry, agreed, and Web created the costly website. Adco is unable to pay Web.

Beth, Charles, and David have now learned that Adco's shareholders have regularly taken its funds for their personal use.

In an unrelated transaction, Charles received a call from his friend Sam who wanted Web to create a new game website. Charles told Sam that the new game website was such a small job that he could do it at home for less money than Web.

Charles told Sam to send the payment for the game website to Charles at his home. Sam was pleased with the work and sent the check to Charles as requested. Shortly afterwards, Beth and David learned of this transaction.

1. What duties to Web, if any, have been breached by Beth, Charles, and David regarding the money lost on the Adco job? Discuss.

2. What rights, if any, does Web have against Adco's shareholders for Adco's failure to pay for the website? Discuss.

3. What rights, if any, does Web have against Charles regarding the contract with Sam? Discuss.

Answer A

4)

1. Directors' Breach Regarding the Adco Job

Duty of Care:

Since corporate directors have a fiduciary duty to the corporation, directors of a corporation owe the corporation a duty of care. The duty of care requires that the directors act with good faith and the degree of care which a prudent person would proceed with in regard to his own business,

Here Adco asked that Web perform complex work that would cost thousands of dollars to create on credit. Adco claimed to be a well-established corporation, but the directors had a duty to investigate Adco's financial situation to determine whether it was safe and in the Web's best interest to extend credit for the work. Beth, Charles and David all agreed to take the work conditioned upon a prior review of Adco's financial statements. Their decision to review was correct, but they did not adequately follow through with it.

David, anxious to obtain Adco's business, decided to proceed with the work. This decision violated David's duty of care. David should have conducted a reasonable inspection of the financial records and then reasonably determined whether it was in the corporation's best interests to extend the credit. Instead, David made an uninformed decision. Further, David acted in bad faith by misrepresenting to the other directors that he reviewed the financial statements and made his determination to proceed based on information he obtained from them. Therefore, David clearly breached his duty of care to Web.

Charles and Beth relied on David's decision without inquiring further as to what was found in the financial reports. They will likely claim that the[y] reasonably relied on David's statements in making their decision and should, therefore, not be liable. However, Charles and Beth cannot completely delegate their responsibility to the corporation and should have at least inquired further about what David based his decision on. Because Beth and Charles blindly followed David's conclusory statement, they too violated their duty of care to the corporation.

Business Judgment Rule:

Directors may be protected under the business judgement rule. Courts will not second guess a business judgment if, at the time it was made, it was informed, reasonable (based on sound business judgment), and made in good faith. Directors will still be liable for decisions which are grossly negligent or reckless.

This will certainly not serve as a defense for David, who was not informed when making

his decision and acted in bad faith by lying to the other directors about having obtained and reviewed Adco's financial statements. Beth and Charles have a better chance to succeed with this defense since they did not act in bad faith and will claim that their reliance on Charles' decision was reasonable. However, it is likely that their decision to proceed in such a risky, costly and extensive project without any independent investigation or at least further inquiry was probably not sufficiently reasonable or informed under the circumstances. Therefore, they should not be able to be protected from liability from their breach by the business judgment rule.

2. Web's Rights Against Adco's Shareholders

General Rule Regarding Shareholder Liability

Generally, shareholders are not liable for the debts and liabilities of the corporation. One of the main benefits of the corporate form is that it provides limited liability; protecting shareholders from personal liability caused by corporate loss. This benefits the economy, because more risks are likely to be taken.

Piercing the Corporate Veil

Despite the general rule, courts may decide to pierce the corporate (PCV) veil and hold shareholders personally liable if there appears to be fraud or bad faith. Courts will often PCV if (1) the corporation is actually just an alter ago of the shareholders, or (2) the corporation was inadequately capitalized at its inception.

A corporation will be found to be the alter ego of its shareholders when there is serious lack of corporate formalities. If, for example, shareholder commingle corporate funds with personal funds, use corporate funds for any personal benefit, that would be grounds to PCV. Also, if meetings are not held or decisions are consistently made without meeting or voting, that may constitute grounds to PCV. Courts are generally more willing to PCV for the benefit of tort creditors than contract creditors, since contract creditors presumably had the opportunity to investigate and make an informed decision about whether to enter into the contract.

Here, it was determined that Adco's shareholders have regularly taken its funds for their personal use. This would constitute violating the corporate form and creates grounds to PCV. Web can successfully argue that Adco's shareholders are using the corporate form in bad faith to commit fraud use[,] then use the corporation as a shield from personally [sic] liability. It can argue that since Adco is operating as an alter ego and [sic] therefore, its shareholders should be held personally liable for Adco's liabilities. However, since Web voluntarily decided to enter into the contract and could have investigated before making their decision to assume the risk of doing business with Adco, they will have a higher burden. If Web can convince the court to PCV, it will be able to sue the shareholders of Adco personally to the debt owed.

3. Charles' Contract with Sam

Duty of Loyalty

Director has a fiduciary relationship with the corporation and has a duty of loyalty towards the corporation. The director must act in the corporation's best interests and not engage in any self dealing or receive personal gain at the corporation's expense. If a director comes across a situation which would breach his duty of loyalty, the director may cure the problem by disclosing it and getting approval by a majority of disinterested directors or disinterested shares.

Here, Charles did work that the corporation was entitled to and received personal profit from it. He therefore violated his duty of loyalty by acting in his own interest rather that [sic] the corporation's. If he really wanted to proceed with the work, he could tell the other disinterested directors about Sam's interest and see if a majority of disinterested directors or shares would decide that he could proceed to do the work on his own. In this case, he convinced Sam to allow him to do the work, received profit that the corporation could have had, and did so without proper disclosure and approval. Therefore, Charles breached his duty of loyalty to Web.

Usurping a Corporate Opportunity

A director should not usurp a corporate opportunity. A corporate opportunity is one which the corporation has a business interest or reasonable expectancy in. Something that is in the corporation's line of work/field will usually be deemed a corporate opportunity. If a director learns of a corporate opportunity in his capacity as director and wants benefit from it personally, he may be able to do so if he takes certain steps: (1) he must inform the corporation of the opportunity [and] (2) wait for the corporation to decline to take the opportunity.

Here, Web clearly had an interest in the job Sam was asking about. Sam wanted Web to create a new game website, which is exactly the kind of work Web does. As a business that creates websites, Web clearly has an expectancy interest in the work and would benefit (profit) from it. Charles usurped Web's legitimate right to the opportunity by convincing Sam that the job was small and that he could do it at home for less money than Web. Charles should have first disclosed the opportunity and waited to see if Web would have taken it. In this case, since the job is exactly in the line of work Web ordinarily conduct[s], Web would have likely taken the job. As a remedy, Web can recover any profit that Charles earns from performing the work for Sam.

<u>Charles's Defenses:</u>

Charles may argue that he learned of the corporate opportunity in his personal capacity,

from his friend, and not because of his position as director of Web. However, Sam called Charles asking for Web to create a new game website, not asking for Charles to do it personally. Therefore, Charles was being contacted in his professional capacity as director of the corporation, and will not succeed with this argument.

Answer B

4)

(1) Beth, Charles and David breach with regard to Web

As directors of Web, Inc., Beth[,] Charles[,] and David owe a Duty of Care to the corporation. In their dealings for Web they must behave as a reasonably prudent person would with regard to his personal finances. All three directors have breached this duty.

David

David has breached the duty of care by failing to properly investigate Adco's finances and by falsely reporting to the other directors that he had investigated Adco's finances and falsely indicating that Adco's creditworthiness was sufficient to allow Web to extend Adco credit for Web's work.

All three directors initially made a responsible decision to investigate the financial condition and creditworthiness of Adco before extending credit for the work Adco wanted Web to do. However, David did not act as a reasonably prudent person would when he subsequently failed to make this investigation and instead misrepresented to the other directors that he had made an investigation and that Web should proceed with the work. A reasonably prudent person would not have extended credit without making any investigation into the finances and creditworthiness of the person or company to whom they were extending credit. Furthermore, David's failure to make any investigation cause[d] damage to Web because Web created a costly website for Adco and will not be paid for this work. Therefore, David has breached his duty of care and will be liable to the corporation for the damage that he caused.

Finally, David's conduct cannot be saved by the business judgment rule because he did not act in good faith after a reasonable investigation of the facts. He made no investigation and had none of the relevant facts. Furthermore, he did not act in good faith when he lied about having made an investigation.

David also probably [sic]

Beth and Charles

Beth and Charles have also breached their duty of care owed to Web because they too agreed to extend credit to Adco without making any investigation of Adco's creditworthiness. Again, after initially making a reasonable and prudent decision to investigate they did not car[r]y through and instead agreed to extend credit without making any investigation. A reasonably prudent person would not behave in this manner. Furthermore, it was not reasonable them to rely on David's assertion that he had

investigated and come to the conclusion that Web should proceed. Although directors are allowed to rely on the reports of officers of committees of directors assigned to perform a certain role (as well as the reports of officers of the corporation, accountants[,] etc[.]) directors may not delegate all their duties to a committee and serve simply as a "rubber stamp" for the committee's decisions. A director may not delegate his duty to make independent decisions. Therefore, Beth and Charles should have insisted on seeing at least some further information about the financial health of Adco so that they could evaluate for themselves whether the decision to extend credit was a good decision. This is, at minimum, what a reasonably prudent person would do with regard to their own finances. Web suffered damage as a result of Beth and Charles['] breach, and therefore these directors are personally liable to Web for the loss they caused.

Finally, Beth and Charles cannot take shelter in the business judgment rule because they did not act in good faith after a reasonabl[e] investigation. They made no investigation and knew none of the relevant facts. Therefore, their decision was not within the business discretion protected by the business judgment rule.

(2) Web's rights against Adco's shareholders

A company must maintain corporate form and structure if the shareholder's personal assets are going to be protected by the corporate form. The shareholders may not use the corporate form fra[u]dulently - as simply a cloak for their personal business activities. Therefore, the shareholders may not intermingle corporate and personal assets or take the corporation[']s assets for their personal use. When shareholders behave in this way, a court may disregard or pierce the corporate veil to hold the shareholders personally liable if justice requires it.

Here, Adco's shareholders have been regularly taking its funds for their personal use. Usually, a court will not pierce the corporate veil simply because a corporation is unable to pay its debts. Undercapitalization when a company is formed is usually required for veil piercing. However, if the shareholders have made an extensive practice of draining the corporate assets for their personal benefit, then it will appear that they have been abusing the corporate form to shield their personal business transactions from creditors. This pattern of behavior will introduce the required element of fraud.

The shar[e]holders who took the corporate assets probably cannot claim that they were just receiving dividends. A company cannot pay out dividends if paying the dividends will cause it to become insolvent (unable to pay its bills when they come due). Therefore, the shareholders (who seem to control Adco) will not be allowed to make themselves dividend payments and then not pay Web.

Web can make a strong case that a court should pierce Adco's veil to reach the shareholder's assets to satisfy Adco's debt to Web. The court will be able to reach the assets of those shareholders who engaged in the improper behavior (although the

shareholders who did not take part in the misbehavior will not be liable).

Even if a corporation's shareholders have abused the corporate form, a court will not pierce the corporate veil unless justice requires it. Furthermore, a court is generally more willing to pierce the corporate veil in tort situations than in contract situations since tort victims usually do not cho[o]se to interact with the corporation. Because Web has been harmed by Adco's failure to pay its debts, Web can argue that the interest of justice require[s] holding the shareholders personally liable. However, because Web did not make an adequate investigation of Adco before doing work for them, it may be more difficult for Web to prevail. On the other hand, Web can try to argue that Adco intentionally and fraudulently misrepresented its financial health to Web (both by saying it was a "well-established corporation" and that "the sooner Web could start on the website, the sooner Adco would be able to pay"), and that this weighs in favor of piercing the veil even though Web did not take all possible precautions to protect itself.

Finally, if Adco is a close corporation and the shareholders who were siphoning money from Adco were the same people who participated in negotiations with Web and David, then Web may be able to make a claim against them personally for fraud. To do this Web would have to show intentional misrepresentation (of fact) with the intent to induce reliance by Web, which did induce reliance and reasonable reliance by Web. It is unlikely they can show reasonable reliance on misrepresentations of fact.

(3) Web's rights against Charles

Corporate directors owe a duty of loyalty to the corporation. They must reasonably believe that their actions are in the best interest of the corporation. A director violates the duty of loyalty when he usurps a corporate opportunity and takes it for himself. A corporate opportunity is one in which the corporation has a reasonable expectation or one that is in the business of the corporation. A director cannot excuse taking a corporate opportunity by showing that the corporation would not have been able to take the opportunity. Before a director may take advantage of any corporate opportunity he must disclose it to the corporation and wait for the corporation to turn it down.

Here Charles took for himself a corporate opportunity (work) that should reasonably have gone to the corporation. He did not fully disclose the existence of opportunity to the other directors nor did he wait for the other (disinterested directors) to refuse the opportunity. Instead he did the work himself and was paid for it. Here it seems likely that Web would have been fully capable of doing the work (taking the corporate opportunity) but even if it wasn't this would not excuse Charles's behavior.

Charles is therefore liable to the corporation for the money he made by doing the work and must disgorge it to Web.

Q5 Professional Responsibility

Lawyer represents Client, who sustained serious injuries when she was hit by a truck driven by Driver. Lawyer and Client entered into a valid, written contingency fee agreement, whereby Lawyer would receive one-third of any recovery to Client related to the truck accident. Because Client was indigent, however, Lawyer orally agreed to advance Client's litigation expenses and to lend her $1,000 monthly in living expenses that he would recoup from any eventual settlement. Lawyer did not tell Client that he had written a letter to Physician, Client's doctor, assuring Physician full payment of her medical expenses from the accident out of the recovery in the case.

Unfortunately, Driver had strong legal defenses to defeat the claim, and the case would not settle for the amount Lawyer initially forecast. Counsel for Driver finally offered $15,000 to settle the case without conceding liability. By this time, Lawyer had advanced $5,000 in litigation and living expenses, and Client had incurred $5,000 in medical expenses.

Client was reluctant to accept the offer. Realizing, however, that this case could drag on indefinitely with little chance of substantial recovery, Lawyer took Client out for an expensive dinner, at which they shared two bottles of wine. Afterward Lawyer took Client to Lawyer's apartment where they engaged in consensual sexual relations.

Later that evening Lawyer persuaded Client to accept the settlement offer by agreeing to give her the net proceeds after his contingency fee and the amounts he had advanced were deducted and not to pay Physician anything.

The next week, Lawyer distributed the net proceeds to Client as agreed.

What ethical violations, if any, has Lawyer committed?

Answer according to California and ABA authorities to the extent there is any difference among them.

Answer A

Q5

The issue is whether lawyer has committed any ethical violations in his representation of Client, either under the ABA Code ("Code"), the ABA Model Rules, or the California rules of professional responsibility. Based on the facts provided, Lawyer has committed a number of ethical violations, each of which will be discussed in turn.

Contingency Fee Agreement

In general, a lawyer is prohibited from taking a proprietary interest in the case he is working on. However, all 3 bodies of law discussed above recognize contingency fee agreements, or agreements in which the lawyer and client agree that the lawyer's fee will be paid out of any recovery the client receives. Lawyer and Client had such an agreement in this case.

Under the ABA Model Rules, a contingency fee agreement must be in writing, must state the percentage of the recovery the lawyer will take, must state what expenses will be paid out of the recovery and must state whether such expenses will be paid before or after the lawyer's percentage is calculated.

In addition, California law requires that the agreement state that the lawyer's percentage is negotiable, i.e. that it is not fixed by law, and that it state how other, non-covered expenses will be paid.

In this case, Lawyer and Client entered into a valid, written contingency fee agreement under which it was agreed that Lawyer would receive 1/3 of Client's recovery. Assuming that all of the above elements were also included in the agreement, it will be enforceable as a valid contingency fee agreement.

Expense Advances and Loans

Next, there is the issue of whether Lawyer violated any ethical duties by advancing Client's litigation costs and lending her $1000 in living expenses.

Under both the ABA Code and Rules and California law, a lawyer may advance an indigent client's litigation expenses, provided that the lawyer may later recover them as part of his contingency fee. In this case, therefore, Lawyer did not violate any ethical duties simply by advancing client's litigation expenses.

However, as stated above, the continency fee agreement must include how all expenses will be paid, and whether they will be paid, and whether they will be paid before or after the lawyer's percent is taken. Here, Lawyer and Client orally agreed on the advance, and it is not clear when it was to be repaid - before or after Lawyer's fee was deducted. Failure

to reduce this agreement to writing with precise terms therefore constitutes a violation of Lawyer's ethical duties.

The ABA Code and Rules prevent lawyers from making loans to their clients in excess of litigation expenses. However, California permits lawyers to make such loans, so long as the payment is actually a loan that must be repaid and not an outright gift. Additionally, the lawyer and client must enter into a written loan agreement, signed by both parties.

Here, Lawyer's loan of $1000 for living expenses would be banned under the ABA Code and Model Rules. Although California law is more permissive with respect to loans, Lawyer's actions would also constitute a violation of California's rules of professional responsibility, as he did not ensure that the loan agreement was reduced to writing and signed by Client. Furthermore, as with the litigation expenses, it is not clear whether Lawyer's loan will be repaid before or after his 1/3 of the recovery is calculated.

Lawyer's Assurance to Physician - Duty of Communication

Lawyers owe a duty of communication to their clients, according to which they must relate information about a case's progression and status to the client on a periodic basis so the client can make informed decisions regarding the case.

Here, Lawyer made a side agreement with Physician by sending Physician a letter stating that he would receive full payment from the recovery in the case. Lawyer did so without Client's knowledge or consent. Because this is an important matter that ultimately affects the amount Client will receive to compensate her for her injuries, she should have been informed of this agreement. Therefore, Lawyer violated his duty of communication by failing to disclose the contents of the letter to client first.

And again, because the agreement with Physician addressed the payment of expenses out of client's recovery, it should have been included in the terms of the contingency fee agreement.

Duty of Due Care/Competence

An attorney also owes a duty of competence, which means he must act with the care, skill, preparation and diligence of a reasonable practitioner under the circumstances.

Here, the facts state that the case would not settle for the amount Lawyer initially forecast due to Defen[d]ant Driver's strong case. If Lawyer was negligent, or failed to adequately investigate the case before arriving at his initial estimate, and if that error harmed his initial negotiating position, he may be found to have violated the duty of competence as well.

Duty of Loyalty

A lawyer owes a client a duty of loyalty, according to which the lawyer must act solely to further the client's best interests. He may not sacrifice the client's interests to his own or to those of a 3rd party.

In this case, the facts suggest that Lawyer pressured Client into accepting the settlement offer, even though she was reluctant to do so at first. Indeed, Client had already incurred $10,000 worth of expenses, and the offer was only for $15,000. Lawyer appears to have convinced her to accept by taking her out to dinner, engaging in sexual relations with her, and renegotiating their oral contingency fee agreement.

The facts also suggest that Lawyer's interests in so doing were not solely to ensure Client received the largest possible award, but also to ensure that he too would recover his expenses.

Under these facts, therefore, it appears Lawyer has violated his duty of loyalty to client by using undue influence to ensure that he is able to recover his continency fee, regardless of how much is left over for Client.

Consensual Sexual Relations

The ABA Code and Model Rules expressly forbid lawyers from engaging in consensual sex with their clients. California, by contrast, allows such relations where the Lawyer and Client are involved in a preexisting sexual relationship and where the nature of their personal relationship will not affect the Lawyer's care, judgment, skill, etc.

Here, Client and Lawyer engaged in consensual sex after drinking two bottles of wine with dinner. This would be grounds for an ethical violation under the ABA Model Rules and Code.

Under California law, the answer is slightly less clear. There is no indication that Client and Lawyer had a previous relationship. Furthermore, as discussed above, the circumstances indicate that Lawyer was using sex as a means to exert undue influence over client's decision to accept the settlement off[e]r. The presence of wine certainly doesn't help Lawyer's case.

Therefore, Lawyer will likely be found to have violated California's rules as well by engaging in consensual sex with client.

Substantive Decisions

Clients have a right to make substantive decisions about their cases, while lawyers typically choose the legal strategy to be employed.

Here, Client had a right to decide whether or not to accept the settlement offer, as this was

a decision affecting her substantive rights. Lawyer's exertion of undue influence over this decision therefore violated her right[.]

General Duty of Good Faith

Finally, Lawyer will likely be found to have violated his general duty of good faith by failing to pay Physician after expressly agreeing to do so earlier, albeit without Client's knowledge or consent.

Answer B

The question asks what ethical violations the lawyer in this fact pattern may have committed. There are five events which might have given rise to ethical violations by the Lawyer (L): 1) The agreement to advance legal and living expenses; 2) The letter to the Physician (P); 3) Sexual relations between L and Client (C); 4) The settlement offer agreement decision by C; and 5) Failure to pay P.

1. Agreement to advance expenses

The issue is whether the lawyer committed any ethical violations regarding the advances from L to C. Under ABA rules, a lawyer may advance litigation expenses to clients unable to afford such expenses, but he may not advance living expenses for fear that a lawyer is buying a client. Under CA rules a lawyer may advance both legal and living expenses, but the lawyer must get any loans to a client in written form with the client's knowing consent that such funds are loans that must be paid back. Further, the advancement of legal expenses in both CA and ABA must be contained in the writing of any contingent fee agreement.

Here, the lawyer advanced living expenses[,] which is strictly forbidden under the ABA, so he could be subject to discipline. Also, the expense arrangement was oral[,] not in writing, so in CA, the lawyer has also violated the ethical code re: loans to clients.

In addition, in any contingency fee agreement, it must be explained in the writing whether the lawyer's percentage is pre- or post- expenses. On these facts, it is unclear whether L put such arrangement in the writing. L should be subject to discipline[.]

2. Letter to Physician (P)

The next issue is whether L committed any ethical violations re: his letter to P that P's fee would be paid out of the accident recovery. L potentially violated his duty of loyalty to C, his duty to communicate to C, overstepped the proper scope of his representation of C, and his duty of confidentiality to C.

Duty of Loyalty

A lawyer owes his client a high duty of loyalty - the lawyer must act in accordance with the client[']s best interest. Here, L assured P that P would be paid out of the recovery of [the] case without informing C of such agreement. This action possibly created a conflicting duty on L because L had sent a letter to P which P may have relied upon and considered a contract or surety created by L. Since L's duty of loyalty to P extends beyond the representation, L created a potential conflict in that he may have been personally liable if C did not pay P and hence he would have an incentive to ensure payment even if C had a good faith reason not to pay P. This potential conflict could have been overcome if

contin[gen]cing in the representation would have been reasonable (likely on these facts since there is no indication that C was not going to pay when the letter was sent) AND if L had gotten C's informed consent under ABA and written informed consent under CA.

Duty to Communicate

A lawyer also has a duty to keep a client informed about his representation, particularly of important points regarding the representation.

Here, the agreement with P was of great interest to C since the amount that P would receive was possibly a very substantial amount of any recovery that C could have expected. C was entitled to know from L that L had ensured the P that he would be fully compensated for treatment out of C's potential award.

Overstepping Scope of Representation

In general, clients are permitted to make any decisions regarding the ends of the litigation, while lawyers make decisions regarding the means of the litigation, such as legal strategy. Here, a decision regarding the use of any recovery funds are not clearly about legal strategy or means of representation, so the action of commit[t]ing C to payment of P is not clearly within the scope of L's duties. Although a lawyer is assumed the power to make an action on client's behalf necessary to the representation, this may be outside the proper bounds. At the very least, L should have gotten C's informed consent to enter into this agreement on C's behalf.

Duty of Confidentiality

A lawyer also has a duty to keep confidential any information related to the representation without client consent. The lawyer has the imputed authority to disclose any information reasonably necessary to the representation. Hence, although it is not clear whether he gave any confidential info related to representation to P, if he did give such information it would have been a breach of confidentiality to the extent it was not reasonably necessary to the representation of C.

3. Sexual Relations between L and C

The issue here is whether the consensual sexual relations between L an C violated any duties. Under the ABA standard lawyers are not permitted to engage in sexual relations with clients, consensual or otherwise, as presumptively creating a conflict between the lawyer and the client. In CA, consensual relations between lawyers and clients are discouraged, but permitted as long as no duress or illegality is involved. Here, sexual relations are stated to be "consensual", and so permitted under CA law, but still impermissible and a violation under the ABA.

4. Settlement Offer Agreement

The issue here is whether the L committed any violations in convincing C to enter into a settlement agreement with driver. The issues here are whether L acted improperly in convincing client and in counseling C not to pay P.

A client has the ultimate decision in whether or not to accept any settlement agreement as part of the ends of representation discussed above. However, it is appropriate for a L to persuade a client to accept a settlement as in her best interests as long as L is acting according to his duty of loyalty. The duty requires that L act in good faith with the client and make sure that the client's decision is informed and reasonable by apprising the client of her rights and what a settlement means regarding those rights.

Here, it is not clear whether the L is acting in the best interest of the client because of the guarantee that he made to P and because of his own interest in recovering expenses and his fee. However, if the L made a good faith evaluation about the merits and worth of the lawsuit, L may have satisfied his good faith determination.

There is a possibility, however, that the L did not obtain intelligent, knowing consent from C because L and C had been drinking. Any settlement decision should have been made when C was not impaired in judgment.

Counseling C to not pay P

In counseling C to not pay P, lawyer may have violated his duty of loyalty to client and his duty of loyalty to client and his duty of fair dealings and honesty to the public and to P.

Under duty of loyalty, a lawyer should not counsel acts that may subject a client [to] liability without a good faith belief that such decision is in client's best interest. Here, it seems as if L is more interested in getting expenses and fees than protecting C. L is liable for breaching his duty of loyalty to C.

In addition a lawyer has a duty of fair dealings and honesty to the public and specifically to P. A lawyer may not counsel criminal or fraudulent acts by their clients. Here, L has counseled C to break a contract with P, violating his duty to the public.

Finally, L has violated a duty of fair dealing to P since he has both counseled fraud and disbursed funds to C over which he knew P had a legitimate claim to and that C was preparing to violate. In addition L may be a surety for C's actions. L may be held liable for breaching his duty of fair dealing and fiduciary responsibility over settlement funds to P.

Q6 Wills

In 2003, Tom, a patient at Happy Home, a charitable convalescent hospital that specializes in caring for the disabled elderly, asked Lilly, his personal attendant, to help him execute his typewritten will. Tom suffered from severe tremors and had difficulty signing his name. In the presence of one other attendant, Tom directed Lilly to sign his name and to date "my will." She did so and dated the document. At Tom's request, Lilly and the other attendant, in the presence of each other, then signed their names as witnesses.

The 2003 document stated "I give $100,000 to my niece, Nan. And, because Happy Home does such important work for the aged who are disabled, I give the residue of my estate in trust to Happy Home for the continued care of the disabled elderly. Lilly to act as Trustee."

In 2004, Tom, believing he needed to do more for the disabled elderly, asked Lilly to type a new will and told her he would take care of executing it. She typed the will, including in it the terms Tom dictated. He then asked Lilly to send two attendants into his room to act as witnesses. After the first of the attendants arrived and was present, Tom explained the purpose of the document and then signed his name at the end of the document. The first attendant then signed her name as a witness and left the room. Immediately thereafter the second attendant came into Tom's room and quickly signed the document as a witness. Lilly was not present when Tom or the attendants signed their names. The 2004 document stated "I revoke all prior wills and I give my entire estate to Happy Home in trust for the continued care of the disabled elderly. Lilly to act as Trustee."

In 2005, Tom died, leaving an estate worth one million dollars.

At the time of Tom's death there were only two convalescent hospitals in the county where Tom lived, Happy Home and Sunnyside. A few days after Tom's death, Happy Home went out of business. Sunnyside, also a charitable convalescent hospital, provides care for disabled persons of all ages.

Sunnyside has petitioned the court to substitute Sunnyside as the beneficiary of Tom's estate.

1. What rights, if any, does Nan have in Tom's estate? Discuss. Answer according to California law.

2. How should the court rule on Sunnyside's request to substitute Sunnyside for Happy Home as the beneficiary of Tom's will? Discuss.

Answer A

6)

Q6

1) What right does Nan ("N") have in Tom's ("Ts") estate?

The first issue is whether N has any rights in T's estate. N was named as a beneficiary under T's first putative will but was not named as a beneficiary under T's second putative will. The issue is thus whether the first will was valid in the first instance, and, if so, whether the second will validly revoked the first will.

Will #1

Formalities of a Formal, Attested Will

Will 1 was a typewritten will. Thus, Will 1 would have to conform to the requirements necessary for a formal, attested will.

Under California law, a formal attested will: 1) must be signed by the testator, by someone at his direction and in his presence, or by his conservator: 2) must be signed in the presence of two disinterested witnesses who are both present at the same time; 3) must be dated; and 4) must be signed by the two witnesses. Although the witnesses need not know the contents of the will, they must know that they are witnessing the execution of the testator's will.

Signature

Here, T, as a consequence of his disability, asked Lilly ("L") to help him execute his will. Because T had severe tremors and had difficulty signing his name, he asked L to sign for him. Given that L signed the will in T's presence and at his direction, this would satisfy the first condition stated above (i.e., that the testator sign the will or have another person sign the will at his direction).

Attestation

The next issue is whether the will was validly attested to by two disinterested witnesses. Here, one other attendant, in addition to L, was present when the will was signed. The issue is whether L, who signed the will at T's direction, could be considered a disinterested witness. On one hand, it might be argued that L was simply taking T's place, as she signed the will for T at his direction. In that sense, L would not seem to be a disinterested witness who could properly attest to the signing of the will. On the other hand, however[,] because L was simply signing the will for T, it might be argued that she could serve in two

capacities: as a witness and as T's attendant. Under this view, which is the one adopted here, L was a proper witness. Thus, because the will was validly witnessed by two disinterested witnesses who were both present when the will was signed, the second requirement stated above would also be met. Additionally, because both L and the other attendant signed the will before T's death, this would meet the fourth requirement stated above. Consequently, on these facts, it seems that Will 1 was a validly executed, formal will.

Disinterested Witness

Assuming, as stated above, that L was a proper witness, the next issue is whether she would truly be considered disinterested, as she was named as the trustee under the terms of Will 1.

The general rule is that a beneficiary cannot be considered as a disinterested witness for purpose of attesting to a will. However, if a witness is deemed to be interested, this does not affect the validity of the will. Rather, this simply means that the interested witness only takes that share of the estate that he would be entitled to in the absence of the will (i.e., his intestate share).

Here, L was named as the trustee of the trust to Happy Home ("HH"). Thus, it might be argued that L was an interested witness. Therefore, under this reasoning it might be argued that the will was not validly attested to. However, under the California law, a trustee of a trust is not considered a beneficiary under a will. Rather, the trustee is a fiduciary who does not take a gift under the will in her personal capacity. Thus, L would not be considered an interested witness, and she could thus properly witness the execution of T's first will.

Effect of Will 2 on Will 1

Before considering whether N would have any interest in T's estate, we must first consider the effect of T's second putative will ("Will 2") on Will 1, which, as discussed above, was likely a valid will.

Revocation by Subsequent Instrument

A testator may revoke his will be executing a subsequent will or codicil, which is a testamentary document that amends, revokes, or revises a prior will. To revoke a prior will, the testator must show an intent to do so. Moreover, for a valid revocation to occur, the second testamentary document must also comport with the formalities stated above under the California Probate Code.

Here, Will 2 was also a typewritten will. Although T did not type the will himself, he directed L to do so. However, the first issue is whether this would be valid, given that L, rather than

T, typed the will. Because the facts state that L typed the will, including in it the terms T dictated, it is reasonable to assume that L typed the will in T's presence. This would be proper.

Attestation

The next issue is whether Will 2 was validly attested to by two disinterested witnesses. Here, L sent two attendants to T's room to act as witnesses. After the first attendant arrived, T explained that he was executing his will, and he signed the will in the presence of the first attendant only. The first witness signed her name before the second witness entered the room. This would be proper under California law, as the witnesses need not sign in each other's presence. However, because the second attendant was not present when T signed his will, the will would be invalid under California law, which requires both witnesses to be present when the testator signs his will. Additionally, when the second attendant signed T's will, she did so quickly and the facts suggest that she likely did not know what she was signing. Although, as stated above, a witness need not be aware of the terms of the testator's will, she must know that she is in fact witnessing the execution of a will. Because T did not explain this to the second attendant, it seems that this requirement would also be lacking.

In sum, Will 2 was not validly executed because: 1) the two witnesses were not both present when T signed the will; and 2) the second witness likely did not even know that what she was witnessing was actually T's will.

Effect

Because Will 2 was not validly executed, it did not legally revoke Will 1, which was validly executed. Thus, although T explicitly stated in Will 2 that he revoked all prior wills, this statement would not be given effect despite T's apparently contrary intent. Consequently, Will 1 would continue to exist and would be probated in accordance with its terms at T's death in 2005.

N's Gift Under Will 1

Under Will 1, T left N $100,000. This would be considered a general gift as it is simply a sum of money, which is fungible. This, this gift could be satisfied from any of the funds remaining in T's estate at his death. Given that T had one million dollars in his estate at his death, N would be entitled to the $100,000 devised to her in Will 1.

2) How should the court rule on Sunnyside's ("S") request to substitute S for HH as the beneficiary of T's will?

Under Will 1, T gave the residue of his estate in trust (all of his one million dollar estate less the $100,000 to N) to HH for the continued care of the disabled elderly. L was to act

as trustee of the trust.

Trust Principles

A trust is a fiduciary relationship with respect to property wherein one person (the trustee) holds the property (trust res) for the benefit of a person or group of persons (beneficiaries), arising out of a manifestation to create it for a legal purpose. A trust thus requires: 1) an intent by the person creating the trust (settlor) to create it for a valid purpose; 2) property (trust res); 3) beneficiaries; 4) a trustee; and 5) valid delivery of the trust res to the trustee. A settlor may create a trust inter vivos by making a declaration of trust or by effecting a transfer in trust. A settlor may also create a trust through the provisions of his will (a testamentary trust).

Here, T created the trust through the provisions of his will. Thus, T created a testamentary trust which was to take effect on his death. The trust had a res, the residue of T's estate. The trust also had beneficiaries, HH and the disabled elderly. The trust had a trustee, L. The Trust was created for a valid, legal purpose- to care for and help the elderly. And, T expressed the intent to create the trust and the trust res was validly delivered through the will upon T's death.

Charitable Trust

The next issue concerns the nature of the trust created in T's will.

A charitable trust is a trust that is created in order to benefit the public health and welfare. Because the trust benefits society, it does not have any readily ascertainable beneficiaries. In other words, unlike a private express trust, the settlor does not name specific individuals who are to benefit from the creation of the trust. Rather, all those persons who fall within the class described in the trust are to receive its benefits.

Here, in Will 1, T devised the residue of his estate to HH for the continued care of the disabled elderly. Because no specific beneficiaries are named, it might be argued that the beneficiaries are all of those disabled elderly persons who qualify for convalescent care. Thus, it seems that the trust to HH might be considered a charitable trust, especially since it serves the greater public good by providing for the aged.

Cy Pres

The next issue is the effect of HH's going out of business on the validity of the trust. Under the doctrine of cy pres (meaning, as near as possible), a court has the power to give effect to a charitable trust where it would otherwise fail as long as the court only has to change the mechanism of the trust as opposed to the beneficiaries of the trust. A court only has cy pres powers to give effect to charitable trust where the settlor has manifested a general

charitable intent as opposed to a specific charitable intent.

Here, S might argue that T had a general charitable intent, as his ultimate goal was to provide for the care of the disabled elderly. Thus, S would argue that the court could use its cy pres powers to carry out T's intent by simply substituting S for HH. On the other hand, however, it might be argued that T had the specific charitable intent of giving the benefits of the trust only to those elderly persons who were residents of HH. On this view, the court would not be able to amend the trust to give it effect because T's intent would only be to benefit those elderly persons residing in HH as opposed to all elderly persons residing in convalescent homes in the county where T lived. Because T likely knew that S was in existence when he executed his will, there were only two convalescent homes in the county, a court would likely find that T only intended to benefit those persons who resided in HH. Consequently, the court would not use its cy pres powers to deviate from T's intent. Therefore, a court would likely find that the charitable trust to HH failed, as HH was no longer in existence at the time T's will was probated. Consequently, the court would declare a resulting trust under which the trust res (consisting of the residue of T's estate) would be reconveyed to T's estate and would be distributed to her heirs. Thus, it seems likely that N, T's niece, would also receive her intestate share of the residue of T's estate in addition to the $100,000 general devise she already received under Will 1.

Answer B

6)

Q6

As discussed below, Nan will likely take $100,000 from Tom's estate.

Validity of 2003 Will

Tom's 2003 will was a typewritten, formal. As such, in order to be valid, it must be [sic] satisfy the requirements for an attested (or printed) will.

Capacity to Make a Will

Under California law, in order to make a will, the would-be testator must be (1) at least 18 years old; (2) be able to understand the scope of his or her estate; (3) be able to understand who it is the estate will be devised and (4) have intent to make a will. Here, Tom is in a convalescent elderly home, so he is clearly over 18 years of age. In addition, the fact that he was able to specify the gifts and devisees indicated he meets (2) and (3). Finally, Tom also apparently had the intent to make a will. Hence, Tom had the capacity to make a will in 2003.

Requirements for an Attested Will

An attested will must be (1) in writing, (2) signed by the testator or by someone in testator's presence at his/her direction; (3) signed or signature acknowledged in the presence of at least two witnesses; and (4) the witnesses must understand that they are witnessing the execution or acknowledgment of a will.

In writing. Here, the will was typewritten, so this requirement for an attested will was met.

Signed by the testator or at testator's direction. Here, while Tom had difficulty signing his name, he asked Lilly, his personal attendant, to help him execute the will. Because Tom directed Lilly to sign and date the document at his direction and in his presence, the will was validly signed.

Signed or Signature Acknowledged in the Simultaneous Presence of At Least Two Witnesses. In order to be valid, an attested will must either be signed, or the signature must be acknowledged by the testator, in the presence of at least two uninterested witnesses. Here, this requirement is met because both Lilly and the other attendant, in the presence of each other, served as witness to the signature at Tom's direction.

Understanding of Witnesses of Execution of Will. Finally, the witnesses must understand

that Tom was executing a will. Here, Lilly and the other attendant both heard Lilly to [sic] sign Tom's name and to date "my will." Accordingly, this requirement is also met.

Possibility of Lilly as Interested Witness

In order to be validly executed, an attested will must have the signatures of at least 2 uninterested witnesses, meaning witnesses who will not take under the will or otherwise have a stake in its outcome. Here, the 2003 document gives the residue of Tom's estate in trust to Happy Home with Lilly as trustee. A witness is not an interested witness if he or she receives legal title only in a role of fiduciary duty. Here, Lilly is tasked with serving as trustee for the trust, and accordingly is named only in her capacity as a fiduciary. However, arguably, to the extent Lilly is an employee of Happy Home, she may have an interest in the trust that goes beyond her fiduciary duty. Nevertheless, with the facts presented, there is nothing to raise such suspicion that Lilly could not serve as a fiduciary and remain an uninterested witness. Hence, Tom's 2003 will was validly executed with 2 uninterested witnesses.

Validity of 2004 Will

In 2004, Tom attempted to execute another attested will that would have revoked the 2003 will and, instead of giving $100,000 to Nan, would have given the entirety of Tom's estate to the Happy Home trust. Because it was an attested will, it needed to conform with the same requirements discussed above for the 2003 will.

Failure to Comply with Requirements of an Attested Will

There is no indication that Tom lost the legal capacity to make a will. In addition, the 2004 will [was] typed by Lilly at Tom's direction and was signed by Tom himself.

NOT signed in Simultaneous Presence of At Least Two Witnesses

However, the 2004 will was not validly executed because it was not signed before two witnesses who were simultaneously in each other's presence. Here, the first attendant signed as a witness after witnessing Tom's signature and left the room before the second witness came in to sign. In addition, the second attendant did not witness Tom's signature or an acknowledgment by Tom of his signature. Nor was Lilly was [sic] present during Tom's or the attendants' signatures. Hence, execution of the will did not meet the requirement that it be signed in the simultaneous presence of two witnesses. As a result, the 2004 will is invalid.

Lack of Awareness By 2nd Witness of Will

In addition, the second witness did not appear to understand that Tom was executing a will. While Tom asked Lilly to send two attendants into his room to act as witnesses, it is unclear whether Lilly explained to the witnesses that they were witnesses to the execution of a will. Here, while the first attendant understood that Tom was executing a will – since

Tom explained the purpose of the document – the second attendant did not receive that information and instead "quickly" signed the document and left. Accordingly, execution of the will also fails for this reason, and the 2004 will is invalid on this ground as well.

Effect of Failure to Execute 2004 Will

Because Tom failed to validly execute the 2004 will, the 2003 will stands because the revocation contained in the 2004 will was not valid. Accordingly, Tom's 2003 will would enter into probate, under which Nan would inherit $100,000.

Charitable Trust

Trust. A trust is a fiduciary relationship whereby the trustee holds legal title of the res (or trust property) for the benefit of others, who are the beneficiaries of the trust, for a valid and legal purpose. Here, Tom's will created a trust at his death (as opposed to an inter vivos trust, or trust created while Tom was still alive) to Happy Home for continued care of the disabled elderly.

A private express trust requires (1) a trustee, (2) a beneficiary, (3) the res (trust property), (4) intent by the settlor to create a trust ad (5) a legal purpose. By contrast, a charitable trust differs from a private express trust in that a charitable trust does not benefit anyone in particular personally but rather society at large. Here, Tom's trust complied with the above by bequeathing the residue in trust with Lilly as trustee for a legal purpose of assisting the disabled elderly.

Here, Tom's trust is given to Happy Home "for the continued care of the disabled elderly." Society generally benefits when the most disadvantaged of its members–including the disabled elderly – are cared for. Accordingly, even though the trust names Happy Home (and the elderly it cares for) as specific beneficiaries, the intent was to create a charitable trust that in fact benefits society at large.

Cy Pres

Cy pres is an equitable remedy which a court may invoke in order to effectuate the settlor's general charitable intent with a charitable trust. Under cy pres, which means "as close as possible," a court may modify the direct beneficiary or goal of the charitable trust, to substitute another as close to as possible in keeping with the original goal or beneficiary, if the settlor's original wishes are no longer possible. Here, Happy Home went out of business a few days after Tom's death, and Sunnyside is another charitable convalescent hospital, although Sunnyside benefits people of all ages. Accordingly, Tom's trust would otherwise fail since Happy Home is no longer in existence without the intervention of the court in granting cy pres in order to keep the trust alive.

General or Specific Charitable Intent

In order to apply cy pres, the court must determine– using both the intrinsic (i.e. the trust instrument) and extrinsic evidence–whether Tom had a general charitable intent in setting up the trust, or whether he had specific intent. If Tom had specific charitable intent only to benefit Happy Home or only to benefit the elderly disabled, then the court will not be allowed to substitute Sunnyside as the beneficiary and a resulting trust will be applied. On the other hand, if Tom had general charitable intent to benefit the disabled generally, then cy pres may be invoked to prevent the failure of the trust by substituting Sunnyside.

Here, Tom set up the trust "to Happy Home for the continued care of the disabled elderly." Taken alone, this arguably suggests a general charitable intent to benefit the continued care of the disabled elderly, since Tom did not specify that the trust was meant to benefit only Happy Home's disabled elderly residents. On the other hand, Tom did specify that the trust was to benefit the elderly while Sunnyside assists disabled persons of all ages. Nonetheless, Sunnyside is the only other convalescent hospital in the county where Tom lived, so it may very well be the closest thing to effectuate a general charitable intent, even if it was for the disabled elderly.

The foregoing is of course subject to other extrinsic evidence, such as remarks Tom may have made to others. But assuming Tom had a general charitable intent and Sunnyside is the next-best alternative to effectuate Tom's intent, the court will invoke cy pres to substitute Sunnyside for Happy Home.

Feb 2006

California Bar Examination

Essay Questions and Selected Answers

February 2006

ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2006 CALIFORNIA BAR EXAMINATION

This web publication contains the six essay questions from the February 2006 California Bar Examination and two selected answers to each question.

The answers received high grades and were written by applicants who passed the examination. Minor corrections were made for ease in reading. The answers are reproduced here with the consent of their authors.

TUESDAY MORNING

California Bar Examination

Answer all three questions. Time allotted: three hours

Your answer should demonstrate your ability to analyze the facts in question, to tell the difference between material and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

Q1 Torts

Autos, Inc. manufactures a two-seater convertible, the Roadster. The Roadster has an airbag for each seat. Autos, Inc. was aware that airbags can be dangerous to children, so it considered installing either of two existing technologies: (1) a safety switch operated by a key that would allow the passenger airbag to be turned off manually, or (2) a sensor under the passenger seat that would turn off the airbag upon detection of a child's presence. Both technologies had drawbacks. The sensor technology was relatively new and untested, and the safety switch technology had the risk that people might forget to turn the airbag back on when an adult was in the seat. The safety switch would have increased the price per car by $5, and the sensor would have increased the price per car by $900. Research showed that most riders were adults and that the airbags rarely hurt children who were properly belted into the seat. No federal or state regulation required either a safety switch or a sensor. Autos, Inc. chose to install neither.

Oscar bought a Roadster. On his first day of ownership, he decided to take his 10-year-old daughter, Chloe, to a local ice cream shop. On the way home, Oscar accidentally ran the Roadster into a bridge abutment. The airbags inflated as designed and struck Chloe in the head, causing serious injury. Chloe was properly belted into the seat. She would not have been hurt if the airbag had not struck her.

What tort theories can reasonably be asserted on Chloe's behalf against Autos, Inc., what defenses can Autos, Inc. reasonably raise, and what is the likely outcome? Discuss.

Answer A

4)

1)

Chloe v. Autos, Inc[.]

Products Liability

When a consumer is injured by a product, there are 5 theories the consumer can sue under in the area of products liability: battery; strict products liability; negligence; breach of warranties; and misrepresen[t]ation. The facts in the present case would give rise to three of the causes of action: strict products liability; negligence; and breach of warranties.

Strict Products Liability

A manufacturer or distributor of a product placing a product into the stream of commerce in a defective manner will be strictly liable for harm caused by the product. In order to recover under this theory, the following elements must be met: a proper defendant, i.e., a manufacturer or distributor of the product that left the plant in a defective condition; a proper plaintiff; a defective product; causation; damages; absent defenses.

Proper Defendant - Manufacturer or Distributor

To recover under strict products liability, the defendant must be a manufacturer or distributor of the product that left the plant in a defective condition. Here, the defendant is Auto[s], Inc[.], the manufacturer of the vehicle. This is a proper defendant for recover[y] under the theory. Additionally, the product must have left the manufacturer's plaint in a defective condition, which will be established under defective condition (see infra). The product here, the car, left the defendant's plant in the condition that was not subsequently changed and if found to be defective, was in that condition at the time it left the plant. This element is therefore met.

Proper Plaintiff - User or Consumer

Traditionally, the person injured was required to be the purchaser of the product, or at least a person in privity with the purchaser. Modernly, a proper plaintiff is any user, consumer, or foreseeable bystander who could be injured by the product. Here, the person injured was a passenger in the car, and the daughter of the purchaser. As a family member and rider in the vehicle, she is a proper plaintiff for recovery under this theory.

Defective Condition

A product can be defective by: manufacturing defect; design defect; or failure to adequately warn.

Manufacturing Defect

A manufacturing defect is present when a few of the products leave the plant in a condition different than the rest. The facts in the present case suggest that all the cars left the plant in the same condition. There was therefore no manufacturing defect.

Design Defect

A design defect can occur when all the products leave the plant in the same condition and there is a defect in the design of the product. There are two tests for design defects: the consumer expectation test and the reasonable alternative test.

Consumer Expectation Test

This test is met if the product leaves the plant in a condition more dangerous than the average consumer would reasonably expect. Here, a consumer might reasonably expect that a safety feature in a vehicle, such as an airbag, would make the car more safe, not less safe. Facts in the present case indicate that but for the airbag, Chloe would not have been injured. This product is therefore defective under this test.

Feasible Alternative Test

This test compares the design of the product with other reasonable alternatives available in the market. The test balances the availability of alternatives and their cost against the risk to users and the value of lives saved. Although there are no facts to indicate what other car producers did, it is evident that there were alternatives that were available. Even though there were no statutes to mandate their usage, this fact is not determinative in alternatives. Facts indicate that the company had considered implementing two separate safety measures. The fact that both the safety measures themselves had risks and drawbacks is also relevant. Chloe will first ague that the first alternative the defendant should have employed was the switch to manually disable the airbag. The cost of this product is very minimal at $5. However, the defendant will claim that there was a risk that people would fail to turn it back on, making the car more dangerous to the majority of passengers, according to research. The reason the airbag was designed in the first place is [sic] to make the car more safe for the majority of riders, which this device would prevent. In weighing these two arguments, the court would probably find that even though the cost of this is minimal, its risk might have outweighed its utility, making the car even more dangerous.

The plaintiff will next argue that the second device should have been employed, the sensor switch, as it would not be at risk to user misuse. However, defendant will assert

that this device, because it is new and untested, would malfunction, making the product more dangerous. They will argue that the cost of this device, at $900, is far too costly to be reasonable. In weighing utility, costs and risks, the outcome of this argument is highly depen[den]t upon the reliability of this device. If it is truly new and unreliable, the defendant will no doubt be successful in its argument. If, however, it is show[n] to be reliable, the defendant's argument will be weakened. The court will have to decide whether, if useful and reliable, $900 is reason[a]ble for this device, in light of its reliability and lives saved.

Failure to Warn

A product is defective if the defendant, knowing of a defect, fails to adequately warn the consumer. An adequate warning is one that tells the consumer of the risk, how it occurs, how to prevent such risk, and any mitigating factors to avoid further injury. Here, facts indicate that the D was aware of the danger of the airbags to children. There is no information on whether there was a warning as to this fact. If there was no warning about the risk of airbags to children, as it appears from the available facts, this product is defective.

Causation

Actual Causation

For strict liability, the injury to the P must have been actually caused by the defendant's product. The test is "but for" for the D's condu[c]t, the P would not have been injured. Here, the facts indicate that but for the airbags, the P would not have been injured.

Proximate Causation

Additionally, the P's injury must have been caused by the D's product. Here, P will argue that the injury was caused by the airbag and the D should be held strictly liable for all injury. The D will argue that Oscar crashing the car is a superceding intervening cause that should sever liability. Since airbags are installed to protect passengers in car accidents, this case is not superceding and the court will agree with the P here.

Damages

For strict liability, the P must have suffered physical injury. Here, the P was struck in the head, causing serous injury. This is a sufficient damage here.

Defenses

Contributory/Comparative Negligence

A P's recovery may be reduced or barred if found to be contributorily negligent. Although comparative neglig[e]nce is the majority view, under either comparative or contributory negligence, the P must be contributorily negligent. It is true here that Oscar ran the car into the bridge, but he is not the P. Even though Oscar may have been negligent, his conduct was not the conduct of the P, in order to trigger this defense. There are no facts present to indicate that P was at all negligent, since she had her seatbelt fastened.

Assumption of Risk

Assumption of risk is a defense when P proceeds in spite of a known risk. However, since D failed to warn of the risk, P could not have knowingly assumed it.

Since all elements have been met, P can recover under strict liability.

Negligence

Negligence cause of action is available when the D owed a duty of care to the P, which he breaches, causing damage to the P. A P can recover for injury caused by a manufacturer's negligence if P can establish: duty; breach; actual causation; proximate causation; damages; absent defenses.

Duty

A duty is owed by all persons to act in a way as to avoid harm to other[s]. The standard owed here is the duty to act as a reasonable prudent person to avoid harm to all for[e]seeable persons. Here, the D, as a car manufacturer (see supra), owed a duty to its consumers to produce a car in a safe way and to avoid all injury to purchasers and passengers. The amount of care owed is that of another reason[a]ble prudent car manufacturer.

Breach

The duty owed is breached when the D fails to act as another reasonable prudent person under the circumstances. Here, the P will argue that a reason[a]ble car producer would employ safety devices to protect riders and passengers, as were available. The D will argue that it acted reason[a]bly, since there were no statutes mandating conduct. Although presence of a statute may mandate conduct, absence of a statute is not a defense. The D still must act as a reasonable prudent car producer. Here, there is no indication of what other vehicle manufacturers do, but there are facts of other safety precautions. Since a reasonable car manufacturer would have at least warned of the danger, and facts indicate that the D did not, it appears as though D breached the duty owed when it failed to at least warn of the dangers.

Causation - Actual & Proximate

Actual Causation

See supra for actual cause. As discussed supra, the D was the actual cause of the D's [sic] injury.

Proximate Cause

See supra for proximate cause. As discussed supra, the D was the proximate cause of the D's [sic] injury.

Damages

The cause of action allows recovery for personal injury, which was incurred here (see supra).

Defenses

The same defenses are available here as under strict liability, and are not met (see supra). Therefore, P will be able to recover.

Warranties

Implied in every product are 2 implied warranties: Implied warranty of merchantability and implied warranty of fitness.

Implied Warranty of Merchantability

A product must be merchantable, meaning generally safe and fit for ordinary purposes. Here, the car was generally safe for general purposes. Although children could be injured by the car, this is a failure to warn not generally de[a]lt with by the warranty.

Answer B

1)

CHLOE V. AUTOS, INC[.] ("AUTOS")

Chloe was injured while traveling as a passenger in her father, Oscar's, Roadster, which was manufactured by Autos. Oscar will bring a cause of action against Autos on Chloe's behalf ad litum because she is under eighteen years old. The following will examine and analyze the possible causes of action, the defenses Autos may raise, and the likely outcome.

1. CAUSE OF ACTION UNDER A STRICT PRODUCTS LIABILITY THEORY AGAINST AUTOS

STRICT PRODUCTS LIABILITY

A commercial seller who sells a defective, unreasonably dangerous product to an intended consumer or user will be held strictly liable for any harm caused as a result of the defective product.

Commercial Seller

In order to be held strictly liable, the defendant must be a commercial seller who purposefully injected the product into the stream of commerce.

Autos manufacturers the Roadster and is a corporation. Because Autos manufactures the Roadster and places it into the stream of commerce, Autos is a commercial seller.

Defective Product

A defect may be shown by plaintiff the following ways: 1) Defective Design, 2) Manufacturing Defect of that Particular Product Only, 3) Failure to Warn or Inadequate Warning.

1) Design Defect

Plaintiff may show that defendant's product had a design defect if there was a feasible alternative available at the time it was manufactured and if so, that the alternative would make the product safer and was economically reasonable.

Alternative Design Available

The facts state that at the time the Roadster was manufactured Autos itself was aware of two possible alternative designs to the Roadster that would possibly make the car's airbags safer for childre[n]. This included: (1) A safety switch operated by a key, or (2) A sensor under the seat that would detect the child's presence. The facts do not indicate that either product guaranteed the child's safety. However, they may have helped. Plaintiff will contend that the safety switch would have worked, but that Autos did not install it in fear that passengers would forget to turn it off and on. Thus, it appears that the safety switch, if operated correctly by the users, would have made the airbags safer for children. In regard to the sensor, its technology was relatively new and untested. Defendant will argue and thus there is no guarantee that it would have made the car safer. Plaintiff, however, will argue that while it might not have been tested and [was] relatively new, it was a feasible alternative design that could have indeed made the Roadster safer. Additionally, Plaintiff will assert that Autos was even "aware" of the danger to children, and even "considered installing either of the two existing technologies.["] Autos will contend that neither the Fed nor State governments require a safety switch or sensor. However, this argument is invalid because they knew of the potential risk of the airbags and if they knew about the risk and did not remedy it, they should not have manufactured the Roadster. Because the safety switch and sensor were available technologies at the time that would likely have made the Roadster safer, there was an alternative design available to Autos.

Economic Feasibility of the Alternative Design

The alternative design must be one that is reasonable and economically feasible to the manufacturer.

The safety switch according to the facts would increase the Roadster's price by $5.00. The sensor would increase the Roadster's price by $900 per car. Plaintiff will first contend that for $5.00 extra per car, the safety switch was economically reasonable and that $5 would not have made a difference in the car's price and marketability, as the car is likely much more expensive already. Plaintiff will further assert that the sensor, while untested, was worth it to install for $900 extra per car. Defendant will contend that $900 was too much per car for an untested product and that $900 extra would hurt the Roadster's sales appeal and marketability. While this may be somewhat true, Plaintiff will argue that safety is priceless, and that $900 extra is relatively small in comparison to the overall price of a car such as the Roadster, and that saving a life or minimizing injury of a child or adult is worth every penny. For $5 more, the safety switch is economically feasible and Plaintiff has a valid argument that for $900 extra, the sensor is worth it if it has the chance of preventing injury or death while traveling in the Roadster.

2) Manufacturing Defect

Manufacturing defect may be asserted if the particular product that Plaintiff purchased was individually defective. Here, there is no evidence that Oscar's particular Roadster was individually defective, and thus Chloe cannot assert this theory.

3) Inadequate Warnings or Failure to Warn

Plaintiff may also show defect or that the product was unreasonably dangerous if Defendant failed to warn or gave inadequate warnings.

Chloe will contend that Autos failed to warn its purchasers of the risk to children by the airbags. As stated in the facts, "Autos Inc. was aware that airbags can be dangerous to children," and thus should have provided some warning to purchasers of the vehicle. Autos will contend that no warnings were necessary because "research showed that most riders were adults and that the airbags rarely hurt children who were properly belted..." Chloe will rebut this argument with the fact that children are everpresent and it should be obvious to Autos that children would ride in the Roadster as passengers and this is a fact that Autos should have considered, despite the research. Thus, because Autos knew of the risk to the children and the potential dangers, and failed to warn of them, they can be held accountable for failure to warn.

Conclusion: Chloe can show under a design defect theory that an alternative safer design existed. Additionally, Chloe can show that Autos failed to provide inadequate [sic] warnings as to the airbags' risk to children.

Foreseeable User

The consumer who was harmed by the alleged defect must be one that is foreseeable to the manufacturer.

Chloe, as a passenger in the Roadster, who was properly seated in the car, will contend that she was a foreseeable user, as it is foreseeable that the driver will have passengers in the vehicle from time to time. Autos will contend that Chloe, a ten-year old child was not a foreseeable user because "research showed that most riders were adults and that the airbags rarely hurt children who were properly belted..." However, this argument will fail for Autos because they were still aware that children would ride as passengers from time to time and thus Chloe was a foreseeable user.

Causation

Plaintiff must prove defendant was the legal and proximate cause of her injury.

Legal Causation

Under legal causation, plaintiff must show that "but for defendant's defective design, she would not have been harmed."

Thus, here we ask, but for the failure of Autos to install sensors or a safety switch or provide a warning to the users of the Roadster regarding the airbags and children, would Chloe have been hurt? The answer is no, because as the facts state, the airbags inflated as deigned and struck Chloe, "causing serious injury," and "she would not have been hurt if the airbag had not struck her." Autos is the legal cause of Chloe's harm.

Proximate Cause

Proximate cause examines whether the harm to plaintiff is foreseeable and whether there were any intervening forces.

Chloe was injured by the airbags as they [sic] inflated as designed as they [sic] struck her. Autos will contend that this was caused as a result of Oscar accidentally driving into a bridge. However, Chloe will successfully argue that accidents by drivers of the Roadster are foreseeable and frequent and that the whole purpose of airbags is to prevent or minimize injuries from such foreseeable accidents. Additionally, Chloe was properly belted in the seat, and because she was properly belted and the airbags operated as designed, Autos['] defect was the direct and proximate cause of Chloe's injury.

Damage/Harm

Plaintiff must prove damage. As discussed, as a result of the defect Chloe suffered serious injury to her head.

DEFENSES BY AUTO

Assumption of the Risk

Plaintiff assumes the risk of injury if he consciously and voluntarily assumes the risk and is aware of the danger, but still proceeds. This serves a complete defense to strict liability in most modern jurisdictions.

Autos will contend that Chloe and Oscar assumed the risk of harm by purchasing a two-seater convertible and because it was a convertible they knew or should have known that it was a dangerous vehicle. However, Chloe will rebut this claim by asserting that even if the car was a convertible, it should have and could have been designed safer and that she did not assume the risk of a defective airbag whatsoever. Autos['] defense is weak and will fail because Chloe never assumed the risk of injury by a defective airbag according to the facts.

2) NEGLIGENCE CLAIM AGAINST AUTOS

Chloe may also assert a claim of negligence against Autos. Negligence requires the showing of: 1) Duty, 2) Breach of Duty, 3) Actual Cause, 4) Proximate Cause, and 5) Damages.

Duty

A person is held to the duty of care to act as a reasonably prudent person under the circumstances.

Autos, a car manufacturer, will be held to act as the reasonably prudent auto manufacturer would in designing and manufacturing the Roadster.

Foreseeable Plaintiff - Chloe as a passenger was a foreseeable plaintiff under both the Cardozo and Andrews views as she was legitimately riding with Oscar in the vehicle at the time of the accident.

Breach of Duty

Breach of duty may be show[n to] be an actual breach or inferred via res ipsa loquitur.

Chloe will contend that Autos breached its duty of care to her by failing to make the Roadster safe and by failing to install the safety devices, such as the sensor and/or switch. Furthermore, Autos knew of the alternatives, as discussed above, and could have installed them. Autos will contend that doing so would be costly and that there were drawbacks to each. However, as discussed, the drawbacks and risks were worth it in comparison to the risk of harm and thus viable. Autos will contend that neither the Fed nor State governments require a safety switch or sensor. However, this argument is invalid because they knew of the potential risk of the airbags and if they knew about the risk and did not remedy it, they should not have manufactured the Roadster. As a result, by failing to make Roadsters and its airbags safe for children, Autos breached its duty of care to Chloe, who was harmed by the defect.

Actual Cause/Legal Cause

Rule: see supra. As discussed above, Autos is the actual cause of Chloe's harm.

Proximate Cause

Rule: see supra. As discussed above, Autos is the proximate cause of Chloe's harm.

Damage

See supra.

DEFENSES

Assumption of the Risk

Rule: supra. As discussed above, an assumption of the risk defense will fail.

Comparative Negligence

Comparative negligence is shown by demonstrating that plaintiff was negligent in its actions. Depending on the jurisdiction (pure or partial), the damages will generally be reduced in proportion to plaintiff's negligence.

Autos will contend that because Oscar was negligent in causing the accident, as the Roadster ran into a bridge abatement [sic], he was contributorily negligent. While this is a valid argument, as the accident and release of [the] airbag was caused by Oscar, Chloe may contend that Oscar's negligence should not be imputed to her. This is true in most jurisdictions- that the driver's negligence is not imputed to a passenger's claim. However, if the jurisdiction imputes Oscar's negligence, his negligence will be reduced in proportion thereof and provide Autos with at least a partial defense.

Conclusion: Chloe has a valid negligence claim against Autos. Depending on the jurisdiction, however, Autos may reduce their damages via Oscar's comparative negligence.

3) IMPLIED WARRANTY OF MERCHANTABILITY

Under the implied warranty of merchantability, a product that is sold is impliedly warranted to be reasonably useful and safe for average use.

Chloe will contend under this theory that the Roadster, a two-passenger vehicle, should have been at least made safe for all that [sic] would be in the vehicle, including the driver and passenger. Because the airbags were not safe, and injured her, she will argue that the Roadster was not fit for regular use, as intended by its purchasers. Autos may try and contend that the Roadster was not designed to be safe for children because research showed that children were not regularly passengers in the Roadster. However, for reasons discussed above, this argument will fail. Chloe will be successful against Autos under an implied warranty of merchantability theory as well.

Q2 Wills

Tim and Anna were married for ten years. In 2000, their marriage was legally dissolved. For several months following the dissolution, Tim and Anna attempted to reconcile but ultimately failed to do so.

In 2001, after reconciliation attempts failed, Tim executed a valid will leaving "all my property to my best friend, Anna." Later that year, Fred was born to Anna out of wedlock. Tim was Fred's father, but Anna did not inform Tim of Fred's existence.

In 2002, Tim and Beth married. Two days before the wedding, Beth executed a prenuptial agreement waiving all rights to Tim's estate. Beth was not represented by counsel when she executed the prenuptial agreement.

In 2003, Sarah was born to Tim and Beth.

In 2004, Tim died. His estate consists of his share of a $400,000 house owned with Beth as community property, plus $90,000 worth of separate property.

Tim's 2001 will has been admitted to probate. Beth, Sarah, Fred and Anna have each claimed shares of Tim's estate.

How should the estate be distributed? Discuss.

Answer according to California law.

Answer A

Question Two

I. Existence of a Valid Will

The first issue is whether, upon his death, Tim dies testate leaving a valid will able to be probated. The facts indicate that upon his death in 2004, Tim died[sic]. In 2001, Tim executed a valid will which has now been admitted to probate. As such, the will will be presumed to be a valid statement of Tim's testamentary intent; he will be presumed to have had testamentary capacity when he made it, knowing the natural objects of his bounty and the status of his personal possessions, and will be presumed to have complied with the requisite legal formalities.

As such, the next issue is to determine whether, under the terms of his will as executed, any of those individuals having an interest in Tim's estate, which include Beth, Sarah, Fred and Anna, will take an inheritance under the terms of the will.

II. Distribution of Tim's Estate Under the Will

Upon death, a testator may devise and bequest his one-half share of community property and the entirety of his separate property. Tim's 2001 will, as probated, leaves all of his property to Anna. The issue is whether this will prevent Beth, Sarah, or Fred from taking any portion of Tim's estate. Each individual and the will's impact upon their ability to inherit from Tim's estate and[,] if so, the extent of their portion, will be discussed in turn.

A. Beth

On the face of the will, Beth receives nothing from Tim's estate, however Beth has claimed a share. Two key issues will impact whether Beth is entitled to a portion of Tim's estate despite the the [sic] terms of the will, 1) whether she may claim the status of a pretermitted spouse, and 2) whether her waiver of inheritance rights prior to marriage was an effective relinquishment of her portion of Tim's estate.

1) Pretermitted Spouse

Under CA law, if a testator dies with a validly executed will that makes no provision for a spouse whom he married after he executed the will, a presumption is raised that the testator did not intend to leave the spouse out of the will but merely forgot to execute an updated will.

This presumption can be rebutted by showing that the will on its face makes it clear that the testator did not intend to provide for the spouse, or by demonstrating that the testator made alternative, non-testamentary provisions for the spouse, i.e. by purchasing life insurance or an annuity or making an inter vivos gift. Because the terms of Tim's will are so simple,

it cannot be shown on its face that Tim intended to leave Beth out. In addition, Tim does not seem to have made alternative arrangements for Beth via gift or the provision of insurance. The only such evidence would be the fact that the house Tim and Beth shared was community property, so perhaps Tim thought the house would go to Beth, and that would be sufficient; however, the terms of his will contradict this, as he indicated all of his property would go to Anna.

The final way to rebut the presumption of Beth's status as a pretermitted spouse is to show that she validly executed a waiver of her rights to inherit from Tim's estate, discussed below.

2) The Prenuptial Waiver

The issue is whether Beth's waiver of all rights to Tim's estate is valid. If valid, then Beth may make no claim on Tim's estate. In order for such a waiver to be valid, several requirements must be met. First, the waiver must have been voluntary and not due to coercion. The facts indicate that Beth signed the waiver 2 days prior to marrying Tim, which may raise an inference that she did not have sufficient time to consider the waiver and[,] as a result, it wasn't truly voluntary.

Second, the waiver must have been executed only after Beth was fully informed of Tim's wealth and the extent of his estate. If Beth had no such knowledge, the waiver will be ineffective.

Third, Beth needed to have been represented by independent legal counsel. She was not so represented when she signed the agreement, and therefore the waiver will be presumed invalid. Unless Tim's estate can overcome the presumption of the invalidity of Beth's waiver due to the factors discussed above, she will be treated as a pretermitted spouse. As such, she will take her intestate share and will be entitled to Tim's half of the community property (the house) and one-third of his separate property, because he left 2 or more living issue, Sarah and Fred.

B. Fred

The issue is whether Fred will be able to claim status as a pretermitted child because he was born after the will, and thus if he will be entitled to a share of Tim's estate despite the terms of the will.

Because Fred was born in 2001, but after the will was executed, he will claim to have been unintentionally left out of Tim's testamentary provision and thus pretermitted. Fred will argue that because the terms of the will do not state on their face that he was left out on purpose, and because he has received no other gift or devise in lieu of an inheritance, that he is pretermitted.

Tim's estate may argue that because Tim's will left everything to Anna, Fred's mother, that Tim did not intend to make a separate provision for Fred. However[,] this argument will fail because Tim did not know that Fred existed, and thus the bequest to Anna could not have been meant to also care for Fred.

CA courts presume that when a man dies without knowledge of a child, that has [sic] the man known of the child that he would have provided for the child. As such, and because Fred will be considered a pretermitted heir, Fred will be entitled to a one-third share of Tim's separate property, equal to $30,000.

C. Sarah

Sarah will make substantially the same arguments as Fred, in claiming that she too is a pretermitted child. Of course, Tim knew of Sarah, but she can also rebut the presumptions against pretermission as Fred was able to do, and because Tim seems to have made no other provision for her, she will be considered a pretermitted child and will take a one-third share of Tim's separate property, $30,000.

D. Anna

Upon divorce, any will that has already been executed that leaves everything to the ex[-]spouse is considered invalid. However, in this case, Tim's will was executed both after legal dissolution of him [sic] and Anna's marriage and even after attempts to reconcile. Thus, Anna being an ex-spouse will not result in an invalidation of the will.

The CA courts hold a testator's intent to be the key to whether a will makes a valid distribution of the estate. Because the will was validly executed, Anna is entitled to inherit under it. However, because of the claims of Beth, Fred, and Sarah, there won't be anything left for her.

III. Intestate Succession

Under the contingency that the court holds the will invalid as no longer demonstrating Tim's intent, his estate will pass via intestacy. In that case, once again Beth would get the house and $30,000 (a SP), Fred a SP and Sarah a SP, and Anna nothing.

Answer B

2)

In Re Estate Of Tim (T)

Tim (T) died in 2004 and left various individuals who are all claiming a stake in Tim's estate.

Requirements for a Will

A will requires that the testator sign a will with present testamentary intent in the presence of two witnesses at the same time and that both witnesses understand the significance of testator's act. Here the facts state that the will was valid, so it is presumed that all formalities were met.

Beth

Beth was T's wife. Therefore, she is entitled to a ½ interest in all of T's community property. Additionally, Beth may argue that she is entitled to T's estate as an omitted spouse.

Omitted Spouse

A spouse that is not mentioned in a will is entitled to an intestate share of a testator's estate if the marriage began after the execution of the will, unless there is (1) a valid prenuptial agreement, (2) the spouse was given property outside of the will in lieu of a disposition in the testator's will or if (3) the wife was specifically excluded from the will. T and B were married after T executed his will, as the will in probate was executed in 2001 and the marriage of T and B was in 2002. Additionally, there was no disposition outside of the will in lieu of a devise in the will and there was no reference to excluding any spouse of B in particular in T's will. However, whether the prenuptial agreement was valid is in question.

Prenuptial Agreement

A will argue that the prenuptial agreement was not effective because she was not represented by a lawyer. A prenuptial agreement is valid if there is a writing signed by the testator and the spouse was represented by counsel at the time that the agreement was signed. However, there is no need for separate counsel if the spouse knew of the extent of testator's property at the time of signing the will and she specifically was [sic] waived the right to counsel in writing.

Here the[re] was no representation by counsel. Additionally, there are no facts that indicate that Beth was advised to get separate counsel, waived her right to separate

counsel, or even knew of the extent of Tim's property. Nor did Beth waive the right to knowledge of Tim's property. Therefore, it cannot be said that Beth validly waived her right to counsel or knowingly and voluntarily entered into the prenuptial agreement.

Although Anna will argue that the prenuptial agreement should have served as evidence of T's intent to disinherit B, such evidence should not be admissible because it is not probative of any of the exceptions to the omitted spouse provisions in California's intestacy statutes.

Because the prenuptial agreement was not valid, Beth is entitled to an intestate share of the estate.

Intestate Share of the Estate

If the court agrees that the prenuptial agreement was not effective, then the omitted spouse will receive an intestate share of Tim's estate. Under California's probate code, an [sic] spouse's intestate share is ½ of all community property and a of testator's separate property if the testator died with more than one issue. Here, Tim dies with two children. Although T did not know about Fred (his illegitimate son), if his will had been admitted to probate, Fred would have been able to collect his share under the will along with Sarah, T's legitimate daughter.

Conclusion

Therefore, if the prenuptial agreement was found to be invalid, Beth should claim a of T's separate property estate and the testator's ½ community property, or all of the $400,000 of T's community property share in the house and $30,000 of his separate property. If this is so, all other gifts under the will will be abated in this amount. If the prenuptial agreement is found to be valid, however, Beth will be entitled to nothing.

Sarah

Sarah was a child who was left out of the will and was born after the execution of the will. Therefore, Sarah will attempt to invoke the omitted child rule under the probate code.

Omitted Children

A child may claim to be a pretermitted child if a will omitted them from its face and if the child was born after the last executed will or codicil. An omitted child may collect his or her intestate share, unless she was left property outside of the will in lieu of the a [sic] devise, unless there was some intent in the will to disinherit the child or unless there was at least one child in existence at the time of the will's execution and the testator gave substantially all of his assets to the pretermitted child's parent.

Here, Sarah was born after execution of the 2001 will and was not included in the will. Additionally, she was no[t] disinherited in the will, nor was she given anything outside of the will in lieu of a devise in the will. Finally, there was no child in existence at the time of Tim's execution of his will. Even if A argues that the child was in gestation at the time of execution and, therefore, is a Prometheus child, this argument is still flawed because Tim did not leave substantial property to Sarah's parent under the will.

Therefore, Sarah should collect an intestate share under the will.

Intestate Share

As stated above, a spouse should claim a of a [sic] intestate's separate property estate under intestacy if the testator had 2 or more children or issue of those children at the time of his death. Under Section 240 of the probate code all property in intestacy shall pass to the next living generation, which is the generation of Sarah and Fred. At that point the property should be divided equally among all issue then living and not living. Because both Fred and Sarah are living, both would collect ½ of the b remaining separate property estate under intestacy.

Conclusion

Therefore, Sarah should also receive a of Tim's separate property estate, which should be a of the $90,000, or $30,000.

Fred

Fred may also claim to be an omitted child because he was left out of the will and was born, according to the facts, later in the same year as the execution of Tim's will. Fred was not included in Tim's [will] or disinherited in it, nor was he provided any property outside of the will in lieu of the property in the will.

However, although A may argue that although substantially all of Tim's property was left to Fred's mother, Anna, at the time of the disposition of the will, this exception to the rule for omitted children will not apply because Tim did not have at least one child in existence at the time of executing the will. Because this is so, the third exception, which excludes a child as an omitted child if the testator has at least one child at the time of his or her will's execution and left substantial property under in [sic] his or her will to the child's parent, does not apply.

Therefore, Fred is entitled to an intestate share of the property as an omitted child.

Conclusion

If it is shown that Fred was the child of Tim then Fred should collect $30,000 of Tim's estate as an omitted child.

Anna

Anna was Tim's ex-wife, and she claims a stake [in] T's will. Anna was left the residuary of T's estate. A residuary is a devise that leaves all property that has not otherwise been devised under the will or been taken through the omitted children and spouse provisions in the probate code.

Anna's take under the will depends on the distributions to Beth and to Fred. If the prenuptial agreement with Beth was valid, Anna would collect T's ½ interest in the house and the $30,000 in separate property that would have gone to Beth under the intestacy statutes. Additionally, Anna would collect Fred's $30,000 if he could not collect under the intestacy statutes.

However, Anna's distribution under the will is abated in the amount that Beth, Fred and Sarah collect under the will. If all three collect under the will, there will be nothing in the estate left to probate, [and] all of Anna's distributions under the residuary clause of T's will will be reduced to nothing[.]

Dissolving Of Will Terms At Divorce

Although normally provisions in a will dissolve at a divorce, a will created after the finalization of the divorce to a spouse [does] not dissolve. The provisions in this will were executed after the divorce and name Anna as a friend, rather than a spouse. Therefore, the provisions did not dissolve as they were not in existence at the time of the divorce.

Community Property

A spouse is entitled to ½ of all of testator's community property. However, Anna was not the spouse of T at T's death. Therefore, there is no community, and, thus no community property.

Conclusion

Whether A collects under the will depends on whether the omitted child statute applies to Fred and the omitted spouse exception does not apply because of the prenuptial agreement with to [sic] Beth. If either the omitted spouse or child do not collect under the will, all property not taken by those persons should go to Anna as the residuary devisee.

Q3 Real Property

Mike had a 30-year master lease on a downtown office building and had sublet to others the individual office suites for five-year terms. At the conclusion of the 30-year term, Olive, the building's owner, did not renew Mike's master lease.

When Olive resumed control of the building, she learned that Mike had failed to comply with the terms in the 30-year lease that required him to renew an easement for weekday parking on a lot between the building and a theatre. The theatre, which, in the past, had always renewed the easement, used the lot for its own customers on evenings and weekends.

Olive also learned that a week before the end of the 30-year lease Mike had renewed for another five years the sublease of one tenant, Toby, at a rate much below market. Toby ran an art gallery, which Mike thought was "classy." Upon signing the renewal, Toby purchased and installed expensive custom lighting and wall treatments to enhance the showing of the art in his gallery.

Because of Mike's failure to renew the parking easement, the theatre granted it to another landowner. As a result, Olive had to request a variance from the town ordinance requiring off-street parking. The Board of Zoning Appeals (BZA) denied the request because a nearby parking-lot operator objected. The off-street parking requirement, combined with the loss of the parking easement, meant that several offices in Olive's building would have to be left vacant. The BZA had recently granted a parking variance for a nearby building under very similar circumstances.

Olive commences the following actions:

1. A suit against Mike to recover damages for waste resulting from Mike's failing to renew the parking easement.

2. An action for ejectment against Toby and to require him to leave the lighting and wall treatments when he vacates the premises.

3. An appeal of BZA's denial of Olive's variance request.

What is the likelihood that Olive will prevail in each action? Discuss.

Answer A

3)

A lease or "leasehold estate" is an interest in land whereby the landholder ("landlord") grants another person (the "tenant") the exclusive use of the land for a limited period of time, subject to certain terms and conditions, if any, set forth in the lease. The lease between Mike and Olive was a lease "for years," which means that it was for a specific period of time, after which the lease would automatically terminate. Therefore, here, Mike's lease terminated automatically at the conclusion of 30 years, in favor of Olive.

1. Olive v. Mike

Waste is an action initiated by a person with an interest in land (usually a holder in fee or a remainderman), against the occupier of the land, for harm to the land caused by the occupier's actions. Here, Olive is arguing that Mike's failure to renew the parking easement harmed the downtown office building [and] constituted waste, since this action set off a chain of events leading to Olive's inability to rent out all of the office spaces, thus decreasing the value of the office building.

Typically, an action for waste lies when the occupier's action is physically damaging the land - such as where the occupier removes trees or minerals for commercial use. Therefore, Olive's claim for waste based on Mike's failing to renew the easement is unusual. However, the existence of an easement appurtenant, as exists here, is in fact an interest in land that is "attached to" the office building itself. Thus, a court could find that loss of the easement is tantamount to harm to the land, and allow Olive to proceed with the waste action. It seems, however, that this would be highly unusual and therefore it is most probable that, since Mike's failing to renew the easement did no physical harm to any land, Olive is not likely to prevail on this theory. (She should try a breach of lease theory, since the facts state that the renewal requirement was a term of the lease.)

2. Olive v. Toby

Ejectment is an action at law whereby one claiming a superior interest in a parcel of land seeks to have the present occupier removed. (Modern courts, including California, use the unlawful detainer action to accomplish substantially this remedy.) Olive's ejectment action against Toby can only succeed of [sic] Toby is not entitled to occupy his office.

Sublease

Absent any provision in the lease to the contrary, a lease is freely alienable, meaning that it may be freely assigned and subletted. A sublease is an interest in land created when a tenant transfers part of his leasehold interest to another party. Here, Mike subletted Toby's office for 5-year renewing terms. However, the last time that Mike renewed Toby's sublease, there were less than five years remaining in Mike's term. An estate can never last longer than the estate on which it depends, which is why an assignment or sublease can never be for a longer period of time than the sublessor has remaining in his term. Therefore, while earlier subleases to Toby may have been proper, the last sublease, made

only a week before Mike's lease terminated, was improper. Accordingly, Tony's sublease automatically extinguished upon the termination of Mike's lease. At that point, Olive was entitled to possession of Toby's office.

Therefore, Olive is likely to succeed in her action to eject Toby.

Fixtures and Merger
Under the doctrine of fixtures and merger, when an occupier of land affixes any object to the land, or to any structures built upon the land, those items merge into the land. The general rule is that an occupier is not entitled to remove fixtures from the occupied property when the estate terminates. Therefore, under this general rule, Toby should not be permitted to remove the expensive custom lighting and wall treatments he added to his office space. However, some courts will permit a tenant to remove trade fixtures (equipment used in carrying out a specific business or occupation) if the circumstances suggest that the tenant intended to be able to keep them and if they can be removed without significantly harming the property. Here, since: (1) the lighting and wall treatments that Toby installed were custom-made for him; (2) the items were expensive; and (3) Toby had installed them very recently (which means that he probably has not received the benefit of buying them), a court will probably allow Toby to remove these items, if this can be done without significantly harming the building.

3. Olive v. BZA
Zoning ordinances are laws restricting the use of land, and are a valid exercise of the police power inherent in the states and their political subdivisions.

It is important to note here that Olive is requesting a variance to a zoning ordinance requiring off-street parking, and not simply a permit to which she has an entitlement if certain requirements are met (as may be defined by statute with respect to some kinds of permits). Therefore, the BZA was free to deny her permit, and that denial will be deemed lawful unless it was: (1) arbitrary or capricious in violation of the Fourteenth Amendment to the United States Constitution; (2) an unlawful taking of her property for public use without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution; or (3) otherwise illegal (e.g., unlawfully discriminatory or otherwise violative of state or federal law).

Arbitrary and capricious. Olive will argue that the denial of the permit based solely on the fact that the nearby parking lot owner objected was arbitrary and capricious, especially in light of the fact that the BZA had recently granted a parking variance for a nearby building under very similar circumstances. While these are factors that the court will consider in determining whether the denial of the permit was improper, Olive will have the burden of proof here, and if the court can find rational basis for upholding the denial of the permit, it will do so. It is likely that the court will be able to find such a rational basis for the denial of the application - as just about any valid reason will do.

Taking. Olive may argue that the denial of the variance requests is causing her so much harm that it amounts to a taking of her property without just compensation, in violation of the Fifth Amendment to the United States Constitution as incorporated against the states and their political subdivisions through the Fourteenth Amendment. It is true that if the BZA's exercise of its police power in executing the zoning ordinances created such a severe economic harm to Olive, that is not justified by the denial of the permit, this could constitute a taking, which would be invalid unless the city paid Olive just compensation. However, even though it appears that Olive did incur economic harm because she was not able to obtain the permit, this "taking" argument will still be a stretch given the fact that Olive was never entitled to the permit in the first place, and thus never had a property interest in it.

Otherwise unlawful. The facts do not indicate that BZA's denial of the permit to Olive was in violation of any other laws or the federal Constitution.

Based on the above, Olive is not likely to prevail in her appeal of the BZA's denial of her variance request.

CONCLUSION

Based on the foregoing, Olive should not prevail in her action against Mike for waste. She should be successful in her action to evict Toby, but the court will probably allow him to remove the lighting equipment and wall coverings if he can do so without harming the property. Finally, Olive is unlikely to succeed in her appeal of the BZA's denial of her variance request.

Answer B

3)

Olive v. Mike

A landlord can sue a tenant for "waste" where the unreasonable acts of the tenants cause a diminution in value of the leased property. Normally the issue of waste involves physical property damage, but it can involve a loss of a right such as an easement. Certainly the loss of the occupancy permit greatly diminished the value of the property. It was also arguably "unreasonable" for Mike to fail to renew the lease, particularly in light of the fact that the Theatre was apparently willing to grant such a renewal.

A cause of action for "waste" would require Olive to prove that Mike caused a diminution of the value of the office building. Here, she could most probably prove the loss of the easement diminished the value of the office building. The easement was an "easement appurtenant" that benefited the office building (the dominant estate), as opposed to the easement in gross, which would only benefit an individual person. An easement appurtenant can increase the value of land and is a real interest.

As a defense, Mike can argue that there was no guarantee that the lease would be renewed and that, since Olive had no real interest in the easement past its original term, the loss of the easement was not "waste" because it did not diminish the value of the leased property. The value of the property was that of an office building with an easement that was set to expire. An anticipated right (such as the optional renewal of an easement) is not part of the "value" of the property, since there was no guarantee that the easement would be renewed at all.

Olive would most probably be better off suing Mike under a contract theory for a breach of his lease agreement.

Olive v. Toby

Toby's Sublease

Modern law generally favors the assignability of leases. An assignment of an entire leasehold is called "an assignment," whereas the partial assignment of a leasehold is considered a sublease. An assignment novates the lease wher[e]as a sublease does not absolve the original lessor of liability.

Even though assignability is favored, a tenant can never assign or sublease any more than his or her interest under the master lease. In this case it appears that, at a point when he only had a week left on his master lease, Mike attempted to grant Toby a 5 year sublease. This sublease would be invalid because Mike only had one-week's worth of interest left under his master lease. Because Mike cannot sublease out an interest greater

than he possesses, the sublease to Toby is invalid (at least insofar as it extended past a week).

Ejectment

The owner of real property has the right to eject any person on the property without a legal right to be there. Toby has no valid lease or sublease, because Mike couldn't grant him a lease that extended beyond the ma[s]ter lease's 30-year term. Accordingly, Olive can bring an action for Toby's ejectment.

Retention of Improvements

Absent a contrary provision in a valid lease, the owner of real property is not entitled to retain possession of fixtures installed by a tenant or a third-party (in this case a third party with an invalid sublease). The landlord is only entitled to retain the improvements if they are "permanently affixed" to the real estate.

It would be a question of fact as to whether Toby's improvements are "permanently affixed." The custom lighting, if it is track lighting that can be removed without damaging the structure, is probably not a "permanently affixed" item that the landlord has a right to retain. A "wall treatment" might be something that is permanently affixed, depending on its size and how it was attached to the structure. This would be a matter for the finder of fact to determine.

Of course, if Olive is owed any unpaid sums due to Toby's use of her real property, she would probably be entitled to a lien on any of Toby's property within the office building, including the fixtures and wall treatment.

Olive v. BZA

A local government has the authority to pass zoning ordinances under general police power to legislate for the well-being of citizens. This power, however, cannot be employed in a way that violates a citizen's right to due process or equal protection, or that amounts to an "unauthorized taking" of private property.

BZA is a government entity and, therefore, any actions by BZA constitute "government activity" implicating the U.S. Constitution.

It appears that Olive was given the opportunity to be heard and notice of any proceedings, therefore her procedural due process rights were most probably not violated. No fundamental rights are implicated by the BZA's decision to deny a variance for lack of parking, so it appears unlikely that any substantive due process rights were violated. Olive can argue that the failure to provide her with a variance when a similar variance had been recently granted to a similarly situated applicant violated her substantive due process rights because the action was not "rationally related to a legitimate state purpose." The BZA,

however, will res[p]ond that requiring parking for office space rationally related to the legitimate state purpose of a unified zoning scheme, and that granting variances to all applicants would diminish the uniformity and purpose of that scheme. Olive will argue that the zoning ordinance gives the board unfettered authority to grant or deny variances, which might be a problem for the BZA if they can't establish that the[y] follow guidelines or standards in determining what variances to grant. Olive will most likely fail in her attempt to argue that the refusal to grant her a variance was so "irrational" as to constitute a due process claim.

In this case, Olive's best argument would be that the denial of the variance was a violation of equal protection. Unless a fundamental right or a suspect classification is implicated, a zoning regulation or determination by a zoning board will be evaluated under the rational basis test and will be upheld if the regulation is reasonably related to a legitimate state purpose. In this case Olive can argue that the government created a classification by treating her differently from the other applicant who was granted the variance, and that the disparate treatment was irrational. The burden would be on Olive to demonstrate that the BZA's action in treating her differently was not reasonably related to a legitimate state purpose. In this case, Olive will argue that the different treatment could not possibly be rational because the applicants were so sim[i]lar. The BZA will most likely respond that it can only grant a limited number of variances, and therefore classifying among applicants in[h]erently requires some degree of discretion and they often grant variances on a "first come first served" basis.

Because the "rational basis" test is so deferential to the government, Olive is unlikely to succeed in her due process or equal protection claims.

Citizens are also protected from any "takings" of property without just compensation. Olive can argue that the refusal to allow her to use her property for offices if she does not secure parking amounts to a "taking." She is also unlikely to prevail on this claim. A property owner can sue for "reverse condemnation" if a government agency enacts regulations that preclude virtually any reasonable use of the real estate, but here the BZA has not denied Olive any use. She can still rent out some of the offices, and she is free to continue to seek commercial parking elsewhere so she can regain the use of the offices that she currently can't use. Accordingly, Olive's claim of an "unjust taking" will most likely fail.

THURSDAY MORNING
FEBRUARY 23,2006

California Bar Examination

Answer all three questions. Time allotted: three hours

Your answer should demonstrate your ability to analyze the facts in question, to tell the difference between material and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

Q4 Civil Procedure

Pat, a resident of State A, received a letter from Busco, a tour bus company that had been in business for about two months. Busco was incorporated and had its principal place of business in State B. The letter invited Pat to go on a tour of State C at a special introductory price. After Pat sent in her money, Busco sent Pat a tour brochure and ticket.

Ed, also a resident of State A, saw an ad that Busco had placed once a week for the last several weeks in Ed's hometown newspaper for the same State C tour. The ad listed a State A telephone number to call for tickets. Ed called the telephone number and ordered and bought a ticket for the same tour as Pat and for the same price.

Pat and Ed boarded the tour bus in State B. Upon entering State C, the bus veered off the road and hit a tree. Ed was not hurt, but Pat suffered serious injuries. The tour was canceled. Busco refused to reimburse passengers the price of their tickets.

Ed sued Busco for breach of contract in state court in State A to recover the price of his ticket. Busco moved to dismiss the suit based on lack of personal jurisdiction. The court denied the motion. After trial, judgment was entered in favor of Ed.

Thereafter, Pat sued Busco in state court in State A for breach of contract to recover the price of her ticket and for tort damages for her personal injuries. After Busco filed its answer, Pat filed a motion for summary judgment on both claims on grounds of res judicata and collateral estoppel. The court denied Pat's motion.

State A has a long-arm statute that authorizes the exercise of personal jurisdiction over nonresident defendants on any basis not inconsistent with the Constitution of the United States.

1. Did the court rule correctly on Busco's motion to dismiss Ed's suit for lack of personal jurisdiction? Discuss.

2. Did the court rule correctly on Pat's motion for summary judgment on each of her claims on grounds of res judicata and collateral estoppel? Discuss.

Answer A

I. The Court CORRECTLY Ruled in Finding Personal Jurisdiction Over Busco in State A.

A. An Overview of Jurisdiction

In order for a court, be it state or federal, to gain jurisdiction over an individual or entity (such as Busco ("B")), it must either assert in personam jurisdiction (jurisdiction over the person or entity itself), in rem jurisdiction (jurisdiction over property within the jurisdiction in which the court has authority and is related to the cause of action), or quasi-in rem jurisdiction (jurisdiction over property within the jurisdiction which the court sits but is not related to the cause of action). It must comply with due process requirements of state and federal constitutions such that a defendant is not called into a court in a jurisdiction in which it would be deemed to be unfair or unforeseeable.

B. In Personam Jurisdiction Requirements

Here, the Court in State A, upon Ed ("E") bringing his claim in State A, asserted jurisdiction over B using in personam jurisdiction. In personam/personal jurisdiction comes in two types: general and specific.

1. General Personal Jurisdiction

A court can exercise general personal jurisdiction over a defendant when it has systematic and continuous contacts with the forum. This requires more than just drawing on a bank account in the forum, or communicating with entities or individuals in the forum. The defendant's involvement must be intentional. The reason why the standard for contact here is so strict is that the [sic] under general jurisdiction, a court can take jurisdiction over a defendant even if the cause of action is completely unrelated to its contacts with the forum. Thus, the law has been crafted such that a defendant is deemed to have subjected itself to the laws of the forum, and benefited from their protection, to such an extent, as to be susceptible to suit there[,] no matter where the cause of action arises.

Without knowing what grounds upon which the Court in E's suits against B used to sustain personal jurisdiction, I must assume that general jurisdiction was not the grounds upon which the court relied. B had only been in business for a few months, and having been incorporated in State B, as well as having its principal place of business ("PPB") in state B, it's unlikely to have "systematically and continuously" availed itself to State A.

The US Sup Ct has also shown that general jurisdiction can also be attained over a defendant in several more "traditional" ways. For instance, if the defendant was served with process in the jurisdiction (absent fraud or coercion), if the defendant consented to jurisdiction (either expressly or by failing to timely raise an objection to jurisdiction), or if a

defendant is deemed to have consented constructively by nominating an agent to accept service. In this case, B meets none of these standards, assuming it challenged jurisdiction in a timely fashion.

2. Specific Personal Jurisdiction

The more likely way the Court in E's claim asserted jurisdiction over B in this case is through the use of specific personal jurisdiction. Although not available historically at common law (only general jurisdiction was available), this developed in the face of a more mobile and economically integrated society. Under this doctrine, specific personal jurisdiction requires two elements. First, jurisdiction must be permitted under state law, which usually means it must fall under a state long-arm statute, permitting courts within the state to "reach out" of the forum to grab defendants for suit within the forum's courts. As we're told, State A has a long-arm statute (similar to that of California's) which permits jurisdiction to the same extent that the due process requirements of the US Constitution will allow. Thus, this takes [us] two [sic] our second requirement: the jurisdiction is permitted if the due process requirements are satisfied pursuant to the US Constitution.

Under due process, a defendant's contacts need not be "systematic and continuous" to sustain jurisdiction. However–and this is a major caveat–the cause of action must be related to the defendant's contacts with the forum. What contacts are required? Specific personal jurisdiction requires the satisfaction of two elements: 1) the defendant must have minimum contacts with the forum, and 2) exercising jurisdiction must not offend traditional notions of fair play and substantial justice.

A. Minimum Contacts

First, for the Court in state A to get jurisdiction over B, it must show that B had minimum contacts with state A. This requires an investigation into whether B purposefully availed himself of state A and whether it would be foreseeable for B to be haled [sic] into court there.

Under these facts, B, although incorporated in state B, had reached out to state A by placing an advertisement in the newspaper in that state, by providing a phone number for folks in that state to call to order tickets, and purposefully solicited patronage from state A. These facts are not all that different from the facts in the Asahi case in which the US Sup Ct found jurisdiction when a company provided phone numbers for customers and advertised in the forum. B was taking advantage of the laws of state A by directing its business to that state, and thus it was quite foreseeable that it would be haled [sic] into court there. Thus, minimum contacts are likely satisfied here.

B. Fair Play and Substantial Justice

Second, it must also be fair to exercise jurisdiction over B, even if B had minimum contacts with state A. This requires an investigation into several factors, including the interests of state A in protecting its citizens from "foreign" tortfeasors, the interests of the plaintiff in being able to seek the protection of the laws of his domicile, the fairness accorded to B in forcing him to a different state to defend himself, and administrative details associated with litigating in state A, such as the location of witnesses, etc. Here it's not entirely clear how far State B or State C is from State A, but it's likely quite close in distance. Moreover, State A has a significant interest in defending its citizens from foreign tortfeasors, or in the case of E, contract breachers. Granted, because the price of the contract is likely not great, it's possible the interest here is not all that significant. However, on the other hand, there is likely to be little unfairness in pulling B into State A, so I would conclude that it comports with traditional notions of fair play and substantial justice to find jurisdiction here. Again, these facts are quite similar to [a case] where the Sup Ct did find jurisdiction. Granted, there were forum non conveniens issues in that case, but an international defendant was involved there – which is not the case with B.

Finally, a note should be made again about the action arising out of the contacts with the forum. Because this is specific personal jurisdiction (ie, not general), it requires that the minimum contacts with the forum be related to the cause of action. Here, B's contacts with the forum–its attempt to get business from E–are directly related to the breach of contract action.

II. The Court did NOT Rule 100% Correctly on Pat's SJ Motion[.]

When Pat ("P") brought claims against B, [s]he brought two causes of action: breach of contract and tort damages. Although the former had already been litigated, the latter had not yet been litigated. This makes a significant difference when applying rules of Res Judicata and Collateral Estoppel.

A. Res Judicata

In order to invoke the doctrine of Res Judicata ("RJ"), three elements must be satisfied. First, the claim at issue must be related to the same transaction or occurrence of a previously litigated claim. Second, it must involve the same parties as the previously litigated claim. Finally, the previously litigated claim must have resulted in a final judgment on the merits.

Here, although the contract claim that P brings against B is the same as that brought against B by E, and although there was a final judgment on the merits, P was not [a] party to the earlier litigation. This means that RJ is not applicable to P's claims. In other words, collateral estoppel (below) is all that [s]he has available to try to sustain [her] summary judgment motion.

B. Collateral Estoppel

The doctrine of Collateral Estoppel ("CE") requires 5 elements. First, it must involve a previously litigated issue of law or fact. Second, the previously litigated issue must have been actually litigated, and third, it must have been litigated to a final judgment on the merits. The issue must have been a central (non-collateral) issue in the previous litigation, and at least one of the parties from the previous litigation must be present.

1. P's Tort Claim

First, here the issues that P would like to assert CE over pertain to the liability of B to its patrons resulting from the bus accident. Although the issue of liability resulting from B's breach of contract for not refunding the ticket price has been litigated to a final judgment on the merits by one of the parties, the issue pertaining to tort liability has not! Thus, so far as P's summary judgment motion regarding B's liability for P's injuries, the court did rule correctly because the issue of B's liability had not been previously litigated (it wasn't even an issue in E's litigation against B). Thus, showing that B was negligent, or that the driver was drunk, or whatever the tort claim may rely upon must still be shown by P. Given that P brought his [sic] SJ motion immediately following B's answer [s]he [is] asking the court to find that there is no material issue of disputed fact with regard to B's tort liability. Obviously, without affording B an opportunity to provide evidence to the contrary, and without P fulfilling his [sic] prima facie obligations as to his negligence claim, the Court ruled correctly here.

2. P's Breach Claim

On the other hand, P's second claim, his [sic] action for breach of contract was actually litigated in the previous action by E against B, and it would satisfy all of the above requirements for CE. However, there are two additional requirements that must be noted.

First, the party against whom CE is being asserted must have been the party to the previous action. This is satisfied here–B was a party to E's litigation.

Second, there's a question as to whether there must be mutuality. Traditionally, both parties had to have been party to the earlier litigation for CE to apply. However, modernly this is changing. The US Sup Ct has recognized that non-mutual defensive CE can be used quite easily so long as the other requirements of CE are satisfied. What that means is that, if B had won in his earlier litigation against E because the trier of fact had found that there was no breach (for example), then B would be entitled to assert CE against P's claim here. The more questionable assertion of non-mutual CE is when it's used offensively, as P is attempting to do here. Although this is less likely to be permitted, courts have begun to permit it more often so long as the defendant had an opportunity to litigate the issue competently in the previous case, it was foreseeable to the defendant that CE may arise in the future from the issue, that it's fair to the defendant, and that the plaintiff who's trying to assert CE could not have been joined in the previous litigation.

In applying this to the facts before us, it's likely that the court in State A decided that because P could have brought his[sic] contract action at the same time as E, CE should not apply. If that's the case, then the court was correct. On the other hand, it seems as though, for judicial efficiency['s] sake, the court could have at least granted CE on the breach of contract claim in this case, leaving the tort claim to go to the trier of fact.

Answer B

4)

1. Did the court rule correctly on Busco's motion to dismiss Ed's suit for lack of personal jurisdiction?

Personal jurisdiction

Personal jurisdiction ("PJ") refers to the power of the court to render a judgment that will be binding on the defendant. The exercise of PJ is proper if it is authorized by statute and does not violate Due Process.

Traditional bases

States usually have a PJ statute that authorizes personal jurisdiction where the defendant (1) is domiciled in the forum state[,] (2) is personally served with process while physical present in the forum state[,] or (3) expressly or impliedly consents to jurisdiction in the forum state. A corporation is domiciled in any state in which it is incorporated and in which it has its principal place of business.

Here: (1) defendant Busco was incorporated in and had its principal place of business in State B. It was therefore not domiciled in State A. (2) No evidence suggests that any representative of Busco was personally served while physically present in State A. (3) Ed might argue that Busco consented to jurisdiction when it appeared in State A court, but this argument will fail if Busco's appearance was specially limited to the sole purpose of contesting the court's PJ over it.

Thus, no traditional bases for PJ are present.

Long-arm statute

State A's long-arm statute provided for PJ over any non-resident defendant if such PJ is not inconsistent with the Constitution of the United Sates. The issue therefore becomes whether State A's exercise of PJ was constitutional.

Constitutional limitations on personal jurisdiction

The Due Process clause of the Fourteenth Amendment limits a state's power to exercise PJ over a non-resident defendant to those cases where (1) the defendant has minimum contacts with the state[,] and (2) exercising PJ would not offend traditional notions of fair play and substantial justice. International Shoe v. Washington.

Minimum contacts

Minimum contacts analysis focuses on (1) whether the defendant's contacts with the forum were systematic and continuous (in which case the state has general personal jurisdiction over the defendant and the defendant is subject to PJ in the state for any act[)]; (2) whether the defendant purposefully availed itself of the benefits and protections of the laws of the state; and (3) whether the defendant could foresee being haled into court in the state.

Here, Busco's contacts with State A were the following. It sent a letter to Pat, a State A resident, inviting Pat to go on a tour of State C at a special introductory price. After Pat sent in her money, Busco sent to Pat in State A a tour brochure and ticket. Busco also placed an ad once a week for several weeks in a hometown newspaper in State A advertizing the same tour. The ad listed a State A telephone number to call for tickets. Ed called the telephone number and ordered and bought a ticket for the tour. Although it is not stated, Busco probably also sent Ed a ticket to his residence in State A.

(1) Systematic & continuous

General jurisdiction is found where the contacts are systematic and continuous. Here, Busco is a State B corporation which has only been in business for two months. It has placed an ad several times in a State A newspaper. It has sent tickets to two State A residents. It sent a letter to a State A resident. These sporadic and short-term contacts are not the sort of continuous activity sufficient to find general jurisdiction.

(2) Purposeful availment

The next issue is whether Busco purposely availed itself of the benefits and protections of State A law.

Ed would point out that Busco deliberately placed an ad in a State A newspaper. This was a contract with the newspaper and was likely governed by the contract law of State A, on which Busco would rely for protection if the newspaper were to breach the agreement. Moreover, Busco maintained a State A telephone number for potential customers to call. This involved contracting with a telephone service provider in State A and again Busco would have availed itself of the protections of State A law in negotiating this agreement. Finally, after receiving an order from two State A law residents, Busco sent tickets to both Ed and Pat in State A. These were contracts and again would likely have been governed by State A law.

On the other hand, Busco did not conduct its business in State A - the tour began in State B and went to State C. The state A telephone number might simply have connected to a call center in State B. Busco also has only been in business for two months so there has not been much opportunity for purposeful availment.

On balance, Busco did purposely avail itself of the benefits and protections of State A law.

(3) Foreseeability

The third element of minimum contacts is whether the defendant should reasonably have foreseen being haled into court in State A.

Ed will argue that, based on the analysis under 'purposeful availment', Busco should have foreseen the possibility of a contract dispute based either on the ad, the telephone number, or the tour contracts with Pat and Ed. Busco knew that these contracts were negotiated with State A entities and that there was a strong likelihood that any dispute might be litigated in State A. Moreover, Busco was offering a tour service which involved the possibility of causing personal injury to tour participants if there was an accident. Busco knew that at least two persons on the tour were State A residents, and thus should have foreseen that any tort suit they brought might well be brought in their state of residence, State A.

Busco will counter that it was domiciled in State B and that any contract actions would probably have been brought there. Further, the tour never visited State A, so tort suits in State A were unforeseeable.

On balance, however, it was reasonably foreseeable that Busco might have been sued in State A.

Fair play and substantial justice

Even if minimum contacts are found, personal jurisdiction is only proper if it does not offend traditional notions of fair play and substantial justice. The court will consider three factors here: (1) the relation of the contact and the claim[;] (2) the convenience of the parties[;] and (3) the forum state's interest in providing a forum for resolving the dispute.

(1) Relation of contact and claim

Personal jurisdiction is more likely proper if the claim arose out of the contact with the forum state. Here, Ed is claiming for breach of contract for the tour. This contract was entered into as a direct result of Busco's placing an ad in Ed's State A hometown newspaper. Thus, this element is met.

(2) Convenience of parties

The court will not impose personal jurisdiction where requiring the defendant to defend in the forum would impose an unreasonable burden on the defendant.

Busco would argue that the witnesses to the formation of Ed's contract are its employees in its State B principal place of business, that the records relating to the contract are there, and that it would be unreasonable to require Busco to produce these in State A.

Ed would counter that Busco is a corporation which can surely spare a few employees for the limited purpose of testifying. Further, much evidence is in State A - the newspaper in which the ad ran, the telephone number through which Ed placed his order, and the tickets.

Since the inconvenience to Busco is not extreme, the convenience of parties favors State A.

(3) State A's interest in providing a forum

The forum state must have an interest in providing a forum for the dispute.

E will assert that he is a resident of State A and negotiated a contract from his residence in State A using a State A telephone number after seeing an ad in a State A newspaper. This contract action will probably be governed by State A law. State A has a strong interest in providing a forum for its residents to obtain damages.

Busco will argue that the action likely raises no new issues of contract law, and since no new law is to be made, State A has little interest in having the issue litigated there.

On balance, State A's interest favors PJ in State A.

Conclusion

In view of the factors in favor of and against finding PJ, the court probably was correct to deny Busco's motion to dismiss for lack of personal jurisdiction.

2. Did the court rule correctly on Pat's motion for summary judgment on each of her claims on grounds of res judicata and collateral estoppel?

Summary judgment

Summary judgment is a ruling that the moving party is entitled to judgment as a matter of law. It is proper where there is no triable issue of material fact, and, after viewing the evidence most favorably to the non-moving party, the court concludes that no reasonable trier of fact could find in favor of the non-moving party.

Here, Pat will argue that Busco's previous action against Ed should result in judgment as a matter of law for Pat on both her contract and tort claims on theories of res judicata and collateral estoppel. Each claim will be examined in turn.

Breach of contract claim

Res judicata

Res judicata, or claim preclusion, bars relitigation of an action (1) by the same plaintiff against the same defendant (or their privies) (2) when the previous action ended in a final judgment on the merits and (3) the previous action involved the same claim (it arose out of the same transaction or occurrence, or series of transactions or occurrences).

Here, Busco will argue that Pat's contract action related to a different contract from the one negotiated by Ed because the parties were different. Pat will argue that it was the same contract because the terms and the price were the same. Ed's action ended in a final judgment on the merits because after trial, judgment was entered in favor of Ed. But the earlier lawsuit was between Ed and Busco, and this claim is between Pat and Busco.

Since the plaintiff is not the same in each case, res judicata will not apply.

Collateral estoppel

Collateral estoppel, or issue preclusion, bars relitigation (1) of the same issue (2) against a party to the previous action (3) when the issue was actually litigated[,] (4) the resolution of the issue was essential to the judgment[,] (5) and the previous action ended in a judgment on the merits.

Here: (1) the issue of whether Busco's refusing to reimburse the tour passengers the price of their tickets after the tour was cancelled was a breach of contract is the same issue in Pat's case as in Ed's, because both likely had the same contract with Busco for the tour, and both were on the same bus. (2) Busco was a party to the previous action by Ed. (3) The issue of Busco's breach was actually litigated in Ed's action and (4) was essential to the judgment, because Ed could not have won his contract suit without a finding that Busco's refusal to reimburse was a breach of contract. (5) The judgment was on the merits because after trial, judgment was entered in favor of Ed.

Non-mutual offensive collateral estoppel

Since Pat was not a party to the previous action, traditional mutuality rules should bar her use of collateral estoppel. But modernly, courts will allow non-parties to use collateral estoppel against parties to a prior action because mutuality is not required by Due Process. Use of non-mutual collateral estoppel against a defendant ('offensive') is permissible under Parklane Hosiery where the defendant had a full and fair opportunity to litigate the issue in the prior action and the forum of the previous action did not unfairly limit the defendant's litigation strategies or use of evidence.

Here, Busco was a party to the prior action, and had the same opportunity and motive to argue that its actions were not a breach of contract against Ed as it had to argue this against Pat. Both actions were brought in State A court so the forum rules of litigation and evidence were the same.

Conclusion

Since offensive collateral estoppel is allowed under these circumstances, the court incorrectly denied Pat's motion for summary judgment on her contract claim.

Tort claim

Res judicata

For the same reasons as the breach of contract claim, res judicata will not apply to the tort claim.

Collateral estoppel

The issue of Busco's tort liability for the accident when the bus hit a tree was not actually litigated in Ed's action, which was solely for breach of contract because Ed was not hurt. Accordingly, collateral estoppel will not apply to Pat's tort action.

Conclusion

The court correctly denied Pat's motion for summary judgment on the tort claim.

Q5 Contracts / Professional Responsibility

Marla is a manufacturer of widgets. Larry is a lawyer who regularly represents Marla in legal matters relating to her manufacturing business. Larry is also the sole owner and operator of a business called Supply Source ("SS"), in which he acts as an independent broker of surplus goods. SS is operated independently from Larry's law practice and from a separate office.

At a time when the market for widgets was suffering from over-supply, Marla called Larry at his SS office. During their telephone conversation, Marla told Larry that, if he could find a buyer for her excess inventory of 100,000 widgets, Larry could keep anything he obtained over $1.00 per widget. Although Marla thought it unlikely that Larry would be able to sell them for more than $1.25 per widget, she said, ". . . and, if you get more than $1.25 each, we'll talk about how to split the excess." Larry replied, "Okay," and undertook to market the widgets.

During a brief period when market demand for widgets increased, Larry found a buyer, Ben. In a written agreement with Larry, Ben agreed to purchase all 100,000 widgets for $2.50 each. Ben paid Larry $250,000. Larry then sent Marla a check for $100,000 with a cover letter stating, "I have sold all of the 100,000 widgets to Ben. Here is your $100,000 as we agreed."

When Marla learned that Ben had paid $2.50 per widget, she called Larry and said, "You lied to me about what you got for the widgets. I don't think the deal we made over the telephone is enforceable. I want you to send me the other $150,000 you received from Ben, and then we'll talk about a reasonable commission for you. But right now, we don't have a deal." Larry refused to remit any part of the $150,000 to Marla.

1. To what extent, if any, is the agreement between Larry and Marla enforceable? Discuss.

2. In his conduct toward Marla, what ethical violations, if any, has Larry committed? Discuss.

Answer A

The Agreement Between Larry and Marla is enforceable because it was a unilateral contract fully performed by Larry and it was not subject to the Statute of Frauds[.]

Offer, Acceptance and Consideration:

The agreement between Larry and Marla is a unilateral contract. In order for there to be a unilateral contract there must be mutual assent (and offer and acceptance) and bargained for exchange (consideration). An offer is a communication between two persons or entities, and it is made where reasonable people would believe that acceptance of the offer would lead the participants to be bound by its terms. The terms of the offer must also be sufficiently definite. In our case, an offer was made by Marla to Larry to find a buyer for her widgets. As a finder, Larry would be entitled to the portion of the proceeds between $1.00 per widget and $1.25, and then a portion of the proceeds above $1.25. In this case the terms of the contract were sufficiently definite even though the portion of proceeds above [$]1.25 had not been definitively determined. Given their preexisting, ongoing relationship, and that both are merchants it is fair to assume that they could finalize the contract terms at a later date, after the sale of the widgets. A reasonable person would believe that Marla was inviting acceptance and wanted to be bound by the terms of her offer.

In this case, Larry accepted Marla's contract by performing. Marla's offer was for a unilateral contract. A unilateral contract is a contract that can be accepted only by full performance. It is clear from its terms that Larry could only accept Marla's offer by actual performance because her offer was conditional. He would only get a percentage of the proceeds "IF" he found a buyer. In this case, Larry accepted the contract when Ben agreed to purchase all 100,000 widgets for $2.50 each and the widgets were actually sold.

Consideration is present in a contract where the promissee incurs a detriment. That is, he does something that he does not have to do, or refrains from doing something that he does not have to do, or refrains from doing something that he is entitled to do. In this case, there is consideration because Larry, the promissee[,] incurs a detriment when he enters the market to look for a buyer. He is not required to look for a buyer in this case, but does so anyway. He incurs a detriment because it takes time away f[ro]m his other business pursuits (including his law practice).

Because there has been a definite offer made by Marla, Larry fully accepted through his performance, and consideration is present, a contract has been formed so long as no defenses can be raised.

Defenses

The agreement between Larry and Marla is enforceable because no defenses to formation

can be raised. The Statute [of] Frauds is a requirement that certain contracts be in writing.

The writing must include the material terms of the contract and be signed. Contracts that are subject to the statute of frauds are contracts in consideration of marriage, surety contracts, contracts that cannot be formed in one year, and land sale contracts. None of these are relevant here. In addition, contracts for goods in amount greater than $500 are also subject to the statute of frauds. If a contract for goods in an amount greater than $500 is not in a signed writing, it generally is not enforceable.

In this case, the contract between Larry and Marla was not subject to the "goods prong" of the statute of frauds because Larry did not purchase the goods directly from Marla. Larry's role was that of a finder or marketer whose responsibility it was to find a buyer for Marla's widgets. He was incented [sic] to find a high price because he was entitled to keep anything over $1.00 per widget, and then a portion of the proceeds above $1.25 per widget. The arrangement would also benefit Marla because a high price for the widgets would benefit her as well, and she could rely on Larry's expertise as a broker. Marla would also not have to worry about the hassle of setting [sic] the goods and could concentrate on the core aspect of her business, manufacturing. One could argue that Larry purchased the goods from Mary because he received the purchase price from Ben directly and his business was as a broker of surplus goods. In this case he did not act as a broker, because he did not buy the goods from Marla directly. There is no indication that the goods were ever in his possession. Further, in a typical sales contract, a manufactu[r]er is not entitled to a percentage of the middleman's purchase price. Thus, the contract is more akin to that of finder who never "owned" the goods.

Ethical Violations

Operating a Business:

Larry did not commit an ethical violation when he formed and operated a business called Supply Source. A lawyer may own and operate a business that is separate and apart from the practice of law. For example, a lawyer may own a restaurant or a gas station. Lawyers may also operate a law firm that offers services related and incidental to the practice of law, but that are no[t] actually the practice of law. For example, a law firm may offer services relating to money management and accounting. In this case, we know that Larry was the sole owner and operator of a business called Supply Source, and that it operated independently from Larry's law practice and from a separate office. Because the business was run separately and apart from his legal practice, and it did not involve anything remotely related to the practice of law, it is permissible for Larry to own and operate the business. However, a lawyer who runs a business must be careful not to engage in business that would pose conflicts of interests with its clients. We will see below that Larry did not operate his business in a way to minimize conflicts.

Entering into a Business Relationship:

Larry committed an ethical violation when he did not follow proper procedures when he

entered into a business arrangement. When a lawyer enters into a business arrangement with a non-lawyer (and especially a client!), the lawyer must abide by a set of procedures. First, the lawyer should advise the other party to consult another lawyer and give him or her time to do so. Second, the lawyer must disclose and explain all the relevant terms of the contract in a way that the other party can understand. Last, the terms of the contract must be fair and not one-sided to the lawyer's benefit. In this case the terms of the contract seem to be fair. We can presume that they are fair because Marla set the terms of the contract and the contract was not negotiated by Larry. Second[,] there was no need for Larry to explain the relevant terms of the contract because they were self-explanatory and a lay person could understand them. However, Larry did not give Marla an opportunity to consult with a lawyer before entering into the contract. While Marla could have waived the right to consult a lawyer, Larry must still advice [sic] her that it may be beneficial. In this case, a lawyer may have been helpful. He may have advised Marla not to enter into a contract with Larry where all the terms have not been finalized. The fact that the terms have not been finalized is what caused the problem in the first place.

Duty to be an honest, upright member of the community

Larry should have been honest in his dealings with Marla. A lawyer had a duty to act in upright, honest manner in all aspects of his or her life. In this case, Larry should have disclosed to Marla the amount of money he received from Ben and made a good faith attempt to resolve the open issue in their contract. By ignoring that aspect of the contract and no[t] disclosing the amount he received, he seems to be acting in a deceitful manner. Not only [should] a lawyer abide by ethical considerations in the course of his practice, he must also abide by them in other aspects of his or [her] life.

Answer B

5)

(1) Enforceability of the contract between Larry and Marla

Applicable Law: If this case involves the sale of goods (tangible personal property), widgets, Article 2 of the Uniform Commercial Code applies to the transaction. However, while the case does involve the sale of widgets, the contract is really for Larry's service in selling the widgets, therefore common law would likely apply. Indeed, the payment to Larry was for the sale of the widgets. He never purchased the widgets himself, but merely acted as a broker to Ben.

The issue is whether the agreement between Larry and Marla is legally enforceable, and therefore a contract exists. In order to form a contract there must have been an offer by Marla, acceptance by Larry, and some form of consideration for the agreement.

Offer: The first issue is whether Marla ever made an offer to Larry. An offer is made when a party manifests an intent to enter into contract and communicates such intent to an offeree. Here, Marla did call Larry at his Supply Source ("SS") office and stated that she wanted Larry to sell her excess inventory. Under common law, an offer must state a price term and the material terms of the contract. The material terms, the sale of widgets up to 100,000, were certainly state[d].

The issue is thus whether there was a price term. Marla did agree to give Larry all profits over $1.00, up to $1.25. However, there was no certain price term since Marla stated that any excess over $1.25 would have to be negotiated as to the amount Larry would receive. Therefore, the lack of a certain price term negates the enforceability of the contract. The parties did not have a meeting of the minds as to what Larry would be paid for the profits he received on the widgets over $1.25. Thus, the facts probably indicate that Marla intended to contract and not to continue to negotiate.

Under the UCC, however, the court only looks at the intention of the parties to determine if there has been an offer. The UCC does not require a price term and will imply a reasonable price term if one is not stated. However, if the parties are negotiating the price term there is no intention to contract under the UCC. There was likely an intend [sic] by Marla to enter into contract since she believed it unlikely that Larry could sell the widgets for more than $1.25 per widget. Although the price term is not certain, the court could infer a "reasonable" price term for any sale over $1.25.

If there is not offer[sic], the agreement would not be enforceable under contract law. However, if there was an offer, all the other elements for a valid contract (as discussed below) were satisfied and therefore there was an enforceable agreement.

Acceptance: Marla's offer to Larry was probably a unilateral contract, that is, one

that states a specific (and only) form of acceptance. Here, Larry could only accept Marla's offer by selling the widgets for at least $1.00 per widget and giving Marla $1.00 for each widget sold. His acceptance was only upon completion of his performance.

If the contract was a bilateral contract, Larry would have promised Marla he would sell the widgets. Failure to sell the widgets would have meant Larry could have incurred liability for breach of contract for failure to perform. There is no such liability under a unilateral contract, since there is only acceptance upon completed performance.

Consideration: Consideration is a bargained for legal detriment. The only issue as to consideration in this case is whether Larry's promise was illusory. However, this was not a bilateral contract, but a unilateral contract in which Larry could only accept by performance. His performance therefore would be consideration.

Statute of Frauds: The statute of frauds requires that some contracts be in the form of a signed writing (statute of frauds may be satisfied in other ways). The statute of frauds does not apply to this case however because it is for a service, Larry's sale of widgets, which can be completed within 1 year.

If this was a contract for a sale of goods of at least $500, the statute of frauds would apply. There was no writing. However, the statute of frauds can also be satisfied by full performance, which Larry did provide, by selling the widgets and turning payment over to Marla.

Again, as discussed above, this is a services contract, not a sale of goods contract and therefore not under the statute of frauds.

Quasi-Contract

Larry could still recover damages from Marla even if there was no contract, under quasi-contract principles. Quasi-contract is a principle used in contract law to prevent the unjust enrichment of a party. Here, Marla would be unjustly enriched if there was no formal contract and Larry expended his time and energy to find a purchaser for the widgets and was not compensated for his efforts. Therefore, the courts will allow Larry to recover for the fair market value of the services he rendered to Marla. The likely determination of the amount Marla benefited would likely be $25,000, but could include a reasonable amount for the remaining $125,000 over the agreement terms.

Conclusion:

There probably is an enforceable contract under which Larry can keep $25,000 and a reasonable amount of the additional $125,000 he received from the widget sales. Even if Larry cannot recover under contract, he can still recover under quasi-contract principles.

(2) Possible ethical violations committed by Larry

Attorneys owe several duties to many different parties, including their clients, adversaries, the court, and the public at large. Here, Larry regularly represents Marla in legal matters relating to her manufacturing business. Although Larry was not representing Marla in a deal for the sale of widgets, he still may have violated some of his duties to the profession.

Duty of Loyalty - business transactions with clients:

A lawyer owes his or her clients a duty of loyalty. The lawyer must act in a way they believe is for the best interest of the clients at all times (unless other ethical rules prohibit such, like placing a client on the stand who intends to perjur[e] herself.) Included in the duty of loyalty is fair dealing in business transactions with a client.

Both California and the ABA have rules regulating business transactions between lawyers and their clients. These rules require that for any transaction between a lawyer and a client, the lawyer should make sure the deal is fair to the client, express the deal in an understandable writing, allow the client to meet with independent counsel, and the client should consent to the deal in writing. Here, there is no evidence the deal entered into between Larry and Marla was not fair. The great increase in widget price occurred after the deal between the two was struck[.] However, there was no writing or opportunity for Marla (or suggestion by Larry) to consult independent counsel.

This rule may not apply here because Larry was not representing Marla at the time of the business transaction, at least as far as the limited facts [are] known. Furthermore, Larry did properly separate his law practice and his SS business. It is in a separate office and [there is] no indication the two endeavors are mixed in any manner by Larry.

However, since Larry has a regular and ongoing (at least prior to this incident) relationship with Marla, he should have satisfied the elements stated above and in failing to do so violated his duty of loyalty to his client Marla.

Duty to act honestly, without deceit or misrepresentation: A lawyer owes a duty to the public at large in all of his or her dealings to act honestly, without deceit or fraud and not to misrepresent. Violations of this rule harm the integrity of the profession. Here, it is unknown whether Larry truly believed he simply owed Martha the $100,000 dollars [sic] for the transaction for the widgets or if he attempted to deceive her as to the price he received in an attempt to keep the additional profits to himself. If Larry violated the agreement knowingly, he would have also violated his duty to the profession by acting in a dishonest manner. This is a clear violation and compounded by the fact that Larry represents Marla on a regular basis in legal matters.

Conclusion:

Larry likely violated his duty of loyalty and his duty to act honestly to the public at large in his dealing with Marla. Although he was not acting as her attorney at the time of the deal to sell the widgets and Marla was likely aware of such since she contacted him at his SS office, Larry still violated his professional duties. However, Larry probably did not violate his duties of confidentiality or loyalty if he revealed any information received during his representation of Marla in finding Ben, the buyer of the widgets.

Q6 Criminal Procedure

Deft saw Oscar, a uniformed police officer, attempting to arrest Friend, who was resisting arrest. Believing that Oscar was arresting Friend unlawfully, Deft struck Oscar in an effort to aid Friend. Both Friend and Deft fled.

The next day, as a result of Oscar's precise description of Deft, Paula, another police officer, found Deft on the street, arrested him for assault and battery and searched him, finding cocaine in his pocket. After Paula gave proper Miranda warnings, Deft said he wanted to talk to a lawyer before answering any questions. Paula did not interrogate him. However, before an attorney could be appointed to represent Deft, Paula placed him in a lineup. Oscar identified Deft as his assailant. Deft was then charged with assault and battery of a police officer and possession of cocaine. Thereafter, he was arraigned.

The next day Paula gave Deft, who was without counsel, proper Miranda warnings, obtained a waiver, and interrogated him. He admitted striking Oscar.

How should the judge rule on the following motions made by Deft at trial:

1. To suppress the cocaine? Discuss.

2. To suppress Oscar's identification during the lineup? Discuss.

3. To suppress Deft's admission that he struck Oscar? Discuss.

4. For an instruction to the jury that Deft's assault was justified on the basis of defense of another? Discuss.

Answer A

6)

1. Deft's Motion to Suppress the Cocaine

The Fourth Amendment of the Constitution protects individuals from unreasonable searches and seizures by government officials. If a defendant's Fourth, Fifth, or Sixth Amendment rights are violated in connection with a criminal prosecution, the exclusionary rule, a judge-made doctrine, requires the exclusion of all evidence obtained in violation of such rights and all derivative evidence, or fruit of the poisonous tree.

Government Conduct

To make a Fourth Amendment claim, there must first be government conduct. Here, Larry was searched by Paula, a police ofiicer, which qualifies as government conduct.

Standing – Reasonable Expection of Privacy

A defendant also must have standing to challenge government action, which occurs if the defendant has a reasonable expectation of privacy in the item or place searched. Because Larry's body was searched, this clearly qualifies Larry to contest the act since he had a reasonable expectation of privacy in his own body.

Requirement for Probable Cause and a Valid Warrant

Generally, a search will be considered unreasonable unless the officer has probable cause to conduct the search, and the search is supported by a valid warrant. However, a number of exceptions to the requirement for a search warrant exist.

Search Incident to a Lawful Arrest

Paula did not have a valid search warrant. However, one exception to the warrant requirement is for searches incident to a lawful arrest. A lawful arrest can be made in public, without a warrant, if the officer has probable cause to believe that the defendant has committed a felony.

Paula was making a lawful arrest because she knew that Oscar had been assaulted and battered and that Deft fit the description of the perpetrator. Thus, she had probable cause to believe that Deft was the perpetrator of these felonies. Because Paula made a lawful arrest of Deft, her search of his body was also lawful. Thus, the court should deny Deft's motion to suppress the cocaine.

Hot pursuit

Paul[a] might also be able to argue that her search of Deft was lawful because Deft was a suspect who might get away. Her better claim, though, is that the search was incident to a lawful arrest.

2. Deft's Motion to Suppress Oscar's Identification During the Lineup

A defendant has a Fifth Amendment privilege against self-incrimination, which includes the right to counsel if the [the] defendant does not waive his right to such counsel. This right attaches whenever there is custodial police interrogation. A defendant also has a Sixth Amendment right to counsel, which attaches once the defendant has been charged with a crime. Here, Deft had not been charged with assault and battery by the time the lineup was conducted; thus, his Sixth Amendment right to counsel had not attached.

The facts show that Deft did not waive his Fifth Amendment right to counsel because he stated that he "wanted to talk to a lawyer before answering any questions." The question is whether the lineup even violated Deft's Fifth Amendment right.

A defendant is in custody when a reasonable person would believe he was not free to leave. Deft had just been placed under arrest; as such, he was in police custody at the time of the lineup.

Interrogation occurs whenever the police make a statement that is likely to elicit an incriminating response. During the lineup, there is no evidence that the police made any statements likely to elicit an incriminating response from Deft. Thus, Deft cannot be said to have been under interrogation during the lineup. For this reason, Deft's Fifth Amendment right to counsel was not violated by the lineup.

Even if Deft's Fifth Amendment right had been violated, the identification would likely still be admissible under an exception to the exclusionary rule, which allows evidence if it would have been discovered anyway. Oscar clearly saw Deft, his assailant, when Deft was committing the crime. Thus, the government can show that it would have had an independent source for the identification. Thus, the court should deny Deft's motion to suppress Oscar's identification.

3. Deft's Motion to Suppress Deft's Admission that He Struck Oscar

The issue is whether Deft's Fifth and Sixth Amendment right to counsel were violated by Paula's interrogation of Deft the day after Deft was arraigned. Paula did give Deft proper Miranda warnings, but she also obtained a waiver. A waiver of Miranda rights is valid if the defendant knowingly, voluntarily, and intelligently waived his rights. There are no facts to indicate that the waiver was not knowing, voluntary, and intelligent, so Deft's Fifth Amendment right to counsel was not violated, even though he was subject to custodial interrogation.

A defendant's Sixth Amendment right to counsel applies to all post-charge proceedings.

The question is whether Paula's interrogation of Deft was a post-charge proceeding. Because Deft had been charged and arraigned, his Sixth Amendment right to counsel had attached. Once this right attaches, a defendant cannot be questioned about the crime charged without the presence of the defendant's attorney, unless he explicitly waives his right to counsel. Although the facts show that Paul obtained a waiver of Deft's Miranda rights, they do not clearly show that Deft explicitly waived his right to counsel. Thus, the court should grant Deft's motion to suppress the admission. If, however, Deft testifies for himself in the criminal trial, then his admission can be used to impeach him on cross-examination.

4. Deft's Motion for a Jury Instruction that Deft's Assault Was Justified on the Basis of Defense of Another

A defendant may have a valid defense if he acts with reasonable force, with a reasonable belief that such force is necessary for self-defense or the defense of another. For the defense of others, courts are split on whether the defense exists in a situation in which the person being "defended" by defendant does not himself have the privilege of self-defense clothes against his "attacker." For example, if an officer in plain clothes conducted a lawful arrest of another, a third party "defending" the arrestee might not have the privilege to assert the defense since the arrestee also did not have the privilege against the officer.

Here, however, Oscar, the party making the arrest[,] was not a plain clothes or undercover officer; rather, he was wearing a uniform when he attempted to arrest Friend. Deft clearly knew that Oscar was a police officer.

A person also can lawfully resist an arrest if an officer clearly does not have lawful basis to make an arrest. This privilege, however, is very limited even as to the person being arrested and would only attach where there is no basis whatsoever to make an arrest of the person. This privilege does not extend to onlooking third parties who witness the arrest. These rules are necessary to protect society and to assist officers in the enforcement of the law for the conduct of a lawful and orderly society.

The facts do not show the circumstances behind why or how Oscar was making the arrest. It would seem that Deft might have a defense if, for example, Oscar were conducting the arrest in an extremely physically abusive manner and was unwarranted in doing so. In plainer terms, if Oscar were "beating the crap" out of Friend for no reason, then Deft might be entitled to assert a privilege of defense. However, there are no facts to indicate that Oscar was acting unreasonably; further, because Friend was resisting arrest, this weighs in favor of not extending the privilege, even if Oscar did have to resort to some physical means to complete the arrest.

In Deft's situation, absent additional extenuating facts just described, it simply was not reasonable for Deft to strike Oscar in an effort to aid Friend, even if Deft believed, reasonably or unreasonably, that Oscar was arresting Friend unlawfully. Accordingly, the court should deny Deft's motion to instruct the jury that Deft's assault was justified on the

basis of defense of another.

In short, the judge should deny all of Deft's motions except for his motion to suppress Deft's admission, which the court should grant.

Answer B

Deft's Motion to Suppress Cocaine

The issue is whether Paula properly seized the cocaine from Deft's pockets. The Fourth Amendment protects individuals from unreasonable searches and seizures by government agents. It only applies to evidentiary searches when the individual has a reasonable expectation of privacy. Deft has a reasonable expectation of privacy in the contents of his pockets. Therefore the question is whether the government can show that Paula's search satisfied the requirements of the 4th Am.

Warrantless Search

Paula searched Deft's pocket without a warrant. Thus, the gov't must show that Paula executed the search pursuant to a valid warrantless search exception.

Search Incident to Lawful Custodial Arrest

An officer may search a suspect as a consequence of a lawful custodial arrest. In order to fit within this exception, the underlying arrest must be lawful. An officer may not arrest a suspect for a misdemeanor without a warrant unless the officer saw the suspect commit the misdemeanor. An officer may arrest a suspected felon if the officer had probable cause to believe the suspect committed a felony.

The first issue here is whether Paula had probable cause to believe Deft committed a crime. She based her arrest on Oscar's precise description of Deft. Since she knew Deft had assaulted Oscar the day before and because she was relying on Oscar's "precise" description, Paul[a] had probable cause to believe Deft had committed assault and battery. Probable cause is satisfied if an officer has trustworthy facts that lead to the probability that a suspect committed a crime. Oscar's description sufficed.

The second issue is whether Paula had probable cause to believe that Deft had committed a felony. In many states assault and battery are misdemeanors. However, battery is generally elevated to a felony when directed against a police officer under aggravated battery statutes. As long as this state makes battery of a police officer a felony. Paula's arrest of Deft was lawful because she had probable cause to believe he had committed a felony. Under the SILCA doctrine, the judge should deny Deft's motion to suppress the cocaine.

Other Warrantless Search Exceptions

If a judge determines that Paula's arrest of Deft was unlawful, the judge must suppress the cocaine because no other warrantless search exceptions apply to these facts. The other exceptions are: plain view, consent, auto searches, searches in hot pursuit or to seize evanescent evidence, and pat down searches performed with reasonable suspicion

that a suspect is armed. There are no facts to support any of these doctrines.

2. Deft's Motion to Suppress Oscar's ID

The issue is whether Oscar's pre-arraignment identification of Deft can be suppressed.

6Am Right to Counsel

Deft may argue that the identification should be suppressed because he did not have counsel present for it. Under the 6th Amendment, defendants have a right to counsel at all 'critical stages' of litigation following indictment/arraignment. Courts have ruled identification lineups are 'critical stages' under the Sixth Amendment.

Deft's arguments must fail here because the lineup occurred before his arraignment. Therefore, his 6th Amendment right to counsel had not attached. This is true even though Deft properly invoked his right to counsel after being given his Miranda warnings. The 5th Amendment provides Deft with a limited right to have counsel present during custodial interrogation. It does not apply to Deft's presence in a lineup because his physical appearance is not testimonial in nature.

Unnecessarily Suggestive

The only other argument that Deft may offer to suppress the identification is that the lineup was unnecessarily suggestive and resulted in a substantial likelihood of misidentification. Deft must pose this argument under the due process clause of the 14th Amendment, and a court would consider the suggestiveness of the lineup in the totality of the circumstances. There are no facts to suggest the lineup was unnecessarily suggestive, so Deft will likely lose this argument.

Thus, a court should not suppress Oscar's identification of Deft.

3. Deft's Motion to Suppress His Statement

This issue is whether Deft's admission should be suppressed. It should be suppressed under both the 5th & 6th Amendments.

5th Amendment

On the day of his arrest, Paula gave Deft Miranda warnings and he unambiguously invoked his 5th Amendment right to counsel by saying he wanted to talk to a lawyer before answering questions.

Once a suspect invokes his 5th Amendment right to counsel, the police may not question that suspect on that charge or any other charge until the suspect has spoken with an attorney. The facts that new charges were brought against Deft and that Paula readministered Miranda warnings and obtained a waiver do not change this analysis. Deft's invocation of the 5th Amendment right to counsel operates as a complete bar to questioning until he has a spoken with an attorney.

The proper remedy for testimony obtained in violation of the 5th Amendment is suppression except for impeachment. Therefore, the court should suppress Deft's statement from the prosecution's case[-]in[-]chief.

6th Amendment

As discussed above, defendants have the right to assistance of counsel at all "critical stages" of litigation after indictment/arraignment. Here, Deft's admission came a day after he was arraigned. Therefore, his Sixth Amendment right to counsel had attached. The only issue is whether interrogation is a 'critical stage'.

Courts have ruled that interrogation is a critical stage of ligation under the Sixth Amendment's right to assistance of counsel. Thus, Deft had a right to have counsel present when he admitted striking Oscar.

The proper remedy for a statement gained in violation of a suspect's 6th Amendment right to counsel is suppression of the statement. Thus, the court should suppress Deft's admission under the 6th Amendment.

4. Jury Instruction re: Defense of Another

The issue is whether the court should provide a jury instruction on the defense of defense of [sic] another. A defendant may justify a battery on defense of another when he acted out of a reasonable belief that another person had the right to use force in his own defense. A defendant asserting a justification of defense of another cannot use force that is excessive in the circumstances.

Here, the first issue is whether Deft had a reasonable belief that Friend could use force in resisting arrest by Oscar. An individual may use nondeadly force in order to resist an unlawful arrest by a uniformed police officer. Here, we are told that Deft believed Oscar was unlawfully arresting Friend. We do not know why Deft believed the arrest was unlawful. However, if Deft had a reasonable basis for his belief then he had the right to use nondeadly force in Friend's defense. This right stemmed from the fact that Friend has the right to use nondeadly force against a uniformed police officer making an unlawful arrest.

The second requirement is that Deft used reasonable force. We are told that he

struck Oscar. As long as this was a reasonable amount of force to use in the circumstances, then Deft can invoke the justification of defense of others.

Based on this analysis, the court should offer the jury instruction[s] on defense of others.

Jul 2005

California Bar Examination

Essay Questions and Selected Answers

ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2005 CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2005 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

Q1 Community Property

In 1998, Henry and Wilma, residents of California, married. Henry had purchased shares of stock before marriage and kept these shares in his brokerage account. The shares in the account paid him an annual cash dividend of $3,000. Henry deposited this income in a savings account held in his name alone.

In 1999, Wilma was hired by Tech Co. Wilma was induced to work for Tech Co. by the representation that successful employees would receive bonuses of companystock options. Later that year, Wilma was given options on 1,000 shares of Tech Co. stock. These stock options are exercisable in 2006, as long as Wilma is still working for Tech Co.

In 2003, because of marital difficulties, Wilma moved out of the home she had shared with Henry. Nevertheless, the couple continued to attend marriage counseling sessions that they had been attending for several months. Later that year, Henry was injured in an automobile accident. Afterwards, Henry and Wilma discontinued marriage counseling and filed for dissolution of marriage.

In 2004, Henry settled his personal injury claim from the automobile accident for $20,000. The settlement included reimbursement for $5,000 of medical expenses that had been paid with community funds.

Henry had a child by a prior marriage and, over the course of his marriage to Wilma, had paid out of community funds a total of $18,000 as child support.

1. When making the final property division in Henry and Wilma's dissolution proceeding, how should the court characterize the following items:
    a. Henry's savings account? Discuss.
    b. Henry's personal injury settlement? Discuss.
    c. Wilma's stock options? Discuss.

2. Should the court require Henry to reimburse the community for his child support payments and, if so, in what amount? Discuss.

Answer according to California law.

Answer A

1)

Califor[n]ia is a community property state. All property acquired during marriage is presumptively community property (CP). All property acquired before marriage or after permanent physical separation, or during marriage by gift, will, or inheritance, is separate property (SP). Upon divorce, marital CP assets are distributed 50-50 unless certain except ions apply.

In determining the time for final property division, the probate court will look at when there was a permanent physical separation and an intent not to resume marital relations. This is when the economic community is considered to be at an end.

Here, the economic community did not end when W first moved out of the home due to marital difficulties, early in 2003. The couple continued to attend marriage counseling sessions, suggesting that they were still hopeful of a possible reconciliation. At the point, they did not have the requisite intent to not resume marital relations. The economic community ended later in 2003 when H & W discontinued marriage counseling and filed for divorce. Only at that time was it clear that there was a permanent physical separation and an intent not to resume marital relations.

1.a. Henry's savings account

Property acquired before marriage is that spouse's SP. All income, rents, and profits from SP earned during marriage is also that spouse's SP. Upon dissolution of marriage, the spouse who owns the SP will take it in its entirety. Although the character of property might change, what was initially SP will remain SP unless there has been a transmutation. No transmutation occurred here.

Henry purchased shares of stock before marriage and kept these shares in a brokerage account. Because the shares were purchased before marriage, they are his SP. The income from these shares, the annual cash divided of $3,000, is also Henry's SP. Furthermore, the income from the shares was deposited into a savings account held in his name alone. This suggests that the funds were not commingled with CP. In addition, it is assumed that W had no rights to withdrawal on the account.

Because the income deposited into H's savings account had as its source the stock he had purchased before marriage, all income in the savings account--assuming it was solely for such income and did not contain any commingled CP funds - - is H's upon divorce. W has no right to the income in the savings account.

b. Henry's personal injury settlement

A personal injury settlement that results from an injury sustained during marriage is presumptively CP. Legal relevance is placed upon when the injury occurred, and not on when settlement was awarded. Upon divorce, however, the injury settlement belongs to the injured spouse: it is treated as the injured spouse's SP. The community is, however, entitled to reimbursement for medical expenses paid with CP when SP was available.

Here, H was injured in an automobile accident that occur[r]ed in 2003, while he was still married to W. As stated above, at the time of the accident, H & W were no longer living together but were still attending marriage counseling sessions. Because there is no indication that H & W intended not to resume marital relations at this point, the economic community was not yet at an end. There was, at this point, no permanent physical separation. Because of these facts, the injury occurred at a time when H & W were still married and the settlement is thus CP during marriage.

On the given facts, the settlement was paid to H in 2004, after H & W had discontinued counseling and had filed for divorce. Thus, the economic community was at an end. Nevertheless, what is legally relevant is that the injury arose during marriage, and not the time the settlement was paid.

At the outset, upon divorce, the $20,000 will be awarded to H as the injured spouse. It is treated as his SP. However, because $5,000 of medical expenses were paid with CP, the community is entitled to reimbursement. Because H received an annual cash dividend of $3,000, it can be assumed that he had $5,000 in his separate savings account at the time the medical expenses were paid. Thus, because CP funds were used to pay his medical expenses at a time when H had SP available, the community is entitled to reimbursement.

The net result is that H will receive $15,000 of the settlement. The community receives a reimbursement of $5,000 which will be divided 50-50 between H & W.

c. Wilma's stock options

Stock options earned during marriage are CP to the extent that CP contributed to them. The court will apply the time rule to determine the pro rata share of contribution of CP and SP. Applying the time rule, a fraction is given whereby the numerator is the number of years that have elapsed between the granting of the options and the date the economic community of the marriage ended. The denominator is the number of years that have elapsed between the granting of the options and the year in which they are exercisable.

Here, the 1,000 shares of Tech Co. stock were awarded to W in 1999. The economic community of H & W ended in 2003. Thus, four (4) years of CP labor creates the numerator. The options are exercisable in 2006. Thus, the denominator will be 7.

The remaining 3 years, from 2004 to 2006, will be treated as W's SP.

Because 4 years out of 7 are attributable to CP, upon dissolution of marriage the community will be entitled to 4/7 of value of the stock options, while 3/4 will be W's SP.

2. Henry's reimbursing the community for his child support payments

Child support payments from a prior marriage are considered a spouse's premarital debt, regardless of whether the payments started before marriage or began during the marriage. Although CP and the debtor spouse's SP are both liable for any premarital debts of the debtor spouse, if CP funds are used during the marriage to make child support payments arising out of a prior marriage, and it is determined that the debtor spouse had available SP funds at the time, then the community may be entitled to a reimbursement upon divorce.

Here, H's child support payments arose out of a prior marriage. H had a child by a prior marriage – not the marriage to W. During the course of his marriage to W, H had paid out of CP funds a total of $18,000 as child support. However, on the given facts, H had SP available to make those payments. He received $3,000 annually in cash dividends from his stocks. Between 1998 and 2004, that amounted to $15,000 ($3,000 multiplied by 5 years). Moreover, he received $20,000 as settlement for the personal injury claim which, although CP at the time received, is treated as his SP upon divorce.

Thus, because CP funds were used to make the child support payments, the community is entitled to reimbursement. H should be required to reimburse the community at least $15,000 which is the amount he had accrued in his personal savings account during the course of the marriage. This amount can be offset from his personal injury settlement claim which will be treated as SP upon divorce. The amount is also $15,000, after the $5,000 has been deducted to reimburse the community. Furthermore, because half of the $5,000 will go to H, that makes an additional $2,500 available to reimburse the community for the child support payments.

In summary, on the given facts, H should be required to reimburse the community for $17,500 for his child support payments.

Answer B

1)

California is a community property state. As such, all things acquired between the date of marriage and date of separation are community property and are subject to a 50/50 division upon divorce. Separate property consists of assets acquired before the marriage or after the separation, as well as gifts, inheritances, and devises, and all the profits or rents thereon. Henry and Wilma were married in California in 1998, thus their divorce is subject to the community property system. In analyzing each of their assets it is important to keep in mind the source of the property and whether any subsequent changes in the character of the asset may have transmuted the property from community to separate or separate to community.

Henry's Savings Account

Henry purchased shares of stock before his marriage to Wilma and kept these shares in a brokerage account. These shares were thus Henry's separate property b/c he acquired them before marriage. The shares in the account paid him an annual cash dividend of $3,000, which he deposited into a savings account in his name alone. The cash dividends are also Henry's separate property b/c all rents and profits garnered from separate property are separate property as well. This is true even though there is a presumption that all things acquired between the date of marriage and the date of separation are community property. The rule that rents and profits upon separate property is separate in nature trumps that presumption.

An asset which begins as community property may be transmuted into community property if a spouse manifests an intent to change the asset's character. Here[,] however, Henry has kept both the stock and the cash dividends in an account in his name alone. Therefore, he has not manifested an intent to transmute these stocks from separate to community property. Furthermore, after 1985 a transmutation must be in writing, signed by the spouse losing their interest, and state expressly that they are transmuting the property. Since none of that happened here, everything in Henry's savings account is his separate property.

Personal Injury Settlement

Personal injury settlements awarded during the marriage are community property. However, upon divorce the personal injury settlement will be awarded solely to the injured spouse unless equity demands otherwise. Here, Henry's right to his personal injury settlement arose during the marriage b/c Henry and Wilma were not legally separated at the time he was injured. To be legally separated, the couple must be living physically apart and manifest an intent not to resume the marital relationship.

Here, Henry and Wilma were living apart as of 2003. However, the couple continued to attend marital counseling sessions. Because the couple was still in marital counseling, they obviously did not have an intent not to resume the marital relationship. Rather, counseling suggests that they were trying to work things out. During this time period, Henry was injured. Henry may argue that he did not receive the actual settlement until 2004, at which point he and Wilma had filed for dissolution. However, since his injury and therefore his right to a claim arose during the marriage, the personal injury award will be considered to have arisen during the marriage.

Luckily for Henry, upon dissolution the personal injury award will be awarded to him entirely despite its initial community property characterization, unless equity demands otherwise. Wilma will argue that equity demands otherwise here b/c the community paid for $5,000 of Henry's medical expenses. The community is obligated to pay for all of a spouse's "necessaries." This includes food, shelter, and medical expenses. Because the community had no choice but to pay for Henry's medical bills, a court would probably find that $5,000 of the settlement should be awarded as community property. Under such an analysis, Wilma is entitled to $2,500 (one half of $5,000). Henry is entitled to $2,500 and the remaining $15,000 of the $20,000 as his separate property.

Wilma's Stock Options

If a stock option is awarded during the marriage, then the community has an interest in it. This is b/c stock options are considered incentive compensation, meaning that they reward work currently going on. Therefore, if a stock option is awarded during marriage it is based at least in part upon past and present work in the hope that the employee will keep up the good job. Where the spouse is awarded the stock option during the marriage but exercisability occurs after the date of separation, a special formula must be used to extract the community's interest.

Here, Wilma was awarded the stock option in 1999 in recognition of her success as a new employee for Tech Co. She was married to Henry at that time and thus the community has an interest. Henry and Wilma separated in 2003 and the date of exercisability is 2006 (so long as Wilma is still working for the company.) The formula for extracting the community's interest mandates that the years between the date of the award and the date of separation be used as a numerator while the total number of years between the date of the award and the date of exercisability be used as a denominator. That comes to 4/7. Therefore, the community will be entitled to a 4/7 interest in the 1,000 stocks should they become exercisable.

Another issue is whether Henry can compel Wilma to exercise her stock options. In order to exercise them, Wilma must still be working for Tech Co. in 2006. At some point before 2006, Wilma may decide she no longer wishes to work for Tech Co. and therefore lose her interest. A court will not compel Wilma to continue working for Tech Co. The community merely has an expectancy in the stock options should she decide to eventually exercise them.

Whether the court should require Henry to reimburse the community for his child support payments

Where one spouse owes child support or alimony from a prior marriage, separate property funds should be used first to pay these costs. However, if separate property funds are not available, then the community is responsible for making these payments. Here, Henry had a child by a prior marriage and over the course of his marriage to Wilma he paid out $18,000 in child support from community funds. That comes to $3,600 per year. Since Henry had $3,000 cash dividends coming to him each year as separate property, those funds should have gone to the child support payments first. Only $600 per year of community funds should have been used (for a total of $3,000 during the marriage). Therefore, the community is entitled to $15,000 reimbursement for these child support payments. This means that Henry is entitled to $7,000 and Wilma is entitled to $7,000.

Henry may counter that the community is not entitled to reimbursement b/c he had co-equal powers to spend and incur debt with Wilma over the community property. This is true, however equity still demands that the community receive reimbursement since Henry should have depleted his separate property funds first.

Wilma could also make the argument that one spouse may not unilaterally make a gift of community property and that she may void such gifts while Henry is still alive. This is true. However, child support is more in the nature of an obligation than a gift. Therefore, this argument will be less successful.

Q2 Contracts / Real Property

Developer acquired a large tract of undeveloped land, subdivided the tract into ten lots, and advertised the lots for sale as "Secure, Gated Luxury Home Sites." Developer then entered into a ten-year, written contract with Ace Security, Inc. ("ASI") to provide security for the subdivision in return for an annual fee of $6,000.

Developer sold the first lot to Cora and quickly sold the remaining nine. Developer had inserted the following clause in each deed:

> Purchaser(s) hereby covenant and agree on their own behalf and on behalf of their heirs, successors, and assigns to pay an annual fee of $600 for 10 years to Ace Security, Inc. for the maintenance of security within the subdivision.

Developer promptly and properly recorded all ten deeds.

One year later, ASI assigned all its rights and obligations under the security contract with Developer to Modern Protection, Inc. ("MPI"), another security service. About the same time, Cora's next-door neighbor, Seller, sold the property to Buyer. Seller's deed to Buyer did not contain the above-quoted clause. Buyer steadfastly refuses to pay any fee to MPI.

MPI threatens to suspend its security services to the entire subdivision unless it receives assurance that it will be paid the full $6,000 each year for the balance of the contract. Cora wants to ensure that she will not be required to pay more than $600 a year.

On what theories might Cora reasonably sue Buyer for his refusal to pay the annual $600 fee to MPI, what defenses might Buyer reasonably assert, and what is the likely outcome on each of Cora's theories and Buyer's defenses? Discuss.

Answer A

2)

Q2

Cora (C) will assert three different theories: (1) that there was a covenant, the burden of which ran to Buyer (B), and the benefit of which runs to C, (2) that there was an equitable servitude, the burden of which runs to B, and the benefit of which runs to C, and (3) that a negative reciprocal servitude can be implied from a common scheme initiated by Developer (D). C will sue under a covenant theory to obtain damages in the form of the series of $600 payments, or will sue under an equitable servitude theory to require B to pay the $600.

C will assert that he had no notice of either the covenant, equitable servitude or common scheme, and therefore should not have to pay. He will also allege that even if he did have notice, that the assignment of the contractual rights from Ace Security (ASI) to Modern Protection[,] Inc. (MPI) extinguished any obligation he had or notice of an obligation to pay for maintenance of security services.

Cora's Theories of Recovery

1. Covenant

Cora will assert that the original deed between Developer and Seller created a covenant, the burden of which ran to B, and the benefit of which ran to C. A covenant is a non-possessory interest in land, that obligates the holder to either do something or refrain from doing something related to his land. For the burden of the covenant to run, there must be (1) a writing that satisfies the statute of frauds, (2) intent of the original contrac[t]ing parties that the covenant bind successors, (3) Horizontal privity between the original parties, (4) Vertical privity between the succeeding parties, (5) the covenant must touch and concern the burdened land [,] 5 [sic] Notice to the burdened party. For the benefit of the covenant to run, there must be (1) a writing satisfying the statute of frauds, (2) intent of the original parties, (3) the benefit must touch and concern the benefitted land, and (4) there must be vertical privity between the parties.

Running of the burden

Writing

For the burden to run to B, there must be a writing that satisfies the statute of frauds. Here, the original deed was properly written and recorded. Developer inserted the clause covenanting payment in all of the deeds given to the original 10 purchasers. Therefore, there is a writing satisfying the statute of frauds.

Intent

For the burden to run, the original contracting parties must have intended that the benefit run to successor in interest to the land. Here, the deed on its face evidences an intent that the burden run. It specifically says that the "heirs, successors and assigns" of the deed will be bound to pay the security fees. Therefore the[re] is an intent that the successors– such as B – be bound by the covenant.

Horizon[t]al Privity

For the burden of a covenant to run, there must be horizontal privity between the parties. This requires that the parties be successors in interest – typically this is satisfied by a landlord-tenant, grantor-grantee, or devisor-devisee relationship. Here, the relationship is one of seller-buyer. D was the original seller of the land, and S was the purchaser. S was a successor in interest in the land of D. Therefore there was horizontal privity between the original contracting parties.

Vertical Privity

Vertical privity requires that there be a non-hostile nexus between the original covenanting party and a later purchaser. It is not satisfied in cases in which title is acquired by adverse possession or in some other hostile way. Here, however, S sold the property to B. A sale relationship is a non-hostile nexus, and therefore the requirement of vertical privity is met.

Touch and Concern

Defense by C: B may argue that the covenant here does not touch and concern the land. For the burden to run to a party, the covenant must touch and concern the land, that is, it must burden the holder, and benefit another party in the use and enjoyment of their own land. C will argue that this is not the case here.

B will argue that personal safety of house occupants is not necessarily related to the land. Contracts for security services often are used in matters outside of the home. However, this argument will likely fail. C can argue that the safety services are needed to keep the neighborhood safe. In fact, C and others specifically bought homes in the community because of representations that there would be security services available to keep the land safe. The use an[d] enjoyment of the land would be difficult, if not impossible, without the knowledge that the parties will be safe in their homes. Therefore, C can show that the covenant does in fact touch and concern the land.

Notice

Defense by C: B's primary defense will be that he was not given notice of the covenant. The burden of a covenant may not run unless the party to be burdened has notice of the

covenant. Notice may be (1) Actual, (2) by inquiry, or (3) By Record. The latter two types of notice are types of constructive notice.

–Actual Notice

B will argue that he did not have actual notice of the covenant. Actual notice occurs where the substance of the covenant is actually communicated to the party to be burdened, either by words or in writing. Here, there is no indication that B was told of the covenant in the deed. Therefore, he did not have actual notice.

–Inquiry Notice

A party may be held to be on inquiry notice, if it would be apparent from a reasonable inspection of the community that a covenant applies. C will argue that B was on inquiry notice of the covenant. However, this argument will likely fail.

A reasonable inspection of the community would not have revealed the covenant to pay $600. B might have discovered that the community was protected. There were advertisements claiming that the community was gated and secure. There were probably fences or other signage. However, this notice would be inadequate to tell B that the homeowners themselves were obligated to pay for the security service. The payments for security services may have simply been imputed to the home price, or the funds may have come from elsewhere. Either way, a reasonable inquiry would not have informed B of the existence of the covenant.

–Record Notice

C will argue that B was on record notice of the covenant. Record notice applies where a deed is recorded containing covenants. The burdened party is said to have constructive notice of the covenant that is recorded in his chain of title.

B will argue that he is not on record notice because the covenant was not in his specific deed. This argument will probably fail. A party taking an interest in land, or an agent of theirs, will typically perform a title search. Therefore, they will be held to be on constructive notice of any covenants, easements or other obligations. A simple title search by B would have revealed that the deed from P to S contained a covenant binding successors to pay for the security services.

Therefore, B was on record notice of the existence of the easement.

Running of the Benefit

For the benefit of the covenant to run, there must be (1) a writing satisfying the statute of frauds, (2) intent of the original parties, (3) the benefit must touch and concern the benefitted land, and (4) there must be vertical privity between the parties.

The analysis here will be the same as for the running of the burden, except that horizontal privity will not be required (even though it is present). The original agreement was in writing. The original contracting parties intended that the benefit run. The benefit arguably touches and concerns the land. Furthermore, D and C were in a non-hostile nexus, therefore the requirement of vertical privity is satisfied.

Conclusion: Because the requirements for running of the burden and running of the benefit are present, C can enforce the covenant against B, and will be entitled to damages for B's failure to pay for the security services.

2. <u>Equitable Servitude</u>

C may also attempt to enforce the requirement in the deed as an equitable servitude against B. The requirements for an equitable servitude are less stringent than those required for a covenant – for the burden of an equitable servitude to run, there must be (1) a writing satisfying the statute of frauds, (2) intent of the original parties to bind successors, (3) the servitude must touch and concern the land, and (4) notice to the party to whom the covenant is being enforced. If the equitable servitude is enforced, it will allow the party enforcing it to obtain a mandatory injunction. In this case, enforcement of the servitude would require B to make the $600 payments to MPI.

The analysis for an equitable servitude will be the same as that for the running of the burden of a covenant. There was a writing, there was intent by the original parties, the servitude touches and concerns the land, and arguably, there was notice to B. Therefore, given the forgoing [sic] analysis, C will be able to enforce an equitable servitude against B, and obtain a court order compelling him to pay the fees (subject to any defenses: see below).

3. <u>Reciprocal Servitude Implied from Common Scheme</u>

C may also attempt to enforce the payment of the security fees as a reciprocal servitude based on the original common scheme. A reciprocal negative servitude can be implied from a developer's actions where a developer develops a number of plots of land with a common scheme apparent from the development, and where the development party is on notice of the requirement.

C can argue that there was a common scheme to create a secure and gated community. There were advertisements at the time that the land was developed indicating that a major selling point of the development was that the development would be secure. To that end, the developer entered into a contract with ASI. It is apparent from developer's actions that a common scheme, including maintenance of security in the development, was intended.

The analysis for notice of the common scheme is the same as above – it may have been predicated on actual or constructive notice. Here, B was on record notice of the scheme. Therefore, C can successfully hold B to payment of the security fees on an implied

reciprocal servitude theory as well.

Buyer's Defenses

Notice

As noted above, one of B's primary defenses will be that he was not given notice of any covenant or servitude. This argument will fail in most courts, because of the fact that B was on record notice of the covenant, based on a deed in his chain of title.

Touch and Concern

As noted above, B may argue that the covenant at issue does not touch and concern that land. This argument will fail, because the security arrangement will clearly benefit the homeowners in their use and "peace of mind" concerning their homes and personal safety.

Assignment of the Contract from ASI to MPI

B will allege that even if he was obligated to pay ASI based on notice in his deed, he was under no obligation to pay MPI, because of the assignment of the contract. This argument will fail.

Here, ASI has engaged in both an assignment of rights and a delegation of duties. All contract duties are delegable, if they do not change the nature of the services to be received by the benefitted party (here, B). Unless B can show that the security services received from MPI will be materially different from those he would receive from ASI, then he cannot allege that the delegation and assignment excuses his duty to pay. There is no reason to think that MPI is any less capable of performing security services than MPI.

Furthermore, once contract rights are assigned and delegated, a party must pay the new party to the contract once he receives notice of the assignment. B knows that he has to pay MPI, therefore he cannot allege that he is not making payments because he doesn't know who to pay.

Answer B

2)

What theories might Cora sue Buyer for his refusal to pay the annual $600 fee to MPI, what defenses could Buyer raise, and what is the likely outcome on each theory?

Cora will argue that the Buyer is bound by a covenant that runs with the land. Cora will further argue that this covenant requires Buyer to pay MCI the $600 per year.

Covenants

A covenant is a promise relating to land that will be enforce[d] at law. Enforcement at law usually gives rise to money damages. Equitable servitudes, which will be discussed later, are enforceable in equity, which often means with an injunction.

Cora will argue that a valid covenant was created when each lot owner signed the deed with Developer that contained the clause that each purchaser, including heirs, successors, and assigns, will have to pay an annual fee of $600 to Ace Security. This covenant was in writing[;] Developer recorded all the deeds.

Will the burden of the covenant run?

Cora will argue that even though Seller was the person who initially signed the deed containing the covenant, the burden of the covenant should run to Buyer. The burden of a covenant will run to a successor in interest if 1) the initial covenant was in writing, 2) there was intent from the initial people creating the covenant that it would run to successors, 3) the covenant touches and concerns land, 4) there exists horizontal and vertical privity, and 5) the successor in interest had notice of the existence of the covenant.

Writing:

The initial covenant was in writing because it was included in the deed that each lot purchaser signed in the contract with Developer. Therefor, this requirement has been met.

Intent:

There also appears to be intent that the covenant bind successors in interest. This is because the deed which Developer and Seller signed contained the phrase “hereby agree on their own behalf and on behalf of their heirs, successors, and assigns.” This is clear evidence that the original parties intended the burden to run.

Touch and Concern:

A covenant will be considered to touch and concern land if it relates to the land and affects each covenant holder as landowners. Here, the covenant was to provide security and maintenance within the subdivision. This probably will be considered to touch and concern land because the safety and maintenance of the subdivision has a clear impact on each landowner's use and enjoyment of his or her lot. The covenant was not to provide personal security to the landowners, but rather to secure the land that was conveyed in the deed. Therefore, the covenant likely will be considered to touch and concern land.

Horizontal and Vertic al Priv ity:

There must also be horizontal and vertical privity in order for a successor in interest to be bound by the burden of a covenant. Horizontal equity deals with the relationship between the original parties. Here, the original parties are Developer and Seller. There must be some connection in this relationship, such as landlord-tenant, grantor-grantee, etc. Here, Developer owned the large tract of undeveloped land that was eventually turned into the ten lots. Then, Developer conveyed one of the lots that it owned to Seller. This will satisfy the requirement of horizontal privity.

Vertical privity relates to the relationship between the original party and the successor who may be bound by the covenant. Vertical privity will usually be satisfied so long as the relationship between the two parties is not hostile, such as when the new owner has acquired ownership by adverse possession. Here, Seller sold the property to Buyer. Therefore, this will satisfy the vertical privity requirement.

Notice:

The final requirement for the burden of a covenant to run to successors is notice to the successor in interest. A successor will be deemed to be on notice of the covenant if there is 1) actual, 2) inquiry, or 3) record notice of the covenant. Actual notice is if the successor was actually aware of the covenant. Inquiry notice is where the successor would have discovered the existence of the covenant had she inspected the land as a reasonable person would have. Record notice occurs when the successor would have discovered the covenant if an inspection of the records had taken place.

Here, there is no evidence that Buyer had actual notice of the covenant at the time that she bought the land from Seller. Also, it is unclear whether Buyer was on inquiry notice. If Buyer had inspected the land prior to purchase, Buyer may have noticed that the land was being maintained and secured by a company. If Buyer had seen this, she should have also probably concluded that each landowner was partially paying for this maintenance and security service. Therefore, Buyer may be deemed to be on inquiry notice.

Even if Buyer did not have actual or inquiry notice, Buyer clearly had record notice of the covenant. This is because the covenant was in writing and was included in the deed of

each of the original purchasers from Developer. Furthermore, Developer promptly recorded all of these deeds. Therefore, if [B]uyer had went [sic] to the record office and looked up the land that she was buying, she would have discovered the covenant.

Therefore, Buyer will be considered to be on notice of the covenant.

Buyer's possible defenses to enforcement of the covenant:

Buyer may argue that [s]he should not be bound by the covenant because the covenant does not touch and concern land, she was not on notice of the covenant, and that she should be excused from performing under the covenant because of Ace Security's assignment to MPI.

Touch and concern:

As discussed earlier, the covenant will likely be considered to touch and concern land. Buyer may argue that the duty to provide security to the landowners is primarily there to protect the landowners personally rather than to protect the actual land. Buyer will further argue that because the covenant relates to personal protection of the landowners, it does not relate to land and therefore should not be deemed to touch and concern land. If the covenant is deemed not to touch and concern land, the covenant will not bind successors in interest.

However, because the contract with Ace Security was for the security and maintenance of the subdivision, Buyer's claim will likely be rejected. Even if Buyer can convince the court that the Ace Security had promised to protect the individual landowners rather than the land, Ace Security's promise to maintain the property clearly related to land. It would not make sense for Buyer to argue that Ace Security's duty to maintain relates to maintenance of the landowners rather than maintenance of the land.

Therefore, Buyer's argument that the covenant does not touch and concern land will be rejected.

No Notice:

As discussed earlier, Buyer may argue that she did not have notice of the covenant and, therefore, should not be bound by the covenant. Buyer will point to the fact that the deed between Seller and Buyer did not mention the covenant to pay for security services. However, this argument will fail because Devel[o]per properly recorded each of the deeds which contained the covenants. As a result, if Buyer would have checked the records she would have discovered the covenant.

Thus, this argument by Buyer will also fail.

Contract Defenses:

Buyer may also make some contract arguments.

What law governs?

The contract between Developer and Ace Security will be governed by the common law because it is a contract for services, not goods. Even though the contract cannot be performed within 1 year (because the contract is for 10 years) the statue of frauds has been satisfied because the contract was in writing between Developer and Ace Security.

Third Party Beneficiary

Cora can claim that he [sic] is a third party beneficiary of the original contract between Devel[o]per and Ace Security. Cora will point out that in the initial contract between Devel[o]per and Ace Security, it was clearly Developer's intent that performance of the security services go to the purchasers of the land rather than to Developer. He will also claim that his rights under the contract has [sic] vested because he has sued to enforce the contract. Because Cora can show that all of the landowners are third party beneficiaries, Cora will have the ability to use under the contract.

Invalid Assignment to MPI:

Buyer may also argue that even if the original covenant runs to her, she should no longer be bound by the covenant because of Ace Security's assignment of the contract to MPI.

An assignment can include all of the rights and obligations of the original contracting party. In general, an assignment and/or delegation will be valid unless 1) the original contract specifically says that all attempted assignments or delegations will be void, or 2) the assignment or delegation materially changes the risks or benefits associated with the original contract.

Here, there is nothing in the original contract between Developer and Ace Security that states that assignments will be void. Furthermore, there is nothing in the covenant that Seller signed with Developer that limits the covenant only to performance by Ace Security. Therefore, this will not be a valid reason for invalidating the assignment and excusing Buyer's need for performance.

Also, it does not appear that Ace Security's assignment to MPI will in any way impact that obligations [sic] to Buyer or the benefits that Buyer will receive. Ace Security was originally required to provide security and maintenance for the subdivision. This is not a personal service that only Ace Security can effectively provide. Rather, security service is a task that any competent security company can handle. Therefore, the fact that performance will now be coming from MPI rather than Ace Security will not negatively impact Buyer's benefits from the contract.

Moreover, the assignment will not effect [sic] Buyer's obligations under the contract either. Under the initial contract with Ace Security, Buyer was required to pay $600 per year. After the assignment to MPI, Buyer is still required to pay only $600 per year. Therefore, Buyer's obligations after the assignment will not be changed in any way. Therefore, the assignment from Ace to MPI will be considered valid and Buyer will not be excused from performing as a result of this assignment.

MPI's threat to suspect [sic] service unless it receives assurances that it will be paid the full $6,000 each year for the balance of the contract

Buyer may also argue that even if they are bound by the covenant, MPI is not entitled to assurances that it will be paid the entire value of the contract for the remainder of the contract term. As common law, a suit for breach of contract could not be brought until the date for performance has passed. Cora will argue, on behalf of MPI, that they are entitled to assurances of future performance because of Buyer's anticipatory repudiation.

Anticipatory Repudiation

Generally, a suit for breach of contract can only be brought when the date for performance has passed. However, is [sic] a party to a contract unambiguously states that he cannot or will not perform under the contract, a suit may be brought immediately for breach of contract.

Here, Buyer has steadfastly refused to pay any fee to MPI. It is unc lear whether the time has passed in which Buyer was required to pay MPI. Regardless, Buyer's clear statement that it will not pay MPI will be considered an anticipatory repudiation. Thus, Buyer will be able to immediately bring suit.

Also, because of the anticipatory repudiation, Cora or MPI would be entitled to immediately bring suit. Because they could immediately sue Buyer if they so chose, it only makes sense to allow MPI to seek assurances that Buyer and the other landowners will continue to perform under the contract.

Equitable servitude

An equitable servitude is much like a covenant except that an equitable servitude is enforceable in equity, rather than at law. Here, Cora may prefer to have the court declare an equitable servitude, so that the court will enjoin Buyer to pay the $600 each year for the 10 year length of the contract. This will ensure that Cora will not have to pay more than $600 in any year.

In order for the burden of an equitable servitude to run with the land, there must be 1) a writing, 2) intent, 3) touch and convern[sic], and 4) notice to the successor in interest. All of these have been discussed earlier and have been satisfied. Therefore, this could be

considered to be an equitable servitude.

Cora may wish to get an injunction requiring Buyer to pay $600 per year for the 10 year length of the contract. Cora will first need to show that Buyer has breached his obligations under the contract.

Under an equitable servitude, the court may require Buyer to pay $600 per year for the remainder of the contract.

Buyer's defenses

Buyer could make the same defenses as in the covenant situation. As stated earlier, all of these defenses will likely be rejected.

Common Scheme Doctrine

Even if Cora's other attempts to enforce a covenant or equitable servitude fail, Cora may be able to show that Buyer should be bound by the common scheme doctrine. Cora would need to show that the original developer had a common scheme for the entire subdivision and that this scheme was clear to anyone who inspected the area and the records. Cora's argument may succeed because of the fact that Developer recorded the covenant between all of the original purchases from Developer.

Conclusion/Likely Outcome:

Cora will likely succeed in showing that there was a covenant between all of the original landowners. Cora will also be able to show that the burden of this covenant should run to Buyer. Cora will also be likely able to show the existence of an equitable servitude.

Q3 Business Associations / Professional Responsibility

Alice is a director and Bob is a director and the President of Sportco, Inc. (SI), a sporting goods company. SI owns several retail stores. Larry, an attorney, has performed legal work for SI for ten years. Recently, Larry and Carole were made directors of SI. SI has a seven-person board of directors.

Prior to becoming a SI director, Carole had entered into a valid written contract with SI to sell a parcel of land to SI for $500,000. SI planned to build a retail store on the parcel. After becoming a director, Carole learned confidentially that her parcel of land would appreciate in value if she held it for a few years because it was located next to a planned mall development. At dinner at Larry's home, Carole told Larry about the planned mall development. Carole asked for, and obtained, Larry's legal opinion about getting out of her contract with SI. Later, based on Larry's suggestions, Carole asked Bob to have SI release her from the contract. She did not explain, nor did Bob inquire about, the reason for her request. Bob then orally released Carole from her contract with SI.

The next regular SI board meeting was attended only by Bob, Alice, and Larry. They passed a resolution to ratify Bob's oral release of Carole from her contract with SI. Larry never disclosed what Carole had told him about the proposed mall development.

Three years later, Carole sold her parcel of land for $850,000 to DevelopCo, which then resold it for $1 million to SI.

1. Was Bob's oral release of Carole from her contract with SI effective? Discuss.

2. Was the resolution passed by Bob, Alice, and Larry to ratify Bob's oral release valid? Discuss.

3. Did Carole breach any fiduciary duty to SI? Discuss.

4. Did Larry commit any ethical violation? Discuss.

Answer A

1. Bob's oral release

Bob, a director of SI, entered into an oral agreement to release Carole, another director, from a contract into which she had entered with SI for the sale of land. The question is whether this release was valid.

Statute of Frauds

Contracts for the sale of land must comply with the statute of frauds, and modifications of such contracts must also comply with the statute. Here, the original contract was in writing, but Bob's release was oral. This statute requires a writing signed by the party to be charged. That requirement was not met.

However, courts have held that parties may rescind a contract without complying with the statute. This appears to have been such a rescission. Further, Carole's reliance on the release – by selling the land to another party – was probably sufficient to make the release effective.

Bob's authority to release SI

The release was valid only if executed by someone with authority to bind SI. On these facts, there is no indication that Bob had such authority.

The Board of Directors has the authority to oversee the management of a corporation and approve major business decisions. However, individual directors do not have such authority.

An officer or director may be given actual authority by the articles of incorporation or bylaws to engage in particular duties. Further, a board of directors can delegate certain responsibilities to a committee of directors (which can be a single director). There is no indication here, however, that Bob was delegated authority to enter into land sale transactions. Because these are significant business decisions, it would be inappropriate in any case to delegate them to a single director.

Finally, because making or rescinding land sale contracts is not one of the ordinary duties of a director, Bob had no implied authority as director to release Carole.

In his position as president, however, Bob may have had authority to execute the release. A president of a company may be given specific powers in the articles and bylaws. Again, there is no indication that Bob had such explicit powers. However, a president may also exercise implied or inherent powers necessary to do his job. A president would certainly have the authority to bind the corporation, for example, to ordinary services or employment contracts. Such authority is implied because it is necessary to exercise the

management powers of his job.

In this case, however, the land sale was a major capital investment. Such a major decision was probably not within the province of the president's authority and required Board approval. Therefore, Bob's release was probably not valid.

Board Resolution

The issue here is whether the subsequent ratification of the release was valid.

Quorum

Board actions are valid only if a vote occurs when a quorum of the Board is present. A quorum is normally defined as more than half the directors – in this case, 4 out of 7. Only three directors were present, however.

In its bylaws, a corporation can establish a smaller number for a quorum if it is more than 1/3 of directors. There is not indication, however, that Sportco had varied the normal rule in this case. Therefore, a quorum was not present and the Board's action was invalid.

Interested Director Transaction

As discussed below, this was an interested director transaction because Carole, a director, stood to profit from the sale of the land. Such transactions may be ratified only by a majority of non-interested directors. In this case, then four directors – a majority of the six non-interested directors – would have had to approve this transaction.

Further, to ratify an interested director transaction, the Board would need to know the facts of Carole's transaction in acco[r]dance with their duty of care. Here, Bob, Alice, and Larry did not know Carole's motives.

Because there was no proper ratification of an interested director transaction, the Board's action was invalid.

3. Carole's fiduciary duties

As a director, Carole had a duty of loyalty to the corporation. She had a duty to act in what she reasonably believed to be the corporation's best interest, and not to profit at the corporation's expense.

Here, Carole violated that duty in several ways. First, she used confidential information for her personal gain. This was a violation because she had a duty to keep confidences acquired in the course of her duties and not use them for personal profit.

Second, Carole usurped a corporate opportunity by selling the parcel to DevelopCo. Having learned that the parcel would appreciate in value, Carole had an obligation to let Sportco profit from that opportunity because it was part of Sportco's line of business – that is, finding suitable locations for its sporting good stores. Carole could only have taken advantage of the opportunity herself had she first offered it to Sportco & Sportco had turned it down. Here, however, Sportco was clearly interested in acquiring the land – since, after the land's value became apparent, Sportco brought it.

Finally, Carole's conduct in withholding her true mot ives from Bob was arguably fraudulent. Because of her fiduciary duty, Carole was obliged to disclose material facts. Carole's knowledge of the proposed mall development would certainly have been material in the Board's decision.

Carole also violated her duty of care as a Board member. She did not act in conducting the corporation's business affairs as a reasonably prudent person would in her own activities. Certainly passing up a valuable business opportunity that Sportco could have profited from was not prudent.

4. Larry's ethical violations

Conflict of Interest

Larry represented SI, not any individual director. By seeking Larry's legal advice on a personal transaction, Carole attempted to use Larry as her personal lawyer. This created at least a potential conflict of interest if Carole's interests should differ from SI's. In this situation, Larry could not represent Carole unless he informed both Carole & SI & both gave consent that an independent lawyer would find reasonable. By advising Carole without seeking such consent, Larry violated his duty of loyalty to each client.

Further, once it became apparent that Carole was seeking to profit at Carole's expense[sic], the conflict was direct. At that point, Larry should have sought Carole's permission to withdraw. Further, as discussed below he probably should have sought to withdraw from the Board as well. In failing to do so, he further violated his duty of loyalty.

Larry's Board Service

No per se rule exists barring a lawyer from serving on his client's board. However, such service may create problems with the duties of confidentiality and loyalty. Here, as a board member, Larry owed fiduciary duties to SI. He was therefore obliged to tell them material information he received relating to Carole's proposed rescission. He violated these by concealing the information. Further, he acted in Carole's best interest, not SI's, by voting to ratify the transaction. Larry should instead have disclosed the existence of a conflict (giving as little information as possible to avoid breaching his duty of confidentiality to Carole for all information arising out of the course of representation). He should then have sought to resign from the Board, and probably from representation of SI as well.

Duty of Loyalty

A lawyer has a duty to represent each client zealously & and put that client's best interests first. Larry did not do so in regard to SI because he did not advise SI how to enforce the contract with Carole – which would have been in SI's best interests.

Duty of Competence

A lawyer has a duty to thoroughly investigate his client's legal issues. Here, Larry failed to learn the facts of SI's transaction with Carole[.]

Duty of Communication

A lawyer must give a client the information necessary to make major decisions relating to the representation. Here, Larry withheld material information re: his consultation with Carole. SI needed this information in order to fully exercise its legal rights.

Because Larry could not fulfill duties to SI w/out breaching his duties of loyalty & confidentiality to Carole, he should have withdrawn from representation of both clients. In addition, he violated his board member fiduciary duties.

Answer B

3)

I. Bob's Oral Release of Carole

Bob's Powers as President
A corporate officer, such as president, can only act under proper authority. In his capacity as president, Bob's release of Carole must have arisen under his express, implied, or apparent authority to bind SI.

Express Authority
A corporate officer acts with express authority to bind (unbind) the corporation when the board has formally conferred that authority to him. Here, the board did not not know abou[t] Carole's intention to be released from the contract. It neither held a vote nor a meeting to grant Bob the express authority to "bind" the corporation in this way. Thus Bob lacked express authority to release Carole from her contract with SI.

Implied Authority
A corporate officer has implied authority from the board to bind the corporation to relatively minor obligations that arise in the everyday course of business. Here, however, a sporting goods corporation had bought and was planning to develop a retail store on a parcel of land worth $500,000. SI only owned "several" sporting goods stores, so the addition of another one is a fairly important development. The facts suggest that this was a relatively major business initiative, and so would not fall within the scope of a corporate officer's implied powers. Thus, Bob as acting as president could not have released Carole from her contract under implied authority.

Apparent Authority
A corporate officer has apparent authority to bind (or unbind) the corporation when he is held out to a third party as having such authority, and the third party relies on that authority. Here, apparent authority is not likely, because Carole, as a board member would not precisely [sic] the metes and bounds of Bob's authority as president. She would thus not be able to claim detrimental reliance on Bob's release based on apparent authority.

Bob's Powers as a Director
Carol[e] might also claim that Bob released Carole from her contract based on Bob's position as a director. In order to bind a corporation, board action must consist of a unanimous vote of all members, or a majority of a meeting with quorum. Here, Bob acted unilaterally as a director; there was no meeting and no vote so he, acting as a single director, could not bind the corporation.

II. Validity of the Resolution Passed by Bob, Alice, and Larry

Quorum Rules for Binding Board Action

As mentioned, binding board action can only arise when there is a unanimous vote, or upon a majority of votes at a meeting with quorum. Here, SI's board has seven members, so quorum would constitute four members. Therefore, since quorum was not achieved, no business of the board meeting with only Bob, Alice and Larry could be binding.

Interested Directors

Even if there were additional board members at the meeting, only directors who do not have a personal interest in a transaction can be counted for quorum. Thus, any vote on whether to release Carole from the contract would have to exclude Carole, because she stood to gain considerably if the contract were released based on the appreciation of the land price. It is not clear if Larry should also be excluded. While he was privy to confidential information not shared with the other members of the board, he did not aim to materially gain from cancelling Carole's contract, unless Carole agreed to pay him. If so, then Larry should be excluded from any vote of whether to release Carole from her contract.

III. Carole's Breach of Fiduciary Duties to SI

Carole breached sev eral fiduciary duties to SI.

Breach of Loyalty

Seeking Release from the Land Contract

A director owes a fiduciary duty of loyalty to the corporation, and must always act in the best interests of the corporation without regard for self-interest. Here, Carole sought release from a valid contract with SI for the land for $500,000. Her motivation in doing so was personal gain; after making the contract, she sought release from it because land prices were appreciating and she stood to gain a profit by retaining ownership of the land and selling to another buyer at a higher price. This behavior clearly contravened her duty of loyalty to SI, which was to obtain the land at the lowest possible price[.]

Since she breached her duty, Carole is liable both for any personal gain as well as material loss to the corporate [sic] as a result of her breach. Instead of selling to SI for $500,000, Carole sold the land to DevelopCo for $850,000; the resulting profit of $350,000 must be disgorged and returned to SI.

In addition, SI originally contracted to buy the land for $500,000 but ultimately paid $1 million. SI can thus recover the damages of $500,000 due to Carole's breach.

Not Disclosing Confidential Information of Land Appreciation

As part of her duty of loyalty to SI, Carole has a duty to communicate all information in her possession that could be used for the corporation's advantage. The fact that the land that SI had obtained via contract was apprec iating in value was relevant to SI's business objectives, since it could have decided to keep the land and then sell it later for a substantial profit. Carole's withholding of this confidential information thus marked another breach in her duty of loyalty to SI.

Corporate Opportunity

Related to her duty to communicate information, under the duty of loyalty Carole must present any corporate opportunities to SI first, and can only pursue them upon the board's decision not to pursue them on behalf of the corporation. Here, Carole became aware of a corporate opportunity through obtaining information that the land she had sold to SI was going to appreciate because of the mall development. She thus had a duty to present this opportunity first to the board, and only pursue it if they refrained.

Carole might argue that this does not apply since SI is in the business of sporting goods, not real estate speculation, and that therefore the corporate opportunity did not lie within SI's line of business. Modern authorities, however, state that a corporation may take opportunities broadly defined, even those outside their traditional line of business. Here, then, Carole had a duty to inform SI of the mall development and likely appreciation in land values, and she breached that duty.

Breach of Duty of Due Care

A director owes a duty of due care to the corporation, and must make decisions in the best interest of the corporation as if it were her own business. Here, it was clearly a breach of the duty of due care for Carole to engineer a rejection of a land sale contract at a very favorable price to SI.

Business Judgment Rule

The business judgment rule will normally protect directors whose decisions, made in good faith and with good business basis[sic], nevertheless result in adverse consequences. Here, however, Carole's efforts to seek release from her contract were not made in good faith. She was self-interested and desired to retain the profit from land speculation to herself at SI's expense, and Carole thus cannot be protected by the business judgment rule.

IV. Ethical Violations by Larry

Representation and Service on a Board

Although it is discouraged, a lawyer is allowed to serve as a board member on an organization he represents if he can do so effectively and without jeopardizing his ethical duties to the client organization. Here, Larry performed legal services for several years for SI, which was his client. At the time he accepted his board position, because there was no apparent conflict with his duties as lawyer, this acceptance was permissible.

Duty of Loyalty – Conflicts between Clients
A lawyer owes a duty of loyalty to his client, and must act in his client's best interest. Here, Carole came over for dinner and sought advice regarding her plans to annul the contract. At the time, Carole informed Larry that she was seeking his legal advice, and a putative lawyer-client relationship between Carole and Larry formed.

A lawyer can take on a potential client conflict where 1) the lawyer believes he can reasonably and effectively serve all parties, 2) he informs each party, 3) each party presents written consent, and 4) that consent is reasonable. When Carole disclosed her plans, her interests became materially adverse to those of Larry's client, SI. At that point, Larry should have informed Carole that he could not represent her and urged her to seek independent counsel. His not doing so consti[t]uted a breach of his duty of loyalty to SI.

Duty of Communication
A lawyer has a duty to relay all helpful information to his client. Here, Larry learned that the land that SI had purchased was going to appreciate rapidly, and this information should have been related to his client. This duty, however, conflicted with his duty of confidentiality to Carole, which had attached because she sought legal advice from him. Though a close question, Larry's decision to honor Carole's confidence and not tell SI of the land value was probably correct.

Duty of Competence
A lawyer owes his client a duty of competence. Here, Larry did not disclose and breached.

Assistance in a Crime or Fraud
Under ethical rules, a lawyer must not assist a client in a criminal enterprise or fraud. Here, Carole approached Larry about cancelling the land sale contract because of Carole's desire to profit at the expense of SI. Larry's legal opinions led Carole to seek release from Bob, which involved breaches of fiduciary duties on behalf of Carole owed to SI. Larry might counter by noting that no actual fraud was perpetrated, since Carole never disclosed to Bob the reasons for seeking release. Nevertheless, Larry assisted in breaching a fiduciary duty, and thus breached ethical duties of his own.

Q4 Evidence

Dan was charged with arson. The prosecution attempted to prove that he burned down his failing business to get the insurance proceeds. It is uncontested that the fire was started with gasoline. At a jury trial, the following occurred:

The prosecution called Neighbor, who testified that fifteen minutes after the fire broke out, he saw a blue Corvette speed from the scene.

The prosecution next called Detective Pry. Pry testified that he checked Motor Vehicle Department records and found that a blue Corvette was registered to Dan. Pry also testified that he observed a blue Corvette in the driveway of Dan's house.

The prosecution then called Scribe, the bookkeeper for Dan's business. Scribe testified that, two months before the fire, Dan told Scribe to record some phony accounts receivable to increase his chances of obtaining a loan from Bank. Scribe then testified that she created and recorded an account receivable from a fictitious entity in the amount of $250,000, but that Bank denied the loan anyway. Scribe further testified that, two days after the fire, Dan again told her to create some phony accounts receivable, but that she refused to do so.

The prosecution called Jan, the night janitor at Dan's business, to testify that the evening before the fire, as Jan was walking past Dan's office, Jan heard a male voice say, "Gasoline is the best fire starter." Jan knew Dan's voice, but because the office door was closed and the voice muffled, Jan could not testify that the voice was Dan's.

Assume that, in each instance, all appropriate objections were made.

Should the court have admitted:

1. Detective Pry's testimony? Discuss.
2. Scribe's testimony? Discuss.
3. Jan's testimony? Discuss.

Answer A

4)

State v. Dan

Admissibility of Detective Pry's Testimony

Logical Relevance

To be admissible, evidence must first be relevant. A piece of evidence is logically relevant if it has any tendency to make a fact of consequence in the case more or less likely to be true than it would be without the evidence.

Detective's Pry's testimony regarding what he learned from checking the DMV records is admissible because it tends to make it more likely that Dan was the one who committed the arson. Neighbor has already testified that he saw a blue [C]orvette speeding away from the scene of the arson. It is likely that the [C]orvette was driven by the one who had committed the crime. Therefore, if Dan also drove a blue [C]orvette, it would tend to make it more likely that Dan is guilty of the crime.

Detective Pry's testimony regarding the blue [C]orvette that he observed on Dan's driveway is also admissible. Since a witness saw a blue [C]orvette speeding away from the scene, the fact that Dan owns and possesses a blue [C]orvette makes it more likely that he committed the crime. The officer's testimony regarding seeing the car in Dan's driveway is also relevant because it tends to support the theory that Dan still possessed the car and had not sold it to someone else before the crime was committed.

Therefore, Detective Fry's testimony is logically relevant.

Legal Relevance

To be admissible, evidence must also be legally relevant. Evidence may be excluded if its probative value is substantially outweighed by the risk of undue prejudice to the jury.

Here, the evidence is legally relevant. The evidence has some probative value in making it more likely that Dan was the one who committed the arson, and there is little risk of undue prejudice. Evidence is only prejudicial if it is likely to lead the jury to draw improper conclusions about he defendant's guilt or innocence. The fact that Dan possessed a blue [C]orvette like that driven from the crime scene may hurt Dan's case, but it will be because the jury drew the reasonable conclusion that Dan may have been driving the car scene [sic] by neighbor, not because of any prejudicial effect.

Thus, the evidence is legally relevant.

Personal Knowledge

For the evidence to be admissible, Detective Pry must be competent to testify regarding it. A witness is competent if he has personal knowledge about the facts that he is testifying to.

In this case, [P]ry is competent to testify to the fact that he saw a blue [C]orvette in Dan's driveway, because he observed that himself and had personal knowledge of it. However, Pry's testimony regarding the DMV records will be inadmissible because Pry's only knowledge that the [C]orvette was regist ered to Dan came from the DMV records, and the DMV records have not been produced at trial, under the best evidence rule described below.

Best Evidence Rule

Under the best evidence rule, if a witness's sole knowledge of facts comes from a written document, then the fact must be proved from the written document unless the absence of the document is explained and excused.

On these facts, Pry's only knowledge of the fact that a blue [C]orvette was registered to Dan came from reading the DMV records. Therefore, the best evidence rule applies and Dan's ownership of the car must be proved with the DMV records themselves, rather than by Detective Pry's testimony regarding the contents of the records.

For this reason, Detective Pry's testimony regarding the contents of the DMV records should not have been admitted into evidence. Instead, the prosecution should have proved Dan's ownership of the car by introducing the DMV records themselves into evidence.

Hearsay

Another objection that Dan could make to the admission of the evidence is hearsay. Hearsay is an out[-]of[-]court statement offered into evidence to prove the truth of the matter asserted. The DMV records are hearsay because they are the out[-]of[-]court statements of DMV employees who prepared the report and it is being offered to prove the truth of the matter asserted – namely, that Dan was the registered owner of a blue [C]orvette.

Therefore, the evidence will be inadmissible unless a hearsay exception or exemption applies.

Business Records Hearsay Exception

Under the business records hearsay exception, the records of a business may be admitted into evidence if they were regularly prepared in the ordinary course of business by business employees with a duty to the business to maintain accurate records. Business is defined

to not only include for-profit businesses but also nonprofits and government agencies.

The DMV records could be admitted into evidence under the business records hearsay exception. As part of its business of regulating motor vehicles, the DMV regularly maintains records of the cars that are registered as owned by a certain person. These reports are prepared by DMV employees who have a duty as part of their job to maintain accurate records. Therefore, the statements in the DMV report are admissible under the hearsay exception for business records.

Government Records Hearsay Exception

The contents of the DMV records could also be admitted under the hearsay exception for government records. For this hearsay exception to apply, the records must have been maintained by a government agency and must be: (1) a record of the activities of that agency, (2) a report prepared in accordance with a duty imposed by law, or (3) a report of an investigation duly authorized by law. Government records of the police investigation regarding a crime are not admissible against the defendant in a criminal trial, but other government records are admissible.

In this case, the DMV records would qualify as records of the activities of the agency. When a person buys a car, they go to the DMV and register as the owner of the car, and the DMV makes the appropriate changes in its records. Therefore, it would qualify as a record of the activities of the DMV. It would also qualify as a report prepared in accordance with a duty imposed by law because the DMV is likely under a duty imposed by the state legislature to maintain vehicle ownership records.

Therefore, the contents of the DMV report would also be admissible under the hearsay exception for government records.

Conclusion

Detective Pry's testimony regarding observing a blue [C]orvette in Dan's driveway is admissible because it tends to make it more likely that Dan committed the arson and Pry had personal knowledge.

However, Pry's testimony regarding the contents of the DMV records should have been excluded because the best evidence rule required that the records themselves be produced rather than allowing someone else to testify to their contents. The prosecution should have instead introduced the DMV records themselves into evidence. The records would have been admissible under the hearsay exceptions for business records and government records and could then have been considered by the jury to help establish Dan's guilt.

Admissibility of Scribe's Testimony

Logical Relevance

Scribe's testimony is logically relevant because it tends to establish motive. If the jury believes Scribe's testimony, then it will establish that Dan's business was failing and that his previous desperate attempts to obtain financing through fraudulently obtained bank loans had failed. This would make it more likely than it would otherwise be that Dan would turn to other illegal measures, such as committing arson, to escape his precarious economic situation.

So the evidence is logically relevant.

Legal Relevance

Although Scribe's testimony is logically relevant, it could still be excluded at the discretion of the judge if its probative value was substantially outweighed by the risk of improper prejudice.

Dan would argue that this testimony is highly prejudicial and should be excluded. The testimony involves prior bad acts of Dan – specifically by inducing Scribe commit [sic] fraud in connection with a bank loan by falsifying the accounts receivable of the business and trying to do so a second time. Thus, Dan would argue, the evidence would be highly prejudicial because it would lead the jury to draw the improper inference that because Dan had done other bad things in the past, he was just a bad guy and is likely guilty of this crime as well.

However, the prosecution could successfully counter by pointing out that while the evidence does present some risk of undue prejudice, it is also quite probative of the issue of Dan's guilt. Scribe's testimony established that Dan was desperate for money because of his failing business and had resorted to illegal conduct in the past to try to get money. This established motive and makes it much more likely than would otherwise be the case that Dan is the one who committed this arson.

Although the evidence does present some risk of undue prejudice, it does not substantially outweigh the high probative value of the evidence. Therefore, Scribe's testimony is legally relevant and should not be excluded on this basis.

Character Evidence

Another issue presented by Scribe's testimony is character evidence. Character evidence – evidence of prior bad acts of the accused offered to prove the bad character of the defendant to show that he acted in conformity with the bad character – is generally inadmissible in a criminal case. However, character evidence may still be admitted if it is offered for some other purpose, such as to show motive, intent, modus operandi, or common plan or scheme.

Here, the evidence of Dan's prior activities in connection with falsifying the company's records is admissible forthe non-character purpose of establishing motive. The evidence

is not being offered to prove that Dan is a bad guy in general. Rather, it is being offered for the specific purpose of showing that Dan had a strong motive to burn down his business because he was in financial trouble and his other efforts to obtain funding had failed.

Therefore, the judge should admit Scribe's testimony. However, the judge should also issue a limiting instruction informing the jury that they may only consider Dan's prior bad acts in establishing motive and may not infer from them that he had a bad character and so is likely to be guilty for that reason.

Personal Knowledge

Scribe is competent to testify regarding what he heard and did because he had personal knowledge of it. Scribe was there when Dan told him to falsify the books and did so himself, so Dan has personal knowledge.

Thus, this requirement for admissibility is satisfied.

Hearsay

A final issue is whether Scribe's testimony is inadmissible hearsay. Hearsay is out[-]of[-]court statement offered to prove the truth of the matter asserted, and is normally inadmissible unless an exception to the hearsay rule applies or the statement is exempted from the definition of hearsay under the Federal Rules of Evidence (FRE).

The prosecution would argue that Scribe's testimony regarding Dan's out[-]of[-]court statements and Scribe's out[-]of[-]court statement is not hearsay at all, because it is not being offered for its truth. A statement is not considered hearsay if it is being offered for some purpose other than its truth, such as to prove the mind of the speaker and the listener. Under this argument, Dan's statements to Scribe are not being offered to prove that the bank loan was really rejected, but to show that Dan believed that the business was desperate for money and was willing to do anything to get funds. Similarly, Scribe's out[-]of[-]court statement refusing to falsify the books a second time is being offered for the non-hearsay purpose of proving the listener's state of mind – that Dan knew his fraud scheme would not work and thus was likely to try some other way to get money.

Because the prosecution has a strong argument that Scribe's testimony is not hearsay at all, the testimony should be admitted into evidence.

Hearsay Exemption for Admissions by a Party Opponent

Furthermore, with regard to Dan's statements to Scribe, the statements will be admissible for their truth because the hearsay exemption for admissions by a party opponent applies.

Under this hearsay exemption, the statements of an adverse party in a proceeding are not considered hearsay, regardless of when they were made.

Thus, in this prosecution the prosecutor is offering the evidence against Dan, so Dan is an adverse party. Therefore, Dan's statement are [sic] not considered hearsay and are admissible for their truth.

Conclusion

In summary, Scribe's testimony should be admitted. The evidence is relevant to proving Dan's motive to commit the crime, a non-character purpose. And the conversations between Dan and Scribe are admissible because they are being offered for a purpose other than their truth and the hearsay exemption for party admissions applies.

Admissibility of Jan's Testimony

Logical Relevance

Jan's testimony is relevant because it tends to make it more likely that Dan committed the arson. As Jan walked by Dan's office she heard someone say "gasoline is the best fire starter". Because the statement was made in Dan's office, it was likely made either to Dan or in Dan's presence. Therefore, it establishes that Dan had knowledge regarding the means to commit the crime, which makes it more likely that he did in fact commit the arson. It also makes it more likely that Dan would have chosen gasoline if he were to commit arson, which matches up with the fact that the fire was indeed started with gasoline.

Of course, the conversation could have been perfectly innocent. Dan could have been seeking or obtaining advice on the best way to BBQ, or he could have not even been there are [sic] the time. But to be relevant, evidence must only have some tendency to make a fact of consequence more or less likely to be true. Because the evidence has some tendency to make it more likely that Dan committed the arson, it is logically relevant.

Legal Relevance

The evidence is also legally relevant. As discussed above, even relevant evidence can be excluded if its probative value is substantially outweighed by its prejudicial effect.

Here, the evidence is legally relevant because it has substantial probative value and poses little risk of undue prejudice. The fact that the defendant may have given or received advice on the best way to start a fire the night before the defendant's business burned down, coupled with the motive established by Scribe's testimony, is strong evidence of guilt. In contrast, there is little risk of undue prejudice. The defense will be able to argue that Dan was not present at the time the statement was made or that it was innocuous when they present their case.

Therefore, the evidence is legally relevant.

Personal Knowledge

Jan is competent to testify to what she heard because she had personal knowledge of it. She was there that night and heard the statement made.

Authentication

To be admissible, documentary evidence must be authenticated as being what it purports to be. For a voice recording by someone, this would normally mean that a witness who knows the person's voice must testify that the voice on the tape is the voice of the person. Dan would argue that Jan's testimony is inadmissible because Jan could not testify that the voice was Dan's.

However, the authentication requirement will not apply to bar admission of this evidence. First, the evidence is testimonial, rather than documentary, so authentication requirements would not apply. More importantly, it is irrelevant whether Dan was the one who made the statement. The statement could have been made by someone else in Dan's presence, for example if Dan sought the advice of someone in determining what the most effective way would be to commit the arson. Therefore, the statement is relevant even if it was not made by Dan and for this reason need not be authenticated as Dan's.

The defense can argue that Dan was not present when the statement was made or that it was innocuous, but deciding those issues will be up to the jury, not the judge.

Hearsay

A final objection Dan might make to admission of Jan's testimony is hearsay. Hearsay is an out[-]of[-]court statement offered to prove the truth of the matter asserted. Dan would argue that Jan's testimony is hearsay because she is testifying about what she heard someone say in Dan's office.

However, the hearsay objection will be rejected here. A statement is only hearsay if it is offered for its truth. An out[-]of[-]court statement is still admissible for other purposes. Here, it is irrelevant whether the statement is true. Whether gasoline is in fact the best fire starter has no bearing on the case. The significance of the statement is to establish either the speaker's or the listener's state of mind, which are both permissible non-hearsay purposes. If Dan made the statement, then it tends to establish that he had knowledge about how to commit the crime, which would help show his guilty [sic]. Similarly, if someone else made the statement to Dan, it would be relevant to show that Dan heard the statement and thus had obtained advice on the best way to start a fire, which again would be relevant to guilty [sic].

Although Dan may not have been in the office at the time, the fact that the statement was

made in Dan's office, a place where people would not normally be without Dan being there as well, justified the judge in concluding that there was sufficient evidence to find that Dan either made the statement or was present when it was made.

Conclusion

Jan's testimony should be admitted into evidence because it is relevant to establish Dan's guilt, Jan had personal knowledge of the statement, and it is being offered for a non-hearsay purpose.

Answer B

4)

Detective Pry's Testimony about DMC [R]ecords

Logical/Legal Relevance

Relevant evidence is generally admissible. In order to be relevant the evidence must have any tendency to make a fact more or less likely than that fact would be without the evidence proffered. The prosecution is offering this evidence to prove that the car seen speeding away from the scene of the arson was owned by Dan (D). This evidence is logically relevant as it tends to prove identity of the arsonist.

Some logically relevant evidence will still be excluded if there are public policy reasons for the exclusion of that evidence. If the probative value of relevant ev idence is substantially outweighed by the prejudicial nature of the evidence then the evidence will be excluded. D's attorney would argue that lots of people own blue [C]orvettes and thus using the [C]orvette to identify D as the guilty party is prejudicial. D's attorney would lose however because ownership of a car seen speeding away from the scene of a crime is not prejudicial and any possible prejudice resulting from the inference that D was driving the [C]orvette as it speed [sic] away does not substantially outweigh the probative value that this evidence possesses as far as identifying the arsonist.

Witness Competency

A witness is competent to testify if the witness has personal knowledge and is capable of understanding the oath or affirmation required of all witnesses.

Pry would be a competent witness because he read the dmv [sic] report and thus has personal knowledge of its contents.

Best Evidence

When a witnesses [sic] sole source of knowledge is from the contents of a document, and the witnesses [sic] testimony is being elicited in order to establish the contents of that document as true the best evidence rule requires the profferor of that evidence to either produce the document or explain why the document was not produced before allowing the witness to testify as to the contents of that document.

The defense's objection to Pry's testimony on the contents of the DMV printout should have been upheld as officer Pry's sole source of knowledge regarding D's ownership of a blue [C]orvette was from the DMV printout. Pry did not explain why he was not able to produce the dmv[sic] record. Without the DMV record or a reasonable explanation concerning why it was missing Pry's testimony should have been excluded.

Hearsay

Hearsay is an out-of-court statement offered for the truth of the matter asserted. Pry's

testimony about the DMV printouts[sic] contents would also be hearsay because it is a statement made by the employee transcribing data into the DMV database that is being offered to prove that D owned a blue [C]orvette. Because this statement was hearsay it should have been excluded unless on of [sic] the exceptions or exemptions from the hearsay rule applied.

Exemptions/Exceptions

Official Document

Official certified documents from public agencies charged with complying [sic] the information contained in the document are exempt from the hearsay rule. Because the prosecution failed to produce a certified record from DMV this exception to the hearsay rule would not have been available.

Business Record Exception

A record that is made in the ordinary course of a business by an employee with a duty to accurately report such information can be admitted in lieu of the employee's testimony. Since there was no dmv[sic] record being offered this exception would not have applied.

Presumption that owner was driver of a vehicle

A presumption can be raised that the driver of a car was the owner of the car. However in criminal trials the burden of proof is on the prosec ution to prove each element of a crime and the identity of the person committing the crime beyond a reasonable doubt and thus the prosecution would not have been able to use the testimony regarding dan's[sic] ownership of a blue [C]orvette to raise a presumption that dan[sic] was driving the [C]orvette on the night of the arson.

Because of the best evidence and hearsay problems, Pry's testimony about the DMV printout should have been excluded.

Detective Pry's Testimony about Corvette in Driveway

Logical/Legal Relevance
This evidence is logically relevant because it makes it more likely than not than D owned a blue [C]orvette which was seen sp[e]eding away from the scene of the arson. This evidence would not be excluded due to legal relevance for the same reason the DMV printout testimony would not have been excluded for legal relevance reasons.

Witness Competency

The officer is competent to testify about seeing a blue [C]orvette in D's driveway because the off icer has personal knowledge regarding what the officer saw in D's driveway.

Presumption that D was the driver of the blue [C]orvette on the night of the arson

The prosecution would still not be able to use the driver presumption because this is a criminal case.

Scribe's Testimony re: phony accounts receivable for bank loan

Logical/Legal Relevance

This evidence would be logically relevant to show that D needed money because he falsified account records to receive a bank loan which was denied. The defense would argue that this testimony is highly prejudicial and that its prejudicial effect outweighs its probative value substantially because the jury is likely to convict D for arson based on the fact that his [sic] is a dishonest person and not based on whether he actually committed the arson. While this evidence is highly prejudicial, the court was right to admit it as it goes to the d's[sic] motive in starting the fire.

Witness Competency

Scribe would be a competent witness because he or she had personal knowledge about D's request to make false accounts receivable.

Hearsay

This testimony would be hearsay because Scribe is testifying about a statement made by D out of court to prove the[sic] D had Scribe create false records in order to get a loan from the bank. The prosecution would argue that this is not hearsay because the evidence is not offered to prove that D tried to get a loan by false pretenses but that he had a motive to burn down his building for the insurance proceeds because he was denied a loan and thus was in need of money.

The court properly admitted this as non-hearsay if it allowed it in for the limited purpose of showing that D had a motive to burn down the building to collect insurance proceeds.

Admission of a party opponent made by an agent

A statement made by a party offered against the party by the opposing party that is adverse to the party's interest is admissible as non-hearsay. The statement did not have to be against the party's interest at the time that it was made. The prosecution would argue that D's request that Scribe falsify accounts receivable is a party admission exempt from the hearsay rule because it is a statement made by D that is now relevant to his culpability for the crime of arson. The statement would be admitted under this exemption to the hearsay rule because D made the statement and it is being offered by the opposition against D.

Present sense impression

S's testimony would not be excepted from the hearsay rule under the exception for a present sense impression as D's statement to falsify records was not made contemporaneous to d[sic] observing the falsification of the records.

Excited Utterance

It would also not qualify as an excited utterance because there is no evidence that D experienced a traumatic or exciting event around the time that his instructions were made.

Present Intent to engage in future conduct

Since D was instructing S to destroy the records it is unlikely that the prosecution could have this statement admitted as a present expression of intent to engage in future conduct to prove that the future conduct was engaged. D did not make a statement concerning conduct that he was about to engage in or planned to engage in in [sic] the future.

Double Hearsay

S's testimony about transcribing false accounts receivable would be double hearsay because S is testifying to an out[-]of[-]court statement that he made in response to a request that his boss made to prove that S engaged in the conduct alleged by the hearsay statement.

Vicarious Admission

S's statement would be admitted as a vicarious admission so long as transcribing records was [sic] part of the duties that S performed. As D[']s agent S' testimony would be vicariously attributed to D.

Character evidence

Character evidence is not allowed in a criminal trial by the prosecution to show that the defendant acted in conformity with his character unless and until the defendant offers evidence of his good character. Character evidence is however admissible to show motive, intent, a common plan or scheme, identity or opportunity.

D would argue that this evidence was offered to show that D is of bad character and likely to commit fraud and thus it should be excluded as impermissible character evidence.

The prosecution would argue that this evidence is being offered to show that D had the motive to commit an arson in order to collect the insuranc[e] proceeds on his failing business. Because the falsified accounts receivable are not required to prove that D did not get a loan from the bank which is the evidence that really tends to show that D had a motive to burn down his failing business for insurance proceeds the court should have excluded the portion of Scribe's testimony concerning the falsified records as impermissible

character evidence.

Scribe's Testimony Re: phony accounts receivable tw o days after fire

Logical/Legal Relevance

This testimony is not logically relevant because Scribe did not offer any reason related to the arson for falsifying the accounts receivable. While the prosecution may argue that D was falsify[sic] the records to get a bigger insurance payoff, Scribe's testimony does not suggest that this is the case. Even if the court did find the evidence to be logically relevant for showing that D was attempting to increase the amount of payoff from the insurance company, this testimony should have been excluded because its prejudicial value substantially outweighs its probative value. W ithout some testimony concerning why D asked Scribe to falsify the accounts receivable after the fire this testimony tends to suggest to the jury that it should convict D for being a dishonest guy generally instead of for committing the specific crime charged.

Witness Competency

Scribe would be competent because he or she had personal knowledge of what was said.

Hearsay

This testimony would be hearsay as was the prior testimony regarding false accounting records if it was admitted to show the truth of the statement – that D wanted to falsify accounts receivable. The prosecution could still argue that it was being offered to show motive which would be for a reason unrelated to the truth of the statement.

Admission

This testimony would also be an admission of D because it was made by D and is being offered against him and thus it is exempt from the hearsay rule.

The court should not have admitted this evidence because of its potential lack of logical relevance, it [sic] highly prejudicial nature in light of its relatively low probative value.

This testimony would also not fit under the exceptions to the hearsay rule for present sense impressions, excited utterances, or a present statement of intent to engage in future conduct for the same reasons the first statement regarding the falsification of accounting records would not fit under these exceptions.

Jan's Testimony re: "Gasoline is the best fire starter"

Legal/Logical Relevance

This evidence is legally relevant because it tends to show that D knew gasoline was the best fire starter and since it is undisputed that gas was used to start the fire at the business it would tend to show that D committed the arson.

Witness Competency

J is famil[i]ar with D's voice and he heard the statement[;] thus he would be competent because he has personal knowledge of the statement and is potentially capable of authenticating the identity of the speaker, a problem which will be dealt with more extensively below.

Hearsay

[T]his statement would not be hearsay because the purpose for its admission is not to prove that gasoline is the best fire starter. The prosecution wants this evidence in to show that D had knowledge that gasoline starts fires since gasoline was used to start this fire. Even if the statement was found to be offered for its truth a hearsay exemption would apply.

Party Admission

D is a party and the statement is being offered against him and thus so long as he can be identified as the speaker this statement would be admissible as a party admission.

Authentication of Voice

When the identify of a speaker is in issue because the speaker was not visible to the person hearing the speech the voice must be authenticated. A voice may be authenticated by the person who heard the voice so long as that person is familiar with the voice. Even if the hearer is not necessarily familiar with the voice of the speaker other facts can be admitted to establish the speaker's identity.

J is familiar with D's voice[,] however J is unable to authenticate the speaker's identity as that of D because the door was closed and the voice was muffled. However the prosecution would argue that there are enough circumstantial factors available that the jury should be allowed to decide whether or not the voice was D's. Such evidence exists from the fact that J was passing D's office and that the voice was a male voice coming from D's office. This should be sufficient to allow this testimony to go to the jury because J's testimony is enough to allow the jury to determine whether D was in his office.

The judge properly admitted J's testimony as either non-hearsay because it was not admitted to prove the truth of the matter asserted or as a party admission.

Q5 Remedies

Stan and Barb entered into a valid written contract whereby (1) Stan agreed to convey to Barb 100 acres of agricultural land and water rights in an adjacent stream, and (2) Barb agreed to pay Stan $100,000. When Stan and Barb were negotiating the deal, Stan said, "You know I want to make sure that this property will still be used for farming and not developed." Barb replied simply, "Well, I can certainly understand your feelings." In fact, Barb intended to develop the land as a resort.

The conveyance was to take place on June 1. On May 15, Stan called Barb and told her the deal was off. Stan said that a third party, Tom, had offered him $130,000 for the land. Stan also said that he had discovered that Barb intended to develop the land.

On May 16, Barb discovered that Stan has title to only 90 of the 100 acres specified, and that he does not have water rights in the adjacent stream.

Barb still wishes to purchase the property. However, it will cost her $15,000 to purchase the water rights from the true owner of those rights.

What equitable and contractual remedies, if any, may Barb seek, what defenses, if any, may Stan assert, and what is the likely outcome on each? Discuss.

Answer A

5)

Barb v. Stan

Barb's Equitable and Contractual Remedies

Contractual Rights - - Land-Sale Contract
Barb can sue Stan under contract rights for breach of the land-sale contract, for failing to deliver marketable title and for breach of a general warranty deed. She should assert that she is entitled to the remedy of specific performance, or alternately, damages under contract.

Specific Performance
Specific performance is an equitable remedy that is available when: 1) there is a valid contract, 2) the terms of the contract are clear and definite and were performed, 3) there is [sic] inadequate legal damages, 4) there [sic] mutuality, and 5) there are no valid defenses.

Valid Contract
A valid contract in a land-sale agreement requires a writing with all essential terms.

The contract between Barb and Stan was a valid written agreement, for the sale and purchase of 100 acres of agricultural land and water rights to a stream, to close on June 1st. Barb agreed to pay $100,000 for the purchase of the land.

Clear and Definite Terms
Terms are clear and definite when a court is able to enforce the terms. For a land-sale contract, the contract must contain: 1) parties, 2) property defined, 3) time for performance, and 4) purchase price.

Here, the court can enforce the sale of land, since it defines 1) the parties are Barb and Stan, 2) the land to be sold is 100 acres of agricultural land and water rights, 3) the time for performance as June 1st, and 4) the purchase price of $100,000. Therefore, this element is met.

Inadequate Legal Damages
Legal damages are inadequate when there is a contract for a subject matter that is unique. Land has been held as a unique subject matter, since no two lots of land are the same, even if they appear to be.

Since the contract between Barb and Stan is for 100 acres of land, the contract is for a unique subject matter and legal damages are inadequate. Therefore, this element is met.

Mutuality
At common law, mutuality required that both parties be entitled to specific performance. However, modernly, mutuality only requires that the person seeking specific performance be ready and able to perform.

Here, as long as Barb, the person seeking the specific performance of the contract, is able to pay the purchase price, she should be entitled to specific performance.

Abatement of Purchase Price
In a land-sale contract, a purchase price can be abated, or reduced when the title rendered is defective due to an encumbrance or unmarketable title, or a conveyance of less than promised.

If Barb succeeds on specific performance, subject to Stan's defenses (discussed below) then she should be entitled to abate the purchase price. Bob contracted for 100 acres of land and water right[s] to an adjacent stream. Barb later discovered that Stan only owned 90 acres and did not own the water rights he claimed to own. Since Barb contracted to pay $100,000, she should be entitled to a reduction of the purchase price to reflect the value of the land, minus the 10 acres and the stream.

Stream
The stream was not owned by Stan, but owned by another person who is willing to sell the stream to Barb for $15,000. Therefore, the purchase price should be first reduced by the amount, to a total of $85,000. This is fair since it would cost Barb that amount to correct the contract as agreed.

10 Acres
Stan agreed to sell Barb 100 acres, but only owned 90 acres of the land. The ten acres of land should be subtracted from the remaining $85,000. One method of doing this would be to divide $85,000 by 100 and value each acre at $850. Then multiply $850 x 10 acres for a reduction of $8,500 credited to Barb.

Legal Damages
If Barb is unsuccessful in her attempt to obtain specific performance, she could sue Stan for breach of contract and obtain legal damages.

Breach of the Contract–Anticipatory Repudiation
Anticipatory repudiation is a clear and unambiguous statement that a party will not perform before performance comes due under the contract.

Since Stan called off the sale of the land on May 15, which was two weeks before the closing date of June 1st, Stan anticipatorily repudiated the contract, which is a major breach. This entitles Barb to suspend her performance and sue for breach of contract.

Expectancy Damages

A major breach entitles the aggrieved party to damages to make them whole. These are called expectancy damages. In these contracts, the appropriate measure of damages is the fair market value of the land - - the contract price.

Here, Barb contracted for the sale of land for $100,000. Stan was later offered $130,000 for the land by a third party. If indeed this contract reflects fair market value and if the contract was also for the 100 acres and the water rights, then Barb should be granted $30,000. Otherwise, Barb should get $30,000 plus $15,000 for the water rights plus $8,500 to reflect the additional 10 acres.

2) Stan's Defenses

Stan should assert defenses that Barb is not entitled to an equitable remedy and that specific performance was inappropriate since there was not a valid contract which Barb had performed.

Laches

Laches bars equitable remedies when a party unreasonably delays and this causes prejudice.

Here, there is no indication that Barb delayed in filing her suit. Therefore, this defense will fail.

Unclean Hands

Under the Clean Hands Doctrine, equity will not come to the aid of a person with unclean hands. The Clean Hands Doctrine bars equitable relief to a person who engages in wrongful, fraudulent or unconscionable conduct with regard to the subject matter at hand.

Here, Stan could argue that Barb knew of Stan's firm desire to keep the land as agricultural land to be used for farming and prevent its development. In fact, Barb said, "I can certainly understand your feelings," but in reality had intended all along to develop the agricultural land as a resort. Barb did not disclose this information to Stan, which is material omission and one that probably would have terminated the contract. On the other hand, Stan did not include this statement in the contract, and if it were truly a deal-breaker, he probably should have. Since courts tend to favor the free alienation of property and prefer that material agreements be in the writing, if there is one, the court will likely side with Barb, unless they find that she committed fraud against Stan. Therefore, this defense, although a close call, will not likely bar Barb's relief in equity.

Contract Invalid

Stan can also claim the contract is invalid, which would refute one of the elements necessary to enforce an agreement with specific performance.

Unconscionability
Stan should argue that the contract was unconscionable since there was unfair surprise in Barb's intent to develop the land.

However, this argument will likely fail as Barb and Stan appear to be at arm's length and Stan should have included his restriction on the land.

Terms of the Contract Not Met
Stan can also argue that the contract terms were not met and Barb breached the contract by having the intent to develop the land although there was a condition that Barb use the land with the restriction on the land for agricultural purposes. However, the parol evidence rule will bar this argument.

Parol Evidence
Parol evidence bars introduction of oral or written agreements make [sic] before or contemporaneously with a completely integrated writing.

Therefore, Barb will argue that the oral statements by Stan that he preferred the property be used for farming and not be developed is barred.

Stan's Bad Faith/Unclean Hands
Since Stan also acted in bad faith and with unclean hands by accepting an offer from another purchaser for more money, he will probably lose on his defense arguments.

Answer B

5)

Barb (B) v. Seller (S)

Breach of the Land Sale Contract

Valid, Enforceable Contract

The facts tell us that B and S entered into a valid written contract for the sale of 100 acres of agricultural land and water rights in exchange for $100K.

Anticipatory Repudiation

B will argue that S breached the agreement when he anticipatorily repudiated the agreement on May 15. In order to have an anticipatory repudiation, the breaching party must unequivocally indicate an intent not to perform. In this case, S called B and told her the deal was off. This qualifies as an unequivocal repudiation and S would be free to pursue all remedies available to her for the breach.

B has four options available to her after S's repudiation. She is free to: (1) treat the contract as repudiated and sue for damages, (2) treat the contract as discharged; (3) await the time for performance (June 1) and sue when performance does not occur; or (4) urge S to perform. In this case, we know that B still wishes to purchase the property; thus, her best option is to treat the contract as repudiated and sue immediately for all contractual remedies available to her.

Unmarketable Title

B will also argue that S breached the land sale contract by being unable to provide marketable title. This is because she discovered on May 16 that S only had title to 90 of the 100 acres he was purporting to sell B and because he did not have any water rights in the adjacent stream.

Although S might try to argue that his inability to provide marketable title discharges him from the contract, this will not be a successful defense because only the buyer to a land sale contract has a right to terminate the contract if the seller cannot provide marketable title. If the buyer still wants to purchase the property, the seller must perform under the contract. In addition, the buyer has a right to sue for damages incurred under the contract. This could include abatement of the purchase price.

Remedies

Compensatory Damages

Expectancy Damages

In order to be awarded damages, B must prove that they are foreseeable and certain to result. The usual measure of damages in a contract action is for B's expectancy; that is, B is entitled to recover the amount that she would need to purchase a replacement. In this case, it would be very difficult for B to establish how much it would cost her to purchase comparable property since she specifically wants S's property. Thus, there does not appear to be any way to provide B with an amount that would allow her to buy an adequate substitute. If, however, there were other comparable nearby [sic] for sale, and if S could not obtain specific performance, then she might be able to prove expectancy damages by establishing how much it would cost to purchase that other property. If she could do that, she would be entitled to the difference between what it cost to purchase the replacement property and the contract price ($100K).

Consequential Damages

In addition to expectancy damages, consequential damages are sometimes available in contract actions. These are damages that are unusual, but that were foreseeable to both parties at the time the contract was formed. B will try to argue that S should be liable to her for any lost profits she will suffer as a result of the delay in developing the land for a resort. She'll argue that the substantial delay that will occur because she has to either bring suit to obtain S's land or because she'll have to go find an alternative property will result in significant lost profit damages. Moreover, she will argue that S knew on May 15, before the June 1 performance date, that she intended to develop the land as a resort and that he thus should be liable for all lost profits that she will incur as a result of his breach.

S will successfully argue that B is not entitled to consequential damages for two reasons. First, he will prove that he was not aware of B's plans at the time the contract was formed. The contract was formed at the time the parties signed the agreement, and at that time, S was under the impression B would be using the land for farming. This is evidenced by his statement that he wanted the property to remain undeveloped and to be used for farming and B's response of "Well, I can certainly understand your feelings." S will argue that this did not put him on any kind of notice as to B's intentions and thus he isn't liable for her lost development profits. Second, S will successfully argue that the lost development profits can't be proven with certainty since it is a new business with no prior history of profits. Since courts are loathe to award lost profits to new businesses, S will also succeed in this argument.

Accordingly, B is entitled to receive the amount it would take to allow her to purchase a new piece of replacement property. However, since land is unique, this is inadequate compensation for B. B will not be able to prove that she is entitled to consequential

damages since they are uncertain and since S was unaware of B's plans at the time the contract was formed.

Incidental Damages

B is always entitled to recover for incidental damages suffered as a result of the breach. In this case, to the extent she can prove what it cost her to search for new property, etc[.], she can recover from S.

Restitutionary Damages

Restitution is an alternative remedy to compensatory damages when the defendant received a benefit and compensatory damages are not the best measure of damages. In this case, S has not actually received any benefit yet. However, B may be able to succeed in her argument that if B is allowed to sell his property to Tom because the court refuses to grant specific performance, then she should be entitled to receive the $30K S was receiving from Tom that was in excess of the amount S was entitled to receive under the contract with B. She can argue that allowing S to retain the additional sum would result in unjust enrichment.

Specific Performance

Specific performance is available only if B can establish that: (1) damages are inadequate; (2) the terms of the contract are definite and certain; (3) it is feasible to enforce the contract; (5) there is mutuality of remedy/performance; and (5) there are not equitable defenses.

Inadequacy

As discussed above, since land is unique and since B can't prove her damages with certainty, damages are an inadequate remedy in this case.

Definite and Certain Terms

Courts do not award specific performance unless the terms are very definite and certain. Here, B will argue the terms are quite certain since she was entitled to receive 100 acres of land and water rights in exchange for $100K. She will succeed in her argument.

Feasibility of Enforcement

A court will not award specific performance unless it is feasible to enforce the injunction. Here, a court presumably has jurisdiction over the land and S. In addition, the court would be able to use its contempt power to force S to convey the land to B. Thus, the injunction is feasible to enforce.

Mutuality of Remedy/Performance

In the past, courts would not award specific performance if there was no mutuality of remedy (if the party asking for specific performance could not be made to specifically perform in the event of her breach). Courts today have modified this requirement so that they grant specific performance if it is possible to ensure mutuality of performance. In this case, mutuality of performance is possible since the court can require S to convey the deed to the property at the same time B tenders $100K to S.

No Equitable Defenses

Laches

B has not waited an unreasonable length of time to bring suit such that S can argue that he detrimentally relied on B's failure to bring suit. Accordingly, this is no defense.

Unclean Hands

S will assert that B has acted with unclean hands with regard to this particular transaction. He will point to B's statement in response to his request that he would like the property to remain undeveloped. S will claim the statement, while not explicitly false, was deceptive since it induced S into believing that B would not develop the property when, in fact, B planned all along to develop it as a resort. S will argue it was a misstatement by omission since B knew at the time the contract was formed that she would develop the property despite S's desire for her not to, yet she did not volunteer this information to S.

B may counter that her evasion was not an actual false statement and that she cannot be held responsible for whatever S may have interpreted her statement to mean beyond its actual literal meaning – that she did, in fact, understand that he'd like the property to remain undeveloped. B will argue that since there was no actual false statement, she does not have unclean hands and[,] thus, is fully entitled to specific performance.

If S is successful in making his argument, the court will deny B specific performance, and award her damages only.

Conclusion

A court will not award B specific performance of the contract since she had unclean hands with respect to the contract. Accordingly, it will grant her whatever damages can be proven would be certain to occur. In this case, B will likely be entitled to the $30K that S will get from Tom that is in excess of the contract price they had agreed on. In addition, she can receive incidental damages and, in the unlikely event she can prove how much it would cost to obtain replacement property, she can receive any amount in excess of the contract price from S as well.

If, however, the court did award specific performance, it would require that S convey the 90 acres of land S actually owns to B. B would only have to pay $90K for the 90 acres. In addition, since it would cost B $15K to purchase the water rights from the true owner, B is also entitled to deduct this from the purchase price. Accordingly, if a court does award B specific performance, it will only require B to tender $75K to S in exchange for S's 90 acres of property.

S's Defense - Contract was Subject to a Condition

S will argue in his defense that he did not actually breach the contract because the contract was subject to a condition (an agreement not to develop the land). He'll argue this condition was not satisfied because he discovered that B fully intended to develop the land. Thus, he will argue, he was discharged from his own duty to perform under the contract by B's failure to abide by the condition and was free to terminate the contract.

B will successfully defend against this argument by proving that there was no explicit agreement to create a condition to the contract. The parol evidence rule doesn't apply to extrinsic evidence used to demonstrate the existence of a condition precedent to the contract. B will introduce the statement S made: "You know I want to make sure this property will still be used for farming and not developed." Next, she'll introduce her response: "Well, I certainly understand your feelings." Her response did not state that she would agree not to develop the property; thus, there is no condition precedent and B's argument that his duty to perform was discharged will not succeed.

Q6 Professional Responsibility

Lou is a lawyer. While he was having lunch with a friend, Frank, he learned that Frank's sister, Sally, had decided to dissolve her marriage. At Frank's request, Lou telephoned Sally, told her that Frank had asked him to call, and offered to represent her. They set up an appointment for the next day.

During the appointment, Lou began the discussion by talking about his fee. Sally told Lou she had no money, but admitted jointly owning with her husband some art valued at $1,000,000. Lou agreed to accept a payment of fifty percent of any assets awarded to Sally in exchange for representing her. Lou and Sally memorialized the agreement in writing.

Over the next month, Lou found himself attracted to Sally and eventually asked her to go out with him. She accepted, and they began dating on a regular basis, including having consensual sexual relations with each other.

Soon after Sally filed for dissolution, her husband's lawyer called Lou and made a property settlement offer. Lou told the lawyer the offer was ridiculously low and he would not insult Sally by telling her about it. Sally learned about the offer from her husband. She thought it was a good offer and was incensed that Lou had turned it down. When she asked Lou about it, he told her he was looking out for her best interests.

What ethical violations, if any, has Lou committed? Discuss.

Answer A

6)

Lou has potentially violated the ABA [R]ules of Professional Conduct and the model code of Professional Responsibility. He has potentially violated the California [R]ules of Professional Conduct, and where there is a distinction in the law, I will address it.

Here, Lou telephoned Sally at Frank's request to tell Sally that he would offer to represent her. The general rule is that an attorney may not instigate direct, in person solicitation for legal services unless they are talking to a former client or the person comes up to them. In this case, Lou was having lunch with Frank who asked him to call Sally because Sally is his [s]ister. While Lou did not directly make the contact with Sally in person, he is still not allowed to call Sally and offer her his services because they do not have a previous legal relationship. It is also immaterial that Lou told Sally that he is calling because her brother told him to. Lou should have told Frank that he cannot call Sally because it would be violating his ethical obligations. Lou could have told Frank to tell Sally to call him if she really needed help and was looking for legal representation. Thus, because Lou instigated client contact and solicited his services to Sally, he has breached his ethical obligations.

When Lou agreed to take 50% of Sally's assets she would be awarded after the dissolution, he is basically having an interest in the litigation. Generally, a lawyer may not have an interest in the litigation and thus, what Lou should have done is the following: 1. He should have given Sally consultation as to what fees are, 2. He should have given her informed consultation, 3. He should have given her the chance to see outside counsel if she wanted (in writing in CA), 4. He should have obtained her waiver or consent to this agreement (in writing in CA). However, a lawyer may have an interest in the litigation if, for example, it is a contingency fee arrang[e]ment.

Generally under the ABA rules, a lawyer may not engage in a contingency fee arra[n]gement with a client when the case is about a dissolution of marriage because it would violate public policy concerns. However, in California a lawyer may enter a contingency fee arrang[e]ment so long as the arrang[e]ment does not encourage the divorce. Since Sally is in need of a lawyer to have her divorce, it appears that Lou's representation is not encouraging the divorce. Thus, Lou should have given Sally consultation about the fee arrangem[e]nt, put the contingency in writing, he should have also told her and [sic] what his obligations are under his representation (written in CA), and he should have written what the amount of his services would be after he subtracts any court costs, and obtained her written consent to the arrang[e]ment. While the [sic] memorial[i]zed this arrangement in writing, Lou did not give Sally informed consent about the arrang[e]ment nor did he write down what his responsibility and liability is under his representation. Thus, Lou has breached his ethical obligations.

Lou agreed to accept 50% of any assets awarded to Sally in the divorce. A lawyer has a duty to not make his fee unreasonable or unconscionable. In this case, Sally had no money except she jointly owned art with her husband valued at 1 million dollars. Thus, taken into consideration that Sally and her husband may have a lot of money, some courts would find that 50% of Sally[‘s] divorce decree would amount to an unreasonable fee for Lou. Plus, it may also be uncons[c]ionable to take so much money from a client. In this event, what Lou should have done was determine what the normal percentage was for a contingency fee in the general area that he lived in. For example, he could have asked other lawyers and taken note of payment in divorce decrees. He should have also determined if this percentage would actually reflect the amount of work he would be doing. Additionally, Lou should also know that 50% may be too unreasonably high as his fee percentage and he should have offered Sally something more reasonable such as 33% or so. In conclusion, he has breached his ethical obligations by making his fee 50% of Sally’s assets as this is most likely far to[o] unreasonable and unconscionable.

Lou and Sally began a relationship during his representation of her case. Under the ABA rules, a lawyer may not engage in sexual relations with a client. However, in CA it is permissible so long as it does not affect the lawyer’s representation of their client. Here, they began dating regularly and had consensual sexual relations. One the one hand, while this is permissible in CA, it may have affected Lou’s duties as a lawyer because this is a divorce situation where Lou’s emotions may be entangled with the fact that his client is still married. Plus, Lou may be engaging in adultery since Sally only filed for the divorce after she started dated [sic] Lou, subjecting him to more potential ethical violations. Lou has a duty to place his client’s interest in front of his own and now Lou may be placing his emotional interests first. For example, when Husband’s lawyer called, Lou said that he would not take the property offer nor tell Sally about it because he did not want to insult Sally. Here, Lou may be protecting his relationship with Sally rather than being her loyal lawyer.

Also, when Sally asked Lou why he didn’t tell her about the offer, he said that he was looking out for her interests[,] which may not have been true. A lawyer has a duty of loyalty to their client to place their client’s interest first and Lou may have breached that duty by saying he was looking out for her interests when he was really looking out for his relationship with Sally. In this event, Lou should have consulted Sally about their potential conflict of interest (since Lou may place his interest in front of Sally’s best interest), he should have given her informed consent that he may not be able to put her interests first, and he should have asked her to seek another outside counsel’s advice (in writing in CA), then obtain her consent or waiver (in writing in CA). Lastly, if Lou could not reasonably represent her, he should have withdrawn from representation [so] as to not prejudice his client. For example, he could give Sally adequate time to find another lawyer and give her all the documents she would need to continue on her case.

Lou told Husband’s lawyer that he would not tell Sally about the settlement offer. Generally the lawyer is entitled [to] decide the technical and procedural decisions of a case while the client must decide on all the objectives and goals. One major goal is whether or not a client

wants to accept a settlement offer. Here, Lou had a duty to tell Sally about the settlement offer because it was her right as his client to know about it and decide if she should reject it or not. Lou cannot reject a settlement offer and since Lou rejected it, he has breached his duty to behave like a competent lawyer.

Lou did not tell Sally about the settlement offer. A lawyer has a duty to communicate with their client and tell them of all material aspects of their case, especially in a situation like this where Sally would have to know about the settlement offer. Here, Sally found out the settlement from her Husband, not her own lawyer. What Lou should have done is when he received the settlement offer, he should have consulted Sally as to its terms, explained the pros and cons of it and thus, allowed her to make the final decision. Then Sally could ask Lou want [sic] the best thing to do would be since Lou could give her consultation as to the legal implications of accepting a settl[e]ment offer. Yet, Lou just rejected the settlement and did not communicate any material terms of the settlement to Sally. Because Lou did not take these necessary steps, he has breached his duty as a lawyer.

Answer B

6)

Applicable Law

An attorney in California is bound by the California Rules of Professional Conduct (RPC) and the California's Attorney's oath. The RPCs are similar but not identical to the ABA Model Rules[,] which govern a lawyer's ethical duties in the majority of jurisdictions. Because it is unclear in which state Lou is a lawyer this essay will apply the majority view of the ABA Model rules but also include distinctions in the California RPCs.

Lawyer-Client Relationship

A lawyer[-]client relationship is formed when the client intends to seek professional advice from the lawyer. In this ca[s]e once Lou and Sally meet for their appointment a lawyer-client relationship has been created because Sally has arrived in response to Lou's call that offered to represent her.

Telephone Call To Sally
Breach of Duty of Candor to the Public and Dignity of the Profession

A lawyer owes a duty of Candor to the Public and a duty to act in a way that does not bring his profession into disrepute. These duties may be violated by in person solicitations for profit.

In Person Solicitation

The [C]onstitution guarantees the right to free speech. However, the Supreme [C]ourt has ruled that this right is limited in the context of commercial speech. Specifically, they have ruled that the [F]irst [A]mendment does not protect false, misleading or inherently deceptive speech. One category of inherently deceptive speech is live contact by a lawyer of a prospective client for profit. Therefore state bar associations can constituti[o]nally regulate this conduct.

Under the Model Rules a lawyer is prohibited from engaging in in person, live electronic or telephone contact, for profit, with a person that is not a lawyer or with whom the lawyer has no preexisting personal, legal, or family relationship.

Here Lou telephone[d] Sally[,] which qualifies as a live telephone contact. Furthermore, he offered to represent her in her action to dissolve her marriage for which he was planning on charging her a fee and make [sic] a profit as later evidence[d] by their fee agreement. Finally, Sally was not a lawyer and Lou had no preexisting personal, legal, or family relationship with Sally. Although Lou was asked to contact Sally by her brother

Frank, who was Lou's friend, this contact was not sufficient to qualify as a preexisting personal, legal or family relationship. In fact up unti[l] the time of the phone call Lou had no relationship with Sally and she had no idea who he was.

Therefore, by engaging in this live telephone contact, for profit solicitation Lou violated his duty of candor to the public and the duty he owes to the dignity of the legal profession.

What Lou should have done is tell Frank to have Sally call him to ask for representation. In that case Lou would not have initiated the contact and would not have violated any ethical duties.

Fee

Breach of Fiduciary Duty to Client for an Improper Fee

A lawyer owes a fiduciary duty to his client to charge a proper fee that conforms to all the requirem[e]nts laid down by the ethical rules.

Fees Generally

Under both the California RPCs and the ABA Model Rules a fee must be reasonable. Reasonableness is determined by factors such as the time, skill, and expertise required by the lawyer, the difficulty of the issues, similar fees charged for similar work in that locality, and so forth. Here the fee is for 50% of any assets awarded to Sally. Sally had told Lou that she had no money but her and her husband had $1,000,000 worth of art. This would mean that Lou's fee was at least $250,000 assuming Sally had no other assets. However, it is likely that people with such a large amount of art also have other expensive assets such as cars and houses. Therefore, Lou's fee is likely to be greatly in excess of $250,000. Regardless a contingency fee of 50% is usually not a reasonable fee given that most contingency fees are 33% or less. Therefore, Lou's overall fee is unreasonable and violates the ABA Model Rules and the California RPCs.

A fee should be in writing under the Model Rules and must be written under the California RPCs unless it is for less than $1000, for a[n] existing client in a routine matter, exigent circumstances exist, it is waived, or it is for a corporation. This fee was in writing[;] thus in that regard it complied with the Model Rules and the California RPCs.

Therefore, because the fee is unreasonable it is an ethical violation. Lou should have charged a fee that was less than or around 33% or a fee that was charged for similar work in such a locality in order to have a reasonable fee.

Contingency Fee

A contingency fee is one that is a percentage awarded to the lawyer if and when the client prevails. A contingency fee must be in writing, must otherwise be reasonable, must

discuss how work not covered by the contingency fee will be paid, and must provide a formula for how the contingency fee was determined. Here the fee was in writing. However, the fee may not have been reasonable as stated above.

Furthermore, under the Model Rules a contingency fee may not be taken in a domestic relations matter. However, under the California RPCs a contingency fee may be used in a domestic relations matter as along as it does not incetivize [sic] divorce. Therefore, if Lou is in a state that applies the Model Rules this contingency fee is an ethical violation because it involves a domestic relations matter of a dissolution. However, if Lou is in California his contingency fee is likely not an ethical violation because he made the fee with Sally after she had decided to dissolve her marriage and thus did not incentivize [sic] her decision to seek a divorce.

Lou should not have charged a contingency fee if he was in a Model Rules Jurisdiction but rather should have found some other way for Sally to pay her fee, perhaps by asking Frank to loan her the money necessary.

Breach of Duty of Loyalty to the Client

A lawyer owes a duty of loyalty to their client. The lawyer must act with the utmost good faith and in a way she reasonably believes is in the best interests of her client[,] having no other considerations in mind. If the lawyer becomes conflicted and that conflict materially limits the representation the lawyer may continue the representation only if he informs the client in writing of the conflict, receives written consent that a reasonable lawyer would advise their client to give, and he reasonably believes that he can continue the representation without it being materially limited.

Stake in Subject Matter of Litigation

Under the Model Rules a lawyer breaches their duty of loyalty to the client by taking a stake in the subject matter of the litigation. However, one exception to this is contingency fees in civil cases. Here Lou has taken an interest in the subject matter of the litigation because his fee is based on the amount and kind of assets he recovers for Sally in her divorce proceedings. However, this is clearly a contingency fee as it depends on assets actually being awarded to Sally in the divorce, thus it is contingent on Lou's success. Therefore, it does not breach Lou's duty of loyalty. However, because as stated above it is a contingency fee in a divorce proceeding it may not be a valid contingency fee if Lou is in a Model Rules jurisdiction. In such a jurisdiction the court may consider it an interest in the litigation rather than a contingency fee and therefore an ethical violation.

Therefore, the fee agreement breaches Lou's fiduciary duty to his client Sally and possibly his duty of loyalty to her as well.

Consential [sic] Sexual Relations
Breach of Duty of Loyalty to the Client

The duty of loyalty that a lawyer owes a client is laid out above.

Model Rules

Under the Model Rules a lawyer breaches the duty of loyalty by entering into a consensual sexual relationship with the client, regardless of its effect on the representation. However, the Model rules do allow preexisting consensual relationships to continue as long as they do not materially limit the lawyer's ability to represent the client. Here Lou and Sally's relationship began after the[y] entered into the lawyer[-]client relationship. Therefore, under the Model Rules Lou breached his duty of loyalty to Sally by entering the relationship with her.

Lou should have never entered consensual sexual relations with Sally nor even asked her to go out with him. If Lou had really wanted to date Sally he should have asked her to consent to his withdrawal as her lawyer and then started to date her.

California RPCs

Under the California RPCs a lawyer may enter a non preexisting consentual [sic] sexual relationship with a client without breaching the duty of loyalty as long as he reasonably believes the representation of the client will not be materially and adversely affected, the relationship is not in payment of any of the client's obligations to the lawyer, and the relationship is not entered into by the client because of duress or undue influence. Here there appears to be no evidence that the relationship was in part payment of the fee because the written fee agreement predated the relationship and was for a large amount of money[;] additionally there is no evidence of duress or undue influence.

However, there is evidence that the relationship materially and adversely affect[ed] the representation. Lou later received a call from Sally's husband[']s lawyer and turned it down and refused to communicate it to Sally because it was ridiculously low and he did not want to insult her. His motive in not wanting to insult her may have been do [sic] to their personal relationship. Furthermore, his failure to communicate the offer to her was a breach of his duty of care that he owed to Sally as will be discussed below. If his relationship was causally related to his breaches of duty of care then certainly the representation was materially limited by the sexual relationship. This is further reinforced by the fact that Sally learned of the offer and though[t] it was a good offer. Because the relationship was materially limiting the representation it violated the California RPCs.

Lou should never have entered the relationship with Sally and certainly should have withdrawn after his feelings for her began to limit his representation of her. Lou should certainly have received Sally's informed written consent as to the continued representation, however, once he rejected the settlem[e]nt offer it appears that the representation was

materially limited and he could not reasonably continue the representation. Therefore, at that point he should have withdrawn.

Failure to Communicate the Settlement Offer and Rejection Thereof
Breach of Duty of Care Owed to the Client

A lawyer owes their client a duty of care. This duty requires that the lawyer act with the skill, knowledge, thoroughness, and preparedness reasonably necessary to effectively carry out the representation. If Lou rejected the offer and it was a good offer then he may have violated the duty of care because a reasonable lawyer would at least entertain a decent offer and communicate it to their client. We do not know anything about the terms of the offer but we do know that his client Sally believed that it was a good offer. Because of this and because of his failure to communicate the offer to Sally, as discussed below, Lou violated his duty of care.

A Lawyer's duty of care includes a duty to communicate with the client. The duty to communicate requires that the lawyer keep the client reasonably informed about the representation and respond to the client's reasonable requests for information. Here Lou failed to communicate the settlement offer to Sally as communicated by Sally's husband's Lawyer. Failing to inform a client of a settlement offer is a failure to keep them reasonably informed about the representation because a decision whether to settle or not is one that is solely in the purview of the client and the client cannot make that decision unless they are informed of that offer. Furthermore, Lou knows that Sally's husband's lawyers [sic] is ethically prohibited from communicating with Sally because she is a party adverse in the matter whom the lawyer knows is represented. Thus Lou must have known that there was virtually no way for Sally to find out about the offer. Therefore, Lou violated his duty to communicate and thus his duty of care.

A Lawyer's duty of care also includes a duty of diligence. That is[,] the lawyer must diligen[t]ly and zealously pursue the interests of his client. Here by failing to communicate the settl[e]ment offer and thus possibly losing the ability to settle, Lou has violated the duty of diligence because a diligent lawyer would at least communicate the offer to his client and discuss it with them.

Scope of Representation

The objectives of the representation are decided by the client subject to the lawyer's advice on the ethical rules and other law. The means of the representation are decided by the lawyer. The Advisory notes to the Model Rules state that decisions regarding the settlement of a civil case are considered to be objectives. Therefore, the decision to settle or not was one that should have been made by Sally rather than by Lou and Lou violated his ethical duty by not communicating the settlem[e]nt to her and by deciding on his own that the offer was ridiculously low and an insult.

If Lou felt that the settl[e]ment was inadvisable he should have counseled Sally on that fact rather than withholding information. If he thoug[t] such action was repugnant he may have sought permissive withdrawal to end the representation. However, he did none of these things and therefore violated the Model Rules and the California RPCs.

Feb 2005

California
Bar
Examination

Essay Questions
and
Selected Answers

February 2005

California Bar Examination

Answer all three questions. Time allotted: three hours

Your answer should demonstrate your ability to analyze the facts in question, to tell the difference between material and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit.

State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2005 CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2005 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors and may not be reprinted.

Q1 Constitution

A State X statute prohibits the retail sale of any gasoline that does not include at least 10 percent ethanol, an alcohol produced from grain, which, when mixed with gasoline, produces a substance known as "gasohol." The statute is based on the following legislative findings: (1) the use of gasohol will conserve domestic supplies of petroleum; (2) gasohol burns more cleanly than pure gasoline, thereby reducing atmospheric pollution; and (3) the use of gasohol will expand the market for grains from which ethanol is produced.

State X is the nation's largest producer of grain used for making ethanol. There are no oil wells or refineries in the state.

Oilco is an international petroleum company doing business in State X as a major retailer of gasoline. Oilco does not dispute the legislative findings underlying the statute or the facts concerning State X's grain production and lack of oil wells and refineries. Oilco, however, has produced reliable evidence showing that, since the statute was enacted, its sales and profits in State X have decreased substantially because of its limited capacity to produce gasohol.

Can Oilco successfully assert that the statute violates any of the following provisions of the United States Constitution: (1) the Commerce Clause, (2) the Equal Protection Clause, (3) the Due Process Clause, and (4) the Privileges and Immunities Clause? Discuss.

Answer A

1)

Oilco is asserting that the State X statute violates the 1) Commerce Clause, 2) the Equal Protection Clause, 3) the Due Process Clause, and 4) the Privileges and Immunities Clause of Article IV.

Justiciability

Standing

In order to successfully bring an action, Oilco must demonstrate that they have standing. A party has standing where there is injury, the injury is caused by the defendant, and the court can provide relief. Here, Oilco will be injured by the legislation because they do business in State X and do not currently meet the State's gasoline regulations. Oilco could lose profits from loss of business. The loss of profits is directly caused by the statute's ban on non-ethanol based gasoline. The court can provide relief for Oilco by invalidating the statute. Thus, Oilco has standing.

Eleventh Amendment

The Eleventh Amendment prohibits a party from suing a state without the state's permission. It appears from the facts that Oilco is suing State X and thus would be barred by the Eleventh Amendment. If Oilco sues the appropriate official, the suit will not be barred by the Eleventh Amendment.

Ripeness

The courts will not hear a case unless there is some threat of immediate injury caused by the defendant. Here, the statute could result in a significant loss of profits for Oilco, so the State's argument for dismissal based on ripeness will fail.

Commerce Clause

The Commerce Clause grants the federal government power to regulate the channels and instrumentalities of commerce, and other activities that affect interstate commerce. If a valid federal law under the commerce clause conflicts with state law, the federal law invalidates the state law because of the Supremacy Clause. Even if the federal law and state law do not conflict, the federal law may preempt the state law by occupying the field. Where Congress is silent on a matter, a state has the power to regulate the local aspects of commerce as long as the regulation is not discriminatory and does not unduly burden interstate commerce.

Here, there are no facts suggesting that there is a federal law that either conflicts with the State X statute or preempts the field. Thus, State X's statute will be valid as long as it does not discriminate against out-of-state interests and does not unduly burden interstate commerce.

Discrimination against out[-]of[-]state interests

The Dormant Commerce Clause prohibits a state from discriminating against out-of-state interests. Discrimination can appear on the face of a regulation, or it can be discriminatory in its impact on interstate commerce. Here, the statute prohibits the retail sale of any gasoline that does not include at least 10 percent ethanol, an alcohol produced from grain, which, when mixed with gasoline, produces a substance known as gasohol. State X will argue that [t]he statute on its face does not discriminate against any out[-]of[-]state interests, as any other state meeting these requirements would not be prohibited from selling gasoline inside State X.

However, Oilco's strongest argument will be that the Statute has a discriminatory impact. Here, Oilco will argue that State X is the nation's largest producer of grain used for making ethanol. Oilco will also point out that State X has no oil wells or refineries inside State X. Putting these two facts together, Oilco will argue that by passing the statute, State X is promoting its own interests by encouraging the consumption of ethanol while harming out-of-state oil refineries and wells. Since State X has no oil refineries or wells, they will not be harmed by the statute at all. This, Oilco will argue, is discrimination against out-of-state interests and[,] thus, is violative of the Dormant Commerce Clause. Oilco will also point to the legislative finding that State X's statute will "expand the market for grains from which ethanol is produced", strengthening its argument that this regulation is merely economic protectionism, and violative of the Dormant Commerce Clause.

State X will counter by arguing the important interest exception: a state may discriminate against out[-]of[-]state interests where there is an important state interest in the regulation and there are no non-discriminatory options. State X will point to the legislative findings regarding the conservation of petroleum, and the reduction in pollution. These, State X will argue, are important state interests. State X will also argue that achieving these goals cannot be achieved by non-discriminatory means. State X will argue that in order to conserve petroleum and reduce pollution, State X must ban the sale of non-ethanol based gasoline inside the state.

Oilco will argue that there are available non-discriminatory means of meeting the state interests. Oilco can argue that a phaseout of non-ethanol based gasoline is a less discriminatory means of achieving their goals, and would provide time for out-of-state sellers of non-ethanol based gasoline to meet State X's stringent requirements.

State X may attempt to argue the market participant exception which allows a state to discriminate against out-of-state interests where it is a market participant. However, the

facts do not indicate that the regulation only applies when State X is purchasing gasoline. The effect of the regulation is to prohibit sale of all non-ethanol based gasoline to residents, and the State. Thus, the state will not successfully argue the market participant exception.

Because the statute discriminates against out[-]of[-]state interests, the court should find that the statute violates the Dormant Commerce Clause.

Undue burden on interstate commerce

Even if the court finds that the statute does not discriminate against out[-]of[-]state interests, the statute will be invalidated if it unduly burdens interstate commerce. Here, Oilco will argue that it is a major retailer of gasoline inside State X. The effect of the statute is to prohibit all sales of non-ethanol based gasoline inside the state. Oilco will introduce their evidence showing the reduction in sales and profits, and will argue that if every state enacted similar statutes, the effect would greatly burden interstate commerce.

State X will argue that the statute does not significantly burden interstate commerce, as Oilco is still free to sell their gasoline in other states or comply with State X's regulations. However, since the impact of the statute will burden interstate commerce, a court would likely find that the statute is violative of the Dormant Commerce Clause.

Equal Protection Clause

In order to assert an equal protection claim, Oilco will need to show some state action. State action exists where the act is an exclusive public function or there is significant state involvement. Here, the State X legislature passed a law. Thus, Oilco will easily be able to show state action.

The Equal Protection Clause of the 14th Amendment provides that the state must provide all citizens and organizations in their jurisdiction the equal protection of the laws. Where the regulation does not affect a suspect or quasi-suspect class, and where the regulation does not affect a fundamental right, the regulation must pass the rational basis test – that is, the regulation must be rationally related to a legitimate government interest.

Here, Oilco is an international corporation. The statute does not involve a suspect class – race or alienage – and it does not affect a quasi-suspect class – gender or legitimacy. The statute also does not affect a fundamental right such as 1st Amendment protections or the right to privacy. Thus, the rational basis test will be used in scrutinizing the statute. Under the rational basis test, a regulation will generally be upheld as long as it is not arbitrary.

State X will argue that there is a legitimate government interest involved – the conservation of domestic supplies of petroleum, and the reduction in atmospheric pollution. State X will

also argue that the prohibition of non-ethanol based gasoline is rationally related to the government interest, since the prohibition will reduce the amount of petroleum used in producing gasoline, and will also reduce the pollution because ethanol is cleaner than pure gasoline. Thus, the statute will pass rational basis, and the court will find no equal protection violation.

Due Process Clause

Substantive Due Process Clause

In order to assert a substantive Due Process violation, Oilco will need to show state action. As explained above, Oilco will easily show state action because State X passed a statute.

The [S]ubstantive Due Process Clause prohibits states from infringing on a fundamental right. If the state infringes on a fundamental right, the action must pass strict scrutiny. Under strict scrutiny, the regulation must be necessary to achieve a compelling government interest. Where no fundamental right is involved, the regulation must pass rational basis – that is, the regulation must be rationally related to a legitimate government interest.

Here, the right to sell gasoline is not a fundamental right. Thus, the statute must pass the rational basis test. As explained above, State X will successfully argue that there is a legitimate interest in conserving petroleum and reducing pollution, and that the regulation passed is rationally related to achieve those goals. Thus, Oilco's claim under the Due Process Clause will also fail.

Procedural Due Process

In order to assert a substantive Due Process violation, Oilco will need to show state action. As explained above, Oilco will easily show state action because State X passed a statute.

The procedural Due Process prohibits the taking of life, liberty or property without due process of law. Oilco may assert that the statute takes away their right to sell gasoline inside the state without an appropriate hearing. However, the Court will not find a procedural due process violation because the statute was validly passed by the state legislature.

Privileges and Immunities Clause of Article IV

The Privileges and Immunities Clause of Article IV prohibits states from discriminating against non-residents. The Clause does not protect against aliens or corporations. Here, Oilco is a corporation, and is not afforded protection under the Clause. Thus, any claim under the Privileges and Immunities Clause of Article IV will fail.

Answer B

1)

Standing and ability to bring suit

The first issue is whether Oilco ("O") can bring a suit against State X asserting that the statute violates the US Constitution. To bring a lawsuit, O must meet the following requirements: (1) standing, (2) ripeness, and (3) mootness. O has standing because it has suffered present injury that can be redressed by a favorable court decision. In addition, the lawsuit is ripe because O has suffered injury and thus the court would not be rendering an advisory opinion. And finally, the lawsuit is not moot because O is suffering from a live controversy.

Protection of US citizens only?

While the facts do not clearly indicate whether O is a foreign corporation, assuming that it is a foreign corporation, State X may argue that because O is an international corporation, it cannot invoke the protections of the US Constitution since it is not a citizen of this country. But since O does business in State X, it should be allowed to challenge the constitutionality of the statute. The fact that O may not be a US corporation may preclude it from raising certain arguments, but it will not prevent it from bringing a lawsuit.

The following analysis in turn addresses each of the potential arguments.

1. The Commerce Clause

The issue is whether O can assert that State X's statute violates the Commerce Clause. The Commerce Clause provides Congress the power to regulate interstate commerce. The Dormant Commerce Clause or the negative implications of the Commerce Clause provides that even if Congress has not acted in a certain area, states may not be able to regulate those activities if they place an undue burden on interstate commerce. Under the Dormant Commerce Clause, O can make two separate arguments: (1) that the statute discriminates against out[-]of[-]staters, or (2) that even if the statute doesn't discriminate against out[-]of[-]staters, it places an undue burden on interstate commerce and is[,] thus, unconstitutional.

Statute discriminates out[-]of[-]staters

The first argument O can make is that the statute discriminates out[-]of[-]staters. Where a state statute discriminates against out[-]of[-]staters, the Dormant Commerce Clause requires that the state statute must be necessary to an important state interest. Here, although the state statute does not discriminate out[-]of[-]staters on its face, O can argue that because state X is the nation's largest producer of grain that is used in making ethanol

and because the use of gasohol will expand the market for grains, the statute in effect favors its in[-]state companies. Here, it's unlikely that a court will find that the statute discriminates against out[-]of[-]staters because it's neutral on its face- -it regulates in[-]state companies the same way it regulates out[-]of[-]state companies.

If, however, the court does find that the statute discriminates out[-]of[-]staters, State X must meet the intermediate scrutiny test for regulations that discriminate out[-]of[-]staters. State X must show that the statute is necessary to meet an important interest. Here, it can argue that it has an important interest in conserving domestic supplies of petroleum and that gasohol burns more cleanly than pure gasoline. Thus, State X will likely prevail on the argument that it has an important interest in preventing pollution. Furthermore, the statute is substantially related to its interest because it requires all gasoline to be sold with 10% ethanol.

Moreover, as indicated above, because O may be a foreign corporation, State X may argue that because O is an international corporation, it cannot invoke the protections of the US Constitution since it is not a citizen of the country. But since O does business in State X, this argument should be rejected and it should be allowed to challenge the constitutionality of the statute.

Market participant

State X may also try to argue that it is a market participant, thus has not violated the Dormant Commerce Clause. One of the exceptions of where a state can discriminate against out[-]of[-]staters is if it is a market participant. Here, the facts indicate that State X is the largest producer of grain used for making ethanol, but it's not clear on whether the state itself is actually a participant or simply that the companies within the state are the makers of grain. If it's only the companies within State X and State X itself does not produce any grain, it will not prevail in making the argument that it is a market participant.

Statute doesn't discriminate out[-]of[-]staters - balancing test

Where a state statute doesn't discriminate out[-]of[-]staters, in order to meet the constitutional requirements of the Dormant Commerce Clause, it must not place an undue burden on interstate commerce. In determining whether a statute places an undue burden on interstate commerce, courts will look at the state's interest and the cost of compliance. As discussed above, state X can argue that it has an important interest in conserving domestic supplies of petroleum and that gasohol burns more cleanly than pure gasoline. Morever, it will argue that since it doesn't discriminate out[-]of[-]staters, the cost to all companies to comply will be the same. O can argue that the cost of compliance is great because as indicated in the facts, its sales and profits has [sic] decreased substantially because of the limited capacity to produce gasohol. It's not clear from the facts whether other companies are also affected and to what extent they are affected. But assuming that other producers are able to produce gasohol without a great deal of problems - - that the

cost of compliance is not great - - then the statute will likely meet the requirements under the Dormant Commerce Clause.

2. The Equal Protection Clause

The Equal Protection Clause of the 5th amendment applies to the states through the 14th amendment. It provides that all citizens must be offered the equal protection of the laws.

As stated above, because O may be a foreign corporation, State X may argue that because O is an international corporation, it cannot invoke the protections of the US Constitution since it is not a citizen of this country. But since O does business in State X, this argument should be rejected and it should be allowed to challenge the constitutionality of the statute.

State action

The first is whether there is state action. In order to bring a challenge under the Equal Protection Clause, there must be state action. Here, State X has enacted a statute[;] this requirement has been met.

Classification

The Equal Protection Clause protects against different treatments of classes of persons or corporations. The first issue, therefore, is whether the statute classifies people differently. Here, O can argue that because the statute favors grain producers in State X, the largest producers in grain, it is treating the state companies differently than out[-]of[-]staters. State X, on the other hand, will argue that the statute is neutral on its face, it does not classify different companies[,] and thus the Equal Protection Clause does not apply. Here, because the statute does not treat any company based on a particular classification, a court will likely find for state X.

At best, O can argue that the classification is companies that produce grain vs. companies that, like itself, cannot produce grain for the ethanol. Even if O succeeds on this argument, it will be a rational basis scrutiny because this classification doesn't involve any fundamental right or suspect or quasi-suspect classification. O may argue that because its sales and profits in State X have decreased dramatically, it is impinging on a fundamental right to make a living. O will fail in this argument, however.

Under the rational basis test, the statute will be upheld as long as there is any rational basis to promote a legitimate state interest. Here, as discussed, State X can argue that it has an [sic] legitimate interest in conserving domestic supplies of petroleum and that gasohol burns more cleanly than pure gasoline. Thus, State X will likely prevail on the argument that it has an [sic] legitimate interest in preventing pollution and the statute is rationally related to its interest because it requires all gasoline to be sold with 10% ethanol.

In sum, O will not be able to assert that State X has violated the Equal Protection Clause.

3. The Due Process Clause

The Due Process Clause also applies to the states through the 14th amendment and it also requires state action. As discussed above, State X has enacted a statute[;] this requirement has been met.

State X can advance several arguments under the due process clause - - under the takings clause, the substantive due process clause[,] and the procedural due process clause.

Takings Clause

The Takings Clause provides that a state may not take the property of anyone without just compensation. In order to invoke the protection of the takings clause, O must show that the statute impacted its profits and in substance amounted to a takings [sic]. Here, O can show with reliable evidence that since the statute was enacted, its sales and profits in State X have decreased substantially because of its limited capacity to produce gasohol. This fact, along [sic], however, is not likely sufficient to show that there has been a taking. It appears that O is still making money. Simply because the profits have decreased, O hasn't satisfied the burden of showing that it amounts to a taking.

Where a state legislation doesn't amount to a taking, the state will not need to provide just compensation so long as it is substantially related to an important interest. As discussed above, State X will likely meet this burden. Here, it can argue that it has an important interest in conserving domestic supplies of petroleum and that gasohol burns more cleanly than pure gasoline. Thus, State X will likely prevail on the argument that it has an important interest in preventing pollution. Furthermore, the statute is substantially related to its interest because it requires all gasoline to be sold with 10% ethanol.

Substantive due process

The substantive due process clause, which also applies to states through the 14th amendment, provides that the government may not take away life, liberty or property without the due process of law. To meet this requirement, it depends on whether the right infringed upon is a fundamental right. If it is not, then the rational basis test applied and so long as the statute is rationally related to a legitimate interest, it will be upheld.

Under the rational basis test, the statute will be upheld as long as there is any rational basis to promote a legitimate state interest. Here, as discussed, State X can argue that it has an [sic] legitimate interest in conserving domestic supplies of petroleum and that gasohol burns more cleanly than pure gasoline. Thus, State X will likely prevail on the argument that it has an [sic] legitimate interest in preventing pollution and the statute is rationally related to its interest because it requires all gasoline to be sold with 10% ethanol.

Thus, O will not prevail under this argument.

4. The Privilege and Immunities Clause

The Privilege and Immunities Clause of Art IV offers protections to individuals against state's discrimination of out[-]of[-]staters. It provides that if a state action discriminates out[-]of[-]stater [sic] residents, the statute must be necessary to achieve an important interest. The P&I clause, unlike the Dormant Commerce Clause, however, does not offer protection to corporations. Because O is a corporation and not an individual, it will not be able to prevail under the P& I Clause.

Q2 **Contracts**

PC manufactures computers. Mart operates electronics stores.

On August 1, after some preliminary discussions, PC sent a fax on PC letterhead to Mart stating:

> We agree to fill any orders during the next six months for our Model X computer (maximum of 4,000 units) at $1,500 each.

On August 10, Mart responded with a fax stating:

> We're pleased to accept your proposal. Our stores will conduct an advertising campaign to introduce the Model X computer to our customers.

On September 10, Mart mailed an order to PC for 1,000 Model X computers. PC subsequently delivered them. Mart arranged with local newspapers for advertisements touting the Model X. The advertising was effective, and the 1,000 units were sold by the end of October.

On November 2, Mart mailed a letter to PC stating:

> Business is excellent. Pursuant to our agreement, we order 2,000 more units.

On November 3, before receiving Mart's November 2 letter, PC sent the following fax to Mart:

> We have named Wholesaler as our exclusive distributor. All orders must now be negotiated through Wholesaler.

After Mart received the fax from PC, it contacted Wholesaler to determine the status of its order. Wholesaler responded that it would supply Mart with all the Model X computers that Mart wanted, but at a price of $1,700 each.

On November 15, Mart sent a fax to PC stating:

> We insist on delivery of our November 2 order for 2,000 units of Model X at the contract price of $1,500 each. We also hereby exercise our right to purchase the remaining 1,000 units of Model X at that contract price.

PC continues to insist that all orders must be negotiated through Wholesaler, which still refuses to sell the Model X computers for less than $1,700 each.

1. If Mart buys the 2,000 Model X computers ordered on November 2 from Wholesaler for $1,700 each, can it recover the $200 per unit price differential from PC? Discuss.

2. Is Mart entitled to buy the 1,000 Model X computers ordered on November 15 for $1,500 each? Discuss.

Answer A

2)

Uniform Commercial Code

All contracts for the sale of goods, defined by 2-105 as those things identifiable at the time of contract, are governed by the UCC.

This is a contract for the sale of computers, goods movable and identifiable at the time of contract, and it is therefore governed by UCC rather than the Common Law.

Merchants

Merchants, defined by 2-104 as those who deal in goods of that kind sold, are held to a higher standard of good faith.

PC manufactures computers, and Mart retails those computers, so both deal in the computers and are therefore merchants as that term is used in the UCC.

If a contract exists, it is a contract for goods under the UCC, and both parties are merchants.

Offer

An outward manifestation of present contractual intent, communicated to the offeree in such a way as to make the offeree reasonably believe that the offeror is willing to enter into a contract.

The facts state that PC and Mart had been engaged [in] "preliminary discussions" prior to August 1. Because of these preliminary negotiations, PC's fax was probably not a general advertisement sent out to possible retailers (advertisements are generally not offers). The August 1 fax on letterhead from PC to Mart, based on those discussions, was probably an offer. Although it did not state a specific quantity (up to 4000), it did indicate the identity of the parties, subject matter of the contract, and price, and the time of performance would be implied as a reasonable time. The limitation that no more than 4000 computers could be ordered makes the offer sufficiently definite to be enforced. Although the specific quantity of goods is required by 2-201, the statute of frauds, it is not necessary for formation, so this is apparently a valid offer.

Although PC would argue that there was no intent to be bound, in which case Mart would have made the offer on September 10, the court would probably disagree. Because PC delivered the goods without further communication, the court would probably conclude that it was not receiving offers, but had made an offer, to which it was bound.

PC's fax to Mart was probably a valid offer.

Merchant's Firm Offer Rule

Under 2-205, a merchant who promises to hold an offer open with "words of firmness" will not be permitted to revoke the offer for the time stated, but in no case will the offer be irrevocable for longer than three months.

PC's fax was a firm offer from one merchant to another. PC specifically stated that they "agreed to fill any offers during the next six months." Although this offer would only remain irrevocable during the next three months (through November 1), it would remain in effect unless revoked until the end of the six months.

PC's fax was a merchants' [sic] firm offer, irrevocable prior to November 1, and though revocable at that time, in the absence of revocation it was valid under the six months expired.

Acceptance

An outward manifestation of assent to the terms of the offer.

Mart's fax of August 10 was not an acceptance. Although it manifested some assent, it did not indicate a quantity of computers accepted, but only a general agreement to sell computers, and this alone was not sufficient to form a contract.

On September 10, Mart mailed an order for 1,000 computers to PC. This was sufficiently definite in quantity and indicated an intent to be bound. It was therefore a valid acceptance.

Similarly, Mart's November 2 letter was an appropriate acceptance. Though sent by letter rather than by fax, it was effective, since under the UCC an offer may be accepted by any reasonable means. The letter communicated assent to the proposed terms, and specified a quantity (200). This was therefore a valid acceptance of PC's offer. Under the Mailbox Rule, an acceptance if [sic] effective upon dispatch, though a revocation is only effective upon receipt. Mart's letter was sent before PC's revocation was receive[d], and it is therefore effective.

Although the November 15th fax similarly stated an intent to be bound on 1000 more computers, the offer had been properly revoked prior to that time, as discussed below, and Mart therefore could not accept it. This attempted acceptance would be invalid as an acceptance, and would instead be merely an offer, which PC summarily declined to accept.

Mart's November 2 letter was a valid acceptance.

Revocation

A revocation is a statement that an offer may no longer be accepted. It is effective upon receipt by the offeree.

Mart received PC's fax on November 3, and it was therefore effective from that date forward. However, it would have no effect prior to that date, and therefore would not affect the validity of Mart's purported November 2 acceptance of the offer.

Because a revocation is not effective until received, PC's letter would not accept Mart's ability to accept the contract until November 3, and thus would not affect the outcome of this case, although it would prevent any further acceptance.

Consideration

Bargained[-]for exchange of legal detriment

PC promised to sell and Mart promised to buy 2000 computers at $1500 each. This was valid and sufficient consideration.

Because there was a valid offer, accepted and supported by consideration, PC and Mart have a contract.

Statute of Frauds - Defense to Enforcement

The statute of Frauds (2-201) requires that all contracts for the sale of goods be in writing.

Although PC[']s original offer was on letterhead, they did not respond to the acceptance and no integrated contract was signed. The court would probably find, though, and Mart's letter of November 2, was a valid written confirmation, which would allow the contract to be enforced against both parties, although it might find that PC's refusal to agree that there was a contract was sufficient objection within ten days.

The court will probably find that the Statute of Frauds was satisfied by Mart's acceptance under the exception for a written confirmation, unless PC properly objected within ten days.

Material Breach

A refusal to perform under the contract which goes to the heart of the promised performance.

PC refused to tender the 1000 computers ordered by Mart. This was material breach of the contract, since the purpose of the contract was the delivery of those computers. If PC and Mart had an enforceable contract, PC's refusal to tender them was an anticipatory

material breach, and Mart could immediately consider the contract breached (rather than waiting to see if PC would actually perform), and pursue remedies.

PC's refusal to deliver the computers to Mart was probably a material breach.

Remedies

Cover

Under the UCC, a buyer can purchase replacement goods on the market at the time of the breach and recover the difference between the contract price and the price of cover, plus incidental costs.

Mart has a duty to mitigate its damages, which probably means they should buy computers, even at a higher price, rather than completely lose the business. Although generally a party may wait until performance is due, where there is a complete repudiation of the contract by the other party prior to that time, there is probably a duty to mitigate damages. If Mart did purchase replacement computers, from Wholesaler or any other seller, they would [be] entitled to recover the difference between the price they were forced to pay and the price they had agreed on with PC as the cost of cover from PC. Any attempt to cover, however, must be exercised in good faith.

Mart will be able to recover the cost of Cover from PC.

I. Whether Mart will be able to recover the extra $200 purchase if it buys the computers from Wholesaler?

Because PC and Mart apparently had a valid contract, and it was probably enforceable under the Statute of Frauds because of Mart's written confirmation, Mart can probably recover the cost of cover from PC, so long as it acts in good faith. For 2000 computers with an additional cost of $200 each, Mart would probably recover $400,000, plus costs incidental to cover.

If the cover found that the Statute of Frauds was not satisfied, Mart would not be able to enforce the contract, and would recover nothing.

II. Whether Mart can enforce a contract based on the Nov. 15 fax for 1000 final computers?

Because PC properly revoked its offer to Mart on November 3, Mart no longer had the power to accept that offer on November 15, and it has no enforceable rights against PC for the 1000 computers offered on that date.

Answer B

Mart vs. PC

UCC Applies

The UCC applies to all contracts for the sale of goods. Here, the agreement between Mart and PC relates to the Model X computer, a good, so the UCC applies.

In addition, under the UCC, there are sometimes special rules governing agreements between merchants. Merchants are entities that regularly buy, sell and/or trade on the good at issue. Here, both PC and Mart are merchants under the UCC because PC manufactures and sells computers and Mart operates electronics stores that buy and sell computers.

Contract Formation

In order for the agreement between PC and Mart to be enforceable, there must be **CD**an offer, @a valid acceptance[,] and @ consideration.

Offer

An offer must demonstrate a present intent to be bound and must recite the necessary terms with appropriate specificity.

PC's August 1 Fax

PC'S August 1 Fax to Mart likely satisfies the requirements of an offer. In that fax, PC "agree[s] to fill any orders", thereby demonstrating the requisite present intent to be bound. The August 1 Fax also recites the subject matter (the Model X computer), the price ($1,500 each) and the parties (PC and Mart). While the August 1 Fax does not recite a specific quantity of Model X computers to be purchased, it specifies any quantity ordered by Mart within the next six months up to a maximum of 4,000 units. This is an offer for a kind of requirements contract, wherein PC would be obligated to sell Mart however many Model X computers Mart requires up to a maximum of 4,000. Therefore, the August 1 Fax constitutes a valid offer.

Acceptance

An acceptance must be an acceptance of the terms in the offer before termination of the offer.

August 10 Fax from Mart

Here, the August 10 fax from Mart is a valid acceptance. While the August 1 Faxed offer from PC was still open, Mart responded that Mart "accept[ed] [PC's] proposal". Mart did not seek to change the terms of the offer or add any conditions or additional terms. Thus, the August 10 fax from Mart is a valid acceptance.

Consideration

To be enforceable, a contract must include valid consideration. Consideration is a promise with value or detriment.

Here, PC provided consideration in that PC promised to sell up to 4,000 Model X computers to Mart over the next six months. However, the issue is whether Mart provided sufficient consideration. Mart promised to pay $1,500 for any Model X computers it purchased, but Mart was not obligated to purchase any Model X computers. While Mart stated that it was going to conduct an advertising campaign, it is not clear whether that was a promise by Mart or simply a gratuitous statement of a present intent to place ads that is [sic] was not bound to place. It the statement about advertising were found to bind Mart, the contract would be effective as of Mart's August 10 fax.

However, the better result is that there was not a binding contract until September 10, when Mart placed its first order for 1,000 Model Xs. As of September 10, Mart's consideration was its promise to buy 1,000 Model X computers at $1,500 each and PC's consideration was its promise to sell those computers to Mart.

Defense to Formation/the Statute of Frauds

The Statute of Frauds requires that any agreement for the sale of goods exceeding $500 must be in writing to be enforceable. Here, the August 1 fax, the August 10 fax[,] and the September 10 order would likely constitute a sufficient writing to satisfy the Statute of Frauds.

There do not appear to be any other applicable defenses to formation (such as duress, illegality, fraud[,] etc.).

CD Can Mart recover $200 per unit from PC if Mart buys 2,000 Model X computers from Wholesaler?

The primary issue here is whether PC's November 3 fax to Mart purporting to terminate its agreement with Mart excuses or discharges PC's obligation to sell Mart up to 4,000 Model X computers before the six month period expires. The issue is also whether Mart's November 2 order for 2,000 Model X's, that was sent without knowledge of PC's November 3 purported revocation [sic].

Thus, the ultimate issue is whether Mart's November 2 letter ordering 2,000 more

units is effective when mailed (Nov. 2) or when received by PC. I believe the Mailbox Rule applies and provides that the acceptance/order of Nov. 2 was effective when mailed or sent. In other words, Mart's November 2 order is effective as of November 2 - the day before PC's purported revocation. Thus, PC is obligated to sell Mart the 2,000 Model Xs ordered on November 2.

Because PC is in breach of the contract by refusing to perform - i.e., to sell Mart the 2,000 Model X's ordered Nov. 2, PC is liable to Mart for damages.

Mart's Remedies

As noted in the question, one of Mart's available remedies is to buy the 2,000 Model X computers from Wholesaler for $1,700 each and then sue PC for damages. In that situation, Mart would be entitled to expectation damages. Expectation damages are those damages sufficient to put Mart in the position they would have been in if PC had not breached – namely, Mart would have purchased 2,000 Model X computers for $1,500 each. Thus, PC is liable to Mart for $200 per unit ($1,700 - $1,500) multiplied by 2,000 units. Mart could also recover any incidental damages it incurred in procuring the computers from Wholesaler. For example, if Wholesaler was further away and therefore shipping costs were more expensive then [sic] when Mart bought from PC, PC would be liable for the incremental increase in the shipping costs.

2. Is Mart entitled to buy the 1,000 Model X Computers Ordered on November 15 for 1,500 each?

By November 15, when Mart ordered the additional 1,000 computers, Mart knew that PC had revoked its offer to sell up to 4,000 units in that 6 month period or, in other words, had anticipatorily repudiated its obligation to sell Mart the full 4,000 units. Thus, Mart is not entitled to by [sic] the 1,000 Model X's under a contract theory.

Quasi-Contract/Unjust Enrichment

Rather, if Mart is found to be entitled to by [sic] the 1,000 computers it will be because Mart told PC (as far back as August 10 & September 10) that, in reliance on their contract, Mart was going to spend money to place ads for the Model X. Thus, Mart relied to its detriment on PC's promise to sell 4,000 units, so Mart may be able to buy the final 1,000 units under a theory of quasi-contract based upon detrimental reliance.

Even if Model X [sic] is not entitled to actually buy the 1,000 computers from PC, Mart should be able to recover restitutionary damages from PC because PC has been unjustly enriched by Mart's advertising efforts.

Q3 Business Associations

Molly and Ruth were partners in the operation of a dry cleaning store. Recent government environmental regulations relating to dangers posed by dry cleaning fluids increased their exposure to liability and caused a decline in their business. Molly and Ruth decided to convert their partnership into Dryco, Inc. ("Dryco"), a corporation, to limit their potential personal liability.

Molly and Ruth each contributed $20,000 in cash to Dryco. In return, each received a $15,000 promissory note from Dryco and 5,000 shares of stock with a value of $1 per share.

Prior to incorporation, Molly entered into a contract on behalf of Dryco with Equipment Company ("EC") for the unsecured credit purchase of an environmentally safe dryer for $100,000. EC was aware that Dryco had not yet been formed. EC delivered the dryer one week after the incorporation, and Dryco used it thereafter and made monthly installment payments.

Dryco had been incorporated in compliance with all statutory requirements, and Molly and Ruth observed all corporate formalities during the period of Dryco's existence. One year after incorporation, however, Dryco became insolvent and dissolved. At the time of the dissolution, Dryco's assets were valued at $50,000. Its debts totaled $120,000, consisting of the two $15,000 notes held by Molly and Ruth and a $90,000 balance due EC for the dryer.

1. As among EC, Molly, and Ruth, how should Dryco's $50,000 in assets be distributed? Discuss.

2. On what theory or theories, if any, can Molly and/or Ruth be held liable for the balance owed to EC? Discuss.

Answer A

1. Distribution of Dryco's $50,000 in Assets

Valid De Jure Corporation

A corporation is conclusively formed when the articles of incorporation are filed with the state. Here, the facts indicate that Dryco had been incorporated in compliance with all statutory compliances. Therefore, Dryco will be treated as a de jure corporation.

The Equipment Company Contract (EC)

Whether EC will have a claim to Dryco's assets on dissolution depends on whether EC's pre[-]incorporation contract with Molly as a promoter was adopted by Dryco.

A corporation is not liable for pre-incorporation contracts unless the corporation adopts the contract. Since Dryco did not exist at the time the contract was made, it can have liability unless: i) the corporation expressly adopts the contract (i[.]e[.,] through board resolutions or ii) the corporation accepts or retains benefits from the contract and therefore impliedly adopts the contract.

On these facts, Dryco accepted the dryer, used it, and made monthly payments on it. Even though EC was aware that Dryco had not yet been formed, Molly entered the contract on Dryco's behalf. Further the dryer was delivered after incorporation. EC will argue that Dryco's acceptance and use of the dryer constitutes implied adoption, and will likely prevail.

Therefore, EC has a valued unsecured claim against Dryco's assets.

Promissory Note

Promissory Notes are debt securities of a corporation. The holders of these notes have a creditor/debtor relationship with the corporation, and are on equal grounds with other unsecured creditors of the corporation.

Shareholders' Claims

Shareholders own an equity interest in a corporation. Shareholders are not entitled to distribution of a dissolved corporation's assets until all debts of the corporation have been satisfied.

Distribution

EC and Molly and Ruth stand on equal footing as unsecured creditors. As

shareholders, Molly and Ruth will receive no part of the $50K, as explained above.

As between unsecured creditors, however, there is a possibility that Molly/Ruth's claim will be subordinated by a court to EC's claim, based on corporate veil piercing principals [sic] due to inadequate capitalization at the outset of the corporation.

Piercing the Corporate Veil

A corporation is a separate legal entity designed to insulate its officers, directors, and shareholders from personal liability. However, the corporate form will be ignored in some circumstances, including when i) the corporation is acting as the alter ego of the shareholders or ii) when there was inadequate capitalization of the corporation at the outset.

Inadequate capitalization is determined by looking at if the corporation had adequate funds to meet its prospective liabilities. The time between incorporation and dissolution is also considered.

Here, Dryco was funded with $40,000, and dissolved within one year. The short time in existence may be an indication that the corporation was not adequately funded. However, it is unclear from these facts what caused Dryco's dissolution. If Molly/Ruth were aware of increasing environmental costs and liability, $40,000 may not have been sufficient. If this is so the corporate veil will be pierced. (Desire to shield from personal liability from environmental regulation is not enough to pierce the veil in and of itself.)

When shareholders use the corporation['s assets as their own or otherwise ignore corporate formalities, the corporate form may be ignored to hold the SHs personally liable for the corp's debts[.] Here, there is no indication that Ruth/Mary used Dryco's assets as their own, and they did observe all corporate formalities. Therefore, the veil will not be pierced on this theory.

Since the veil can be pierced due to inadequate capitalization, however, Ruth/Mary's claim on the unsecured notes will be subordinated to EC's claim. EC will receive the entire $50,000.

In the event the claims are not subordinated, EC, Mary and Ruth will equally divide the $50,000.

2. Molly and[/] or Ruth's liability

A corporation is a separate legal entity that insulates its SHs from personal liability. As discussed above, Dryco was a de jure corporation. Unless circumstances exist to pierce the corporate veil, Ruth/Mary will not be liable to EC for the excess debt.

Piercing the Veil

As explained above, the corporate veil may be pierced for inadequate capitalization at the outset. Also as explained above, if the veil is pierced, Ruth/Mary will be liable to EC for the $40,000 of unpaid debt.

Promoter Liability

When a promoter raises capital or enters contracts on behalf of a [sic] unformed corporation, the promoter is personally liable on those contracts. Absent novation, this liability remains even if the corporation has adopted the contract.

Here, Molly entered the contract with EC on behalf of Dryco. Therefore, absent novation, she is personally liable. There is no indication of a novation here, so Molly will be liable for the 40K even though Dryco adopted the K.

Ruth may be liable based on vicarious liability. Ruth and Molly were joint venturers, co-promoters, so EC may try to reach Ruth on this theory, or at minimum, Molly may seek contribution from Ruth. Since Ruth did not sign the contract[,] however, this theory will likely fail.

Answer B

3)

1. Distribution of $50,000 of Dryco's assets

Dryco has [sic] $120,000 in debt at the time the corporation became insolvent. This includes the $30,000 in promis[s]ory notes to Molly and Ruth, and the $90,000 still owed to EC, for the environmentally safe dryer. Dr [sic]

Pre-incorporation contract

The issue is whether the debt to Equipment is owed by the corporation. Corporations are only liable for pre-incorporation contracts that they adopt. Here before the corporation was formed, Molly entered into a contract for the the [sic] purchase of the dryer. The facts do not indicate that there was an express adoption of this contract. However the fact that after the corporation was formed, the dryer was delivered to Dryco, used by Dryco, and the monthly installment payments totaling $10,000 were made by Dryco, is sufficient to establish that Dryco impliedly adopted this contract. Furthermore without the Dryer the business might not be able to comply with the governmental regulations imposed on the drycleaning industry. Therefore the dryer is an essential piece of equipment to Dryco and its adoption of the purchase contract entered into by Molly[.]

Inside/Outside Debt

Dryco only has $50,000 in assets, and has $120,000 in debt. Therefore it must be determined which creditors have prio[r]ity for satisfaction. In determining which creditors will be satisfied first the court will generally, in the interest of fairness, subvert inside debt, and allow outside debt to be satisfied first. The reason for this is that the insiders, Molly and Ruth, could have given the $15,000 for stock interests, which would only receive distributions after creditors are satisfied.

Here Molly and Ruth elected to make $15,000 of their $20,000 contribution as a loan. They were trying to insulate themselves further from any potential losses, by only putting at risk the $5,000 for their stock. The court will not allow inside shareholders to try to put their equity investment on an equal level with outside creditors who have no equity interest in the corporation.

Therefore EC should be given priority as an outside creditor and should receive the $50,000 that Dryco has. Molly and Ruth's interest will be subverted to EC's interest and their loan will not be satisfied.

2. Molly and Ruth Personal Liability

After the $50,00 in assets are given to EC, EC is still left with $40,000 that has not been satisfied. EC will thus try to hold Molly and Ruth, as sole shareholders in Dryco[,] personally liable for the remaining debts.

Incorporator liability

Prior to incorporation Molly entered into a contract with EC for the dryer. As a general rule, an incorporator is not relieved of liability of the pre-incorporation contract, until there has been a novation, that is[,] an agreement by all parties to relieve the incorporator of personal liability. Here Molly would have to show that both Dryco and EC to relieved[sic] Molly of personal liability. As discussed above, Dryco impliedly adopted the contract, and thus becomes primarily liable for the contract. However there is no indication that EC relieved Molly of her personal liability, and can be held secondarily liable, because there was no novation.

However, Molly can argue that the contract was entered into "on behalf of Dryco[.]" The corporation by estoppel doctrine holds that a party who knew the contrace[sic] was being entered into on behalf of a corporation is estopped from later claiming that the other party is personally liable. Molly can argue that because EC knew that Dryco had not been incorporated yet, but knew that Molly was entering "on behalf of Dryco" they should be estopped from claiming that Molly is personally liable.

Molly will likely be successful in this claim, and EC will be estopped from claiming that Molly was personally liable, because EC knew that Dryco was not yet incorporated, but still signed a contract "on behalf of Dryco". It would therefore not be equitable for EC to be able to hold Molly personally liable under this theory[.]

Shareholder liability

As a general rule shareholders are not personally liable for the debts of the corporation. The shareholders only put at risk what they invest in the corporation. As discussed above Molly and Ruth each invested $20,000, which will all be treated as equity in Dryco. Therefore under the general rule Molly and Ruth will not be liable for the $40,000 remainder owed to EC.

However where it is necessary to prevent a fundamental unfairness courts may elect to pierce the corporate veil, and hold the shareholders personally liable. Courts generally elect to pierce the corporate where the corporation has attempted to defraud the corporation[']s creditors. Courts are much less likely to pierce the corporate veil for tort creditors than for contract creditors. Here EC was a contract creditor, so EC will have to have a very strong claim to succeed.

Courts will pierce the corporate veil where the shareholders of the corporation fail to follow corporate formalities, or where there [sic] corporation was inadequately capitalized

at the time of formation.

Here the facts state that Molly and Ruth observed all corporate formalities. There are no facts to indicate that there was any com[m]ingling of personal and corporate funds, or that Molly or Ruth treated any of the corporate assets as their own.

EC will try to argue that Dryco was inadequately capitalized at the time of formation, that is[,] that Dryco would be unable to pay debts at the time they came due. Because the EC is a contract creditor they have to make a strong showing. Here Molly and Ruth put in a total of $40,000 cash. Because the inside claim will be subverted to EC claim the full $40,000 should be considered[.] EC wil[l] fail on this claim because the facts indicate that Dryco was able to make the monthly installment payments.

The court will likely find that there was no fundamental unfairness in this transaction, especially because EC was a contract creditor. EC could have protected itself by entering into a separate agreement with Ruth and Molly to agree to personally assume the debt. Because EC did not do this they cannot later claim Molly and Ruth[’s] personal assets. Therefore Molly and Ruth will not be personally liable on this claim.

Director liability

As the sole shareholder[s] of Dryco, Molly and Ruth are probably the directors, and as such owe Dryco fiduciary duties of Loyalty and Due Care. Directors can be held personally liable for injuries caused from breaching this duty. However there are no facts suggesting a violation of these duties, such as self[-]dealing or uninformed decision making and [they] should not be held liable for breaching their fiduciary duties.

Q4 Professional Responsibility

Ann represents Officer Patty in an employment discrimination case against City Police Department ("Department") in which Patty alleges that Department refused to promote her and other female police officers to positions that supervise male police officers. Bob represents Department.

At Patty's request, Ann privately interviewed a male police captain, Carl, who had heard the Chief of Police (Chief) make disparaging comments about women in Department. Carl told Ann that Chief has repeatedly said that he disapproves of women becoming police officers, routinely assigns them clerical work, and would personally see to it that no female officer would ever supervise any male officer. Carl met with Ann voluntarily during his non-work hours at home. Ann did not seek Bob's consent to meet with Carl or invite Bob to be present at Carl's interview.

When Bob saw Carl's name as a trial witness on the pretrial statement, he asked Chief to prepare a memo to him summarizing Carl's personnel history and any information that could be used to discredit him. Chief produced a lengthy memo containing details of Carl's youthful indiscretions. In the memo, however, were several damaging statements by Chief reflecting his negative views about female police officers.

In the course of discovery, Bob's paralegal inadvertently delivered a copy of Chief's memo to Ann. Immediately upon opening the envelope in which the memo was delivered, Ann realized that it had been sent by mistake. At the same time, Bob's paralegal discovered and advised Bob what had happened. Bob promptly demanded the memo's return, but Ann refused, intending to use it at trial.

1. Did Ann commit any ethical violation by interviewing Carl? Discuss.

2. What are Ann's ethical obligations with respect to Chief's memo? Discuss.

3. At trial, how should the court rule on objections by Bob to the admission of Chief's memo on the grounds of attorney-client privilege and hearsay? Discuss.

Answer A

As Patty's attorney, Ann has a duty of confidentiality, loyalty, fiduciary responsibility and competence to her. This means that she must work hard on her case and follow up any possible leads that Patty may give her and follow up on any reasonable requests made by Patty. As an attorney, however, Ann has a duty of candor, fairness and dignity to the court, her adversary and the public. Because Ann knew that the Police Dept. (PD) was being represented by Bob (B), she was aware that any contact with a police officer could possibly be a violation of these duties. She could have a potential conflict because at minimum, the appearance would be that she was doing something unethical or wrong, even if she wasn't. She could have an actual violation of these duties if she were, in fact, having ex parte communications with a represented adversarial party.

Ann could argue that B represents the PD in general, but not Carl personally, & therefore she was w/i her right to contact him. The PD will argue that because Carl is a police captain, he is in a position of authority that someone would naturally look to for advice & information. Further, a police captain is in a position to make decisions that could bind the PD organization & his decisions could affect the PD. Because there is no one single individual to look to as being the defendant, you must look to those individuals who appear to represent the organization, can bind the organization by their decisions, has [sic] a leadership position & would be someone that one would look to for answers. Carl meets these qualities and therefore Ann violated her ethical duty to not have ex parte communication w/ a represented party. She should have gotten Bob's permission to speak w/Carl[.]

The PD could also argue that Carl is the equivalent of an agent & Ann will also need to obtain Bob's permission to talk w/any agent or employee of a business that may have information about the case & who's [sic] answers & information could be of detriment to the organization or bind the organization to a particular thought or conduct. Again, because Ann did not get Bob's permission to talk to a person who she knew was represented by counsel, she violated the ethical rules.

Although Patty asked Ann to talk with Carl, Ann cannot blindly follow the requests of her client if the requests would be illegal or aid or further an illegal act or if they would violate an ethical rule. A duty of competence is not outweighed by her duty of fairness & dignity to the court and her adversary.

2. Ann's ethical obligations with respect to the Chief's memo

As previously discussed, Ann has an [sic] duty of fairness, candor and dignity to the court, her adversary & the public. This means that she is not to use or benefit from or seek out any evidence which she knows is illegally or fraudulently obtained or to which she knows is clearly a mistake and privileged information. If an attorney knows or has reason to believe that any evidence or property that comes into her possession has been obtained

thru illegal means or fraud, she has a duty to turn it over to the authorities or the court. She cannot destroy the evidence nor can she instruct her client to destroy it. She also has an obligation not to use the information.

Here, after reading the memo[,] Ann clearly saw that the material was confidential attorney[-]client information. She could also tell that it was a document that was made in the course of litigation and therefore work product. She therefore had a duty to turn the memo over to either Bob or the Court immediately.

Ann also has a duty of competence to Patty, however. If she had information that could aid Patty in her case, she had a duty to follow up on it. The balance against the privileged information and her duty to Patty, however, is a difficult position for Ann. The memo gives her information about Carl which will give her an idea as to how much she can rely on his credibility and will give her damaging proof and admissions to the Chief's discrimination against females that all but proves her case. Despite the importance of the memo to her case, however, Ann is not entitled to benefit from another party's mistake and the confidential work product. She violated her duty of Fairness & Candor by reading and keeping the memo, as well as her duty of dignity to the court.

3. Bob's Objections to the Admission of the Memo

An attorney has [a] duty of Confidentiality to his client. This means that any information that he obtains during the course of his representation must be kept confidential, no matter how or when the information was obtained. It exists whether the client specifically asked him to keep it confidential or not and whether or not the release of information would harm or embarrass his client. The attorney[-]client privilege protects an attorney from divulging any confidential information about his client to anyone else, including the court, unless the client consents, the information is with regard to an imminent danger of serious bodily injury or death (although CA does not specifically provide for this) [,] the court orders the information be disclosed, the attorney is defending himself in a malpractice or bar complaint charge or bringing an action against his client for payment of services or seeking an ethical opinion.

Here, Bob has a duty of confidentiality to the Chief under the same analysis as he would be to Carl as previously discussed. The Chief can be considered his client because of his role in the PD, as discussed previously about Carl. Bob has a duty to keep the memo confidential because he asked Chief to write it, it's information central to the case and obtained while he represented the PD.

The document can clearly be categorized as confidential information bet/ a client and attorney. As such, the court cannot order that it be disclosed and used without the consent of the PD, as only the client can consent to it be[ing] used. Ann cannot force Bob to disclose the attorney[-]client priv[i]lege.

The memo can also be considered work product because it was made at Bob's request in anticipation of litigation. Such work product is protected by attorney[-]client privilege and cannot be disclosed w/o one of the previously discussed conditions being met. Chief is clearly not going to consent, Ann cannot order the disclosure, there is no threat to anyone[']s safety or life, there is no suit against or on behalf of Bob and he's not seeking a legal opinion. The court should exclude the memo on grounds of attorney[-]client privilege.

Hearsay

Hearsay is any out out [sic] court statement that is being offered for the truth of the matter asserted. Hearsay is not admissible unless there is an exception.

The memo is hearsay because it is a statement by Chief made out[-]of[-]court and Ann wants to use it to prove that Chief and PD discriminate against women. It also has info about prior bad acts of Carl, which are not admissible to show that he did something wrong on this occasion.

If Chief testifies, this information is w/o his knowledge and he could potentially testify about same. Ann could argue that the memo is a stmt of a party opponent and therefore admissible. Ann could argue that the memo is an admission of fault by Chief & therefore also admissible. If a party makes an earlier out[-]of[-]court admission, it can be an exception to the hearsay rule and admissible.

Ann could also argue that the memo is a statement against interest made by Chief when he knew he was being sued. If a person makes [a] statement against his pecuniary interest, it is deemed reliable and admissible hearsay. The negative comments about women could clearly be construed as against his interests.

Chief could also argue that the memo contains prior bad acts about Carl[,] which is inadmissible character evidence. A party cannot offer evidence of prior bad acts to show that the person is guilty of the current act. Further, the issue of character cannot be admitted unless the suit itself deals with a person's character or it goes to their credibility. Then, the only thing they can discuss is the w's opinion about their reputation for truthfulness in the public. There is no evidence of that here at this time. Further, prior bad acts are only admissible in a criminal case to show motive, intent, mistake of fact, identity and common scheme or plan. It does not apply to civil cases.

Because the memo is protected confidential attorney[-]client privilege, it should be excluded. Even though Ann can show that there are several applicable exceptions to the hearsay rule, the ultimate test is whether the probative value of the memo outweighs the prejudicial affect to the PD. Here, the prejudice is high and the memo should be excluded.

Answer B

4)

1. Ethical violations by Ann (A) for interviewing Carl (C)

Ann's interview of Carl raised several ethical concerns:

Duty Regarding Communications with Parties or Employees of Parties Represented by Counsel

In the instant circumstance, C is an employee of an organization, the Department, which is represented by attorney Bob (B). The issue is whether it is permissible under the rules of professional conduct for A to interview C without notice t[o] B or representation by counsel.

To begin with, a lawyer may not have communications with a party who is represented by counsel when the counsel is not present or aware of the communications. In situations where, as where [sic], as here, a lawyer seeks to have communications with an employee of an entity represented by counsel, the lawyer must obtain consent from the organization's counsel if: 1) the employee works regularly or at the behest of counsel, 2) the employee has authority to bind the organization, or 3) the employee's actions may be imputed to the organization.

Here, since C is a police captain, he likely has sufficient seniority to bind the Department or for his actions to his actions [sic] to be attributed to the Department. Therefore, it was improper for A to interview him without the consent of Bob (B), who is counsel for the Department. A's actions were improper under the rules of professional conduct, regardless of the fact that C met with A voluntarily and after work hours.

Morever, where a party is not represented by counsel and it appears that person should be, it is the duty of the lawyer to so advise that party. Thus, A should have advised C that he ought to have the benefit of counsel in his communications with her.

Duty of Fairness to Third Persons

Furthermore, A likely violated her duty of fairness to third persons by interviewing C without notice to B or without the benefit of representation by counsel. In this situation, C acted at his peril and may well face negative consequences at work for his actions. In light of this risk, A should have advised C that he ought to have the benefit of counsel in his communications with her. By failing to advise B in this manner, A's conduct violated her ethical obligations.

2. A's Ethical Obligations Regarding the Chief's Memo

To begin with, the memo contains sensitive material that is protected both by the attorney-client privilege and work product privileges.

Attorney-Client Privilege

The attorney-client privilege applies to confidences between a client and counsel in the course of representation. The attorney-client privilege is an evidentiary privilege. Under the evidentiary privilege, one may not be compelled to testify about a matter falling under the privilege. Here, the memo was made by Chief in response to B's request for the summary of certain information that could be used to discredit C. As such, the communication is one between Chief and his lawyer B and falls within the attorney-client privilege.

Work Product Privilege

The work product privilege applies to all material made in anticipation [of] or preparation for litigation. Here, the memo was prepared at B's direction to aid at trial: specifically to discredit a potential witness. As such, the memo falls under the work product privilege.

Duty to Return Material Mistakenly Delivered

A lawyer is under an ethical duty to return material mistakenly delivered to her. Here, the memo was inadvertently delivered by B's paralegal, and B promptly demanded its return, leaving no doubt in A's mind that it was accidentally delivered to her. Moreover, the material clearly contains sensitive material that falls under the attorney-client and work product privileges. The sensitive nature of this material also should have alerted A to the unintentional delivery of this material to her. Since this material plainly was not intended for delivery to her, A is under an ethical obligation to return it.

Duty of Zealous Representation and Diligence

A lawyer has a duty to zealously and diligently represent her client. Absent the applicability a specific rule requiring an attorney to return material mistakenly delivered to her, A would be under a duty to use such material in connection with her obligation to zealously and diligently represent her client. However, in this circumstance, the rule requiring an attorney to return mistakenly delivered material trumps the duty of zealous representation and diligence.

3. Objections to Admissibility of Memo

a. Objection based on attorney-client privilege

As discussed above, the memo initially falls within the scope of the attorney-client privilege.

Waiver?

The issue is whether the accidental disclosure of the memo to A constitutes a waiver. In general, a privilege is waived if it is disclosed to a third-party. Here, if the disclosure were intentional, there is no doubt that a waiver would apply. However, in the instant circumstance, the disclosure by the paralegal was accidental and B promptly sought the return of the material. Moreover, A is under an ethical duty to return the material in all of the circumstances. In light of the accidental nature of the disclosure and the applicable ethical duty for A to have returned the material, a court would likely rule that a waiver has not occurred and allow the protection of the attorney-client privilege to remain intact.

b. Hearsay

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Here, the memo can be said to constitute double hearsay: the memo is itself an out-of-court statement and it contains references to some things that the Chief said out of court: to wit, that he disapproves of women becoming police officers, routinely assigns them clerical work, and would personally see to it that no female officer would ever supervise a male officer. As double hearsay, an exception to the hearsay rule must apply for each level of hearsay.

Admission

The Chief's statements may be admissible, despite the hearsay objection, because it [sic] can be viewed as an admission. The very essence of the plaintiff's claim is that women are discriminated against. All of Chief's statements that he disapproves of women becoming police officers, routinely assigns them clerical work, and would personally see to it that no female officer would ever supervise a male officer amount to admissions of discrimination. As an admission, the memo can clear both levels of hearsay. Therefore, the court could overrule a hearsay objection on this basis.

Offered Not for the Truth But for The State of Mind

A can argue that the Chief's statements are being offered not for the truth of the matters Chief allegedly said, but rather to show his state of mind. This argument can be

an additional basis for allowing the chief's statements, but it does not solve the hearsay problem inherent in offering the memo, which is another out[-]of[-]court statement, being offered for the truth that Chief said such things.

No Business Record Exception

A business record exception can apply where a party makes a records [sic] in the regular course of business and is under a duty to record. Here, the business record exception would not apply b/c Chief had no duty to make the memo and it was made for litigation, not in the course of business.

No Official Record Exception

Similarly, the official record exception would not apply b/c Chief made the memo for litigation, and it was not made by an agency.

Conclusion

In conclusion, the memo may be admitted and not barred by hearsay b/c it is an admission.

Q5 Real Property

Alice and Bill were cousins, and they bought a house. Their deed of title provided that they were "joint tenants with rights of survivorship." Ten years ago, when Alice moved to a distant state, she and Bill agreed that he would occupy the house. In the intervening years, Bill paid nothing to Alice for doing so, but paid all house-related bills, including costs of repairs and taxes.

Two years ago, without Alice's knowledge or permission, Bill borrowed $10,000 from Lender and gave Lender a mortgage on the house as security for the loan.

There is a small apartment in the basement of the house. Last year, Bill rented the apartment for $500 per month to Tenant for one year under a valid written lease. Tenant paid Bill rent over the next seven months. During that time, Tenant repeatedly complained to Bill about the malfunctioning of the toilet and drain, but Bill did nothing. Tenant finally withheld $500 to cover the cost of plumbers he hired; the plumbers were not able to make the repair. Tenant then moved out.

Bill ceased making payments to Lender. Last month, Alice died and her estate is represented by Executor.

1. What interests do Bill, Executor, and Lender have in the house? Discuss.

2. What claims do Executor and Bill have against each other? Discuss.

3. Is Tenant obligated to pay any or all of the rent for the remaining term of his lease, including the $500 he withheld? Discuss.

Answer A

What interests do parties have in the house?

The court must decide between competing claims by Bill (B), Executor (Exec)[,] and Lender (L).

Joint Tenancy

Alice and B originally took title as joint tenants with the right of survivorship. Joint tenancy required the existence of four unities – time, title, interest, and possession. Assuming these unities were present, the distinguishing feature of a joint tenancy, the right of survivorship, will apply.

Under the right of survivorship, on the death of one joint tenant, his/her interest automatically passes to the surviving tenant(s). Thus, if a joint tenancy existed between Alice and B, B would automatically get Alice's interest at her death.

The issue here, though, is whether any actions by the parties changed the joint tenancy before Alice's death.

Severance/L's mortgage

A unilateral act of mortgaging the property may sever a joint tenancy, depending on the type of jurisdiction.

Lien Theory

A lien theory jurisdiction holds that a unilateral mortgage does not automatically sever a joint tenancy. Therefore, if this is a lien theory jurisdiction, normal survivorship rules would apply, and at Alice's death the following would occur:

Alice's interest would pass to B through the right of survivorship. B would thus be left with a fee simple absolute, subject to L's mortgage. Exec gets nothing.

Title theory

However, in a jurisdiction which follows the title theory, a unilateral mortgage by a joint tenant is held to sever the joint tenancy. The result is that joint tenants become tenants in common, with the mortgagee the equitable owner of the undivided portion legally belonging to the mortgagor.

In a title theory jurisdiction, the following would occur:

Immediately upon B's mortgaging the property, the joint tenancy was destroyed. Alice and B were then tenants in common, each with an undivided ½ interest. B's interest was subject to L's mortgage[.]

At Alice's death, her undivided ½ interest passes through her estate. It will thus be held in trust by Exec to be distributed per the provisions in Alice's will. B will continue to hold his undivided ½ interest. L will have an equitable ownership interest in B's undivided share by virtue of its mortgage.

2. Claims of Exec and B against each other

Exec, as the executor of Alice's estate, may be legally able to assert any claim against B that Alice had during her life. B could counter with any claims he had against Alice.

Exec's claims - Rent

A tenant has a duty to account to co-tenants for any rents or profits received from use of the land. Exec will claim interest in ½ of the rents B received from Tenant.

B rented out the basement apartment to Tenant for $500/month. B received rent for seven months, a total of $3,500. Since Alice had a right to ½ of the rents, Exec will lay claim to $1,750.

B's claims against Exec

B will counter for claims for Alice's share of house-related bills, repairs, and taxes.

House-related bills

The house[-]related bills may or may not be subject to partial reimbursement from Alice's estate. Mortgages or loan payments are generally apportioned between the tenants according to their interest. Since Alice and B had equal interests, B may claim compensation for Alice's half of any such payments made by him.

Some bills, however, are the sole responsibility of the tenant in possession, since they are based on his use or enjoyment of the property. Therefore incidental expenses or use charges such as utility bills will not be subject to reimbursement.

Repairs

Tenants in possession may receive contribution from non-posessory tenants for regular repairs (distinguished from improvements). Thus B may receive reimbursement from Alice's estate for ½ of the regular repairs B had done to keep the property in good condition.

Taxes

Tenants out of possession are also liable for their respective share of taxes levied upon the property. B may therefore claim reimbursement for ½ of the taxes he has paid.

3. Tenant's obligation to pay remaining rent?

B and Tenant (T) entered into a one-year lease. After seven months, T refused to pay rent and has moved out. T will try to get out of his duty to pay rent for the remaining term.

Warranty of habitability

Generally at common law, a tenant's duty to pay rent was considered independent of the landlord's duty to provide the premises. Tenants took the premises as they were; "caveat emptor" was the rule of the day.

Because the harshness of application to tenants, courts have modernly considered residential leases (commercial leases are not protected). Thus, if a landlord provides premises that are not inhabitable, tenant's duty to pay rent may be excused.

"Uninhabitability" has been fairly strictly construed by courts. Property is typically considered "uninhabitable" only if it fails to provide the barest essentials - four walls, a roof, and running water/plumbing.

Here, T will claim that the malfunctioning toilet and drain render the premises uninhabitable. A court will probably find for T, because the lack of working plumbing would result in a possible health hazard. T may thus be excused from paying rent until the problem is repaired.

Many courts allow the tenant, in cases where the landlord has failed to repair, to contract himself to have the repairs done and deduct that amount from the rent due.

Here, T did notify B of the need for repairs, and B never responded. T was therefore eligible to engage in "self-help" by contracting for the needed repairs himself. He did so, and withheld the amount from the rent owed to B. He was within his rights to do so.

Constructive eviction

At issue is whether T can avoid the five months remaining on his lease with B.

If the problem with the toilet and drain render the premises completely uninhabitable,

forming a nuisance to T, then upon proper notice to B[,] T can quit the premises. He will be relieved of his obligation to make future rent payments by virtue of the doctrine of constructive eviction.
Here T notified L of the nuisance conditions. T's own plumbers were unable to repair. Because the condition was a nuisance - a health hazard - T could quit the premises. Since he did so, he can claim constructive eviction.

Therefore T is not liable for any rents remaining on his contract with B.

Answer B

5)

1. Interests of Bill, Executor and Lender

Joint Tenancy

Alice and Bill took title as "joint tenants with rights of survivorship." The creation of a joint tenancy requires the presence of the four unities. Joint tenants must take by the same title instrument, at the same time, with identical interests and rights to possession. A and B took title at the same time and by the same deed and apparently had identical interests and rights to possession and thus a valid joint tenancy was created. Joint tenants have rights of survivorship that entitle surviving tenants to automatic ownership of the interests of deceased joint tenants. Thus a joint tenant's interests are not devisable or descendible. As a consequence, as long as B did not sever the joint tenancy by mortgaging his interest, B became sole owner of the house upon A's death.

Title Theory v. Lien Theory of Mortgages

A joint tenancy is severed, i.e., survivorship rights cease and the tenancy becomes that of tenants in common, when, without the permission of the other joint tenant(s) one joint tenant transfers his or her ownership interest in the property. There are two conflicting theories regarding the consequences of one joint tenant mortgaging his or her interest in a joint tenancy without permission. The title theory of mortgages deems the tenancy terminated once the property is unilaterally mortgaged because it treats title as passing from the mortgagor to the mortgagee[,] thus severing the unity of title. The lien theory of mortgages holds that the joint tenancy remains intact despite the mortgage, concluding that the mortgagee only holds a lien on the property so the unity of title is not disrupted. Thus, the effect of B's mortgage to Lender on his joint tenancy with A will depend on which theory the jurisdiction applies. If it applies the title theory, then the tenancy was severed and A's interest became devisible and descendible and is thus now part of her estate. If the lien theory is applied, then the tenancy was not severed and B automatically took title to the house upon A's death.

Equitable Conversion

Lender certainly has an interest in the one-half share of the house that was B's at the time he mortgaged the house. Lender's rights to the other half depends on whether B took title to the entire property upon A's death as discussed above. B only had the power to encumber what he owned – an undivided one-half interest – and thus at the time of the mortgage L only had a security interest in B's half of the house. Whether L will have a security interest in the entire property, assuming the lien theory of mortgages applies, depends on the application of the doctrine of equitable conversion. Under this doctrine

equity deems done that which ought to be done. Thus, if B represented to L that he owned the house alone and thus L thought his security interest was in the entire property, then the doctrine of equitable conversion could apply to L's mortgage and give L an interest in the entire house.

No Adverse Possession

If the title theory of mortgages applies and thus B does not take A's share of the house, he may argue that his uninterrupted possession of the house for the past ten years gives him title by adverse possession. Adverse possession operates to give title to one who occupies property under certain circumstances for a statutorily prescribed period (i.e., the statute of limitations on trespass). To make out a valid claim of adverse possession to possessor mush [sic] show the [sic] his possession was continues [sic] for the prescribed period, that his possession was open and notorious (such that the rightful owner would have notice of the trespass), that possession of the property claimed was actual (no constructive possession) and that the occupation of the property was hostile (i.e., not with permission of the owner). B's possession of the house likely satisfied the first three requirements as he openly lived in the house[;] however, his claim will fail because occupation by a joint tenant is not hostile absent an ouster of the other tenants. A and B agreed that B would occupy the house after she moved away and thus there was no ouster and no hostility.

2. Claims of Executor and Bill

Executor's Claims – Rents

The general rule is that joint tenants are not entitled to rents from other joint tenants even if one tenant has sole possession of the property unless their [sic] has been an ouster (i.e., exclusion of one tenant of another who [h]as a right to possession). Thus, Executor will not be entitled to any rent claimed for B's occupation of the house because B had not ousted A from the house. However, joint tenants are entitled to their pro rata share of any rents collected from non tenants. Thus, Executor has a claim to half of the rents received by Bill from Tenant, i.e., $1750.

Bill's Claims – Repairs and Taxes

Joint tenants are responsible for their pro rata share of taxes and repair costs absent and [sic] agreement to the contrary. Joint tenants are not responsible for expenses related to another's use of the property. Here B paid for taxes and repairs with no contribution from A for the ten years that he was in sole possession of the house and thus under the general rule A's estate could be held liable to B for her half of these expenditures. Executor would argue that B was obligated to give A notice of any necessary repairs prior to making expenditures that she would be responsible for. Executor would also argue that A and B had an implied agreement that B would make

these payments in return for having exclusive use of the house. That B had never requested payment from A during the ten year period indicates that this was indeed the case. Finally, A's estate would not be liable for "house-related bills" that were incident to B's use of the property as joint tenant's obligations extend only to repairs and taxes.

3. Tenant's Obligations

Covenant of Quiet Enjoyment – Constructive Eviction

Every lease includes an implied covenant of quiet enjoyment. This convent [sic] obligates a landlord to do and refrain from doing whatever is reasonably necessary to enable a tenant's quiet enjoyment of the leased premises. This obligations [sic] includes landlord['s duty to make repairs to the premises if a condition is interfering with the tenant's quiet enjoyment. A continued refusal to comply with this obligation can give rise to a claim of constructive eviction. A constructive eviction will be found when 1) a condition causes a substantial impairment of the tenant's quiet enjoyment, 2) the tenant gave adequate notice to the landlord of the condition and the landlord failed to take appropriate remedial measures[,] and 3) as a result the tenant gave up the lease and moved out. A malfunctioning toilet and drain could certainly cause a substantial impairment of one's enjoyment of an apartment. This is especially true here where the premises consisted of a small basement apartment that likely had only one bathroom and not much ventilation. Tenant gave landlord notice of the problem and even attempted to have the problem fixed himself. Finally, tenant promptly moved out. Thus, tenant has a valid claim for constructive eviction and is thus not liable for the remaining term of the lease. Tenant could also recover damages from B for breach of contract.

Implied Warranty of Habitability – Standard and Remedies

Also implied in every residential lease is the implied warranty of habitability. This warranty requires landlords to provide property that is fit for basic human habitation. The standard can be based on housing code but generally extends to basic amenities such as running water, electricity, heat in cold climates, etc. A malfunctioning toilet that is apparently beyond repair would very likely be found to be a breach of the implied warranty of habitability. Among a tenant's remedies for breach are 1) move out, 2) withhold rent (may be required to keep in escrow), 3) repair and deduct the cost from the rent[,] and 4) remain and sue for damages. Tenant availed himself of the third option by seeking to have the toilet and drain repaired, however the repair was beyond the abilities of the plumbers. As long as tenant's efforts were in good faith he should be entitled to repayment for the $500 he spent to repair the conditions despite the fact that conditions were not capable of being repaired. The continuing breach also gave tenant the right to vacate and terminated his obligations under the lease.

Q6 Trusts

In 2003, Sam executed a valid testamentary trust, naming Tom as trustee. The terms of the trust state:

(a) All net income is to be paid to Bill, Sam's nephew, for life;
(b) Tom may invade principal for Bill in such amounts as Tom, in his sole and absolute discretion, determines;
(c) The trust terminates on Bill's death and any remaining principal is to be distributed to Alma Mater University;
(d) The interests of the beneficiaries are inalienable and not subject to the claims of creditors.

In 2004, Sam died.

In 2005, Lender obtained a judgment against Bill for an unpaid credit card bill that includes charges for tuition, groceries, and stereo equipment. Lender now requests a court order directing Tom to pay all future installments of trust income to it rather than Bill until the judgment is satisfied.

Bill is delinquent in making child support payments to Kate, his former spouse, for their child. Kate now requests a court order directing Tom to pay all future installments of trust income to her rather than Bill until the arrearages are eliminated.

Bill wants Tom to invade the trust principal so Bill can promote a newly-formed rock band, but Tom has refused. Bill now requests a court order directing Tom to invade the trust principal.

Because of Tom's refusal to invade the trust principal, and because Alma Mater is concerned over Bill's debt difficulties, Bill and Alma Mater wish to terminate the trust in order to divide the trust principal, but Tom has refused. Both Bill and Alma Mater now request a court order terminating the trust.

How should the court rule on the requests made by Lender, Kate, Bill, and Alma Mater? Discuss.

Answer A

A trustee is a fiduciary relationship with respect to property where a settlor transfers property to a trustee who holds the property for the benefit of named beneficiaries, for a valid trust purpose. On the facts, Sam executed a valid express testamentary trust naming Tom as the trustee and Sam and Alma Mater University as beneficiaries. Sam has a life interest in the trust and Alma Mater has a remainder interest.

CD Request by Lender

The express trust created creates a spendthrift clause under (d). As a general rule, a beneficiary's interest is both voluntarily and involuntarily alienable as a property right. Involuntary alienation allows a creditor to attach to the beneficiary's rights to future payments by obtaining a judgment.

A spendthrift clause is designed to protect the beneficiary from their spendthrift ways by prohibiting both voluntary and involuntary alienation of the beneficiary's right to future payments. Thus the spendthrift clause created in (d) prohibits Lender from attaching to Bill's future payments of income. The provision explicitly state's [sic] that the beneficiaries' interest is inalienable and not subject to creditor's claims.

However, the courts recognize exceptions to the protection provided by spendthrift provisions including where a creditor has provided necessaries to the beneficiary. Necessaries include items such as food, clothing, shelter and medical care.

On the facts, Lender provided Bill with tuition[,] groceries[,] and stereo equipment. A court would likely find that only the groceries were necessaries and would order that Lender be entitled to payment for the groceries from the income of the trust. Thus a court would likely grant Lender's requested order for payment of Bill's grocery debt.

With respect to the stereo and tuition, Lender could seek recovery based on surplus. The concept of surplus is recognized in some jurisdictions and allows a creditor to attach to future payments to the beneficiary despite a spendthrift clause where the income to be paid exceeds the beneficiaries[‘] station in life, thus resulting in a surplus. On the facts it is unclear what income is produced in relation to Bill's station in life. In making the determination as to whether surplus exists the court will only consider Bill's reasonable expenses. If Lender can establish surplus, a court would likely grant his requested order and direct Tom as trustee to pay future installments of surplus to Lender to satisfy Bill's debt.

@ <u>Request by Kate:</u> Preferred Creditor

In addition to the two exceptions noted in relation to Lender, the courts have also recognized an exception for preferred creditors.

A court will disregard a spendthrift clause and allow a preferred creditor to attach to the beneficiary's future income payments from the trust. Preferred creditors include government debt and outstanding child and spousal support and alimony payments.

On the facts, the beneficiary Bill has failed to make child support payments to his former spouse Kate for the support of his child. Thus Kate is a preferred creditor and is entitled to attach to Bill's right to future income from the trust to satisfy the delinquent child support.

Therefore, a court would likely grant Kate's request and order Tom to pay trust income to Kate in satisfaction of Bill's outstanding child support obligation until the arrearages are eliminated.

®Request by Bill - Discretionary Trust Provision

Under the terms of the will, Tom has sole and absolute discretion to determine whether or not to invade the trust principle [sic] for Bill's benefit. Tom as trustee has all express powers as set out in the trust and all implied powers required to exercise the express powers. As a fiduciary, Tom has an obligation to exercise his discretion in good faith. On the facts, there is no indication that Tom's refusal to invade the trust principal to allow Bill to promote the rock band was made in bad faith.

Therefore, based on the facts, the court would not interfere with Tom's discretion as explicitly set out in the trust and would deny Bill's request. The court would not therefore order Tom to invade the trust principal.

© Request by Alma Mater & Bill - Termination

A court will not order a termination of a trust even with the consent of all beneficiaries where such termination would be in violation of the trust purposes and would be contrary to the testator's intent.

The trust established by Sam evidences a clear intent to provide for Bill during his lifetime. This is a valid trust purpose which continues until Bill's death. On the facts, Bill is still alive and thus the trust purpose is ongoing. As well, the termination of the trust would destroy Sam's intent to provide for Bill throughout Bill's life.

In addition, the trust has not become passive as Tom, the trustee, still has active duties in maintaining and managing the trust. Nor have circumstances changed such that the doctrine of changed circumstances would apply to modify the trust terms.

Therefore, the court would uphold Tom's refusal to terminate the trust and would deny Bill and Alma Mater's request since termination would destroy the settler/testator (Sam's) intent.

Answer B

Trust actions are governed by the trust document.

Valid Trust

A valid inter vivos trust was created since Sam (S), the settlor, had an immediate intent to create a trust for a legal purpose, and delivered a presently existing res, title property interest, to Tom (T), the trustee, for the purposes of management for the benefit of the beneficiaries Bill (B) and Alma Mater (AM).

Type of Trust

Income

B has a life interest in the income of the trust, subject to its provisions.

Mandatory Distributions (Provision A)

The trust sets out mandatory distributions of income to B by T. T must then distribute the income to B.

Spendthrift Provision (Provision D)

All distributions, both income and principal, are subject to a spendthrift provision. This prevents creditors from attaching and beneficiaries from voluntary [sic] assigning their rights. This is held as valid restraint. B & AM may not alienate nor may creditors attach. There are, however, exceptions to the creditor[']s rule discussed below.

Principal

Discretionary to Bell (Provision B)

T is given discretionary power to distribute principal to B. T is thus not required to distribute any principal and may distribute as he feels is necessary) [sic][.]

AM (Provision C)

AM has a right to all of the principal remaining at B's death subject to the spendthrift limitation.

T's Fiduciary Duty

Trustees are subject to fiduciary duties. T is thus bound to follow the provision set out by the trust. As such, his actions below with the individuals are governed by the document provisions discu[s]sed above.

Parties[‘] Requests

Lender

As explained, as a spendthrift trust, creditors may not normally attach and T cannot be required to pay off the court order. Exceptions for creditors are made for the following creditors: government creditors, tort judgments, spousal or child support, alimony, necessities and surplus above station.

Here, Lender seeks reimbursement for groceries, a necessity. Since courts want beneficiaries to be able to obtain necessities based on credit, this exception exists and reimbursement may be made. Lender may also argue tuition is a necessity but this is likely to fail[.]

The right to collect for the stereo equipment and education may come under the surplus exception. Creditors may attach to the income a beneficiary receives beyond that which is necessary to maintain their station in life.

It is unclear here what amount B receives and what amount his past lifestyle dictates is necessary for maintenance[.] Lender may have an argument and thus gain attachment. T will then be required to make payments to Lender[.]

Kate

Again, the income to B is subject to the spendthrift provisions. Kate, however, has a claim under the exception for child support payments, since this is a creditor that courts have felt should not, in equity and public policy, be excluded. Kate may attach and require T to make payments to her. Her order ought to be granted.

Bill

Bill's order will fail. The trustee[']s fiduciary duties to the trust are governed by the document and T is granted discretion in his allocation of principal to B. T's decision not to support B's rock band plans, especially in light of B's other monetary problems, is reasonable. T appears to be using his discretion to fulfill his duty of care, acting as a reasonably prudent person managing other people's money, under the circumstances.

Further, in using his discretionary powers, T must also adhere to his duty of loyalty to all beneficiaries. While AM only has a right to the leftover, he may also consider that all parties', including B's, best interests may be served investing the principal. B's order should be denied.

Alma Mater

B&AM have both requested that the trust be terminated. A trust may be terminated where all the beneficiaries, including unborn beneficiaries represented by legal counsel, petition the court for determination. The court must also find that all of the purposes of the trust have been fulfilled.

While all the beneficiaries (present & future) are currently petitioning, B&AM, the court is likely to find that the trust's purposes have not been fulfilled. S created a trust that granted B a lifetime right in the income of the trust subject to a spendthrift clause[.]

It appears from the terms that S was attempting to insure for the provision of income to B, despite his issues with spending wisely. To prematurely cancel the trust would leave B without the protections that S intended. Cancellation would be directly at odds with this purpose.

Though it may fulfil the purpose of AM's gaining some of the principal, their express right in the trust is only to the remaining principal and not the most principal they can receive. Further, this purpose of S is best protected by T's discretionary power over the principal. B&AM's order to terminate should thus be denied.

Additionally, AM's concerns over the debts fail since B's right to the principal, AM[']s interest, is subject to T's discretion. Even if the creditors could attach under an exception, attached creditors to a discretionary interest only have a right to collect when T chooses to pay out. Only in that scenario is T required to pay the creditor. AM's interest is thus further protected and S's purposes are better furthered through the continuation of the trust and the order ought to be denied.

Jul 2004

California Bar Examination

Essay Questions and Selected Answers

ESSAY QUESTION AND SELECTED ANSWERS

JULY 2004 CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from July 2004 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

TUESDAY MORNING
JULY 27, 2004

California Bar Examination

Answer all three questions. Time allotted: three hours

Your answer should demonstrate your ability to analyze the facts in question, to tell the difference between material and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit.

State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

Q1 Criminal Law

On August 1, 2002, Dan, Art, and Bert entered Vince's Convenience Store. Dan and Art pointed guns at Vince as Bert removed $750 from the cash register. As Dan, Art, and Bert were running toward Bert's car, Vince came out of the store with a gun, called to them to stop, and when they did not do so, fired one shot at them. The shot hit and killed Art. Dan and Bert got into Bert's car and fled.

Dan and Bert drove to Chuck's house where they decided to divide the $750. When Chuck said he would tell the police about the robbery if they did not give him part of the money, Bert gave him $150. Dan asked Bert for $300 of the remaining $600, but Bert claimed he, Bert, should get $500 because his car had been used in the robbery. Dan became enraged and shot and killed Bert. He then decided to take all of the remaining $600 for himself and removed the money from Bert's pocket.

On August 2, 2002, Dan was arrested, formally charged with murder and robbery, arraigned, and denied bail. Subsequently, the court denied Dan's request that trial be set for October 15, 2002, and scheduled the trial to begin on January 5, 2003. On January 3, 2003, the court granted, over Dan's objection, the prosecutor's request to continue the trial to September 1, 2003, because the prosecutor had scheduled a vacation cruise, a statewide meeting of prosecuting attorneys, and several legal education courses. On September 2, 2003, Dan moved to dismiss the charges for violation of his right to a speedy trial under the United States Constitution.

1. May Dan properly be convicted of either first degree or second degree murder, and, if so, on what theory or theories, for:
    a. The death of Art? Discuss.
    b. The death of Bert? Discuss.

2. May Chuck properly be convicted of any crimes, and, if so, of what crime or crimes? Discuss.

3. How should the court rule on Dan's motion to dismiss? Discuss.

Answer A

1)

1. A. Dan - Liability for Art's Death

Murder

Murder is the unlawful killing of a human being with malice aforethought. Malice can be shown by either intent to kill, intent to cause grevious bodily harm, or reckless indifference to human life. Here, Dan is probably not liable under any of these theories. Because Vince, the shopkeeper, shot Art, causing his death, Dan did not exhibit intent to kill or cause grevious bodily harm. Likewise, fleeing probably does not constitute reckless indifference to human life.

Felony Murder Rule

However, Dan might be convicted under the felony murder rule. The felony murder rule holds defendants liable for foreseeable killings committed during the commission of inherently dangerous felonies. Here, Dan, Art, and Bert were engaged in a robbery. A robbery is the taking and carrying away of the personal property of another by force with the intent to permanently deprive the victim of the property. Dan, Art and Bert robbed Vince because they took $750 from him at gunpoint, with the intent to keep the money. A robbery - especially an armed robbery of a convenience store - is likely an inherently dangerous felony. Art's death was the kind of death that frequently results from armed robberies, and thus was foreseeable.

Limitation of Felony Murder Rule - Fleeing

Liability for felony murder generally ends when the felons reach a place of safety after the felony. Here, because Art was killed while fleeing - before the felons reached a place of safety - this limitation will not apply.

Limitation on Felony Murder Rule - Death of a Co-Felon

However, most states have enacted limitations on the felony murder rule when the death of a co-felon is at issue. Under states that follow the agency rationale, a defendant can be found guilty if the killing was done by a felon or his agent. Under this view, Dan is likely not liable for felony murder because it was Vince rather than Dan or Bert who shot Art.

Under the proximate cause view of the felony murder rule, any killing proximately caused by the felony can make a defendant liable for felony murder. Under this rule, it is arguable that Dan should be liable for Art's death. Being shot while fleeing from a convenience store robbery is foreseeable. Thus, if the jurisdiction follows this view, Dan might be liable

for Art's death under a felony murder theory.

First Degree Murder

In most states, first degree murder requires premeditation or deliberation. Many states also include murders that fall under the felony murder rule in the definition of first degree murder. Thus, if this jurisdiction adheres to that view, Dan may be liable for first degree murder for Art's death.

Second Degree Murder

Second degree murder generally is murder that does not involve premeditation and deliberation, but also does not amount to any form of manslaughter. If the applicable statute defines felony murder as second degree murder, Dan may be liable for that crime instead.

Conspiracy

Conspiracy requires an agreement to commit a crime between two or more people, an intent to agree, an intent to commit a crime, and an overt act. A conspirator is liable for all reasonably foreseeable crimes committed in furtherance of the conspiracy. Here, Art, Dan, and Bert clearly agreed to rob Vince's store with the intent to commit the crime. Conspiracy does not merge with the completed crime. Thus, if Dan was liable for conspiracy, and a court found that Art's death was foreseeable, Dan could potentially be liable on these grounds as well. However, this is a stretch, especially since Vince killed Art.

B. Dan's Liability for the Death of Bert

Murder

As mentioned, one potential grounds of liability for murder is intentional killing or killing with an intent to cause great bodily harm. Here, Dan probably intended to kill Bert or at least intended to cause him great bodily harm. Dan simply shot Bert - there is no indication that he was merely trying to scare him.

First Degree Murder

Dan may be liable for first degree murder. Although premeditation and deliberation are generally prerequisites to a charge of first degree murder, some courts have held that one can premeditate or deliberate in very short periods of time. However, Dan will argue that he was "enraged" and had no time to deliberate or premeditate. Due to the spontaneous nature of the crime, Dan will likely not be found guilty of first degree murder. In addition, as discussed below, he is likely not guilty of felony murder. Thus, even if the state murder statute includes felony murder as first degree murder, Dan will likely not be liable for this

crime.

Second Degree Murder

Dan is much more likely to be guilty of second degree murder. As discussed above, he intended to kill Bert, but likely did not premeditate or deliberate. As discussed below, he is unlikely to be guilty of voluntary manslaughter or felony murder.

Felony Murder

A felony murder charge against Dan would be problematic. For one, liability for felony murder generally ends when the perpetrators have reached a place of safety. Dan and Bert had reached Chuck's house when Dan killed Bert. Indeed, they had begun to divide up the money. This would likely cut off any liability for felony murder based on the robbery of Vince's store.

In addition, the prosecution might argue that Dan is liable for felony murder because he took $600 from Bert's pocket. The prosecution might argue that this is a robbery, and that Dan's killing was a foreseeable result of the robbery. However, this is a weak argument. Dan only decided to take the money from Bert after he shot him. In addition, Dan might also be able to argue that since Bert did not have lawful title to the money, no robbery took place. This is because one element of a robbery is that the money be "property of another." Thus, Dan is likely not liable for felony murder for Bert's death.

Voluntary Manslaughter

Dan may argue that he is only liable for voluntary manslaughter. Voluntary manslaughter is a killing that would be murder, but was conducted while the perpetrator was highly upset. The upsetting incident must be the sort that would upset a reasonable person, the defendant must have been upset, a reasonable person would not have had time to cool off, and the defendant must not have cooled off. Dan will argue that he was "enraged" by Bert's demand of extra money. However, this argument is unlikely to succeed. For one, Bert's actions do not rise to the type of extremely upsetting provocation that generally suffices to reduce a murder charge to voluntary manslaughter. Moreover, there is no indication that a reasonable person would have had such a violent reaction to Bert's demand for money. Thus, Dan is likely not liable for voluntary manslaughter.

Conspiracy

As discussed above, any underlying conspiracy to rob Vince's store had likely ended by the time that the robbers reached Chuck's house.

2. Chuck's Liability

Accessory After the Fact

Chuck is likely guilty of being an accessory after the fact. An accessory after the fact is one who shields, shelters, or assists criminals after a crime. Chuck is clearly aware that Dan and Bert have committed a robbery. He threatens to tell the police about the crime unless he receives some of the money. He provides his house as a safe haven for Dan and Bert. If found guilty of this charge, Chuck would not be guilty as an accomplice - he would simply be guilty of an independent, lesser offense.

Accomplice

Chuck is probably not an accomplice to either Dan's killing of Bert or the robbery of Vince. To be an accomplice, one must assist a crime with the intent that the crime be committed. Here, there is no indication that Chuck had any idea that Dan, Art and Bert were going to rob Vince's store. In addition, given the spontaneous nature of Dan shooting Bert, there is no indication that Chuck intended that crime either. Mere presence at a crime scene does not necessarily result in accomplice liability.

Extortion

Chuck perhaps is guilty of extortion. Extortion involves the obtaining of property through threats. Here, Chuck threatened to tell the police about the robbery. As a result, he obtained $150 from Dan and Bert. Thus, because he obtained property through the use of threats, he might be guilty of extortion.

Conspiracy

There is no indication that Chuck was involved in any agreement - or even knew about - the convenience store robbery. Also, Dan seems to have acted alone when he shot Bert. Accordingly, Chuck is likely not be [sic] guilty of conspiracy.

Mispris[i]on of Felony

If the jurisdiction recognizes this crime, Chuck may be guilty because he aided and assisted Dan and Bert to cover up their crime.

3. Dan's Motion to Dismiss

The Sixth Amendment to the United States Constitution protects an accused's right to a speedy trial. When evaluating whether such a right has been violated, courts consider several factors. Among them are the reason for the delay, whether the defendant has objected to the delay, and the length of the delay.

Here, Dan's strongest argument is that the prosecutor's reasons for delaying the trial are simply not compelling enough to warrant impinging upon his constitutional rights. The prosecutor's desire to go on vacation and attend meetings and legal education classes seems more like a personal pred[i]lection than a good reason to delay Dan's trial. Dan will languish in jail during this time - nearly thirteen months after he was arrested and arraigned. Moreover, with the exception of the vacation, it is not at all clear why the prosecutor cannot attend the meeting or legal education courses on his own time. Finally, in any event, it is not clear why those events warrant delaying the trial from January 3 to September 1 - a delay of nine months. Dan will also note that he initially moved to have trial set in October, 2002. Finally, Dan will point out that the prosecutor's motion was granted on Jan. 3, which was essentially the eve of trial. Waiting until the last minute to continue a trial so long seems unfair and may have prejudiced his ability to mount an effective defense.

However, the prosecution will counter that Dan should have moved to have his charge dismissed on Jan. 3. Indeed, Dan waited until September 2 to move to dismiss. Although he "objected" on Jan. 3, he should have moved to dismiss then. By waiting to move to dismiss until after the trial began, Dan likely waived his rights. Accordingly, Dan's motion should be denied.

Answer B

1)

May Dan ("D") be convicted of murder.

The first question is whether Dan may be convicted of murder in the 1st or 2nd degree. At common law, murder was the unlawful killing of a human being with malice aforethought. Malice aforethought was committing murder with any of the following mental states (1) intent to kill, (2) intent to do serious bodily harm, (3) reckless indifference to the unjustifiably high cost to human life and (4) intent to commit a felony. The types of felonies included in felony murder were inherently dangerous felonies.

Murder in the first degree is a statutory creation that involves the unlawful killing of another human being with premeditation and deliberation. In addition, many state statues have also included in the definition of murder in the first degree murders committed while committing a felony -- also enumerating inherently dangerous felonies.

Voluntary manslaughter is the unlawful killing of a human being which would be murder but for the existence of adequate provocation, and involuntary manslaughter is the killing of another human being with criminal negligence or during the commission of an unenumerated felony or misdemeanor.

2d Degree murder is a residual murder category that covers the unlawful killing of another human being that does not fall within the Murder in the 1st Degree or Voluntary or Involuntary Manslaughter categories. With this in mind, we can investigate whether Dan is liable for murder in the first or second degree.

All homicide crimes also require actual and proximate causation as well as the result of death.

KILLING OF ART.

Here, Dan did kill Art. Vince killed Art. Thus, the only theory that could convict Dan of the murder of Art would be the felony murder. Here, Art and Dan and Bert were committing robbery, an inherently dangerous felony.

Robbery is the taking of personal property of another from their person or presence by force or threats of force with the intent to permanently deprive.

Here, Dan, Bert and Art entered the convenience story and pointed guns at Vince (the requisite threat of force) and took $750 (personal property) from Vince's person. This, especially because of the existence of guns, qualifies as an inherently dangerous felony that should rise to the level of a felony that would qualify for Felony murder. Thus,

because the killing of Art took place whil[e] Dan was committing an inherently Dangerous felony, if this occurred in a jurisdiction where felony murder is included in the definition of first degree murder, Dan could be guilty of first degree murder.

There are however some limiting doctrines to felony murder. Notably in this instance, the killing must be a foreseeable result of the felonious conduct, and the redline view of felony murder provides that defendants cannot be guilty of felony murder for the murder of one of their co-felons by the police or by third parties. Thus, although the killing of Art certainly is a foreseeable result of committing a robbery, if this is a jurisdiction that follows the redline view, Dan will not be guilty of felony murder for Art, and will not be guilty of either first or second degree murder for Art.

It is noteworthy that Vince's killing of Art was not lawful because one may never use deadly force in defense of property, and here, Vince chased Art out of the store (after the physical danger to him passed) and killed Art, when Art failed to stop.

FOR DEATH OF BERT

The next question is whether Dan can be guilty of murder in the first or second degree of Bert.

The standards for murder in the first and second degree are set forth above. Here, the question will revolve around whether (1) Dan possessed the requisite premeditation and deliberation to kill Bill, (2) whether Dan could be guilty of felony murder, since this happened right after the robbery, or (3) whether adequate provocation existed to reduce the killing to a charge of involuntary manslaughter.

Premeditation.

Dan can be guilty of first degree murder of Bert if he committed the murder with premeditation and deliberation. Here, the facts do not indicate that he possessed that premeditation. Dan and Bert just committed a robbery together and were returning to divide the money. There is nothing to suggest that he had a prior plan to kill Bert. In fact, he only became enraged when Bert insisted on taking the entire share for himself. Thus, on these facts, he cannot be convicted of first degree murder on a premeditation and deliberation theory.

Felony Murder

The next question is whether he could be convicted of felony murder for the murder of Bert. Dan did just commit a felony (robbery) as discussed above. He had the requisite intent to commit that felony and it was an inherently dangerous felony. Thus, could his killing of Bert qualify for felony murder?

The felony murder rule also has the limited doctrine that the killing must occur during the commission of the felony. Once the felons reach a point of temporary safety, they are no longer considered as carrying out the felony for purposes of the felony murder rule.

Here, Dan and Bert had reached the safety of Chuck's house and[,] therefore, were no longer in the commission of a felony and[,] therefore, Dan cannot be guilty of felony murder.

2d Degree Murder and Voluntary Manslaughter

The next question is whether adequate provocation existed to make the killing a voluntary manslaughter. If not, the murder will fall into the residual category of Murder in the 2d degree. Here, since Dan acted with intent to do serious bodily damage to Bert (he shot and killed him), or at a minimum proceeded with reckless disregard for the unjustifiably high risk to human life, he will be guilty of second degree murder if the charge isn't reduced to voluntary manslaughter.

Vol manslaughter requires (1) provocation aro[u]sing extreme and sudden passion in the ordinary person such that he would not be able to control his actions, (2) the provocation did in fact result in such passion and lack of control, (3) not enough time to cool off btwn the provocation and the killin[g] [gna] d (4) the defendant did not in fact cool off.

Here, Bert refused to give Dan his $300. While it is understandable that the failure to give such money would aro[u]se anger in an ordinary person that had just put their freedom and life on the line in a robbery attempt, we are only talking about $300. While understandably angry, it is hard to imagine that an average person would lose control over $300 to the point of taking another person's life. Thus, Dan will not qualify for the reduction to voluntary manslaughter and will be convicted of 2d degree murder.

MAY CHUCK BE CONVICTED OF ANY CRIMES

The possible crimes Chuck could be convicted of is [sic] either all of the crimes that the principals committed (under an accomplice liability theory), or at a minimum an Accessory After the Fact.

ACCOMPLICE LIABILITY

If one aids, abets or facilitates the commission of a crime with the intent that the crime be committed, one can be found guilty on accomplice liability theories. The scope of liability includes liability for the crimes committed by the principals and all other foreseeable crimes. The common law used to distinguish between principals in the first and second degrees and accessories before and after the fact. Largely those distinctions have been discarded, although, most jurisdictions still do recognize the lesser charge of accessory after the fact.

Here, there is no evidence that Chuck aided, abetted or facilitated the crime until after it was committed. He provided a safehouse and subsequently demanded money. But mere presence or knowledge is not enough to ground accomplice liability.

ACCESSORY AFTER THE FACT

However, Chuck did assist after the crime happened (he provided a safehouse, and agreed not to tell the authorities in exchange for money), so at a minimum he will be guilty of accessory after the fact.

Extortion

Chuck may also be liable for extortion. Extortion is the illegally obtaining property through threats of force or threats to expose information. Here, he threatened to expose the criminals to the police if he didn't get paid, and so he will be liable.

Receiving Stolen Property

Chuck also will be liable for receiving stolen property. The requirement for this crime are [sic] that you know the circumstances around the property (ie, that it is stolen) and that you willing [sic] receive it. Chuck knew this money was the fruit of a robbery and received it in exchange for his providing a safehouse. Thus he will be liable of receipt of stolen property.

CONSPIRACY

Chuck also could be guilty of conspiracy. Conspiracy is (1) an agreement between two or more people, (2) the intent to agree, (3) the intent to pursue an unlawful objective and (4) in some jurisdictions, some overt act. Conspiracy does not merge into the completed crime.

HOW SHOULD COURT RULE ON DAN'S MOTION TO DISMISS.

The 6th amendment provides each defendant the right to a speedy trial. The 6th amd is applied to the states through its incorporation into the due process clause of the 14th amendment. The right to a speedy trial attaches post charge. Whether the defendant has been given a speedy trial depends on an analysis of the totality of the circumstances.

Here, Dan was arrested on August 2, and immediately charged. Thus his right to a speedy trial attached sometime in early August. The initial trial date was set for January 5, 2003. It is not likely that the denial of Dan's request for a trial 2 months after his charge is a violation of his constitutional rights since the court set a date very closely thereafter in January. However, the prosecutor's delay subsequent to that date does not rise to the level of providing adequate excuse for moving Dan's date (coupled with the fact that the request was made only days before the January trial was to commence). Here, the

prosecutor wanted to take a vacation cruise and take some legal education classes, and meet for a statewide meeting of prosecutors. First, none of these seem to rise to the level of an adequate excuse to delay a trial 9 months. Particularly since the defendant was denied bail and was sitting in jail. While the court could have granted a continuance for a short period of time for the meeting or to accommodate the prosecutor, given the defendant's status (sitting in jail), it was improper for the court to grant this motion, and the court may dismiss Dan's case.

It should be noted, however, that Dan should have moved earlier than September 2, as this would have permitted the court to fashion relief without having to dismiss the charge altogether. Accordingly, a court could find that he was not entitled to dismissal because of his delay.

Q2 Constitution

State X amended its anti-loitering statute by adding a new section 4, which reads as follows:

> A person is guilty of loitering when the person loiters, remains, or wanders about in a public place, or on that part of private property that is open to the public, for the purpose of begging.

Alice, Bob, and Mac were separately convicted in a State X court of violating section 4.

Alice was convicted of loitering for the purpose of begging on a sidewalk located outside the City's Public Center for the Performing Arts in violation of section 4.

Bob was convicted of loitering for the purpose of begging on a waiting platform at a stop on City's subway system in violation of section 4.

Mac was convicted of loitering for the purpose of begging in the lobby of the privately owned Downtown Lawyers Building located in the business district of City in violation of section 4.

Alice, Bob, and Mac have each appealed their convictions, and their appeals have been consolidated in the State X appellate court. It has been stipulated that Alice, Bob, and Mac are indigent, that section 4 is not void for vagueness, and that the only issue on appeal concerns the validity of section 4 under the First Amendment to the United States Constitution.

How should the appellate court decide the three appeals, and why? Discuss.

Answer A

2)

STANDING

Since the question states that the only issue on appeal concerns the validity of section 4 under the First Amendment, it is assumed that all standing requirements are met.

STATE ACTION

The constitutional provisions of the first amendment are only applicable to state action which deprives a citizen of his/her right to free speech. Here, State X passed a loitering law affecting speech (expression), and later enforced that law by their police. Therefore there is state action and Alice, Bob and Mac can allege their first amendment rights.

SPEECH

The first amendment is raised with respect to a citizen's rights for free speech or religion. Here, State X passed a law concerning loitering. This law concerns the right to free speech, however, because speech is not limited to words spoken or written, but can also apply to free expression or demonstrative speech. Since this law affects where a person can legally go (in public space) and what they can do in that public space, it does affect speech.

CONTENT-BASED

Speech regulations can be either content-based or content-neutral. Content neutral regulations on speech are viewed more favorably than content-based regulations, because there is no discriminatory purpose on the face of the regulation. Here, however, the regulation affecting Alice, Bob and Mac concerns only those on the property "for the purpose of begging." Since the statute concerns only those who have particular purpose, a particular message (i.e. "please give me money if you can spare it"), the statute is content-based and will have to survive stricter scrutiny.

OVERBREADTH

While the statute is not void for vagueness, it could be challenged by all three for being over broad. That is, it may not be narrowly tailored to serve the interest they are seeking to regulate. The statue seems aimed at prohibiting begging. However, it does not merely prohibit begging but "remain[ing] or wander[ing] about in a public place for the purpose of begging." This statute is arguably overbroad. Here, an officer can arrest someone, not for committing the actual act of begging, but for having that purpose. How can an officer, or judge, or a jury possibly know whether a person has the purpose of begging? This statute

invites abuse of indigent or undesirable people. Furthermore, the statute regulates "remaining" or "wandering about" in a public place. Again, this is overboard because it punishes not only the act of begging but the right of a person to remain in a public place or wander about there. Under this statute, an indigent could arguably be arrested for taking a walk on the sidewalk or sitting in a public park -- if the officer believes that he has the "purpose of begging."

INDIGENCE

It is unconstitutional to pass a statute that places an unreasonable burden on indigents with the respect to compliance (for example, unreasonable fines). Here, the statute & question do not say anything about fines or fees, so it is presumed that there is no undue financial burden on indigent people.

Alice should win her Appeal

SIDEWALK = PUBLIC FORUM

Alice should win her appeal because she was "loitering...for the purpose of begging" on the sidewalk outside the Public Center for the Performing Arts. First, a sidewalk is generally a public forum. In a public forum, a person is given greater leeway to exercise their rights of free speech. The city would have to have a strong justification for repressing Alice's right of self-expression on a sidewalk, such as public safety.

NO DANGER TO THE COMMUNITY

While Alice might not be able to loiter on the sidewalk begging in front of a Fire Station (for example) for public safety reasons, she should be able to do so in front of the public center. There is no indication that there is any danger to the community in letting her exercise her free speech rights. Rather, her speech rights are being suppressed likely because the well-to-do do not want to suffer a beggar when they go out to the theater. This is not sufficient justification to violate Alice's right of free expression.

Bob should lose his appeal:

SUBWAY PLATFORM = QUASI-PUBLIC FORUM

A subway is not a public forum, like a park or a sidewalk. To access a subway platform one has to pay money. Therefore, it is more like a private forum, to which the rider has a license to be on the property. However, the grantor of the license is still a public entity (the city). So the subway platform is like a quasi-public forum. It has elements of being both a public and a private forum.

POTENTIAL DANGER

A quasi-public forum faces a standard of scrutiny similar to the public forum. Here, there is arguably a potential for danger to both Bob and the public. Subway platforms can be crowded places, and the subway trains typically approach at dangerous speeds in close proximity to the waiting passengers. Furthermore, even the rails of the train are often electrified. Finally, the crowds of people on subway trains are often hot, sweaty, in a hurry, tired, and thus more likely to have short tempers. For all these reasons, regulating begging has more value in this forum than on the sidewalk. It is possible that the crowds might push or shove one another (or Bob) to get away from the beggar. Furthermore, allowing begging on the platform would further congest an already dangerously congested area as other beggars moved in to beg in a beggar-friendly zone. Therefore, the state and city have reasonable justification to regulate begging on the subway platform (provided, of course, the statute is not overbroad).

Mac should lose his appeal:

STATE ACTION

Even though Mac was arrested in a private building, he was arrested subject to state action, and state action is what is at issue in his case. The state passed the anti-loitering statute, and the state enforced that statute with its police powers.

PRIVATE FORUM -- OPEN TO THE PUBLIC

The Downtown Lawyers Building is a private building. The state could not regulate what kind of speech could occur in a completely private building, in a completely private setting. But in a setting where the private owner(s) invite the public to their private space (e.g. bringing in employees, or, as here, a lobby open to the public) the state has the right to regulate speech.

PUBLIC CONCERN

Mac should lose his appeal because there is a public concern at stake when a beggar begs in a private, customer-driven establishment. There is not the danger that inheres in the subway platform, but there is a strong potential for a loss of revenue due to the begging. Customers will tire of the begging and may stop frequenting the lawyers building. If beggars could beg in every establishment open to customers, the aggregated effect may be that people will go out less and business, the economy, tax revenues and social programs will suffer. Therefore, the state has sufficient reason to regulate Mac's type of begging (again, assuming that the statute is not overbroad).

Answer B

2)

Validity of Section 4 Under the First Amendment

Alice, Bob and Mac have challenged their convictions under State X's loitering statute under the First Amendment of the Constitution. Although Alice, Bob, and Mac are indigent, the only issue on appeal is whether their rights under the First Amendment have been violated. Thus, there is no issue on appeal of whether the statute violates their rights under the Equal Protection Clause because they are indigent. There is also no issue of whether the statute is void for vagueness under the First Amendment because the parties have stipulated that is not void for vagueness.

Incorporation of the First Amendment Against State Governments

To challenge a statute on the basis that it violates their First Amendment rights, Alice, Bob, and Mac must demonstrate that there is some type of government action that has violated their rights. Under the due process clause of the Fourteenth Amendment, the limitations that the First Amendment places on federal government action have also been incorporated against the states.

Constitutional Standing

To bring a constitutional claim, a plaintiff must have adequate standing. This requires a showing of a personal injury; causation of that injury by state action; and redressability, which means that a favorable outcome in the case will result in the injury being redressed. Third party standing, which is the bringing of a suit by one person when another has suffered an injury, is prohibited in most circumstances. Similarly, generalized grievances are prohibited in most circumstances. A plaintiff must also show if she is seeking to prevent government action, that the controversy is ripe to be heard by the court, meaning that there is adequate factual development and it is an appropriate controversy for the court to hear. Finally, a case can be dismissed for mootness if the court will not be able to change the outcome, as a result of the Article III prohibition on courts issuing advisory opinions.

State X Government Action

Alice, Bob, and Mac must demonstrate that an arm of the State X government has taken some type of action which has violated their First amendment rights. Here, the state has convicted them of violating the anti-loitering statute. Thus, although it is unclear exactly what the penalty for conviction is, it is clear that Alice, Bob, and Mac have been penalized in some way by State X. Thus, the conviction constituted state action sufficient to allow Alice, Bob, and Mac to challenge the statute.

Implication of the First Amendment

The First Amendment prevents the government from limiting the rights of citizens to free speech. Although there are some circumstances in which this right can be limited, the government action must have sufficient justification. Here, the anti-loitering statute appears to be directed primarily at conduct, because it prohibits loitering, remaining, or wandering about in certain types of places. However, conduct, under certain circumstances[,] can also constitute speech. The statute also prohibits loitering for the purpose of begging, which may mean that people are penalized under the statute for what they are doing in specific areas. Thus, a person's right to both conduct as speech and to begging, which is a type of speech, may be limited under the statute. Therefore, the statute must satisfy the requirements of the First Amendment.

The Statute's Regulation as a Discrimination on Content and the Requirement of Strict Scrutiny.

If a state undertakes to regulate the speech of citizens in a way that discriminates on the basis of certain content, the statute must satisfy strict scrutiny to be upheld when the statute is enforced in certain areas. Similarly, if a statute regulates speech on the basis of the viewpoint it expresses, it also must satisfy strict scrutiny. A discrimination based on content means that certain types of speech are regulated or prohibited on the basis of what they say. Such an exercise of government power in choosing the types of speech that are appropriate is particularly disfavored under the First Amendment.

Here, Section 4 prohibits the activities of loitering, remaining, or wandering on certain property for the purpose of begging. Thus, the statute specifically prohibits activities associated with begging, which is a type of speech. If the statute only prohibited the activities of loitering or wandering, it might be argued that it was content neutral. Then, the statute could be upheld if it was demonstrated to be a reasonable time, place, or manner restriction enacted by the state to regulate the places or times at which speech might occur, rather than the actual content of the speech. But instead, this statute forbids speech related to begging. As a result, it can be argued that it is not content-neutral. The statute thus must withstand strict scrutiny to be upheld.

The Standard for Strict Scrutiny

To demonstrate that a restriction withstands strict scrutiny, the state has the burden of proving that the regulation is narrowly tailored to achieve a compelling government purpose. The regulation mus be the least restrictive means of the state achieving its purpose.

Alice's Case

Alice's Standing

Alice has standing to challenge her conviction under the anti-loitering statute. She has been personally injured by being convicted of the statute, which probably carries with it imprisonment, a fine, or some other type of punishment. The injury was caused directly by State X promulgating and enforcing a statute which violates her constitutional rights. Her injury is redressable, because if the appeals court decides on her behalf the conviction will be reversed. There are no ripeness or mootness concerns.

State Action

As discussed previously, the conviction in State X is adequate state action.

Alice Violated Section 4 on a Sidewalk, which is a Public Forum

Alice was convicted for loitering for the purpose of begging on a sidewalk located outside the City's Public Center for the Performing Arts. The location in which Alice was convicted of violating Section 4 is important, because a state has different abilities to restriction[sic] First Amendment rights depending upon where those rights are being exercised. Here, Alice's activities took place in what is called a public forum. A public forum is an area which is traditionally available to the public as a place in which they may exercise their First Amendment rights to free speech. Sidewalks and parks are classic public forums. In addition, the sidewalk on which Alice's activities took place was adjacent to the City's Public Center for the Performing Arts. This appears to be a municipal building. Sidewalks near public buildings are particularly important public forums because those are areas in which people may express their views in an effort to influence the way the city is governed.

Applicable Standard for Content Specific Restriction of First Amendment Rights in a Public Forum is Strict Scrutiny

The fact that Alice's activities took place in a public forum is important for determining the standard the city must satisfy to demonstrate that its restriction of her activities did not violate the First Amendment. As discussed previously, the city has the burden of showing that its regulation is narrowly tailored to achieve a compelling government interest.

The Compelling Government Purpose

Here, the purpose the government is attempting to achieve is unclear. It may be to deter what is seen as nuisance when people ask others for money on the sidewalk. It also might have something to do with the state's interest in preserving its aesthetic environment. These are unlikely to be found to be compelling government purposes that outweigh the exercise of others' First Amendment rights.

If there is crime affiliated with these activities related to begging, that might serve as a government purpose for the statute. Although reducing crime can be a compelling government purpose, the statute will also have to be narrowly tailored.

The Narrow Tailoring Requirement

Because it is unclear what exactly the government's purpose is, it is difficult to tell how narrowly tailored the statute is. However, if the statute was enacted to reduce crime, there are certainly ways that the government could address that crime more specifically by prohibiting the actual criminal activity rather than the begging that creates an environment in which such criminal activity may take place.

Validity of Alice's Conviction

Alice's conviction under the statute is thus invalid, because her activities took place in a public forum. The city may not curtail such activities in a public forum on the basis of content without a compelling government purpose that the statute is narrowly tailored to effectuate. Alice was penalized for exercising her First Amendment rights in an unconstitutional manner, and thus her conviction should be reversed.

Bob's Case

Bob's Standing

Like Alice, Bob has a personal injury in his conviction. That injury was caused by application of the statute to his activities, and may be redressed through the reversal of his conviction. Thus, he has standing to challenge the statute.

Bob's Activities Took Place in a Semi-Public Forum

Bob was convicted of violating the statute on a waiting platform at a stop on the city's subway system. This is likely to be found to be a semi-public forum. Such forums are not always open for speech activities like a public forum. Instead, the standard applied to regulation of speech in a semi-public forum depends on the type of speech the City permits there. If the City permits other First Amendment activities in the semi-public forum, it may not discriminate against other First Amendment activities on the basis of content or viewpoint.

Applicable Standard is Also Strict Scrutiny

If a semi-public forum is open for speech, content or viewpoint neutral restrictions on speech must also satisfy strict scrutiny. However, the type of forum may make this standard easier to fulfill. Here, the government has a compelling interest in making the subway stop a place in which traffic may smoothly operate so that the subway station may

fulfill its duties in transporting people through the city. Thus, activities which may [sic] it difficult for traffic to operate smoothly may be restricted. However, because this statute targets only particular types of speech, it may not be the appropriate method of ensuring that traffic operates smoothly. Such a regulation would likely target particularly problematic conduct, and not types of speech. Therefore, this statute is not narrowly tailored to uphold the state's interest in making sure the subway stop operates effectively.

Validity of Bob's Conviction

Because Bob's conviction for speech at the waiting platform took place under a content-discriminatory statute that was not narrowly tailored to effectuate the government's compelling interest, it should be reversed.

Mac's Case

Mac's Standing

Mac's conviction was a personal injury that was caused by State X's enforcement of its statute and is redressable through the overturning of the conviction. Thus, Mac has standing to challenge his conviction.

Mac was Loitering in a Non-Public Forum, on Private Property

Mac's conviction was for loitering for the purpose of begging in the lobby of the privately owned Downtown Lawyers' building in the business district of city. Thus, Mac's conviction took place as a result of his activities on private property.

Mac's Conviction is not Subject to Strict Scrutiny unless the Building is Serving a Public Function

Mac does not have the same right to speak on private property that Alice and Bob had in public of[sic] semi-public forums. The sole exception to this is if the private forum is serving a public function, which means that the private forum is serving a role typically served by public buildings or areas. However, there are very few examples of private property which serve a public function, other than private company towns that replace a public municipal government. This appears to be a private office building which is not implicated in any function of governing. Thus, the building is not a public forum. Therefore, his conviction is not subject to strict scrutiny.

Validity of Mac's Conviction

Mac cannot challenge his conviction under the First Amendment because he was conducting his activities on private property on which he had no First Amendment right to speak. Therefore, his challenge to the statute will be unsuccessful and his conviction will

be upheld.

Validity of the Conviction

Q3 Wills / Trusts

Hank, an avid skier, lived in State X with his daughter, Ann. Hank's first wife, Ann's mother, had died several years earlier.

In 1996, Hank married Wanda, his second wife. Thereafter, while still domiciled in State X, Hank executed a will that established a trust and left "five percent of my estate to Trustee, to be paid in approximately equal installments over the ten years following my death to the person who went skiing with me most often during the 12 months preceding my death." The will did not name a trustee. The will left all of the rest of Hank's estate to Wanda if she survived him. The will did not mention Ann. Wanda was one of two witnesses to the will. Under the law of State X, a will witnessed by a beneficiary is invalid.

In 1998, Hank and his family moved permanently to California. Hank then legally adopted Carl, Wanda's minor son by a prior marriage.

In 2001, Hank completely gave up skiing because of a serious injury to his leg and took up fishing instead. He went on numerous fishing trips over the next two years with a fellow avid fisherman, Fred.

In 2003, Hank died.

In probate proceedings, Wanda claims Hank's entire estate under the will; Ann and Carl each claim he or she is entitled to an intestate share of the estate; and Fred claims that the court should apply the doctrine of *cy pres* to make him the beneficiary of the trust.

1. Under California law, how should the court rule on:
    a. Wanda's claim? Discuss.
    b. Ann's claim? Discuss.
    c. Carl's claim? Discuss.

2. How should the court rule on Fred's claim? Discuss.

Answer A

3)

1. UNDER CALIFORNIA LAW, THE COURT'S RULING ON:

A. WANDA'S CLAIM

Wanda will argue that the will is valid and she is therefore entitled to at least 95% of Hank's estate, as described under the will.

1. Validity of the Will

a. Choice of Law

In order to determine whether the will is valid, it must first be decided what law will apply. The facts state that Hank dies while living in California. A will will be valid if it is valid in the state in which it was executed, the state in which the testator was domiciled at the time of execution, or the state in which the testator died. The will was executed in State X, and while Hank was domiciled in State X. Although the facts state the will would be invalid in State X, it is not necessarily invalid in California, the state in which Hank was living at the time of his death. The following is a discussion of the will's validity in California.

b. Requirements for an Attested Will

Under California law, for an attested will to be valid, it must be signed by the testator in the presence of two disinterested witnesses. An interested witness is one who is a beneficiary under the will. If a witness is "interested", the entire will is not invalid, but there is a presumption that the portion which the interested witnessed[sic] received is invalid.

Under the facts of this case, Wanda was to receive 95% of the estate. In addition, she was one of two witnesses to the will. Therefore, there is a presumption that the portion left to her is invalid. If Wanda cannot overcome this presumption, she will not be left with nothing; rather, she will still be entitled to her intestate portion under the will.

c. Wanda's Intestate Portion

Under intestacy, a spouse is entitled to receive all community property, and at least 1/3 and up to all of her deceased spouse's separate property, depending on whether or not the decedent left any surviving kin. In the present case, Hank left Ann and Carl. Where two children are left, the testator's estate is divided in 1/3 portions among the spouse and the two children. Therefore, Wanda will obtain 1/3 of Hank's remaining estate.

B. ANN'S CLAIM

1. Omitted Child

Ann will argue that she was an omitted child and, in the event the will is found valid in its entirety, other interests should abate and she should receive an intestate portion of Hank's estate. However, Ann will be unsuccessful in this argument because Ann was alive and known about prior to Hank's execution of the will, and she was not provided for on the will.

2. Intestate Portion

Ann will therefore argue that the aforementioned devise to Wanda is invalid and that she is in this way entitled to her intestate portion of the remaining interest. As discussed above, Ann will be entitled to 1/3 of Hank's estate through intestacy.

C. CARL'S CLAIM

1. Pretermitted Child

Carl will first argue that he was a pretermitted child, as he was adopted after the will was executed. Therefore, he will argue that, if the devise to Wanda is valid, her interests should abate to account for his intestate portion. However, the fact that Ann was excluded from the will harm Carl's interest, as this will evidence as intent not to devise any portion of his estate to his children.

2. Intestacy & Adopted Children

Therefore, Carl will argue that the devise to Wanda is invalid and that he should be entitled to a portion of the remainder of the estate through intestacy. The fact that Carl is adopted and not a child by Hank's blood will not affect Carl's portion because under California law, adopted children are treated the same in intestacy as children by blood.

2. COURT'S RULING ON FRED'S CLAIM

Hank's Will also included a trust. This is called a pour-over will. In order for the pour-over will to be valid, it must meet the requirements of a valid trust.

A. Validity of the Trust

1. Requirements

In order for a trust to be valid, it must have 1) an ascertainable beneficiary, 2) a settlor, 3) a trustee, 4) a valid trust purpose, 5) intent to create a trust, 6) trust property

(res), and 7) be delivered.

2. Lack of Trustee

The facts state that the trust lac[k]ed a trustee. The lack of a trustee, however, is not fatal, as a court can appoint a trustee to administer the trust.

3. Trust Property

The trust property is clearly identified in the will, as “five percent of my estate...to be paid in approximately equal installments over the 10 years following my death...” Therefore, this requirement is satisfied.

4. Delivery

The delivery requirement is met through the inclusion of the trust into Hank’s will.

5. Unascertainable Beneficiary

The fact that the beneficiary is not named poses the biggest problem for the trust. In order for the trust to be valid, a beneficiary must be ascertainable. In the present case, the beneficiary is not named, but rather is described as “the person who went skiing with me most often during the 12 months preceding my death.” Courts can use a variety of methods to ascertain the identity of a beneficiary when he or she is not specifically named on a will, such as: Incorporation by Reference or Facts of Independent Significance. Neither one of these are helpful in the present case.

Incorporation by reference allows a testator to incorporate into a will a document or writing if it is in existence at the time of the will, a clear identification is made, and the intent to incorporate is present. In the present case, the identity of beneficiary was not presently in existence. Therefore, this method fails to assist in ascertaining the beneficiary.

Facts of independent significance can also be used to incorporate outside items into a will. Although the identity of the person most frequently skiing with Hank would have independent significance, it is of little help here since Hank suffered a serious injury to his leg and thus gave up skiing. Therefore, this method also fails to assist in ascertaining the identity of a beneficiary.

When there is no ascertainable beneficiary, a resulting trust occurs. This means that the trust property returns to the settler’s estate.

5. Cy Pres

Fred, however, will argue that under the doctrine of cy pres, the property should not

be returned to the settlor's estate, but should go to him instead.

Cy pres is a doctrine which provides that, where a charitable trust fails for lack of a beneficiary or other impracticality, the court should apply cy pres and grant the trust property to another charity which conforms with the trust purpose.

In the present case, Fred will argue that the purpose of the trust was to further leisurely sports and camaraderie. Fred will compare fishing with skiing, and argue that the two activities were similar in that they provided the opportunity for friends to come together and enjoy each other. Therefore, because it [sic] the two purposes are so similar, and because Fred went on numerous fishing trips with Hank, Fred will argue that he should be entitled to the trust property.

However, in order for cy pres to apply, the purpose of the trust must be charitable. Under the Statute of Elizabeth or the common law, this trust purpose, however Fred defines it, is not charitable. It does not alleviate hunger, help sick, further education, or health. Therefore, the doctrine of cy pres is inapplicable, and a resulting trust will occur. Therefore, the 5% will retain to Hank's estate and be divided among Wanda, Ann, and Carl accordingly.

Therefore, Fred will get nothing, and Wanda, Ann, and Carl will each get 1/3 of Hank's separate estate, and Wanda will get all of her and Hank's community property.

Answer B

3)

1. Under California law, how should the court rule on:

a. Wanda

Wanda (W) claims that she is entitled to Hank (H)'s entire estate under the will. In order to make that claim, the will must first be proved to be valid.

Valid Will?

Choice of Law

The will was executed in State X, and under State X's laws the will would be invalid because a will witnessed by a beneficiary is invalid. W, as a beneficiary receiving the residue of H's estate, was one of the witnesses, and therefore the will would be invalid under the laws of State X.

However, the parties moved and became domiciled in California. Under California law, a will is valid if it complies with the statute of the place where the the will was executed, where the decedent was domiciled when the will was executed, or in compliance with the statute of the jurisdiction where the decedent was domiciled when he died.

Here, while the will is not valid under State X's laws, H was domiciled in California when he died. If the will is valid under California laws, then the will is valid and will be probated. A formally attested will to be valid in California must be in writing, signed by the testator or a third party at his or her direction, in the presence of two witnesses, and the witnesses understand what the testator is signing is his or her will.

Here, the will is valid under California law. First, the will is in writing, and it was executed by H. Further, two witnesses signed the will (but please see "interested witness" below), thus meeting that requir[e]ment. Presuming that the witnesses understood that what H was signing was his will, then California will formalities have been complied with.

Interested Witness

It is important to note that California does not invalidate a will because one of the witnesses is a beneficiary under the will. A witness is interested if the witness will directly or indirectly benefit from the will. If there is a necessary interested witness, California validates the will, but there is a presumption that improper means were used by the interested witness to obtain the gift. A witness is necessary if without her there is only one other witness. If the interested witness overcome[sic] the presumption, she will take under

the will. If, however, the presumption cannot be overcome, then she will only get to take her intestate share of the estate, and no more.

Here, W was an interested witness because she is taking under the will. Further, W was necessary to make the will valid because without her signature, there was only one other witness. Therefore, a presumption of improper influence arises. However, W should be able to easily overcome this presumption. W, being the wife of H, is a natural object of H's bounty. Common sense would dictate that W would receive a substantial share of H's estate. If W can provide some evidence that they had a good relationship, and that he had told her she would get a good share of her estate, that should be enough to overcome the presumption.

Intestate Share

Even if W is unable to overcome the presumption, W is entitled only to her intestate share. However, W's intestate share would be a sizeable share. W would be entitled to H's ½ of the community property and quasi-community property. Community property is that property acquired during marriage while the parties were domiciled in California. Here, this would include all the property acquired through the earnings of H and W and the rents, issues, and profits therefrom, since 1998 when the parties were domiciled in California through H's death in 2003.

W would also be entitled to ½ of the quasi-community property. Quasi-community property is property that was acquired while the parties were domiciled elsewhere that would have been community property had the parties been domiciled in California. Therefore, all property acquired during the marriage between 1996 and 1998 would be quasi-community property. Upon the acquiring spouse's death, that property would go to the surviving spouse. Because W would already own ½ of the community and quasi-community property, W would end up with all of the community and quasi-community property at the end.

Regarding H's separate property (sp), H has the power to dispose of all of his separate property as he sees fit. However, W, as H's surviving spouse, would be entitled to an intestate share of H's separate property if she cannot overcome the presumption. In California, if the decedent dies without any issue, then the sp goes all to the surviving spouse. If he dies with one issue or parents or issue of parents, then the surviving spouse gets ½ of H's sp. If the spouse dies with two or more issue (or issue of a predeceased issue), then the surviving spouse gets 1/3 of H's sp.

Here, H died with two issue surviving- Ann and Carl. Therefore, W's intestate share of H's sp would be 1/3 of all separate property.

Therefore, even if W is unable to overcome the presumption of improper influence, she still will be able to obtain quite a bit of property because of the intestate succession

laws.

In Other Claims

F's claim will be discussed below, as well as C's and A's claim. This is just to note that if all of these three claims fail, then W will take the entire estate of H, both sp and cp. However, if any of these claims do not fail, then W will not get to take the entire estate because the claimant will be entitled to whatever stake his or her claim had.

b. Ann's Claim

A's claim will be based on California's pretermitted child statute. A, a child of H, was left out of H's will. Under the pretermitted child statute, a child that is born or adopted after the will or codicil is executed, and is not mentioned in the will, will be able to receive an intestate share of the decedent's estate, unless the decedent made it clear in the will that a pretermitted child will not inherit, the child is being supported outside of the will, or the decedent has another child and leaves all or substantially all of his estate with the parent of that child.

Here, A's claim will fail because she was alive when H executed his will, and H did not include her in the will. The only exceptions to this rule are if the decedent thought the child is dead or did not know the child existed. Neither of these two are applicable here. H and A lived together in State X, so it is clear that H knew of A and did not think she was dead. A's claim for an intestate share will fail because she was not a pretermitted child.

c. Carl's Claim

C's claim will also be on the pretermitted child statute. Please see immediately above for a discussion on the statute. Here, C was a pretermitted child because he was adopted after H's will was executed. For an adopted child the time is when the child is adopted, not when the child was born. Therefore, unless one of the three exceptions applies, C will receive an intestate share.

First, there is nothing in the facts indicating that the H's will says he won't take. Second, there is nothing demonstrating that C is provided for outside of the will.

However, H does have one child surviving (A), and all or substantially all of the assets are being given to the parent of C, W. Under the third exception, C will not be able to receive an intestate share. C may argue that A is not a child of W. However, the statute says that if the decedent has one child, and the assets are given to the parent of the child claiming, then the exception applies. Here, because those two requirements are met, C will not be entitled to an intestate share. Note that if the statute said the other child living had to be the child of the parent receiving the assets, then the exception would not apply and C would receive an intestate share.

2. Fred's Claim

Fred (F)'s claim depends on whether there was a valid private express trust, and if so, whether the doctrine of cy pres even applies to this trust.

Valid Trust

A trust must have trust property, a trustee, beneficiaries, manifestation of intent by the testatory, creation, and a legal purpose.

Property

First, there is trust property because the will says the property will be 5% of H's estate.

Trustee

Second, there is no trustee named. While a trust must have a trustee, a trust will not fail for want of a trustee. Therefore, a court will appoint someone to be the trustee.

Beneficiary

Third, there is an issue as to whether there is a definite and ascertainable beneficiary. In a private express trust, there must be a definite and ascertainable beneficiary. From the face of the will, there is no beneficiary, and so this may be a problem for F. F will want to resort to other methods to prove it was him.

Integration nor incorporation by reference will not work because both require a writing or document, and there is no writing or document here.

However, F may be able to prove himself under the doctrine of facts of independent significance. The question here is: Would this fact have any independent significance other than the effect on the will? If the answer is yes, then parol evidence may be introduced and that fact will become part of the will. Here, F can make a good argument that whoever is fishing (or skiing) with H the most before his death is a fact that has independent significance outside the will. H will be fishing (or skiing) with this person because they like each other's company, a fact that is significant outside the will. Therefore, F should be allowed to introduce evidence that he was the beneficiary under this doctrine.

But note- if F is not really the beneficiary because he does not meet this requirement, then this trust will fail for lack of beneficiary (please see below, towards the

end).

Manifestation of Intent by Settlor

H, the settlor, clearly had the present intent to create a trust when he executed his will. The terms of the will, using words of direction directing the trustee to pay the beneficiary. Thus, there is sufficient intent.

Creation

A trust may be created either inter vivos or testamentary. A testamentary trust is a trust that is contained in a will. In order for a testamentary trust to be valid, the will must have been executed with the proper formalities.

Here, H has created a testamentary trust by placing the trust in the will to take effect upon H's death. As discussed above, the will was properly executed under California's will statute. Therefore, there was sufficient creation.

Legal Purpose

A trust must serve a lawful purpose. Here, there is a lawful purpose in giving a beneficiary an installment of money over a period of ten years. Nothing in this trust is unlawful.

Therefore, all of the requirements for a trust have been met and there is a valid trust.

Cy Pre[s]?

The trust's terms specially said that the payments would go to whoever was skiing with H the most during the last 12 months of his life. F fished with H the most during the last 12 months of H's life, and now seeks to have the doctrine of cy pre[s] apply.

The doctrine of cy pres applies to charitable trust, when the settlor had a general charitable intent, but the mechanism for expressing the intent has been frustrated. If this is the case, the court will order a new mechanism to express the settlor's charitable intent.

Charitable Trust?

A charitable trust is a trust created for the benefit of society, for such purposes as education, the arts, etc. It is very similar to a private express trust (requiring trust property, a trustee, a beneficiary, manifestation of intent, creation, and lawful purpose), but has two significant differences: first, the beneficiaries must be unascertainable, ie, a large class,

because the “real” beneficiary is considered the public. Second, cy pres only applies to charitable trusts, not to private express trusts. Note also that the Rule Against Perpetuities does not apply to a charitable trust either.

Here, the trust created is not a charitable trust for several reasons.

First, there was no general charitable intent. Nothing in the trust was to benefit education, etc. This lack of charitable intent is shown by the fact that the beneficiaries are not a large class. Rather, the beneficiary is one person. Therefore, this is too ascertainable to be a charitable trust.

Because this is not a charitable trust, the doctrine of cy pres will NOT apply because the doctrine does not apply to private express trusts. F will not get to share in the estate.

Trust Fails For Lack of Beneficiary

This trust will now fail for lack of a beneficiary. F does not meet the terms of the trust, and neither does anyone else. Therefore, there is no beneficiary. When a trust fails for lack of beneficiary, a resulting trust in favor of the settlor or settlor’s heirs occurs. A resulting trust is an implied in fact trust based on the presumed intent of the parties. Therefore, the 5% of the estate will result back to H’s heirs- which is only W under the will. W therefore, will end up taking H’s entire estate under the fact pattern presented in this question.

THURSDAY MORNING
JULY 29, 2004

California Bar Examination

Answer all three questions. Time allotted: three hours

Your answer should demonstrate your ability to analyze the facts in question, to tell the difference between material and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit.

State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

Q4 Evidence

Victor had been dating Daniel's estranged wife, Wilma. Several days after seeing Victor and Wilma together, Daniel asked Victor to help him work on his pickup truck at a nearby garage. While working under the truck, Victor saw Daniel nearby. Then Victor felt gasoline splash onto his upper body. He saw a flash and the gasoline ignited. He suffered second- and third-degree burns. At the hospital, he talked to a police detective, who immediately thereafter searched the garage and found a cigarette lighter. Daniel was charged with attempted murder. At a jury trial, the following occurred:

a. Tom, an acquaintance of Daniel, testified for the prosecution that Daniel had complained to Tom that Victor had "burned" him several times and stated that he (Daniel) would "burn him one of these days."

b. Victor testified for the prosecution that, while Victor was trying to douse the flames, Daniel laughed at him and ran out of the garage.

c. At the request of the prosecutor, the judge took judicial notice of the properties of gasoline and its potential to cause serious bodily injury or death when placed on the body and ignited.

In his defense, Daniel testified that he was carrying a gasoline container, tripped, and spilled its contents. He denied possessing the lighter, and said that the fire must have started by accident. He said that he ran out of the garage because the flames frightened him.

d. On cross-examination, the prosecutor asked Daniel, "Isn't it true that the lighter found at the garage had your initials on it?"
The prosecutor urged the jury to consider the improbability of Daniel's claim that he had accidentally spilled the gasoline.

e. During a break in deliberations, one juror commented to the other jurors on the low clearance under a pickup truck parked down the street from the courthouse. The juror measured the clearance with a piece of paper. Back in the jury room, the jurors tried to see whether Daniel could have spilled the gasoline in the way he claimed. One juror crouched under a table and another held a cup of water while simulating a fall. After the experiment, five jurors changed their votes and the jury returned a verdict of guilty.

Assume that, in each instance, all appropriate objections were made.

1. Should the court have admitted the evidence in item a? Discuss.
2. Should the court have admitted the evidence in item b? Discuss.
3. Should the court have taken judicial notice as requested in item c? Discuss.

4. Should the court have allowed the question asked in item d? Discuss.
5. Was the jury's conduct described in item e proper? Discuss.

Answer A

4)

A. Tom's (T) Testimony Re Daniel's (D) Statement

The issue is whether T's testimony regarding Daniel's prior statement that D would "burn him (Victor- V) one of these days" is admissible against D.

Logical Relevance

Evidence is logically relevant if it has the tendency to make any fact of consequence in the case more probable or less probable than it would be without the evidence. Here, the main issue of the case is whether D tried to murder V. The statement that D would burn V at some point is relevant to prove that D acted intentionally, rather than accidentally, as claimed.

Legal Relevance

Evidence must be discretionarily relevant and there must not be any extrinsic public policy reasons against its admission. The judge has the discretion under FRE 403 to exclude relevant evidence if the probative value is substantially outweighed by the danger of unfair prejudice, jury confusion, misleading or waste of time, among other reasons.

Here, the statement that D would "burn" V is probative of D's motive for acting and for rebutting D's claim that it was an accident, however it is also highly prejudicial to D. All evidence is prejudicial to one party, however, and 403 will only exclude it if the prejudice substantially outweighs probativeness, which is the not the [sic] case here.

As there are not public grounds for excluding the evidence, it would be logically and legally relevant.

Presentation

T testified apparently in the prosecution's case-in-chief. Because T was the person spoken to, he has personal knowledge of the statement and, so long as he could communicate it and appreciate his oath to tell the truth, would be competent to testify.

Hearsay

Hearsay is a statement made by the declarant other than at trial that is introduced for the purpose of proving the truth of the matter asserted in the statement. Hearsay is inadmissible unless it falls within one of the hearsay exceptions within the federal rules. Here, the statement was made out[-]of[-]court by D in a conversation with T.

Truth/Non-Hearsay

The prosecution will argue that it is not introducing the statement for it's [sic] truth, but rather as circumstantial evidence of D's state of mind, which is not hearsay under the rules. The prosecution will claim that the statement indicates that D had a grudge against T and his state of mind was one of hatred or disdain. Because attempt is a specific intent crime, this non-truth assertion could be relevant to show that D had the intent to harm T. This argument has merit, however, it would be better for the prosecution's case if it can get the statement in for the truth.

Admission by a Party Opponent

A statement by a party opponent is not hearsay under the federal rules and comes in for the truth. It need not be against interest when made and may be based on hearsay. In this case, D made the statement to T and it could come in against him as non-hearsay under the FRE.

Hearsay Exceptions
Present Intent

A statement made by a person showing an intent to do something is an exception to the hearsay rule and may be admissible to show that the declarant actually followed through with the act in question. Though more commonly associated with statements like "I'm meeting Joe at 10 on Tuesday" to show that the meeting with Joe happened, here it could be admissible to show that D followed though with what he said he was going to do and actually burned V.

B. V's Testimony that D Laughed While V was Trying to Douse Flames

Relevance

V's testimony is logically relevant because it tends to prove that D acted with an intent to harm V in that, if he hadn't meant for V to catch on fire he would not have been laughing and he would try to help V. Also, it contradicts D's claim that he ran out of the garage frightened.

V's testimony is prejudicial against D, as it tends to paint him as quite the villain, however it is not unduly so and it does not substantially outweigh the probative value. No public policy considerations apply. Accordingly the evidence is relevant.

Presentation

V is testifying in the prosecution's case[-]in[-]chief. As the victim, V was present at the accident and has personal knowledge of the events, although V could be subject to impeachment regarding his ability to really perceive what was happening (he was on fire, after all). However, V has personal knowledge and is competent to testify so long as he has memory, can communicate and can appreciate the requirement of telling the truth.

Hearsay

As mentioned, hearsay is an out[-]of[-]court statement made by the declarant for the purpose of proving the truth of the matter asserted in the statement.

Statement

The issue here is whether D's laughing was a statement. Assertive conduct is treated like a statement and subject to all the hearsay rules. Generally, assertive is that which tends to substitute for a statement, such as nod of the head instead of "yes" or pointing in a direction instead of "turn left." Because it has the effect of a statement, assertive conduct is treated like a statement.

D will argue that the laughing is assertive conduct and thus inadmissible to prove the truth, that D laughed, unless it fits within a hearsay exception or may be non-hearsay. He will argue that it is the equivalent of a statement such as "this is great" or "I said I would burn you."

The prosecution will counter with the argument that it was merely laughing and, unlike assertive conduct such as pointing or nodding, there is no way to determine what was meant by it so it cannot be assertive. It is more likely that a judge would overrule an objection by the defense and that V's testimony comes in and is not hearsay.

Exceptions/Non-hearsay

Even if the judge were to reject the prosecution's argument, the statement could come in as an admission by a party opponent, as discussed earlier. Alternately[sic], it could be admissible as an excited utterance because the laughter was made while D was under the stress of the excited event and arguably related to the startling event.

C. Judicial Notice of the Properties of Gasoline

It is proper for a court to take judicial notice of things that are easily proven or of common knowledge in the community. If evidence is required to demonstrate the fact in question, judicial notice may not be proper. The effect of judicial notice in a criminal case

is to satisfy the prosecution's burden of proof, but the jury may elect to disregard the judicially noticed fact and decide otherwise.

The issue is thus whether the properties of gas and its potential to cause serious bodily injury or death when placed on the body and ignited was proper. On the one hand, most adults drive and are familiar with gas stations and the warnings that are all over the station regarding no flames. One the other hand, most people have not played around with gasoline and matches and are not likely familiar with the effects it can have on the body- how long it will burn, how much gas needs to be on the person, when it will explode, etc. This is important because if there is a certain amount of gas required, D could argue the amount spilled on V was insufficient.

While it may have been proper to take judicial notice of the flammable quality of gasoline, the effects of its ignition are not so likely common knowledge. Accordingly, the judge erred in taking judicial notice of this fact and should have required the prosecution to present expert testimony regarding the specific potential of gas to cause serious injury or death when placed on the body and ignited.

D. Cross-Examination of D re Lighter

Relevance

The question tends to prove ownership of the lighter and refute D's claim that he did not own it/impeach him on that issue. It is highly probative and, while somewhat prejudicial, the prejudice does not substantially outweigh the probative value. There are no policy[-]based reasons for exclusions and, accordingly, the evidence is properly admissible.

Form

Leading

A question that suggests the answer is a leading question and is generally not allowed. Here, the prosecutor's question suggests that the lighter had D's initials on it, and is thus leading. Leading questions are allowed, however, on cross-examination, preliminary matters, hostile witnesses and witnesses who are having trouble remembering. Accordingly, because this was cross[-]exam, the leading question was proper.

Assumes Facts in Evidence

The question assumes that, one, there was lighter [sic] found that has been introduced, which on these facts has not been introduced into evidence. The lighter could be an exhibit and would have to be introduced by someone with knowledge[,] who could authenticate the lighter and indicate the chain of custody. After this a proper foundation would be laid and the prosecution could ask the question.

The lighter may self-authenticate, however, as sort of a label, but that is generally

reserved for commercial items.

Best Evidence

The initials on the lighter could be considered a writing and the question is aimed at oral testimony to prove its contents. The best evidence rule requires that, before testimony regarding contents may be given, the original, in this case the lighter[,] must be produced or a decent reason for its absence must be given. Here, there is no indication that the lighter has been introduced and thus the content of it, the initials, could not be testified to by D if his only knowledge of the content came from the lighter.

E. Jury's Conduct

Juries are prohibited from conducting independent investigations of the case, and such conduct may result in a mistrial for the defendant. Here, one juror when [sic] and measured the clearance on a pickup and the jury tried to re-enact the "accident" in the jury room. Jurors are not restricted to what they can do in the jury room and may use any means to explore and discuss the facts. The only real issue is whether the measuring of a, not D's, pickup truck was independent investigation, plus it was done while the jury was in recess and should not have been discussing the case.

It is likely that the act by the juror was impermissible independent investigation, because he went outside the evidence presented in court. Accordingly, the case should be declared a mistrial unless it can be shown that it was harmless error.

Harmless Error

An error is harmless if, even without the error, there is no reasonable doubt that the case would have come out differently. Here, the independent investigation resulted in a demonstration that changed the minds of 5 jurors, which would have resulted in a hung jury. On the other hand, the jurors, in their deliberations may have eventually decided to act out the event and could have guessed at the clearance of the truck and come to the same conclusion. Although a jury is not allowed to testify regarding what happens in the jury room, unless 3 or more of the 5 would not have eventually changed their minds the error would be harmless. Because it is likely that the jury would have eventually acted out the incident, the error is likely harmless and the juror misconduct, though improper, will not have an effect on the outcome of the case.

Answer B

1) The issue is whether the ct should have admitted T's testimony that D complained of being "burned" by V & that he would "burn" V one day.

Relevance

Evidence is relevant if it tends to make any fact of consequence in a proceeding more or less probable. Here this evidence is relevant b[e]c[ause] it tends to make it more likely that D was the one who caused the fire that burned V & more likely that it was not an accident as D claims it was, but deliberate.

However, even evidence that is logically relevant may be excluded if the court finds that its probative value is substantially outweighed by its unfair prejudicial effect to the party ag[ains]t whom it is offered. Here, T's st[ate]m[an]t is offered ag[ains]t D to show the fire wasn't an accident. It's [sic] probative value is great b[e]c[ause] it is a st[ate]m[en]t that D himself said he wanted to "burn" V & V was in fact literally burned in a fire D claims he started by accident. It is very prejudicial to D b[e]c[ause] it tends to completely negate D's accident defense. However, it is not unfavorably prejudicial - it doesn't increase the chances that the jury will convict just b[e]c[ause] D is a bad guy, rather it goes right to the central issue in the case of whether the fire was deliberate or accidental. Thus, the court shouldn't exclude it on this basis.

Character Evidence in Crim Case

The prosecution cannot present evidence of bad character of a "' in a criminal case unless character is directly at issue or unless the "' initiates by putting a pertinent trait of his own or the victim's character substantively at issue. In addition, the prosecution can't use evidence of specific instances, only reputation or opinion evidence to establish character.

Here, this testimony about D is being offered in our attempted murder case where character is not an element of the crime. It is being offered in the prosecution's case[-]in[-]chief, it is arguably character evidence b[e]c[ause] the statement about D casts D in a bad light b[e]c[ause] it makes him look like a vindictive person out to get V b[e]c[ause] he feels V has "burned" him by dating his estranged wife. In addition, it is evidence of a specific instance where D told T something, not evidence of D's reputation for vindictiveness or violence or T's opinion to that effect. Thus, it seems at first glance that it is barred by the rules against character evidence in criminal cases offered by the prosecution.

However, the prosecution is entitled to offer evidence of specific instances by the"'even if it reflects negatively on the "''s character if offered for a non-character if offered for a non-character purpose such as sharing motive or intent to commit a crime.

Here, D's st[ate]m[en]t about feeling burned by V is relevant to show he had a motive to

harm V deliberately. This is especially true in light of the fact V was seeing D's estranged wife b[e]c[ause] that gives meaning to what D meant when he said he felt burned. In addition, his saying he was going to burn V someday is evidence of intent to do the instant crime. Thus, T's st[ate]m[en]t is admissible even if it is specific instance that reflects badly on D's character offered in the state's case[-]in[-]chief.

Personal Knowledge

Witnesses can only testify as to matters of which they have personal knowledge. Here T has personal knowledge of D's st[ate]m[en]t because it was made directly to him.

Hearsay (HS)

HS is an out[-]of[-]court st[ate]m[en]t offered for the truth of the matter asserted therein.

D's st[ate]m[en]t was made to T out of court before the burning incident took place. It is being offered to show that D wanted to burn V & had motive to do so. Thus, it is hearsay & should be excluded unless an exclusion or exception applies.

Party Admission

St[ate[m[en]ts by a party, offered against a party[,] are deemed non-HS under the criminal law & the FRE.

Here the statement is by D - the "' in this case & it is being offered ag[ains]t him. Thus it is non-HS and can come in.

St[ate]m[en]t ag[ains]t Interest

Statements by any person that are against their penal, property, or civil liability interest at the time made are admissible even if HS as long as the declarant is unavailable at trial.

Here D's st[ate]m[en]t was arguably ag[ains]t his penal interest when made b[e]c[ause] it clearly showed he had intent to do harm to V. However, D is not unavailable b[e]c[ause] he has taken the stand in this case & has waived his privilege against self[-]incrimination w[ith] respect to his motive using an accident defense. Thus this exception doesn't apply.

State of Mind of Declarant

St[ate]m[en]ts offered as direct evidence of a declarant's state of mind are admissible HS. Here, this st[ate]m[en]t is being offered to show that D had a motive & intent to hurt V & the st[ate]m[en]t is precisely about D having had that state of mind. Thus it is admissible under this exception.

The court didn't err in admitting T's st[ate]m[en]t.

2) V's Testimony
Relevance

V's st[ate]m[en]t about D laughing and running out while V was burning is relevant b[e]c[ause] it tends to show D wanted V to burn & again makes his accident defense less likely.

However, the probative value of this is low, the mere fact that D didn't help V & may have laughed doesn't necessarily mean D deliberately set the fire, although his general animosity towards V may have led him to laugh at V's misfortune & leave instead of helping him. On the other hand, the potential the jury will convict D b[e]c[ause] he was coldhearted & callous & not just b[e]c[ause] he actually deliberately set the fire is great. Thus the court should use its discretion to exclude this testimony.

Character Evidence

This was evidence of a specific instance where D laughed & declined to help V, & it reflects very poorly on his character. It was offered by the prosecution in its case[-]in[-]chief. Thus it should be excluded as impermissible character evidence b[e]c[ause] it doesn't seem relevant to any noncharacter purpose & will only inflame the jury against D b[e]c[ause] he acted in a morally reprehensible way by laughing & turning his back on V.

Hearsay

A nonverbal act can be a st[ate]m[en]t for the purposes of the HS rule if it is intended as an assertion. Here D laughed & walked out on V. This may arguably be intended as an assertion by D to V of his hatred for V & his delight that V was burning. Thus, it might be subject to exclusion as an out[-]of[-]court st[ate]m[en]t.

However, even if this argument were accepted[,] it would come in under the party admission exclusion b[e]c[ause] it was conduct by D, and is being offered ag[ains]t him.

3) Judicial Notice

Judicial notice of adjudicative facts (facts that have to be proven in a case) is proper when the facts noticed are either CD notorious facts commonly known to the public or @ facts capable of ready & accurate verification.

Here the prosecution formally requested the court notice the fact that gasoline has certain chemical properties & has potential to cause serious injury or death when placed on the body & lit.

These facts will probably qualify under both categories. It is common knowledge that gasoline is highly flammable & even if lay people weren't aware of all its properties these are scientific facts capable of ready verification. In addition, it is common knowledge that

person's[sic] can be seriously hurt or killed if doused w/ gasoline that is then ignited. Moreover, that is again something capable of verification by expert testimony/scientific experiment. Thus, it was proper for the judge to notice these facts.

Effect of Notice

Since this was a criminal case, the effect of this notice was to relieve the prosecution of its burden of proving these facts & the jury could be told that the prosecution had met its burden but didn't have to accept it as conclusively proven.

4) Question on X

Every party has an absolute right to cross any live witness - even if that witness is the " " in a criminal case.

Here D took the stand & testified, thus he is subject to cross[-]examination on matters relating to his testimony on direct, or else his direct must be stricken.

D testified that he didn't have any lighter w/ him when he was in the garage. Thus it is proper for the prosecution to question him about the lighter on X.

Impeachment

Any witness can be impeached w/a prior inconsistent statement that is materially different from his testimony at trial.

Here D, [sic] testified that he didn't have any lighter when at the garage. The prosecutor is asking him about the lighter found at the scene that has his initials on it which clearly states that the lighter was in fact his. Since this is materially different from what D said at trial, the prosecution is entitled to use it to impeach D & discredit his testimony.

In addition, b[e]c[ause] the prior inconsistent st[ate]m[en]t of D's initials written on his lighter qualifies as a party admission, (st[ate]m[en]t by D, offered ag[ains]t him), the prosecution can use it as substantive evidence that the lighter did in fact belong to D.

5) The issue is whether the jury's conduct during deliberation was proper.

Jurors are not permitted to conduct independent investigations of the facts. Rather they are supposed to look at the facts presented by the parties & to apply the law as instructed by the judge.

Here, the jurors took their own initiative to go out & measure a truck that wasn't even the truck involved in the accident, & to reenact the accident themselves in the jury room. This was prohibited conduct, & in a criminal case could be grounds for mistrial if it had a

substantial effect an the outcome of the case.

Here the experiment led 5 jurors to change their votes. Thus they clearly affected the case & therefore a mistrial should be declared.

Q5 Professional Responsibility

After working for ten years as a deputy district attorney, Lawyer decided to open her own law practice and represent plaintiffs in personal injury actions. In order to attract clients, Lawyer asked her friends and family to "pass the word around that I have opened a solo practice specializing in personal injury law."

Lawyer's brother, Bert, works as an emergency room admitting clerk at a local hospital. Whenever he admits patients who appear to be victims of another's wrongdoing, Bert gives them Lawyer's business card and suggests that they talk to her about filing a lawsuit. Each time Lawyer is retained by someone referred by Bert, Lawyer takes Bert out to lunch and gives him $500.

One such referral is Paul, who suffered head injuries when struck by a piece of heavy equipment on a construction site at Dinoworld, a local amusement park. Recently Lawyer filed a personal injury action on Paul's behalf against Dinoworld. Dinoworld's attorney immediately filed an answer to the complaint. Lawyer and Dinoworld's attorney agreed to set the deposition of the Chief Financial Officer (CFO) of Dinoworld within the next ninety days.

Lawyer's brother-in-law holds an annual pass to Dinoworld. Two weeks ago, he invited Lawyer to a special "passholders-only" event at Dinoworld, at which Dinoworld's CFO led a tour and made a presentation. At the event, Lawyer declined to wear a name tag and avoided introducing herself. She asked CFO several questions about Dinoworld's finances, and made some notes about his responses.

What ethical duties, if any, has Lawyer breached? Discuss.

Answer A

5)

Duty of loyalty: special concerns for prior government lawyers

A lawyer has a duty of loyalty to her client. This includes a duty to avoid conflicts of interest. Under the ABA rules, a lawyer who was a previous government lawyer, must avoid working on the same matter in private practice as she worked on as a government lawyer unless there is informed consent from the client and agency. In California, there is no such general rule; however, the rule does apply to former prosecutors representing defendants. There does not appear to be any conflict here, regarding Lawyer's new work. First, she is going into personal injury law. Therefore, she is unlikely to work on the same matters as she worked on as a prosecutor. Second, there are no facts in this problem that show any conflict of interest has arisen. Therefore, Lawyer has violated no rules, but she must be careful to avoid conflicts of interest.

Duty to profession: Lawyer's request of family and friends

Previously, lawyers were not permitted to advertise their services because it was considered unprofessional. However, the United States Supreme Court has since held that lawyers have a constitutional right to engage in truthful, non-misleading advertising. A lawyer may not, however, solicit clients in person or hire others to do so as her agents if she has no prior relationship with the person she is soliciting.

Here, Lawyer asks her friends and family to pass on the word that she has opened a solo practice. This does not appear to be direct, in person solicitation or requesting her friends to solicit. Rather, it appears to more [sic] just "getting the word out," which is really the same as advertising. She is simply letting her friends and family know, so that they can let others know, about her practice. There does not appear to be anything misleading about what she is asking them to do. They are not expected to make any representations about her practice, only to let people know that the practice exists. Therefore, this appears to be proper.

Duty to profession: getting clients from hospitals

In California at least, it is presumed to be misleading advertising to advertise at a hospital. Here, the facts show that Bert works as an emergency room clerk at a hospital, and that there, when he admits patients, he advertises Lawyer's business by giving people her business card. This is presumptively misleading because people are in an especial vulnerable state when they are very sick or injured. Therefore, Lawyer would have to somehow overcome the presumption that she has mislead [sic] people by advertising her services at a hospital.

A lawyer must also not use cappers to do what she could not do. As noted above, in person solicitation of people with known legal problems when there is no prior relationship with those people is prohibited, and it is prohibited if someone else does it for the lawyer as well. A lawyer cannot avoid the rules by having someone else do the act. Here, the facts show that Bert is soliciting clients for Lawyer; he is acting as a capper. He is suggesting that the injured people "talk to her about filing a lawsuit." This is direct solicitation. There is no evidence that Lawyer previously knew the people he is soliciting. The fact state [sic] that he does this "whenever he admits patients," which implies that Lawyer does not know any of the people solicited. This is improper solicitation, so the Lawyer has breach [sic] a duty to her profession.

Duty to profession: Sharing fees with non-lawyers

A lawyer cannot pay a fee to a non-lawyer to refer him. All a lawyer can do is pay regular costs for advertising or join a referral service.

Here, the facts state that "each time" Lawyer is retained after Bert refers someone, Lawyer takes Bert out to lunch and gives him $500. This is improper. First, it is improper because Bert is not a lawyer. He works as an emergency room clerk at a local hospital. Second, the lunch and the $500 are evidently consideration for his referral. Lawyer may argue that Bert is her brother, and that she is simply taking him out to lunch to be with him, and that there is nothing usual [sic] about a sister taking her brother out. However, the correlation of the lunches with the referrals would belie this assertion. Additionally, the brother-sister relationship does not explain the $500. No facts indicate that Lawyer should have any motive for giving Bert the money except that he made the referral. Therefore, this practice is improper and violates Lawyer's duty to her profession.

Duty of Competence

A lawyer owes her client a duty of competence. This means she must keep the client informed, and act with the legal knowledge, skill, thoroughness and preparedness necessary for the work. Here, the facts show that after being retained by Paul, Lawyer filed a personal injury action on Paul's behalf and that she and Dinoworld's attorney arranged for a deposition. Assuming all proper consultation with Paul regarding the filing of this suit, there does not appear to be any violation here. As long as there was a basis for the suit, Lawyer did the proper research before filing it, and Lawyer prosecutes it faithfully and vigorously, there is no violation of the duty of competence.

Duty of Loyalty: trip to Dinoworld

A lawyer has a duty of loyalty, including a duty to avoid making her client's interests adverse to her own personal interest.

Here, the facts show that after filing a lawsuit against Dinoworld, Lawyer accepted a special "passholders-only" invitation to the amusement park. This may or may not be a conflict of

interest. On the one hand, it seems like Lawyer is accepting personal benefits from Dinoworld. The facts imply that the ticket was free, but it sound [sic] like the ticket came from her brother-in-law. But Lawyer is getting a benefit from Dinoworld. She is receiving a special tour and is permitted to enjoy herself at Dinoworld's invitation. Arguably, this places her personal interest adverse to her client[']s. Lawyer would probably argue that this was a one-time event, and that it is not the sort of event that would compromise her representation with her client. This is probably true. However, on the whole, this action creates an appearance of impropriety, which a conscientious lawyer should avoid. Probably, Lawyer should have informed her client of her intent to go to Dinoworld and gotten Paul's informed consent. Then, Lawyer would not be putting Paul in a position where he could potentially question her loyalty and there would be some question as to whether he should trust her. Whether or not this was strictly a violation of the rules, probably not. Whether Lawyer could have avoided even the appearance of a problem, she could have, and probably should have proceeded accordingly.

Duty to Opposing Parties: duty to avoid deception

A lawyer has a duty of fairness to opposing parties. This involves avoiding making material misstatements of fact or omission where there is a duty not to omit.

Here, the facts state that at the event, Lawyer declined to wear a name tag and avoided introducing herself. This makes it sound like she was being deliberately deceptive as to Dinoworld's CFO, that she did not want him or her to know who she was. This is material omission. The CFO probably would have been more on guard about answering Lawyer's questions, or he or she would not have answered them at all, if he/she was aware who Lawyer was. Her efforts not to introduce herself seem to be motivated by a desire to ask the CFO questions and receiving unguarded responses. Therefore, she is deliberately deceiving the CFO in order to receive information. Lawyer will argue that she did not want to introduce herself or wear a name tag because she was simply trying to enjoy a day at Dinoworld without the lawsuit becoming the focus of the event. She will argue that this was to avoid any conflicts. However, this assertion is countered by her decision to ask the CFO questions. The facts that she chose to ask questions speaks to her motive not to wear a name tag. Therefore, Lawyer violated her duty of fairness to opposing parties in failing to identity herself.

Duty to 3d parties: Duty not to speak with parties represented by counsel

A lawyer had a duty not to speak to someone she knows is represented by counsel without the counsels' permission. When the "person" is a corporation, it is less clear who the lawyer may or may not speak to. This is because corporations tend to have many employees, some of who would be considered the "client" and others who would not. To determine who[m] is covered by this rule, who is the "client" of the other lawyer, courts look at the nature of the employee. People who (1) regularly consult with or supervise; (2) people who can bind the corporation with their statements; and (3) people whose statements may be imputed to the organization are considered the client, and a lawyer

must not speak with those people without the corporation's counsel's permission.

Here, the CFO is probably the "client" for purposes of this rule (and probably for most other purposes as well). The CFO is the Chief [F]inancial [O]fficer, and the person whose deposition will be given within the next 90 days. As the CFO, this person is the corporation's agent. This person's statements can be imputed to the organization, and this person can bind the organization. The CFO is one of the "highest" people in an organization. Therefore, Lawyer has a duty not to knowingly speak with him because Dinoworld has an attorney. The facts state that Lawyer and Dinoworld's attorney decided mutually that Lawyer could depose CFO within the next 90 days. This facts [sic] shows two points: first, it shows that Lawyer knows that Dinoworld is represented by counsel and that the CFO is a person who can bind the corporation. Otherwise, she would not want his deposition. Second, it shows that she did not have consent to speak with CFO. If she has consent to speak with him outside of the deposition, there probably would not have been a reason to schedule the deposition. Additionally, it is reasonable to assume that Dinoworld's attorney would want to be present when the CFO was giving information so she could properly prepare him/her. She would not want him/her to talk unwittingly to opposing counsel. Finally, no fact states that any permission was given. Therefore, Lawyer violated a rule by talking to the CFO without his/her attorney's permission.

Answer B

1. Duty of dignity to legal profession

– Solicitation –

Neither a lawyer nor his agents may approach a party for potential representation in person, by telephone or in real time electronic manner for the purpose of pecuniary gain if that party is not an existing client or relative.

Here, Lawyer (L) through her brother Bert (B) contacted clients in person upon their arrival at a local hospital. In California, such activity is presumed to be improper solicitation. It is solicitation in violation of ethical rules in California to approach an injured person while they are in a vulnerable state. When an individual is being admitted to the hospital for injuries they are clearly vulnerable and solicitation is impermissible.

Such solicitation is a violation of ethics. B is definitely an agent/runner for L. B assesses each individual upon their arrival at the hospital and if B believes their injury is the result of another's wrongdoing, B gives them L's business card. Also, B is given lunch and money for these actions by L so he is clearly acting on L's behalf.

Thus, although L herself is not approaching these accident victims while in a vulnerable state, her agent B is and that is impermissible and an ethical violation.

– Referrals –

Payment to another by a lawyer for referral of a client is not permissible. Referral payments are an ethical violation.

Here, L pays B $500 each time L is retained by someone referred by B. B also gets lunch. This is especially improper because B is an emergency room admitting clerk and not a lawyer.

Thus, L is also in violation of the no referral rule.

– Advertising –

Generally, advertising of a lawyer's services is permissible if it is not false or misleading. All advertising must be labeled as advertising and at least one person responsible for the ad must be identified. General written advertising is also permissible (like direct mail).

Here, L's request of her friends and family to "pass the word around" could be advertising. This is problematic because it is not labeled as advertising or doesn't appear to be and it is unclear who is responsible for it.

Most significantly, L asks her friend[s] and family to pass the word that she is "specializing in personal injury law." Traditionally, the only specializations that were recognized were patent and admiralty law. However, certain other specialties are recognized if they are approved and if the lawyer is certified by the appropriate organization approved by the ABA or state.

Here, nothing indicates that L has received any special certification for her "specialty" in personal injury law.

Thus, this "ad" by her friends and family is both false and misleading. Therefore, L is in violation of the duty to advertise truthfully.

2. Duty of Candor/Fairness

A lawyer is also bound by a duty of candor and a duty of fairness to both the court and the other side or opposition.

– Represented Person –

One of the major issues of fairness and candor is to the other side and involves speaking to individuals who are represented by counsel without getting permission.

Here, L went to Dinoworld and approached Dinoworld's CFO. Without identifying himself, in fact purposely concealing his identity, D spoke with the CFO about finances and made notes about the conversation.

What makes this a problem is that L knew CFO was represented by counsel because L had already spoken with CFO's attorney about the deposition of CFO.

Thus, L had a duty to get permission from Dinoworld's attorney before speaking to anyone associated with Dinoworld, including the CFO. So, L knowingly spoke with a represented individual before obtaining permission from the attorney and thus violated her duty of fairness.

In conclusion, L is in violation of her duty to the dignity of the profession because of her solicitation, advertising and referrals. Also, she violated her duty of fairness by talking to a represented person without permission.

Q6 Torts

Jack owned the world's largest uncut diamond, the "Star," worth $1 million uncut, but $3 million if cut into finished gems. Of the 20 master diamond cutters in the world, 19 declined to undertake the task because of the degree of difficulty. One mistake would shatter the Star into worthless fragments.

One master diamond cutter, Chip, studied the Star and agreed with Jack in writing to cut the Star for $100,000, payable upon successful completion. As Chip was crossing the street to enter Jack's premises to cut the Star, Chip was knocked down by a slow moving car driven by Wilbur. Wilbur had driven through a red light and did not see Chip, who was crossing with the light. Chip suffered a gash on his leg, which bled profusely. Though an ordinary person would have recovered easily, Chip was a hemophiliac (uncontrollable bleeder) and died as a result of the injury. Chip left a widow, Melinda.

Jack, who still has the uncut Star, engaged Lawyer to sue Wilbur in negligence for the $2 million difference between the value of the diamond as cut and as uncut. Lawyer allowed the applicable statute of limitations to expire without filing suit.

1. What claims, if any, may Melinda assert against Wilbur, and what damages, if any, may she recover? Discuss.

2. What claims, if any, may Jack assert against Lawyer, and what damages, if any, may he recover? Discuss.

Answer A

6)

WHAT CLAIMS, IF ANY, MAY MELINDA ASSERT AGAINST WILBUR, AND WHAT DAMAGES, IF ANY, MAY SHE RECOVER?

Standing - Melinda, the widow of Chip, will sue Wilbur either as his representative under a survival action or for wrongful death as his widow.

Melinda v. Wilbur

Negligence - a breach of duty which is the actual and proximate cause of damage to the plaintiff.

Duty - as the driver of a car, Wilbur owed a duty of reasonable care to the people who were within the zone of danger (Cardozo) or the entire world (Andrews view). Chip, as a person crossing the street in front of Wilbur, was within the zone of danger and therefore owed a duty by Wilbur.

Breach - Wilbur drove through a red light and hit Chip because he did not see him. In driving through the red light, Wilbur was probably negligent. Negligence per se may be implied if driving through a red light is a violation of an applicable law, since Chip would be the kind of person that such a law would be designed to protect.

Causation - actual - but for Wilbur driving through the light and striking Chip, Chip would not have died.

Causation - proximate - it was foreseeable on Wilbur's part that driving through a red light would injure someone. The fact that Wilbur did not see Chip would not relieve him of liability. Wilbur may argue that the fact that Chip actually died was the result of his hemophilia, which caused him to bleed to death when another person would have easily recovered from the gash in his leg. Wilbur may argue that it was not foreseeable that Chip had this condition and that therefore the cause of Chip's death was not caused by Wilbur.

However, hemophilia is a pre-existing condition, and the rule in negligence cases is that the defendant takes his victim as he finds him. This is analogous to the "soft skull" cases where a particular plaintiff was particularly susceptible to injury. Therefore, the hemophilia defense will not work.

Damages:

. **Lost earnings** - future earnings are allowed in negligence actions. The court would compute the amount of time that Chip probably would have lived, using some form of

actuary table. The fact that Chip was a hemophiliac would be relevant to possibly reducing the amount of future earnings allowed by discovering what the expected lifespan of a hemophiliac of Chip's age and general heath is. The amount of future ear[n]ings would be reduced to present-day value, because only one recovery is allowed. However, no reduction would be allowed for the fact that Chip is engaged in an especially lucrative profession; again, Wilbur has to take his victim as he finds him.

. .

. **Particular earnings** - the $100,000 under the contract is not going to be earned at this point, because the contract between Jack and Chip said that the $100,000 would only be paid upon successful completion. Completion will never take place, because Chip is now dead, and Chip's performance was a condition precedent to Jack's obligation to pay. This money would have gone to Chip, but Melinda can bring the suit as the representative of his estate. She does not need to show that she is a third party beneficiary because she is not attempting to enforce the contract itself, but to show that Chip would have recovered under the contract if he had not been injured. However, if forced to rely on a third-party beneficiary claim she would probably fail because she was not an intended beneficiary of the contract between Chip and Jack, but merely an incidental beneficiary.

. .

The question will be whether or not Chip would have successfully completed cutting the Star had he not been struck by Wilbur's car. If it appears that he would have completed, then it is possible that this $100,000 could be recovered. However, there is a very strong argument that Chip would not have completed the task. 19 of 20 master diamond cutters in the world declined the job because they thought that they could never do it without shattering the Star. This means that in the professional judgment of men and women who are masters in their field, 95% of them (19/20) turned the job down as impossible. Since the burden of proof in a civil action is a preponderance of the evidence (51%), it is almost certain that the burden of proof cannot be met here to show that the $100,000 would have been recovered had Wilbur not knocked down Chip.

Melinda will probably not recover the $100,000.

. **Loss of consortium** - as Chip's wife, Melinda can get damages for loss of companionship.

. .

. **Punitive damages** - not usually available in negligence cases unless the action of Wilbur in driving through the red light was gross negligence. We have no evidence of gross negligence here, however, since Wilbur was moving slowly at the time he struck Chip.

. .

WHAT CLAIMS, IF ANY, MAY JACK ASSERT AGAINST LAWYER, AND WHAT DAMAGES, IF ANY, MAY HE RECOVER?

Jack v. Lawyer

Jack will sue Lawyer for malpractice.

Duty - Lawyer had a duty to act in a competent manner and as a reasonable attorney under the circumstances. There was a client-lawyer relationship between Jack and Lawyer, and so the duty was owed to Jack.

Breach - Lawyer breached this duty by not filing the lawsuit until the statute had run. This was something that a competent attorney would not have done.

Causation - actual - but for Lawyer failing to file the suit, the statute would not have run and Jack would still have a cause of action against Chip.

Causation - proximate - it was foreseeable that failing to file the suit would result in the suit being barred by the statute.

Damages - Jack will claim that he should recover from Lawyer the same thing he would have recovered had Lawyer not been incompetent and failed to file the suit. This means we must look to Wilbur's liability to Jack, because the mere fact that Lawyer was incompetent does not mean that Jack is immediately entitled to a recovery; the lawyer is not the insurer of the validity of the client's claim such that a client can get an automatic recovery from the lawyer if the lawyer breaches some duty of care in regards to the client where the claim was one which had a low chance of success.

Hypothetical lawsuit - Jack v. Wilbur
Negligence - supra.

Duty - Jack will have a very difficult time proving that Wilbur owed him a duty. Wilbur was driving down the street and ran a red light. It is difficult to argue that Wilbur owes a duty to Jack, who was probably in his house across the street and was not physically harmed by Wilbur's actions. Jack was probably well outside the zone of danger which resulted from driving a car down the street.

Jack can probably not show that he was owed a duty by Wilbur. If he can, then he will attempt to show breach, causation, and damages.

Breach - If Jack can show a duty owed by Wilbur, then driving through the light probably breached this duty.

Causation - but for Wilbur driving through the light, Chip would not have been injured.

Causation - proximate - it was probably not foreseeable that driving through the light and hitting someone would cause damages to Jack, who was not at the scene; furthermore, these are only economic damages without physical damages[,] which are not the kind of harm anticipated by the breach of duty.

Damages - Jack would have had the same problem showing that the job would have been completed as Melinda: the chance of the job actually being finished is so low and difficult to prove that a court would almost certainly not allow a recovery in this case.

The question will be whether or not Chip would have successfully completed cutting the Star had he not been struck by Wilbur's car. If it appears that he would have completed, then it is possible that this $100,000 could be recovered. However, there is a very strong argument that Chip would not have completed the task. 19 of 20 master diamond cutters in the world declined the job because they thought that they could never do it without shattering the Star. This means that in the professional judgment of men and women who are masters in their field, 95% of them (19/20) turned the job down as impossible. Since the burden of proof in a civil action is a preponderance of the evidence (51%), it is almost certain that the burden of proof cannot be met here to show that the $100,000 would have been recovered had Wilbur not knocked down Chip.

Furthermore, Jack only has economic damages under a contract to which Wilbur was not a party.

Contract - because Wilbur was not a party to the contract and did not intentionally interfere with the contractual relations of Wilbur and Jack, it is unlikely that Wilbur can be sued for interference with this contract.

Jack will probably not recover from Lawyer, due to the fact that Chip actually cutting the Star properly was extremely unlikely to occur.

Answer B

6)

1. Melinda v. Wilbur

The issue is what claims if any may Melinda, Chip's widow, assert against Wilbur, and what damages, if any, may she recover?

Survival/Wrongful Death

The executor of a decedent's estate or certain other individuals (spouses, children) enumerated by the state's wrongful death statute may assert a claim against a tortfeasor for damages caused by the tortfeasor's negligence through a wrongful death claim. In a wrongful death action, the executor or other specifically enumerated individual steps into the shoes of the decedent for purposes of asserting the claim on the decedent's estate's behalf. If the decedent survived for even a brief period of time, a claim for survival is also permissible. In both actions, the party asserting the claim is required to prove the underlying tort she alleges lead [sic] to the decedent's death. Thus, Melinda may assert a wrongful death and survivorship claim against Wilbur because Chip survived long enough to bleed to death after the accident before dying.

Negligence

Melinda should claim that Wilbur's negligence in running through a red light caused Chip's death. To assert a successful negligence claim, the plaintiff must demonstrate: (1) a duty owed to her by the defendant; (2) a breach of that duty by the defendant; (3) causation; and (4) damages. As explained below, she can establish each element.

An individual owes a duty to others to act as a reasonably prudent person would in similar circumstances. A reasonably prudent person does not drive through red lights. Thus, Wilbur owed a duty to Chip to not drive through a red light.

A breach is demonstrated by showing that the defendant failed to act as a reasonably prudent person would've acted in similar circumstances. Here, Wilbur breached that duty by driving through a red light. This action also likely constitutes negligence per se. Negligence per se arises when a statute prohibits behavior engaged in by the defendant (here, running through a red light) to protect individuals (like Chip) from harm (injury by failure to stop at a red light). In the presence of such facts, a duty and breach is presumed.

Causation is divided into two parts: (1) factual causation and (2) proximate causation. Factual causation is typically referred to as the "but-for-test," i.e., but for the defendant's negligent conduct the plaintiff would not have been harmed. Here, but for Wilbur's failure to stop at the red light, Chip[,] who was crossing with the light[,] would not

have been injured and then died.

Proximate causation relates to issues of foreseeability. The question is whether the harmed [sic] suffered by plaintiff is foreseeable or rather if some intervening act cuts off the defendant's liability. Wilbur will likely claim that Chip's injuries were not foreseeable because an ordinary person would not have died from a gash on his leg. Here, Chip was a hemophiliac and died as a result of this condition[,] not because of a gash. Running a red light, however, may result in injury to another which could include death, thus proximate causation is clearly present.

Wilbur may also attempt to argue that a defense exists because Chip was comparatively negligent and had the last clear chance to avoid the accident. Defenses to negligence include contributory negligence, which cuts off a plaintiff's right to damages if he shares in the negligence in any way, comparative fault[,] which apportions damages based upon the plaintiff's negligent acts (and in some states limits recovery all together if the plaintiff is more negligent than the defendant), and the last clear chance doctrine, which denies a plaintiff recovery if he had the last opportunity to avoid the accident.

Contributory negligence has been abolished in almost all states and should not come into play here. But what about comparative fault? Wilbur was in a slow moving car so that Chip might have avoided the accident by merely stepping out of the way. This defense seems likely to fail since the facts indicate Chip was crossing with the light. Even if Chip is somewhat negligent for failing to avoid the accident, it is doubtful that his negligence is enough to deny him recovery.

Negligence Damages

A successful negligence plaintiff may recover compensatory damages. Compensatory damages must be certain, foreseeable, and unavoidable. These damages can be divided into economic and non-economic damages which include medical bills, lost wages, and pain and suffering. Chip's estate is entitled to medical bills, funeral expenses, lost wages, and pain and suffering damages. These damages must be reduced to present value after inflation is taken into account.

Here, Wilbur will attempt to argue that some if not all of the damages were not foreseeable. Specifically, he will claim that Chip's death was unforeseeable because an ordinary person would not have bleed [sic] to death after suffering a minor gash to the leg. This claim will fail because of the eggshell-skull doctrine which requires the defendant to take the plaintiff as he finds him. This plaintiff, unfortunately for Wilbur, was a hemophiliac and dies. It sucks to be Wilbur.

Wilbur may also attempt to argue that some if not all of the damages were unavoidable because his car was moving slow and Chip could've avoided the accident. As explained above, this factor may limit damages but not preclude them completely.

Finally, Wilbur may argue that some damages like lost wages (for instance the $100,000 Chip would've made to cut the Star) are not certain. This may work as to this claim since 19 expert diamond cutters refused to take the job. But again it will simply limit recovery, not result in a denial altogether.

Loss of Consortium

A spouse may also assert a claim for loss of consortium if her spouse is injured by a tortfeasor. Here, Melinda may assert her own claim based on the fact that the she lost certain benefits because of Chip's death. She will lose companionship; she will lose his assistance around the house and may have to hire someone to come in and take care of the chores he performed; and she may lose sex.

Since Wilbur caused Chip's death because of his negligence, Melinda should prevail on this claim. She can recover damages based on the amounts if any she paid for substitute services as well as for any other damages she can demonstrate based on the foregoing test.

Negligent Infliction of Emotional Distress

A family member may assert a claim for negligent infliction of emotion[al] distress by demonstrating that she was within the zone of danger when the defendant's extreme and outrageous actions resulted in harm to a fellow family member. Although Melinda may assert the claim, Wilbur's actions do not appear to be extreme and outrageous and it is unlikely that she will recover on this claim.

Jack v. Lawyer

The next issue is what claims if any may Jack assert against Lawyer for failing to file his negligence claim against Wilbur within the applicable statute of limitations, and what damages may he recover if any.

Malpractice

A lawyer may be sued for malpractice if she breach[e]s a duty to her client and this breach results in a harm to the client. To assert a successful claim against Lawyer, Jack must show the Lawyer's conduct fell below that of any other attorney practicing in the locale and that but for this breach of duty he would have not been harmed. Specifically, Jack must show the Lawyer (1) breached a duty to him; (2) causing damages.

A lawyer owes her client a duty to act as a reasonably prudent lawyer would while representing a client under similar circumstances. Here, a reasonable lawyer does not blow a statute of limitations. Lawyer's failure to file a negligence claim against Wilbur on Jack's behalf within the applicable statute of limitations is a breach of that duty. To demonstrate causation, Jack must show that but for the plaintiff's failure he would've

succeeded on his claim against Wilbur.

This requires a brief analysis of Jack's potential negligence claim against Wilbur. The elements of a successful negligence claim have been stated above. First, Jack must show that Wilbur owed him a duty. A person owes a duty to act as reasonable person would [sic] in similar circumstances. But the duty extends only to all foreseeable plaintiffs per Pfalsgraf. Here, Wilbur didn't owe a duty to Jack because Jack was not a foreseeable victim to Wilbur's failure to stop at a red light. Accordingly, Jack cannot show that but for the Lawyer's failure to file a claim within the applicable statute of limitations his claim would've succeeded. Even if the Lawyer had filed the claim, which seems a bit frivolous, Jack still loses.

Accordingly, Jack cannot succeed on his claim against the Lawyer for failing to file that claim. Since his claim will not be meritorious, he cannot recover the damages ordinarily available to a successful claimant in a malpractice action, which include compensatory damages and might well have included damages resulting from his failure to be able to have the "Star" cut since no other master diamond cutter is willing to do it.

Breach of Contract

A contract is a legally enforceable agreement between two people. The facts only indicate that Jack hired Lawyer to file this lawsuit. In California, however, a Lawyer is generally required to enter into a written agreement with a client relating to her representation of him. Assuming the presence of such an agreement, it was likely valid as a bilateral contract (mutual assent plus consideration based on the promises between both parties).

A breach occurs where no conditions exist to performance and the party required to perform fails to do so. Here, the Lawyer failed to file a claim even though she was required to do so. Accordingly, a breach occurred.

When a breach of contract occurs, several remedies are available to a successful party including compensatory damages (those necessary to place the non-breaching party in the same position he would've been in but for the breach), consequential damages (all damages foreseeable as a result [o]f the breach), perhaps liquidated damages. Restitutionary damages are permitted when the defendant confers a benefit on the plaintiff and it would be unjust for her to retain it. In the appropriate situation, injunctive relief, specific performance, recission or reformation might also be appropriate.

Here, if the Lawyer breached a contract, then she owes Jack compensatory damages - - those necessary to place him in the same position he would've been in but for the breach. As explained above, he would still have lost so this is probably nothing. He is also not likely to recover consequential damages for the same reason. However, if he paid the Lawyer any money for her services she may be requi[r]ed to return any amounts that were not used to institute this action

Jack might also consider contacting the local bar association to report Lawyer's actions.

Feb 2004

California Bar Examination

Essay Questions and Selected Answers

February 2004

ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2004 CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2004 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors and may not be reprinted.

TUESDAY MORNING
FEBRUARY 24, 2004

California Bar Examination

Answer all three questions. Time allotted: three hours

Your answer should demonstrate your ability to analyze the facts in question, to tell the difference between material and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit.

State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

Q1 Criminal Law and Procedure

Bank was robbed at 1 p.m. by a man who brandished a shotgun and spoke with a distinctive accent. The teller gave the robber packets of marked currency, which the robber put into a briefcase. At 3:30 p.m., the police received a telephone call from an anonymous caller who described a man standing at a particular corner in the downtown business district and said the man was carrying a sawed-off shotgun in a briefcase. Within minutes, a police officer who had been informed about the robbery and the telephone call observed Dave holding a briefcase at that location. Dave fit the description given by the anonymous caller.

The officer approached Dave with his service revolver drawn but pointed at the ground. He explained the reason for his approach, handcuffed Dave, and opened the briefcase. The briefcase contained only the marked currency taken in the bank robbery. The officer said to Dave: “I know you’re the one who robbed the bank. Where’s the shotgun?” Dave then pointed to a nearby trash container in which he had concealed the shotgun, saying: “I knew all along that I’d be caught.”

Dave was charged with robbery. He has chosen not to testify at trial. He has, however, moved to be allowed to read aloud a newspaper article, to be selected by the judge, without being sworn as a witness or subjected to cross-examination, in order to demonstrate that he has no accent. He has also moved to exclude from evidence the money found in the briefcase, his statement to the officer, and the shotgun.

How should the court rule on Dave’s motions regarding the following items, and on what theory or theories should it rest:

1. Dave’s reading aloud of a newspaper article? Discuss.

2. The currency? Discuss.

3. Dave’s statement to the officer? Discuss.

4. The shotgun? Discuss.

Answer A

1)

This question raises issues involving Dave's rights under the 4th Amendment and 5th Amendment.

Dave's Reading Aloud of a Newspaper Article

A criminal defendant may be required to give a voice sample. This does not violate a defendant's right against self-incrimination.

A criminal defendant is allowed to submit evidence that will prove that he could not or did not commit the crime. Here, the alleged robber spoke with a distinctive accent. Dave seeks to read a newspaper article to the jury in order to show that he was not the robber because he does not have an accent. The key issue, however, is whether Dave may do this given that he does not want to be sworn in as a witness or subjected to cross-examination. By doing so, Dave is denying the prosecution the right to cross-examine him and to test whether he is being truthful. It is possible for Dave to fake an accent or to have taken voice lessons to change this previous accent. All of these are factors that the prosecution should be permitted to test on cross-examination. Because the prosecution will not be given the right to cross-examine Dave, Dave's request to read to the jury should be denied.

THE CURRENCY

The 4th Amendment prohibits warrantless searches and seizures by a police officer in an area where a person has a reasonable expectation of privacy. The 4th Amendment applies to the states via incorporation into the 14th Amendment. Warrantless searches are permitted under certain circumstances.

State Action:

The 4th Amendment prohibits warrantless searches and seizures by a state actor. Here, the officer was conducting the search and seizure as a police officer and therefore state action is involved. In addition, the officer was searching Dave's briefcase - - an area where Dave had a reasonable expectation of privacy.

Search Incident to a Lawful Arrest

An officer does not need a search warrant if the search is done pursuant to a lawful arrest. Under this exception to the warrant requirement, an officer may search the person arrested and search the area within the person's immediate control if the officer suspects that the area would contain contraband or a weapon. In order for this exception to apply, the arrest

must have been lawful.

The officer arrested Dave after receiving a phone call from an anonymous caller stating that a man fitting Dave's description was carrying a sawed-off shotgun in a briefcase. An officer may arrest a person in public without a warrant if the officer has probable cause to believe that the person has committed a crime. A tip from an anonymous informant can be used as a basis for establishing probable cause if the officer reasonably believes that the tip is reliable. Here, the officer knew that a Bank was robbed at 1 p.m. by a man who had a shotgun. The officer received a tip at 3:30 saying that a man was standing at a corner with a sawed-off shotgun in a briefcase. The combination of the call, with the circumstances surrounding the Bank robbery are sufficient to give the officer probable cause to arrest Dave in public without a warrant.

Because the arrest was lawful, the officer could search Dave and the area within his immediate control if the officer suspects that the area would contain contraband or [a] weapon. Here, the officer suspected that the briefcase would have a sawed-off shotgun and it was within Dave's immediate control. Thus, the officer could search the briefcase. Any evidence found during this valid search could be admitted.

Plain View

Any evidence seen by an officer when the officer has a lawful right to search the area may be admitted. Here, the officer had a right to search Dave's briefcase under the exception to the warrant requirement for searches incident to a lawful arrest. Because the marked currency was in the officer's plain view during this search, the currency can be admitted as evidence against Dave.

Stop & Frisk

An officer who has reasonable suspicion to believe that a person is engaged in criminal activity may stop the suspect and conduct a warrantless frisk for weapons. An officer may not look inside containers during a stop & frisk. Thus, this exception to the warrant requirement will not be a basis for admitting the currency.

DAVE'S STATEMENT TO THE OFFICER

The 5th Amendment privilege against self-incrimination applies when there is state action and a custodial interrogation of a person. It gives a defendant a right to refuse to give testimonial evidence that would result in self-incrimination.

State Action

As discussed above, the action of the police officer involves state action.

Custodial Interrogation

Under the 5th Amendment, an officer must read a suspect his Miranda rights before conducting a custodial interrogation. A person is in custody if he believes that he is not free to leave the officer's control. Here, the officer approached Dave with his service revolver drawn and handcuffed Dave. Under these circumstances, Dave was in custody because he was not free to leave the officer's control.

An interrogation is any communication by the police to the suspect that is likely to elicit a response. Before engaging in a custodial interrogation, the officer must read the suspect his Miranda rights, which involves the suspect's right to remain silent and the right to ask for counsel.

Here, the officer would argue that his statement to Dave "I know you're the one who robbed the bank. Where's the shotgun?" was not an interrogation and that Dave's response to this statement was a voluntary statement. A statement by a suspect that is blurted out is admissible. Dave, however, would argue that the officer's statement "I know you're the one who robbed the bank" is a statement likely to elicit a response and that Dave would not have said anything had he not been prompted by the officer's accusation. Dave would probably win on this argument because accusing a suspect who is in handcuffs of committing a crime is the type of statement likely to elicit a response.

As a result, Dave's statement to the officer cannot be admitted because Dave was not read his Miranda warnings prior to the interrogation. Dave's statement could be admitted for impeachment purposes if Dave takes the stand and could be admitted in a grand jury proceeding.

THE SHOTGUN

The admissibility of the shotgun also depends on an analysis of whether Dave's 5th Amendment privilege against self-incrimination was violated when the officer asked Dave where the shotgun was without reading Dave his Miranda rights.

As discussed above, state action was involved and Dave was in custody when the officer asked him where the shotgun was. If the question to Dave was improper, the shotgun cannot be admitted because it is the fruit of a poisonous tree.

Dave will argue that he pointed to the trash container as a result of the officer's interrogation and that he wouldn't have done so but for the officer's interrogation. The officer will argue that Dave's "pointing" to the trash is not testimonial and therefore the 5th Amendment does not apply. The 5th Amendment does not typically apply to conduct but it may apply if the conduct is testimonial in nature. Here, Dave's pointing to the shotgun could be considered testimonial in nature because Dave was telling the police the location of his weapon.

Courts, however, allow an officer to question a suspect about the location of the weapon without giving Miranda warnings if it is necessary because of exigent circumstances. In other words, if the officer thinks that there might be a weapon laying around that might pose an immediate danger to the public the officer can question the suspect immediately following the arrest and pre-Miranda as a means of securing the premises and protecting the public.

Here, the shotgun is probably admissible under this exception because the officer knew that there was a shotgun used in connection with the robbery and has reason to believe that Dave was connected with this robbery given the discovery of the marked bills. Thus, the officer could ask about the location of the gun to secure the premises.

Answer B

1)

Dave's Reading Aloud the Newspaper Article

The Fifth Amendment protects against self-incrimination. Therefore, the prosecution cannot compel D to testify against his will. Furthermore, the Sixth Amendment allows an accused to confront his accusers. Here, D wants to read aloud a newspaper article of the judge's cho[o]sing to demonstrate that he does not have a distinctive accent, which is something that was described by the bank teller. D would like to do this without being sworn in or subject to cross-examination by the prosecution. The issues hinges [sic] on whether reading the statement aloud is testimonial in nature. If it is testimonial in nature than [sic] the judge will not allow Defendant to do this without being sworn in because he will be a witness.

Non-Testimonial

Here, Defendant wishes to demonstrate that he does not have an accent. The content of his speech is not testimonial in nature because he is not asserting this own thoughts, opinions, observations, or knowledge, which are things that a witness would do. Here, D is not making any statements of fact. The evidence is relevant to demonstrate that D doesn't have an accent, but it is only the sounds of his speech that matters [sic] and not the content. It is akin to showing tattoos, needle marks, or hair color. Therefore, reading a newspaper is sufficiently nontestimonial and D will be allowed to do this.

The prosecution may argue that this is testimonial because D can alter the way that he is speaking and if they were allowed to cross-examine him this would come to light in front of a jury that he was faking. This argument would fail because there is no content for the prosecution to cross-examine him on and they can sufficiently argue in closing that he may be faking or offer a witness to counter his assertion that he does not have an accent.

Dave will succeed because his reading the newspaper aloud is sufficiently nontestimonial and will[,] therefore, be admitted at trial.

The Currency

The Fourth Amendment, incorporated to the states via the Fourteenth Amendment, protects against unreasonable searches and seizures. In order to bring an action under the Fourth Amendment, the defendant must have standing and the action must be done by a government actor.

Standing

In order to have standing one must have a reasonable expectation of privacy in the items seized or search[ed]. Here, Defendant was seized and his briefcase searched. Therefore, since D had a reasonable expectation of privacy in himself and his briefcase he has standing.

Government Actor

A police officer is [a] government actor for the purposes of the Fourth Amendment.

Seizure of D

In order to arrest a person an officer must have a warrant based on probable cause signed by a neutral magistrate. Absent a warrant a search or seizure is per se invalid absent an exception. Here, there was no warrant for D's arrest.

Dave would argue that this was an illegal arrest and that the officer did not have probable cause based on this information first and foremost because of the amount of time passed between the robbery of the bank and the time that the officer contacted defendant two and half hours later. D would argue that it is unreasonable to think that a bank robber is going to just stand out in the middle of public [sic] with a gun two and a half hours later. Furthermore, D will argue that he was a man with a briefcase downtown, which is hardly a novel notion. Moreover, D will argue that the anonymous caller lacked any indicia of reliability and was not corroborated by anything other than the fact that D just happened to match the description of a man with a briefcase, but with no sawed-off shotgun. D will also point out that the bank teller described a shotgun whereas the anonymous calle[r] described a sawed-off shotgun, which are noticeably different. Therefore, D will argue that the officer had no probable cause to arrest D based on this information and therefore, the arrest was illegal.

The prosecution would like[ly] respond that the initial contact with D by the police officer was a detention based on reasonable articulable facts or if it rose to the level of an arrest that there was probable cause.

Detention based on Reasonable suspicion

The prosecution may argue that D was not arrested by [sic] merely stopped in order to investigate whether criminal activity was afoot. During a detention, an officer must have reasonable suspicion that criminal activity is afoot. Here, the officer had two basis [sic] as will be described in more detail below. The officer had the matching description of the bank robber with the briefcase and he had an anonymous caller who described D with a gun at the corner. Therefore, the officer had sufficient probable cause to contact D. The officer may detain a suspect long enough to investigate and determine if there is criminal

behavior or not. Here, the officer drew his weapon and handcuffed D because he believed that D had a gun based on the anonymous tip and the bank robbery information.

D will argue that this was an arrest and not merely a stop. D will argue that the officer approached him with a weapon drawn and handcuffed him and[,] therefore, it was an arrest because D was not free to leave.

The court will hold that this was a detention based on reasonable suspicion and was, therefore, not in violation of the Fourth Amendment.

Probable Cause

Moreover, the officer had probable cause to arrest D based on the information that he had. If an officer has probable cause to believe that someone has committed a felony they may arrest that person without a warrant as long as within 48 hours a magistrate makes a determination that there was probable cause for the arrest. If a person commits a misdemeanor it must be committed in the officer's presence for an arrest.

Here, the officer had reason to believe that D robbed a bank. Robbery is a felony under the law. The information that the officer had at the time that he contacted the defendant was that a bank was robbed at 1 pm, by a man with a shotgun who spoke with a distinctive accent. The robber had in his possession marked currency given to him by the teller which he put into a briefcase. The officer received a tip from an anonymous caller who described a man standing at a corner with a sawed-off shotgun in a briefcase. The officer arrived to [sic] the corner within minutes of the call, saw Dave there holding a briefcase and matching the description given by the anonymous caller.

The prosecution will argue that under the "totality of the circumstances" the officer's arrest was based on probable cause. Not only did the officer have reasonably articulable facts to contact D and investigate him to see if he had a weapon but also to arrest him in connection with the bank robbery. As the facts described above detail the officer had description of Defendant and just because minutes after the phone call he no longer had the weapon does not mean that the officer should just walk away without any investigation. The officer has a duty to investigate and determine if there is a safety issue and what is going on.

Therefore, based on the totality of the circumstances the officer has probable cause to arrest Dave and the seizure of D was not unlawful.

Search of Briefcase

Here, the search of the briefcase also requires and [sic] warrant exception because there was no additional warrant to search the briefcase. D had a reasonable expectation of privacy in his briefcase because it was something that was closed and not open to public

view or scrutiny.

Probable Cause

As stated above the officer had probable cause to believe that Defendant was armed with a shotgun and therefore had sufficient probable cause to search the bag to ensure for his own safety and the safety of others where the gun was. During a detention an officer may "pat down" an individual if they believe the person may have a weapon. Here, the officer did believe that D had a weapon which was something that could have easily fit in the briefcase. Therefore, the search of the briefcase was lawful.

Search incident to Arrest

Furthermore, as stated earlier there was sufficient probable cause for a lawful arrest. In a search incident to a lawful arrest, the arrest must be lawful, and the officer can search the Defendant and anything within the "wingspan" of the suspect under Chimel. Here, D was holding the briefcase which was sufficiently in his wingspan. Therefore, the search of the briefcase was a lawful search incident to arrest.

Finding the Currency

Although the officer had probable cause to search the briefcase for a weapon, he saw the currency in plain view when he opened the briefcase. Something is in plain view in a place the officer may lawfully be and without the officer touching or moving it around.

Conclusion: The currency found in the briefcase will not be suppressed.

Dave's Statements to the Officer

Miranda

Miranda protects against coerced confessions. It is a profalactic [sic] measure designed to provide additional protection for the 5th Amendment, incorporated to the states through the 14th Amendment, against self-incrimination. According to Miranda, if a suspect is interrogated and in custody, he is to be warned of his right to remain silent, that anything that he says can be used against him, that he has a right to an attorney and if he can't afford an attorney one will be appointed for him.

Here, Dave made two statements to the police officer and each needs to be analyzed separately to determine the admissibility. The first statement was when Dave pointed to the nearby trash can and the second is when he said "I knew all along that I'd be caught."

Pointing to the trash can

Statements can be express or implied. An express statement is an oral statement. An

implied statement is one made with assertive conduct or by silence. Here, Dave pointed to the trash can in response to the Officer's question "Where's the shotgun?"
In custody

Custody occurs where the suspect is not free to leave. At this point Dave was handcuffed standing on a street corner. This is sufficiently in custody for Miranda.

Interrogation

Interrogation occurs where the officer asks questions in order to elicit a response. Here, the officer asked where the gun was and D pointed to the trash can. Therefore, this was interrogation.

Dave's argument will succeed because the conduct of pointing to the gun should be suppressed and inadmissible at trial.

"I knew all along that I'd be caught"

This was an express statement made by Dave after he pointed to the gun. As stated above Dave was in custody, but the difference with this statement is that it was a spontaneous statement. The officer did not ask D if he knew that he would be caught. He asked him where the gun was. The prosecution would argue that the [sic] D's statement was spontaneous and therefore, not a violation of Miranda and should be admissible. D would argue that this was a result of a custodial interrogation and the statement should not come in.

Dave's argument will fail because this was a spontaneous statement and is, therefore, admissible.

Shotgun

The shotgun was found as a result of D's pointing to where it was located and therefore D will argue that it is inadmissible as the result of a Miranda violation.

Fruit of the poisonous Tree

When there are violations of the Fourth Amendment the exclusionary rule helps to protect against unreasonable officer conduct by excluding the evidence. D would likely argue that as a result of his unmirandized statement the gun should be supressed. This argument would likely fail because courts have not readily applied the fruits of the poisonous tree doctrine to evidence resulting from Miranda violations. Furthermore, under the doctrine of inevitable discovery the officers would have likely found the shotgun independent of D's pointing to it. Generally, when officers find the suspect of a crime who had only minutes before been seen with a weapon and now has no weapon to [sic] search the area around

where the defendant was found to see if he dumped the weapon.

Furthermore, D abandoned the gun before the officer even approached him so he had no expectation of privacy in the trash can.

Dave's argument will fail and the gun will be admissible.

Q2 Community Property

In 1989, Herb and Wendy married while domiciled in Montana, a non-community property state. Prior to the marriage, Wendy had borrowed $25,000 from a Montana bank and had executed a promissory note in that amount in favor of the bank. Herb and Wendy, using savings from their salaries during their marriage, bought a residence, and took title to the residence as tenants in common.

In 1998, Herb and Wendy moved to California and became domiciled here. They did not sell their Montana house.

In 1999, Herb began having an affair with Ann. Herb told Ann that he intended to divorce Wendy and marry her (Ann), and suggested that they live together until dissolution proceedings were concluded. Ann agreed, and Herb moved in with her. Herb told Wendy that he was going to move into his own apartment because he "needed some space." Ann assumed Herb's last name, and Herb introduced her to his friends as his wife. Herb and Ann bought an automobile with a loan. They listed themselves as husband and wife on the loan application, and took title as husband and wife. Herb paid off the automobile loan out of his earnings.

In the meantime, Herb continued to spend occasional weekends with Wendy, who was unaware of Herb's relationship with Ann. Wendy urged Herb to consult a marriage counselor with her, which he did, but Herb did not disclose his relationship with Ann.

In 2003, Wendy and Ann learned the facts set forth in the preceding paragraphs. Wendy promptly filed a petition for dissolution of marriage, asserting a 50% interest in the Montana house and in the automobile. At the time of filing, the Montana bank was demanding payment of $8,000 as the past-due balance on Wendy's promissory note which has been reduced to a judgment. Also at the time of filing, Ann had a $15,000 bank account in her name alone, comprised solely of her earnings while she was living with Herb.

1. What rights do Herb, Wendy, and Ann each have in:
    a. The residence in Montana? Discuss.

    b. The automobile? Discuss.

    c. The $15,000 bank account? Discuss.

2. What property may the Montana bank reach to satisfy the past-due balance on Wendy's promissory note? Discuss.

Answer according to California law.

Answer A

2)

1. Rights of Herb, Wendy and Ann

Herb married Wendy in 1989 while both were domiciled in Montana. In 1998 they moved to California, and California law applies here. One year later, in 1999, Herb began having an affair with Ann and moved out, telling his wife he "needed more space" but saw a marriage counselor with Wendy. When she discovered the relationship in 2003, she filed for dis[s]olution.

Community Property

Except as otherwise provided by statute, all property, real or person, whenever situated, acquired by a married person, during the marriage, while domiciled in California, is community property.

Quasi-Community Property

California law holds that real or personal property acquired before the couple was domiciled in California, or real property held outside of California is quasi-community property.

In California, quasi-community property is treated as follows: 1) For purposes of management and control, quasi-community property is treated as separate property; 2) In cases of death or divorce, or the rights of creditors[,] it is treated as community property.

Putative Spouse

Under the putative spouse doctrine, an otherwise valid marriage that is voidable for some reason (here, bigamy) may allow the putative spouse--who reasonably and objectively believes there is a valid marriage--to have rights similar to community property.

Herb moved out in 1999 and began having an affair with Ann, who knew that Herb was married to Wendy, but was told he intended to divorce her. She took Herb's last name, was known as his wife, and took title to a car as his wife. However, Ann knew Herb was still married to Wendy and that the "marriage" was not valid.

The putative spouse doctrine does not apply.

Marvin Relationship

Under the Marvin case, courts may enforce contracts between couples who are not

married, so long as they are not expressly based on performance of illicit sexual acts.

There is no mention of an express contract between Herb and Ann. The only possible "implied" contract is that Ann allowed Herb to move in with her in her apartment because he promised to divorce Wendy and marry her. Such an agreement was explicitly based on a meretricious relationship (committing adultery and divorcing his wife). Public policy requires that this contract not be enforced since it is a contract in derogation of marriage.

There is a small chance courts will enforce the promise as one merely for "housing" since Ann said Herb could live in her apartment. But this is highly unlikely.

The courts will not enforce any promise.

A. Residence in Montana

General Presumption

Under the general presumption, property acquired during the marriage is community or quasi-community property. The Montana residence was acquired during the marriage, with community funds (savings from salaries earned during the marriage). It was acquired in Montana, however, before they moved to California. Therefore, it will be presumed quasi-community.

Titled as Tenants in Common - Presumption (pre-1985)

Prior to 1985, it was presumed that when title was given to a husband and wife as "joint tenants" that they held property as joint tenants. To find community property, the couple had to 1) intend that it be taken as community, and 2) have a writing stating such. Since Herb and Wendy were not married until 1989, this presumption cannot apply.

Post-1985

After 1985, jointly titled property was considered community absent a desire to hold it jointly. No writing was required.

Here, there is nothing to indicate that Herb and Wendy desired the residence to be community. They were not even domiciled in a community property state. However, in such cases where they moved to California afterwards, California law will apply. The courts will probably consider the residence to be community. But this conclusion is not certain.

No Transmutation of Property

After the marriage, the property may be transmuted by a writing. There is no evidence of

such here.

Disposition

Depending on which way the court decides, the residence in Montana may be considered as owned by the community or by Husband and wife as tenants in common. Either way, at dissolution, it will be divided equally between Herb and Wendy.

B. Automobile

While married to Wendy, but during his relationship with Anne, Herb bought an automobile, with a loan, acquiring title with Ann as "husband and wife." Both Herb and Ann signed the loan application. Herb paid off the automobile out of his earnings.

General Presumption

Since the automobile was acquired during his marriage to Wendy, it will be presumed community property.

Possible Exception - Living Separate and Apart

Earnings while living separate and apart are not considered community property.

In 1999, Herb moved out of the dwelling he shared with Wendy and began living with Ann. He told Ann he intended to divorce Wendy, but never took affirmative steps to complete the divorce. During this time, he told Wendy he merely "needed some space" and let her believe he would return at some point. He spent occasional weekends with Wendy, attended marriage counseling with her, and never informed her of his relationship with Ann.

Herb will attempt to show he is living "separate and apart" because he intended the separation to be permanent and was going to divorce Wendy and marry Ann.

Wendy will contend, however, that it was not separate and apart. She will cite Herb's failure to tell her about Ann, his occasional weekends with Wendy, his attendance at marriage counseling, and his act of living this way for 4 years without ever filing for divorce.

The court will probably hold that the spouses were not living separate and apart, and that the earnings of Herb during this time were community property.

Herb and Anne's Title and Husband and Wife - Presumption

Herb and Ann will argue that they took title to car as husband and wife, and that this should control.

Wendy will argue several reasons the car should be community property.

Management and Control - Husband may not make a gift without written consent

As discussed supra, the courts should hold that Herb and Wendy were not living separate and apart, and that his income was community property. While husband and wife generally have equal management and control neither may give property away without the written consent of the other.

Herb attempted to give community funds to Ann by paying for a car and naming her as a joint tenant. This will not be allowed and the car will be considered community property.

Disposition at Divorce.

The car is community and will be divi[d]ed between Herb and Wendy. Ann will get nothing.

C. $15,000 Bank Account

Ann had a $15,000 bank account in her name alone comprised of her earnings while living with Herb. If they were husband and wife, or Herb was a putative spouse, this is presumed community. However, since they are living in a meretricious relationship, the funds were in an account in Ann's name, and were not commingled, they are separate property.

2. What property may the Montana bank reach to satisfy the past-due balance of Wendy's promis[s]ory note?

Prior to marriage, Wendy borrowed $25,000 from Montana Bank and executed a promis[s]ory note for that amount in the bank's favor. At the time Wendy filed for divorce, Montana Bank was demanding payment of $8,000 as the past-due balance on Wendy's promis[s]ory note which has been reduced to a judgment. This is a separate debt.

Time Judgment Was Entered

If the judgment was entered before Wendy and Herb were living separate and apart, i.e., before she filed for divorce, the bank may reach Wendy's separate property or the community.

Herb's Separate Property

Generally, the separate property of one spouse may not be reached to satisfy the separate debt of the other.

Community

If the judgment was reached before legal separation, then community is liable on the debt. However, the bank must first attempt to recover the judgment from Wendy's separate property.

Answer B

2)

California is a community property state. All property acquired during marriage is presumed to be community property (CP). All property acquired before marriage or after permanent separation, or by gift, bequest, or devise during marriage, is separate property (SP). All property acquired while parties were domiciled in a non-CP state, that would have been CP if the couple had been domiciled in CA, is quasi-community property (QCP). The source of the funds for a purchase can be traced in determining whether an asset is CP or SP.

At divorce, each CP and quasi-CP asset is split 50-50 between each spouse, and each keeps their own SP.

State of Marriages

This is a complicated situation involving two supposed marriages. Two issues that will determine rights in the property are when H & W's marriage ended, and whether Ann & H have [sic].

The Residence in Montana

Hank (H) & Wendy (W) purchased the Montana home with savings from salaries during their marriage. Salaries acquired during marriage are all considered community property, and thus the home was entirely acquired with CP. In addition, H & W took title as tenants in common, a joint form of title. Under CA law, taking title in a joint form, such as tenants in common, creates a presumption that property is CO [sic]. Since H & W were domiciled outside CA in a non-CP state at the time of the acquisition, the home would be considered quasi-CP because it would have been CP if they had been domiciled in CA.

There is no information indicating the source of payments for principal & improvements, but presumably that has been the earnings of the couple & thus CP. Thus under CA law, the home would be classified entirely as quasi-CP.

<u>Effect of Separation</u>

However, any earnings from either spouse after "permanent separation" are considered to be SP. Here, the issue is whether there was a permanent separation when H moved in with Ann in 1999, or if it occurred in 2003, when W filed for dissolution. If the couple permanently separated before 1999, then any of H's or W's earnings used for principal payments or improvements on the house might be considered to be a SP contribution to a CP asset. Under CA law, such contributions are entitled to reimbursement at divorce.

Permanent separation occurs when the spouses are living permanently apart and when one spouse intends to permanently end the marriage. Here, W will argue that permanent separation did not occur until 2003. Prior to that, although H moved in with Ann, he continued to spend occasional weekends with W, and thus did not permanently live apart from her. Also, the fact that he continued to spend weekends with her is evidence that he did not intend to end the marriage; he was keeping his options open. H, however, will argue that he intended to permanently separate when he moved in with Ann in 2003. He told Ann that he was divorcing his wife, bought a car with Ann, listed themselves as husband & wife, & took title as husband as [sic] wife. He also refused to see a counselor with W [sic]. Hence, he intended to move out permanently.

On balance, because H never filed for divorce & continued to visit W, his intent to end the marriage is not clear; it appears that he was keeping his options open. Hence, permanent separation did not occur until 2003.

In that case, all of the contributions to the house are CP, and the house is classified as quasi-CP to H & W. Ann has no rights to the house on any theory (see discussion below).

The Automobile

The Automobile was purchased with a loan obtained by H & Ann. Thus the source of the loan was one-half H's credit, & one-half Ann's. However, H paid off the loan entirely with his own earnings, however [sic]. Since H was still married to W at the time (see discussion above), H's earnings were CP, because all earnings are considered CP. Thus the car was paid for entirely with CP.

All property purchased during marriage by either spouse is presumed CP. W will argue that since H purchased the car with CP, it remains CP, and thus she is entitled to a 50% interest in it. H may respond, however, that by putting title in his & Ann's name, he considered the car to be a gift from CP to his SP & Ann.

W will respond, however, that, under CA law, a spouse cannot make a gift of community property outside the marriage without the written consent of the other spouse. Here, W certainly did not give her consent. A gift of personal property made without the other party's consent may be reclaimed at any time, with any statute of limitations. Here, since H made the gift to A without W's consent, W may reclaim her share of the community property even after 4 years. In addition, since 1985, no gift changing the character of property has been presumed unless the adversely affected spouse consents in writing. If H asserts that he changed the character of the CP by putting it in his & Ann's name, the transmutation will be unsuccessful because W did not consent in writing.

Here, W will prevail, and the car will be considered as H & W's CP. The issue is A's interest in the car.

Putative Spouse Theory

Although A & H were living together, California does not recognize common law marriage. Thus, any rights Ann may have must be asserted under either a putative spouse theory or contract theory.

A may assert that she is a putative spouse. A putative spouse is one who reasonably believed in good faith that she was married. If the court concluded that one was a putative spouse, all property acquired during the putative marriage is entitled quasi-marital property (QMP) & treated like CP at separation or divorce. Although there has not been a definite decision, if one spouse believed in good faith there was a marriage even the bad faith spouse may be able to treat the property like QMP.

Here, H clearly did not reasonably believe that he was married to A because he knew that he had not divorced W & continued to see her. It would not be reasonable for him to believe that he was married to A.

A, however, may argue that she believed in good faith that she & H were married because [t]hey lived together, she assumed H's last name, they bought a car together, and H introduced her to his friends as his wife. She was unaware of his continued relationship with W. Nonetheless, H had told A when they moved in together only that he "intended" to divorce W & that he had not concluded dissolution proceedings. However, putative spouse status also requires that the belief be reasonable. While any belief of A in the marriage may have been in good faith, a reasonable person would verify that the dissolution proceedings had been concluded. In addition, A & H did not take out a marriage licence or have a wedding ceremony, nor did H tell her that they had a valid common law marriage; he simply suggested they move in together. Consequently, A had a good faith but unreasonable belief in the marriage, and is not a putative spouse. Consequently, none of the property she & Hal acquired while they lived together can be considered quasi-marital property.

Contract Theory

A may be entitled to reimbursement from H on a fraud or breach of contract theory for a share of the car. She may argue that the loan application and title constitute a contract between them [and] that she would have a one-half interest in the car. Although the car appears to be a gift, and none of her money went into the car, she may be able to recover from H on a contract theory.

The $15,000 Bank Account

The $15,000 bank account is in Ann's name alone and consists entirely of her earnings while she was living with H. If they were considered to be putative spouses, then the account would be quasi-marital property, and H & A would each be [e]ntitled to a one-half

share. Since they were not putative spouses, the account is Ann's separate property, and neither H nor W have any rights to it.

Property to Satisfy the Note

W's note is a debt that she entered into before marriage. Debts entered into before marriage are CP. The creditor may attach all CP and the debtor spouse's SP. Quasi-CP is treated like CP for the purpose of satisfying debts.

Here, neither H nor W have any rights to Ann's $15,000 bank account. Thus it may not be attached by any debtor. The car is CP, and thus the debtor may repossess the car to satisfy the judgment. The house is quasi-CP, and thus may be also be entirely attached by the debtor.

However, because the house is in Montana, a California court cannot directly order judgement on the house. W, however is subject to the jurisdiction of the CA court, and the court can therefore order her to transfer title to the house if needed to satisfy the judgment. Thus the debtor can reach the house.

Q3 Professional Responsibility

Two years ago, Lawyer represented Sis in her divorce. Last week, Sis made an appointment with Lawyer to assist her father, Dad, with an estate plan.

Sis brought Dad to Lawyer's office. Dad was 80 years old, a widower, and competent. In Sis's presence, Dad told Lawyer he wanted to create a will leaving everything he owned to his three adult children, Sis, Bob, and Chuck, in equal shares. Dad's assets consisted of several bank accounts, which he held in joint tenancy with Sis, and his home, which he held in his name alone. Sis then asked Dad whether he wanted to do something special about his house. Dad thanked Sis for asking, and told Lawyer that he wanted Lawyer to draft a deed that would place his house in joint tenancy with Sis.

At the conclusion of the meeting, Lawyer told Sis and Dad that his customary fee was $750 for drafting such a will and deed. Sis gave Lawyer a check for $750 in payment drawn on her personal account. Lawyer then drafted the will and deed as directed.

What ethical violations has Lawyer committed, and what should Lawyer have done to avoid those violations? Discuss.

Answer A

The lawyer here has violated a number of ethical rules, as follows:

A. Duty to Identify & Disclose Conflicts Before Undertaking the Representation & Obtain Consent

Here, a potential conflict is presented at the very initiation of L's representation, when Sis (not Dad) first made the appointment and brought her father to see L.

The ethical rules (RPC) provide that a potential conflict arises when the lawyer's representation of one client may be materially impacted or limited either by his own interests, the interests of a former client, or other factors. In this situation, the lawyer may proceed only if he reasonably believes the representation won't be affected, and the client (or potential client) consents after full disclosure.

Relatedly, a lawyer can't take on representation that is or may be mat[erial]ly adverse to a former client in the same or a substantially related matter, absent full disclose [sic] and consent of the former client.

Thus, here both provisions are triggered:

(1) The representation of Dad to make a will is potentially adverse to Sis, L's former client. There is a risk to Dad that L's former relationship with Sis could affect his independent judgment. If L reasonably thought it would not, he still needed to fully disclose this conflict to D and obtain his written consent. Logically, to do that, L would have needed to exclude Sis from the discussions (see discussion later conc[ernin]g allowing Sis to be present, which raises other ethical issues).

Whether L also had to get Sis's consent, as a former client, depends on whether the prior represent of Sis is viewed as related to L's current representation of Dad. This test looks at whether there is a potential that the lawyer may have gained confidential information from Sis that could impact his representation of Dad, and also whether Sis and Dad are "adverse" in the current represent.

To be prudent, L should have also obtained Sis's consent to the representation of Dad.

B. Duty of Confidentiality & Preservation of Attny-Client Privilege

L also violated ethical obligations in proceeding to discuss the representation with Dad, while Sue [sic] (a third party) was present. This had the potential effect of disclosing client confidences to Sue [sic], and waiving the privilege. (Note that the attorney-client privilege attaches to initial consultations).

The facts suggest that there was some ambiguity concerning Sis's role. If Dad in fact desired to have Sis present during the discussions, to assist him, that would be permissible (assuming L disclosed ramifications) and there may have been a way to allow that without effecting a waiver. On the other hand, it appears Dad was competent, so there arguably was no need to have Sis present. Regardless, L needed to raise these issues with Dad at the outset, including a discussion of who was the client (Dad) and of the attorney-client privilege, and the possible impact of allowing Sis to "sit in" on the consultation on waiving any privilege. L also would have needed to discuss the fact that because Sis was an interested person in his estate distribution, the potential conflict of interest between Dad & Sis weighed in favor of excluding Sis from the consultation.

Initially, it appeared that Dad wanted Sis to share = with other siblings, so the conflict may have been less apparent. However, once she attempted to influence a disposition to herself, L was obligated (even if not before) not to continue with the consultation in Sis's presence (because at that point her interest conflicted with the client's objective of = distribution.

C. Duty as Advisor and General Duty of Competence

L also violated his ethical obligation to CDbe competent in his representation, @to fully advise the client, ®to act consistent with the client's objectives; and ®to exercise indep. judgment and not let a third pty improperly influence his judgment.

Here, L knew that the client's objective was, as stated, to leave everything to his children in = shares. The final result, contrary to that objective, was that he drafted a will and deed that did no such thing, but in fact conformed to the instructions of a third party, Sis.

L also acted incompetently in failing to explain to Dad what would need to be done to achieve Dad's objective. L would have needed to discuss how the bank accounts were titled (in jt. T w/ Sis) and determine whether that was consistent with Dad's objective of = division, and if not, to discuss options for those accounts that would ensure their distribution on Dad's death =, rather than all to Sis as a Jt. tenant. [This assumes Dad was true owner of funds]. Similarly, L failed to adequately explain the implications to Dad of placing a deed in Jt. T w/Sis on the house (that she would take sole ownership on Dad's death), to make sure that Dad fully understood and appreciated the consequences of holding title in that form, and that this form of title was consistent w/Dad's (not Sis's) objectives.

Finally, in simply acting as a scrivener for Sis's instructions, L failed to exercise independent judgment and improperly allowed his judgment to be influenced by a third party (and one with objectives contrary to the client's stated objective).

D. Duty of Loyalty; Acceptance of Pymt from 3d.

L also violated his duty of loyalty to the client, acted acted [sic] improperly in accepting payment from Sis. The RPC state that a lawyer should not accept payment from a third party for services to a client, unless the third party does not influence the lawyer's indep. judgment, and the client consents after full disclosure.

Here, there was no "informed" consent. Although Dad was present when Sis paid, L did not explain to either of them that he was working solely for Dad, even though Sis was paying. Furthermore, here it appears that there was an actual conflict, prejudicial to the client, in that L acted according to Sis' objectives and did not properly counsel Dad on his options.

E. Fee

A lawyer's fee must be reasonable in light of the services performed. Here, lawyer charged a flat fee of $750. Assuming this amount was reasonably related to the services performed, including their complexity, the lawyers' experience, & fees charged by others in the community for similar work, it would be proper even though in the nature of a "flat" rather than hourly based fee. California does not require fee agreements to be in writing unless amt is greater than $1000.

Summary of Options and What L Should Have Done

In summary, L violated ethical duties by undertaking representation when there was a conflict of interest, without disclosure and consent; by allowing Sis to "participate" when her interests conflicted with Dad's; by failure to adequately advise Dad and to act competently in achieving Dad's objectives. (And other viols. as stated above.) He should have:

CD Made full discl. to Dad of past relat. with Sis, & got written consent assuming L reasonably believed he would not be influenced by Sis.

@ L should not have conducted the initial consultation in Sis's presence, and at the least needed to fully advise & disclose to Dad the implications re: the attorney-client privilege, & Sis's conflicting & potentially conflicting interests w/Dad.

® L should have fully explained to Dad the options and acts needed to achieve his objectives, including the consequences of jtly titled accounts/property.

® L should not have accepted Sue's check without full discussion & disclosure.

®a L should not have let his judgement (apparently) be influenced by Sis.

® Arguably, L should also have obt. Sis' written consent to repres. of Dad b/c both representations related to "property."

Answer B

3)

I. Duty of Loyalty to Client

Lawyer had a possible and actual conflict of interest with Sis and Dad. Sis had worked with Lawyer in the past and she arranged the meeting. However the purpose for the meeting is for Dad to create a will. As such, the current client is Dad. Lawyer should have clearly indicated upfront that Dad was the client and that he would zealously advocate for him. Also since Sis paid the bill, [sic].

A lawyer has a duty of loyalty to his clients. He must not act if there is a conflict of interest - either potential or actual - unless he reasonably believes he can effectively represent the client. He must also inform the client of the potential conflicts and the client must consent in writing. A reasonable lawyer standard will also be applied to determine that he could fairly represent the client.

Here there are a few potential conflicts. Sis was an old client. She has an interest in the dealings with Lawyer and Dad. Lawyer must disclose the previous relationship without revealing any confidential information of the dealings with either Sis or Dad. A lawyer can represent an old and a new client as long as the matter is different. Since Sis brought Dad, consent would have been confirmed by Sis but Lawyer should have got the consent in writing. He also should have clearly indicated to her that Lawyer was representing Dad and not her for this matter even though she was paying the bill.

Dad, however, should have been informed of the potential conflict and given consent in writing. The potential of conflict is apparent in drafting a will where one of the takers under the will is present. Here Sis was involved in the meeting to discuss how the assets would be distributed. As such, Dad should have been informed upfront of the potential conflict with Sis and given his written consent. As the meeting progressed, it became apparent that there was an actual conflict and Lawyer should have again informed and received consent from both Sis and Dad. The assets that were being distributed involved several accounts that Sis held in joint tenancy with Dad. Dad indicated that he wanted to leave everything to his children. That would mean that something may have to be done with the accounts in joint tenancy which would affect Sis's interest.

Sis also prodded Dad about the house. This may be considered undue influence on her behalf and Lawyer should have been aware of that. He should have informed Dad have [sic] the various actions who could take with the house rather than just let Sis make the suggestions.

At this point he should have recognized that he could not adequately represent Dad with Sis present.

II. Duty of Confidentiality

Lawyer has a duty of confidentiality to both Dad and Sis. Any discussions that occurred during the meeting would be held in confidence. Since Sis was present, Dad did not have the opportunity to talk freely with his lawyer. Although he was not likely going to have to disclose any confidential material, it would have been in his client's (Dad's) best interest to have a confidential meeting without Sis present to disclose how he wanted the estate distributed.

III. Fiduciary Duty

Fee discussion upfront

Any discussion of fees should be held upfront. Lawyer did not tell Dad and Sis the fee for his services until the end of the meeting. This should be okay if there was no fee charged for the preliminary discussion. The fee must be reasonable. In California, the fee must not be unconscionable. He also must be clear of any extraordinary costs that he may be aware of that mean a higher fee.

Payment by Sis

Lawyer had a duty to inform Sis that although she was paying the bill, she was not the client and that Dad was. Lawyer should have also told Dad that Sis was paying the bill but that he was the client. He should have gotten this consent and understanding in writing.

IV. Competency

Lawyer has a duty of competency to zealously represent his client's desires. In dealing with Sis and Dad together he could not competently represent Dad. Drafting a will for distribution among three children is difficult. Dad specifically stated that he wanted to distribute his estate to all three children equally. In allowing Sis to have the house put in her name as joint tenant, Lawyer was violating the duty to adequately and competently represent his client Dad and his best interests. He should have had a separate meeting with Dad to ensure that all assets were accounted for and distributed according to his wishes.

V. Duty of Fairness to Third parties - Sis, Bob, Chuck

In addition to his client, Lawyer owes a duty of fairness to third parties. Here specifically those who would take under the will - Sis, Bob, and Chuck. During the course of conversations with Dad and Sis, it should have become clear to Lawyer that Sis was going to get all the property and Bob and Chuck would receive the short end of the stick. He owed this duty of fairness to ensure that Dad's will did reflect his desires and his estate went to all three equally.

Q4 Real Property

Lori owns a small shopping center. In April 1999, Lori leased a store to Tony. Under the lease Tony agreed to pay Lori a monthly fixed rent of $500, plus a percentage of the gross revenue from the store. The lease term was five years. In part the lease provides:

> Landlord and Tenant agree for themselves and their successors and assigns:
>
> * * *
>
> 4. Tenant has the right to renew this lease for an additional term of five years, on the same terms, by giving Landlord written notice during the last year of the lease.
> 5. Tenant will operate a gift and greeting-card store only. Landlord will not allow any other gift or greeting-card store in the center.
>
> * * *

In July 2000, Tony transferred his interest in the lease in writing to Ann. Ann continued to operate the store and pay rent.

In February 2003, a drugstore in the shopping center put in a small rack of greeting cards. Ann promptly complained, but Lori did nothing.

Beginning in March 2003, Ann stopped paying the percentage rent, but continued to pay the fixed rent alone. Lori took no action except to send a letter in April 2003 requesting payment of the percentage rent that was due.

In January 2004, Ann sent a letter to Lori requesting that Lori renew the lease according to its terms. Lori denied that she had any obligation to renew.

1. Is Ann entitled to a renewal of the lease? Discuss.

2. Is Lori entitled to the past-due percentage rent from:

    a. Ann? Discuss.
    b. Tony? Discuss.

Answer A

Ann's Right to Renew the Lease

Statute of Frauds

The statute of frauds requires that a lease for possession of property for longer than one year must be evidenced by a writing, signed by the party to be charged. Here, the lease was for a period of 5 years. So to be enforceable it must comply with the statute of frauds. The facts imply that a written lease was drawn and the lease stated the amount of rent[,] the lease term, a right to renew, and a restriction on landlord[']s lease to a competitor and tenant[']s type of use. The Statute of Frauds has been met.

Sublease vs. Assignment

When a lessee purports to transfer less than its entire term, or entire rights and remedies under a lease, the resultant transferee shall be considered a sublesee and the transfer shall be considered a sublease. In this case, the sublessee would not be considered a successor or assignee of the original lessee and would not be in privity of contract with the landlord. Thus, a sublessee may not enforce lessee's rights under the original lease, against the landlord. Conversely, a landlord may not enforce its right to collect rent from a sublesee.

The facts indicate simply that "Tony transferred his interest in the lease in writing to Ann". Because this transfer was in writing, the Statute of Frauds is satisfied. Because it appears that Tony's entire interest in the lease was transferred to Ann, Ann's is an assignee and the transfer shall be considered as assignment.

Does the covenant for tenant's right to renew the lease for an additional five years, on the same terms, by giving landlord written notice during the last year of the lease run with the land?

In order for Ann to be able to enforce her right to renew the lease, she will need to establish that the covenant runs with the land. A covenant is said to run with the land when four criteria are met:

1. The original parties intended that future takers be bound.

Here, the express terms of the lease state "landlord and tenant agree for themselves and their successors and assigns". This language clearly indicates that landlord and tenant intended their successors to be bound.

2. The successor must have knowledge of the covenant.

Ann has actual knowledge of the covenant as it is expressly stated in the original lease and she is seeking to enforce the covenant.

3. There must be horizontal and vertical privity between the parties.

Ann is in horizontal and vertical privity of estate with landlord by virtue of the assignment from Tony, thus, this criterion is met.

4. The covenant must "touch and concern" the land.

A covenant will be held to touch and concern the land if it burdens the land. Here, a 5 year possessory interest in the demised premises, touches and concerns the land.

Because the covenant to renew the lease "runs with the land," unless Ann is in material breach of the lease, she will be entitled to enforce the covenant upon her satisfaction of the "notice during the last year of the lease" requirement. Ann gave written notice to Landlord (Lori), in January of 2004, the last year of the lease. She has met this requirement & is entitled to renew the lease. (She may have waived the non-competition covenant and the renewed lease may not include this covenant - see below.)

[@a.] Did Ann's failure to pay the percentage rent constitute a material breach of the lease, discharging Lori's duties under the lease and permit Lori to collect the percentage rent from Ann?

The facts indicate that begin[n]ing in March 2003, Ann stopped paying the percentage rent. Lori took no action except to send a letter requesting payment of the percentage rent. The covenant to pay percentage rent is enforceable against Ann by Lori since this covenant "runs with the land" (supra). Ann will argue that Lori's breach of the restriction on leasing space to a competitor discharged her duty to pay percentage rent. At common law, the duty to pay rent was held to be an "independent covenant" and was not discharged by a breach of the landlord in regard to improvements on real property. The modern trend is to find that the covenants under a lease for real property are mutually dependant. If Ann can prove that the landlord's (Lori['s]) breach of the covenant "not to rent to a competitor" gave rise to a claim that the amounts of rent she withheld comprised a reasonable "set off" of damages from Lori's breach, her failure to pay the percentage rent may be discharged.

Waiver:

Ann will also argue that Lori's failure to enforce the percentage rent constituted a "waiver" which Ann then reasonably relied upon to continue her tenancy without paying percentage rent. The facts indicate that Lori's only response to Ann's failure to pay

percentage rent was to write one letter requesting rent in April 2003. On these facts, Lori may have waived the covenant to collect percentage rent.

Conversely, Lori may argue that Ann waived the covenant to not to [sic] lease to a competitor greeting card store by merely complaining in February 2003 and then taking no further action under the lease. If Ann would have claimed that Lori's breach of the covenant caused her business to be economically impacted to the point where she had to close shop, she might be able to present an argument for "constructive eviction". Since this did not occur, Ann may have waived her right to enforce the covenant.

Therefore, while the right in Lori to collect percentage rent from Ann may have arisen under the lease, as this covenant "ran with the land", a court might not enforce this covenant against Ann based upon the "mutually dependent" nature of this covenant with Lori's duty not to lease to a competitor, which Lori breached. In the alternative, a court may find that both parties waived their rights to enforce the respective covenants. It should be noted that as Tony's assignee, under the lease, Ann could raise any of Tony's rights and defenses against Lori - provided the covenants run with the land, as they do here.

[@b.] Lori vs. Tony:

Lori's right to collect past due percentage rent.

The assignment of Tony's interest in the lease to Ann did not discharge Tony's duties under the lease. In the facts presented Tony will remain in "privity of contract" with Lori and will therefore be bound by the contractual duties imposed by the lease. The proper method for Tony to have discharged his liability under this contract would have been for Tony & Lori to effect a novation of the contract. A novation occurs when the two parties agree to substitute in a stranger, in this case Ann, and discharge the original party to the contract. No novation occurred in the facts presented. Tony remains liable for the past due percentage rent owed to Lori, subject to the defenses which Ann could have raised, waiver, breach of mutually dependent covenant. For the reasons stated above, Tony will be subject to a claim for unpaid percentage rent based on his contractual liability to Lori, but he will likely be able to successfully defend this claim as set forth above.

Answer B

4)

1. Lori's obligation to renew the lease

Validity of the Assignment

The first issue in this case is whether a valid contract exists between Lori and Ann. A lessee may assign his interest in a rental property to a third party unless the lease expressly forbids it. In this case, the lease between Lori and Tony did not forbid an assignment. Therefore, Tony had the right under the contract to assign his interest in the lease to Ann, and a valid contract existed between Lori and Ann. Furthermore, Lori accepted rent from Ann, which further indicates that the assignment was valid.

Terms of the Lease

The second issue is whether Ann has a right under the contract to enforce the provision in the lease that Tenant has the right to renew the lease for an additional term of five years on the same terms by giving the landlord notice. Under the terms of the contract, Ann will argue that Tony agreed for himself and his assigns (Ann) to the term of the lease allowing Ann to renew. Therefore, Ann would have the right to renew the lease, as long as she was not in breach of contract.

Lori would argue that there is no privity of contract between herself and Ann. The contract that Tony made with Ann was not expressly assumed by Lori. Therefore, any covenants that do not run with the land are not binding between Ann and Lori, because there is no privity of contract between them. Lori will further argue that the term of the lease requiring Lori to allow the tenant to renew does not run with the land: there is nothing about the agreement to allow the renewal that touches and concerns the property. Therefore, Lori will argue that her promise to Tony is not binding. However, because the terms of the contract are specifically binding on Tony's successors and assigns, Lori will lose this argument. Under the terms of the original contract, Ann is entitled to renew the lease.

Lori will further argue that Ann breached her covenant to pay rent. The duty to pay rent is an obligation that runs with the land: Ann is in privity of estate with Lori, and her failure to pay rent constitutes a material breach of the contract. Though Lori chose not to evict Ann for her failure to pay rent, she could evict her any time and may refuse to renew the lease at the end of the term.

Ann will will [sic] argue that the duty to pay rent in the form of the percentage check has been excused by Lori's breach of contract. The contract contained a provision that Lori would not allow any other gift or greeting card store in the center. Ann can correctly argue that that [sic] a restriction of this type is a covenant that runs with the land: The restriction

touches and concerns the leased property, because it has the effect of making Ann's gift store more valuable. Furthermore, as mentioned above, the contract expressly states that the covenants in the lease would be binding upon each party's assignees, and Ann as Tony's assignee, can sue under the terms of the contract.

The next issue is whether Lori's decision to allow the drug store to put up a small rack of greeting cards constituted a breach sufficient to allow Ann to stop paying the rent. If Lori's decision constituted a material breach, Ann would be excused from her duty to pay rent. Because Lori would be in breach, Ann could suspend her performance of her rent obligations. Furthermore, as the non-breaching party, she would be entitled to renew the lease under the terms of the agreement between the parties. However, Lori did not breach the terms of the contract. The facts indicate that the contract required Lori not to allow "any other gift or greeting-card store in the center." The facts indicate that the store that sold the cards was a drug store, and that the cards it sold were contained on one small rack. Therefore, under the terms of the contract, Lori will be successfully be [sic] able to show that she was not in breach of the contract. Because Lori did not breach the contract with Ann, Ann was not relieved of her obligation to pay the percentage rent. Ann's material breach of contract, her failure to pay the percentage rent, excused Lori from her obligation under the contract to renew the terms of the lease according to Ann's request.

In the alternative, Lori will argue that even if her decision not to stop the drug store from selling greeting cards did constitute a breach of contract, the breach was minor. A material breach occurs when one party fails to pe[r]form in such a way that the value of the contract is substantially destroyed. Ann may argue that allowing even one card rack in one other store expressly breached the lease and should therefore be considered material. However, Ann will lose this argument: the facts indicate that the drug store primarily sold other things, and that it carried one small rack of card[s]. Allowing the drug store to sell card[s] did not substantially impair the value of the contract for Ann. Therefore, if a breach occurred at all, it was a minor breach. A minor breach does not excuse the other party from performing its obligations under the contract. In this case, Ann had no right to cease paying the percentage rent, because the breach was minor. On the other hand, the failure to pay the full amount of rent owed constituted a material breach, and Lori would have been entitled to evict Ann or sue for damages. Lori's rights concerning the rent itself are more fully discussed below: with regards to the obligation to renew the contract, Lori was excused because of Ann's material breach.

2. The Past Rent

Ann's Obligations

The next issue is whether Lori is entitled to recover for the percentage rent from Ann. As mentioned above, because the covenant to pay rent runs with the land, and because the contract expressly states that the obligations of the lease would be bi[n]ding on assignees such as Ann, Ann was obligated to pay rent. For the reasons discussed above, she will

lose her argument that Lori breached the contract.
Ann's duty to pay rent is a covenant that runs with the land. Since Ann is the tenant in possession of the property, she is in privity of estate with the [sic] Lori. Lori may sue Ann to recover for the value of the rent that she is owed.

Ann may try to argue that Lori is estopped from suing her for the rent. She will argue that, although Lori requested the rent, she allowed Ann to continue occupying the premises for 8 months after requesting the percentage rent. She will argue that Lori's acceptance of the rent constituted a waiver of her right to collect the percentage rent. However, Ann will lose this argument as well. Although Lori had the option of evicting Ann and suing for the rent, she also had the option of letting Ann stay and suing for damages. Ann's obligation to pay rent has therefore not been discharged. Lori clearly did not waive this right, because she sent Ann a letter requesting the percentage rent to be paid.

Tony's Obligation

The next issue is whether Lori may sue Tony to recover the percentage rent that Ann has not paid. The rule is that when two parties sign a contract, and one party assigns its interests in the contract to a third party, the assignor remains liable to the obligee on the or[i]ginal contract. The landlord may collect rent from any party with whom she is in privity of contract or privity of estate.

In this case, Tony and Lori signed the or[i]gnal contract. Tony assigned his interests to Ann. As an assignor, Tony is not relieved of his duty to ensure that the contract is fully performed. Lori may sue Tony for his obligation to pay rent and to pay the percentage of revenues that the story [sic] earned. Tony will have the same defenses available to him that Ann had: he can argue that Lori was in breach and that this breach relieved Ann of her duties to pay. However, for the reasons discussed above, these defenses will not be successful. Because Ann remains liable for the percentage rent, Tony is also liable.

Q5 Constitution

The National Highway Transportation and Safety Administration (NHTSA), a federal agency, after appropriate hearings and investigation, made the following finding of fact: "The NHTSA finds that, while motor vehicle radar detectors have some beneficial purpose in keeping drivers alert to the speed of their vehicles, most are used to avoid highway speed-control traps and lawful apprehension by law enforcement officials for violations of speed-control laws." On the basis of this finding, the NHTSA promulgated regulations banning the use of radar detectors in trucks with a gross weight of five tons or more on all roads and highways within the United States.

State X subsequently enacted a statute prohibiting the use of radar detectors in any motor vehicle on any road or highway within State X. The State X Highway Department (Department) enforces the statute.

The American Car Association (ACA) is an association comprised of automobile motorists residing throughout the United States. One of ACA's purposes is to promote free and unimpeded automobile travel. ACA has received numerous complaints about the State X statute from its members who drive vehicles there.

In response to such complaints, ACA has filed suit against the Department in federal district court in State X, seeking a declaration that the State X statute is invalid under the Commerce Clause and the Supremacy Clause of the United States Constitution. The Department has moved to dismiss ACA's complaint on the ground that ACA lacks standing.

1. How should the court rule on the Department's motion to dismiss on the ground of ACA's lack of standing? Discuss.

2. On the assumption that ACA has standing, how should the court decide ACA's claim that the State X statute is invalid under the Commerce Clause and the Supremacy Clause of the United States Constitution? Discuss.

Answer A

5)

1. ACA's Standing

Organizational Standing

An organization may bring suit on behalf of its members if it can establish the following:

1. It's [sic] members have suffered an injury in fact;

2. The injury is related to the organization's purposes; and

3. The court can grant relief without the presence of the individual members who have suffered the injury.

Injury in Fact

The requirement that the members have suffered an injury in fact ensures that the federal courts are only hearing real and live claims and controversies. In order to establish an injury where a statute is challenged based on its unconstitutionality, either the statute must have been enforced against someone or the failure to rule the statute invalid before enforcement must work an extreme hardship to the complaining individual.

Here, there is no evidence that the statute has been enforced against any of the ACA members. Though the State X Highway Department enforces the statute, the facts do not indicate that the department has enforced the statute against any of the ACA members. The facts do state that ACA has received numerous complaints about the statute from State X members who drive in State X where the statute is being enacted. Because there has been no actual enforcement of the statute, in order to obtain pre-enforcement review, the ACA must show that its members are going to be put to an extreme hardship if they are not granted a judgment on the constitutionality of the statute.

The hardship faced by the members if they are forced to continue acting under this statute until it is enforced is relatively light.

It is likely that the court will find that this case is not ripe for review because there is no evidence that the statute has been enforced against the ACA members. Furthermore, the hardship the members will suffer if they are not given pre-enforcement review does not rise to the level of extreme hardship to justify a premature ruling by the federal court.

Injury Related to Organization's Purposes

If the court does find the members of ACA have suffered an injury, ACA must next establish that this injury is related to the purpose of the organization. Here, the injury would be that the drivers are forced to drive without radar detectors. The stated purpose of the ACA is to promote free and unimpeded automobile travel. ACA will have no problem showing that the statute prohibiting drivers from utilizing radar detectors is related to free and unimpeded automobile travel. Not having a radar detector can rationally be viewed as being an impediment to free driving. Thus, the injury is related to the association's purpose.

Presence of Individuals is Unnecessary to Grant Effective Relief

ACA must show that it can bring suit challenging the statute and that the court can grant relief to remedy the injury suffered by its members without the individual presence of the members in the lawsuit. Here, the relief ACA is seeking is a declaration that the statute is invalid. If they are seeking injunctive relief, to keep the Department from enforcing the statute, then the presence of the members would not be necessary to fashion this relief. If the ACA is seeking an injunction this relief would be an effective means to remedy the injury suffered by the drivers. If, however, the association is seeking money damages because of the infringement of some free driving right , then they would need the presence of the drivers in the suit to grant this relief.

11th Amendment

State may also challenge the suit brought by ACA on grounds of the 11th Amendment. The 11th Amendment prohibits cases in federal courts against the states. Here, ACA is bringing an action against State X Department in the federal court. The ACA's suit might not be barred because they are seeking to have the statute ruled unconstitutional and are most likely seeking an injunction prohibiting further enforcement of it. It is unlikely that the 11th Amendment will bar this suit against the Department for a declaration of unconstitutionality.

Conclusion

The court will most likely find that ACA lacks organizational standing because its members have not suffered an injury in fact. There is no evidence the statute has been enforced against the members and the "hardship" suffered by the members is not sufficient to warrant pre-enforcement review. The case should be dismissed for lack of standing.

2,

Validity of State X Statute under Commerce Clause

Preemption

Where the federal government preempts a field, the state may not regulate it. Preemption can take place either expressly by the Legislature stating so in a statute, by the pervasive presence of the federal government in the certain field, or by a federal statute conflicts [sic] with a state statute directly or indirectly.

There is no evidence that the NHTSA intended to preempt the field of radar detector legislation. In the statute, they stated that its purpose was to allow apprehension of speeders by law enforcement officials and assumedly, for the protection of drivers. There is no express preemption of the field. The regulation by the federal government in this area does not seem to be so pervasive so as to imply that the federal government has preempted the field (as is the case with the FCC). This statute appears from the facts to be the only statute related to speed control devices.

The federal statute is limited to large trucks. It prohibits radar control devices in trucks over a certain weight. The state statute is more regulatory than the federal statute- it prohibits such devices in all vehicles. More extensive regulation granting more protection serves the purpose of the federal statute, it does not conflict with it.

Dormant Commerce Clause/Negative Implications of the Commerce Clause

A state may not regulate interstate commerce in a way that is discriminatory against interstate commerce or in a way that unduly burdens interstate commerce. Here, the statute does not discriminate against interstate commerce. The statute prohibits all drivers from using these radar control devices- it does not just prohibit out-of-state drivers from using these devices. Because the law does not discriminate against interstate commerce, to be invalid, ACA must show that the regulation places an undue burden on interstate commerce.

In order for state law that regulates either the channels, instrumentalities or those things that, in their aggregate, have a substantial affect [sic] on interstate commerce, the state must show that the non-economic state interest outweighs any burden on interstate commerce. Here, the interest is not economic. The interest of the state is presumably for the safety of drivers on the State X roads and highways. Speed devices like radar detectors arguably aid drivers in evading the laws that the state will argue were designed to protect drivers.

The safety of drivers on State X roads and highways is a legitimate, important state interest. This interest must outweigh the burden on interstate commerce by the prohibition

on speed control devices. The only burden suffered by interstate commerce is that interstate drivers will be subject to different rules. In other states, they might be permitted to use radar detectors, but in State X, they will not be able to. This might potentially create a substantial likelihood that drivers traveling on interstate highways, traveling between states, will be more likely to unknowingly violate this rule. In order to remedy this problem, the State could post signs at or near its borders that radar detectors are prohibited in State X. Once a driver knows of this prohibition, the driver can put the radar detector away or turn it off. The statute does not prohibit the possession of one within the state, but only the use of one.

Conclusion.

The prohibition of radar detectors in State X in any vehicle traveling on a road or highway within the state serves an important, non-economic state interest. This interest outweighs any burden placed on interstate commerce. The statute will not violate the Dormant Commerce Clause.

Supremacy Clause

The statutes, treaties, and Constitution of the United States are supreme. Where a state law conflicts with either federal statutes, regulations, or the federal Constitution, the state law is invalid.

In order for ACA to prove that the state law violates the Supremacy clause, it must show that the State X law either directly conflicts with the federal law, or frustrates or impedes the objectives and purposes of the federal law. Here, the State X law only regulates more vehicles than does the federal statute which is limited to trucks over a certain weight.

A state may regulate more extensively than a federal statute so long as this does not frustrate the objective of the federal statute. A state may not, however, pass a law that excludes conduct that is included in a federal law. Thus, for example, the State X statute could not read that trucks with a gross weight of five tons or more are exempt from the radar detector ban. This would expressly contradict the federal statute. Here, the State X law does not expressly conflict with the federal statute nor does it impede or frustrate the objective of the federal statute. The federal statute objective and the state statute objective are the same- both statutes aim to prevent drivers from evading law enforcement officials for violations of speed-control laws. The State X statute only prohibits more vehicles from using such devices--- it extends the protections the federal statute desired even further.

Conclusion

This law will not be invalid under the Supremacy Clause. It neither expressly contradicts nor frustrates or impedes the purposes of the federal statute.

Answer B

5)

I. The Court should Deny the Department's Motion to Dismiss for ACA's lack of standing

A. Preliminary Jurisdictional and Venue Issues

Personal jurisdiction in State X is appropriate here, given that the subject action is to challenge the validity of a statute of State X. The Federal District Court for State X has jurisdiction because the ACA is raising a federal question: namely, whether or not the State X statute violates the United States Constitution as to either or both of [sic] the Commerce Clause and the Supremacy Clause. Venue in the Federal District Court for State X presumes that State X is a single-district state, and thus there is not a multiplicity of federal district courts from which to choose.

B. ACA has standing

The Federal courts have jurisdiction to hear cases and controversies. This means that there must be an actual dispute, not a hypothetical or moot question, and that the parties to the action are, respectively, the injured party and the party liable for the injuries.

Although the ACA itself has not suffered an actual injury, the Courts have, since the Sierra Club case, set forth a clear standard by which unincorporated associations can sue on behalf of their members and be found to have standing. There are three components that must be met: first, the purpose of the lawsuit must be directly related to the purpose of the association; second, individual members of the association would have the standing to bring the action on their own individuals[‘] behalves; third, the participation of individual members of the association is not required to prosecute the action. Each of these will be explored in turn.

i. The Purpose of the ACA

As noted in the facts, the ACA is an association comprised of automobile motorists residing throughout the United States. Among ACA's organizational purposes is the promotion of free and unimpeded automobile travel. Such an organization is clearly one that is concerned with a State that has adopted and enforced a statute that imposes different rules on drivers as they cross from state to state.

ii. The Standing of Individual Members

Also, as noted, members of the ACA have complained to the ACA about the relevant statute. We cannot determine, from the facts provided, whether any member of

the ACA has actually been cited for use of a radar detector in violation of the statute, nor can we determine whether ACA members have been cited for speeding based on being "clocked" by police-operated radar that would have been detected with the lawful use of radar detectors. However, a person with a reasonable basis for challenging a criminal statute is not required to first commit the crime and be convicted thereof before challenging the validity of the statute. On this basis, individual members of the ACA who own radar detectors and would use them when driving in State X would clearly have standing to sue; assuming that such persons exist, the next element of the standing analysis is satisfied.

iii. The participation of individual members

The final element of associational standing analysis is whether the individual members themselves are required to participate in the action. Here, the ACA is mounting a broad-based challenge to the statute; their claim is not tied to the enforceability of the statute against a particular person or in a particular set of circumstances. In these conditions, the ACA is fully capable of proceeding with its case absent the active involvement of any particular person or representative plaintiff.

Thus, the requirements of associational standing have been met, and the Court should deny the Department's motion to dismiss for lack of standing.

II. The Court should Uphold the validity of the Statute.

The ACA has identified two bases for its challenge of the constitutionality of the relevant State X statute: the Commerce Clause and the Supremacy Clause. Each will be discussed in turn.

A. The Commerce Clause.

Under the United States Constitution, Congress has the power to regulate interstate commerce. However, individual states, as separate sovereigns, have their own individual police powers to regulate conduct within the boundary of the state. The interplay between these two provisions - often conflicting provisions - requires in part of a fact-based analysis.

The ACA would argue that the subject statute clearly imposes significant restrictions on interstate commerce. They would argue that motorists driving through State X on their way from one state to another should not be expected to know the requirements of State X law, and thus face risk of [a] ticket or possible arrest.

State X will counter by noting that any impact on interstate commerce is, at best, minimal and tangential, and does not constitute an undue burden. The State will note that they do not ban the ownership or possession of radar detectors, only the use of radar detectors.

Additionally, State X will argue that its regulation is required to enable State X to use its

police power to provide for safe roads and highways. State X will cite to laws in other states, such as Virginia, prohibiting the use of radar detectors. State X will similarly note that other states validly impose regulations that are far more burdensome, such as laws regarding child safety seats.

State X will also note that no discriminatory impact exists against out-of-state residents. All motorists - both from outside State X and residents of State X - are subject to the ban. Presumably, State X will post appropriate signage at or near public roads that cross into State X advising motorists of the existence of the ban on radar detectors. This will further minimize the impact on out-of-state motorists.

On these bases, the Court is likely to agree with State X's contention that State X's regulation does not violate the Commerce Clause.

B. The Supremacy Clause.

In arguing that the relevant statute is in violation of the Supremacy Clause, the ACA is really arguing that by reason of the applicable NHTSA regulations on radar detectors, the Federal government has preempted any state legislation impacting this area. For the reasons noted below, this argument too will fail.

Federal laws and regulations can preempt state laws either expressly or through implication. Express preemption is readily apparent when it occurs; here, no evidence exists to indicate that the NHTSA's regulations promulgated on this topic state that they are exclusive, and thus no express preemption exists.

The federal government can also preempt by implication. If the scope of the federal action is such that it leaves no room for any additional state regulation, then state action is prohibited. Here, the NHTSA regulations only apply to trucks with a gross weight of five tons or more. The ACA will argue that by defining certain classes of vehicles which are not allowed to use radar detectors, the NHTSA also implicitly ruled that other motor vehicles are not prohibited from doing so.

This argument is likely to fail, however. Nothing implicit in the text of the regulation, as provided, implies any intent at reserving the arena for the federal regulatory action. Rather, the NHTSA's findings of fact are in no way limited to certain classes of vehicles, certain sizes, weights, etc. This would suggest, the State will argue, that NHTSA simply was not willing or able to extend its regulations further, but not that the individual states were prohibited from doing so.

Again, as noted above, many other states have similar or comparable statutes, regulating radar detectors or other areas. As such, the requisite intent to preempt is not likely to be found, and the Court will agree with State X that the regulation is not in violation of the Supremacy Clause.

* * *

Since the regulation is not invalid on any basis challenged by the plaintiff, assuming no facts inconsistent with those given, the statute will be upheld.

Q6 Civil Procedure

Paul and Tom, both State X residents, were involved in an auto accident in State X. At the time of the accident, Tom, who was working as a delivery truck driver for Danco, was driving through State X to make a delivery to a customer located in State Y. Danco is incorporated in State Y and has its principal place of business in State Z. State Z is located adjacent to State X. Danco does no business in State X.

Paul filed a complaint against Danco in federal district court in State X on the basis of diversity jurisdiction, alleging $70,000 in property and personal injury damages. Danco was properly served with the complaint at its principal place of business.

Appearing specially in the State X federal district court, Danco filed a motion to dismiss the complaint on the grounds that the district court lacked both subject matter and personal jurisdiction and that Paul's action could not proceed without joining Tom. The district court denied Danco's motion.

Danco then filed a counterclaim against Paul to recover $20,000 in property damage to the truck Tom was driving at the time of the accident. Paul moved to dismiss Danco's counterclaim on the ground that the district court lacked supplemental jurisdiction to hear the counterclaim. The district court granted Paul's motion.

State X law provides that its courts may exercise jurisdiction over nonresidents "on any basis not inconsistent with the Constitution of the United States."

1. Did the district court rule correctly on Danco's motion to dismiss Paul's complaint? Discuss.

2. Did the district court rule correctly on Paul's motion to dismiss Danco's counterclaim? Discuss.

Answer A

6)

Q6

(2) Motion to Dismiss Paul's Complaint

Personal Jurisdiction (PJ):

Personal jurisdiction refers to the court's power to bind the person of the defendant. The traditional basis [sic] of personal jurisdiction are (1) domicile; (2) personal service in state; and (3) consent - either expressly through a forum clause or impliedly by failing to raise lack of PJ in your first response to the court. Paul filed a complaint against Danco in federal district court in State X. Danco denies that State X has personal jurisdiction over it. Danco is a corporation which is incorporated in State Y and has its principal place of business in State Z. Therefore, Danco's residence would be considered State Y and Z.

Due Process:

To have personal jurisdiction over a defendant who is not a resident of the forum, the forum state must have a long arm statute and meet the requirements of International Shoe to meet due process requirements. To have personal jurisdiction, due process also requires that defendant be given notice and have the opportunity to be heard. Defendant must be served with the summons and complaint within 120 days of filing of the complaint. In this case, Danco was properly served with the complaint at its principal place of business.

Long Arm Statute:

A long arm statute is a statute that allows the state to assert jurisdiction. States may have specific or nonspecific long arm statutes. State X has a long arm statute that provides that its courts may exercise jurisdiction over nonresidents "on any basis not inconsistent with the Constitution of the United States." This is a nonspecific long arm statute because it does not specific[y] the circumstances under which the forum may exercise personal jurisdiction. Therefore the court may exercise jurisdiction to the limits allowed by due process.

International Shoe:

To meet the test in International Shoe, the forum must show that defendant has such minimum contacts with the forum that assertion of personal jurisdiction would not offend traditional notions of fair play and substantial justice.

Minimum Contacts:

To have minimum contacts, the courts will analyze the (1) D's purposeful availment of the forum; and (2) D's foreseeability of a lawsuit.

Purposeful Availment:

In analyzing purposeful availment, the court will consider (1) the nature and quality of D's actions; (2) voluntary acts of D directed at the forum; (3) whether D intentionally placed a good in the stream of commerce; and (4) where injury is show[n], jurisdiction is established. Here, Danco does no business in State X. However, at the time of the accident Danco's driver was driving through State X to make a delivery to a customer located in State Y. Danco is incorporated in State Y and has its principal place of business in State Z. State Z is located adjacent to State X. Although Danco does not do any business directly in State X, it appears that Danco must make regular use of State X's roads to conduct its business. Also, Paul was injured by a Danco driver in an accident in State X. Therefore, it appears that Danco did purposefully avail itself of State X.

Foreseeability of Lawsuit:

The court must also determine whether Danco could reasonably foresee that its actions could lead to a lawsuit, i.e., it being ha[u]led into court in State X. It appears that Danco drivers regularly traveled State X's roads to conduct business. Therefore, it would be reasonable for Danco to foresee that one of its drivers may get into an accident while in State X and cause damage.

Traditional Notions:

The court must balance the minimum contacts of defendant against traditional notions of fair play and substantial justice. This means that the court will look at (1) the relatedness between the claim and D's conduct; (2) P's interest in obtaining relief; (3) D's burden v. benefit; and (3) the state interest. Here, Danco's driver drove through State X and this conduct lead [sic] to the car accident, P has a high interest in seeking relief for his injuries and property damage, D benefits from being able to drive on State X roads and it would not be a heavy burden to require D to be responsible for any accidents which this may cause, and finally State X has a strong interest in holding drivers who cause accidents on its roads, especially to State X citizens, responsible.

Conclusion: The district court was correct in its decision to deny D's motion because State X may assert PJ over D.

Subject Matter Jurisdiction:

Subject matter jurisdiction refers to the court's power to hear the kind of claim being

brought. P filed a suit against D on the basis of diversity jurisdiction, alleging $70K in property and personal injury damage. For diversity jurisdiction, plaintiff must show that (1) amount in controversy (AIC); and (2) complete diversity.

AIC:

To meet the AIC requirement, plaintiff must have a good faith claim exceeding $75K. Here, P is only seeking $70K. Therefore, he has not satisfied the AIC requirement. If P were seeking some sort of injunction, the value of the injunction could be added to the AIC requirement. However, it does not appear that P is seeking an injunction. Therefore, P has failed to satisfy the AIC requirement.

Complete Diversity:

Complete diversity requires that no plaintiff and defendant be from the same state. This will depend on where the parties were domiciled at the commencement of the lawsuit. P was domiciled in X. As discussed above, D was domiciled in Y and Z. Therefore, there appears to be complete diversity.

Conclusion: The court erred in denying D's motion as to lack of SMJ. State X does not have SMJ to hear this claim because P has not satisfied the AIC requirement. Also, the federal court does not have any other SMJ over this case because it does not involve a federal question (it is a personal injury action) and it is not a matter within the federal court's exclusive jurisdiction.

Joinder:

P claims that the matter cannot proceed without joining Tom. Under compulsory joinder of parties, the court will first look to see if the party is a necessary party. A party is necessary where the court cannot afford complete relief without the party or there is a danger that the absentee will be harmed, there may be an inconsistent judgment or there may be a possibility of double liability. Here, it is arguable whether Tom is a necessary party because although he may be liable to Danco for the accident, P may get a judgment solely against D for the accident because Tom was an agent of D when the accident occurred and because the accident was within the scope of Tom's employment, D will be liable for Tom's negligence.

However, if Tom is a necessary party, the court will next determine whether he is an indispensable party. An indispensable party is one whose joinder will destroy diversity. Here, Tom's joinder will destroy diversity because Tom is also a State X resident and this would destroy complete diversity because P is also from State X. Where the party is indispensable, the court may dismiss the case or proceed without the party. The factors the court will use to determine that are the following: (1) alternative forum; (2) likelihood of prejudice; (3) chance of inconsistent judgment. Here, State X appears to be the best forum

for the case because the claim arose here and it would be highly inconvenient to require P to travel to State Y or Z. Also, there is not a high chance of prejudice because State X will likely fairly administer its laws. There is also not a chance of inconsistent judgment because as discussed, P can sue D alone for her damages. Therefore, the court may continue the case without joining Tom.

Conclusion: The court was correct in denying D's motion for failure to join. Had the court had SMJ, it could proceed with the case without joining Tom.

(3) Motion to Dismiss Danco's Counterclaim:

D filed a counterclaim against P to recover $20K in property damage to the truck Tom was driving at the time of the accident. Paul moved to dismiss D's counterclaim on the ground that the district court lacked supplemental jurisdiction to hear the counterclaim.

Supplemental Jurisdiction:

Where the court has original jurisdiction over a matter, the court may also assert supplemental jurisdiction over other claims that are so related that they form the same case or controversy as the original claim. The same case or controversy means that the claims arose out of the same transaction or occurrence and arise out of a common nucleus of operative facts.

Same transaction/occurrence:

D is bringing a counterclaim to recover for property damage it suffered in the accident between P and Tom. The initial claim by P is for damages suffered as a result of the accident between P and Tom. Therefore, the counterclaim arises out of the same transaction or occurrence as the original claim.

Common Nucleus Operative Facts:

As discussed above, D's counterclaim relates to the accident between P and Tom and P's initial claim is for the same accident. Therefore, the counterclaim arises out of the same common nucleus of operative facts.

Counterclaim:

In cases where a counterclaim arises out of the same transaction or occurrence as the original claim, the counterclaim is considered compulsory and must be brought or it will be waived. Here, D had to assert the counterclaim or it would have been waived because the counterclaim arose out of the same transaction or occurrence. As discussed above, where a counterclaim is compulsory because it arises out of the same transaction or occurrence, the court will assert supplemental jurisdiction. The claim need not have an

independent basis for SMJ.

Conclusion: The court erred in granting P's motion because the district court had supplemental jurisdiction to hear the counterclaim.

Answer B

6)

Personal Jurisdiction in Federal Courts

Personal jurisdiction is the court's power over the individuals in the case: the power to compel them to appear and to bind them to its judgment. The federal court[']s personal jurisdiction applies to state law (of the state it's in) regarding domicile of the defendant, where the defendant was served (whether in state or not), and whether the defendant consented, either expressly or impliedly, to the jurisdiction of the court.

A corporation is a resident of every state in which it is incorporated and the state of its principal place of business.

Here, Danco (D) was incorporated in Y and its principal place of business is in Z. Thus, it is not domiciled in X. D was served in Z.

D filed a motion challenging personal jurisdiction pursuant to rule 12b prior to filing an answer. A 12b motion can allege, inter alia, improper personal jurisdiction, subject matter jurisdiction, process, service of process, as well as failing to state a claim upon which relief can be granted. By filing a 12b motion challenging personal and subject matter jurisdiction, a party does not consent to that jurisdiction by the appearance. Thus D did not consent to personal juris in X by filing the 12b motion.

Minimum Contacts

Personal juris may also be had over a defendant if he had minimum contacts w/ the forum state. The minimum contacts test states that the exercise of personal jurisdiction cannot offend traditional notions of fair play and substantial justice and must be reasonable. In applying this test, the court will look to whether the defendant had systematic and continuous presence in or contact w/ the forum state; whether the cause of action arose in the forum state; whether the defendant could reasonably have foreseen being sued in and being subjected to personal jurisdiction in the forum state; and whether the defendant purposefully availed himself of the privilege of doing business in the forum state.

Here, D's delivery driver was driving through the forum state, X, in order to make a delivery in Y. However, D does no business in X. Furthermore, the facts do not indicate any contact by D w/ X except this driver driving through X to go to Y. While D is incorporated in Y, the facts do not indicate a large amount of business w/ Y requiring D's employees to regularly cross through X. On the facts given, D has had 1 contact w/ X. This is not systematic and continuous contact. However, the cause of action arose in X. If D's trucks were in X at all (which they were on at least 1 occasion), D could foresee an

accident requiring it to defend a lawsuit in X. D didn't purposefully avail itself of doing business in X, but it did purposefully avail itself of the use of the roads of X. And not just a little bit of roadway use, but D's driver was going all the way through X to get to Y. This is a close call, but given that the accident occurred in X and that D's truck was purposefully driving through X it would not offend traditional notions of fair play and substantial justice to subject D to personal jurisdiction in X.

State Z abuts X. Thus, it would be convenient for D to defend the suit in X. Also, X has a strong interest in protecting its citizens from injuries and negligent drivers. In addition, it would be easier for a corporation (with more assets and personnel) to defend in the neighboring state than it would be for an individual (P) to prosecute the claim in another state. Thus, it is reasonable to subject D to personal juris in X.

Because D meets the minimum contacts requirements, the court had proper personal jurisdiction over D and this part of D's motion should be denied.

Subject Matter Jurisdiction

Subject matter jurisdiction is the court's power of the subject matter of the lawsuit. In federal court, subject matter jurisdiction can be based on a federal question properly plead [sic] in the complaint or on diversity jurisdiction. For diversity jurisdiction to be proper, there must be complete diversity (all plaintiffs diverse from all defendants) and the plaintiff must in good faith (subject to Rule 11) plead damages of more than $75,000. (Diversity is where 1 plaintiff resides in a different state from 1 defendant.)

Here, P resides in X. As stated above, D resides in Y and Z. Thus, there is complete diversity. However, P only alleged $70,000 in damages in his complaint. This does not meet the $75,000 minimum. The fact that D counterclaimed for $20,000 doesn't matter; the 2 can't be added to cross the $75,000 minimum. Thus, the court does not have subject matter jurisdiction over the case. That part of D's 12b motion should be granted.

Compulsory Joinder/Indispensable Parties

An indispensable party is one which a current party alleges must be included in the case 1) to grant complete relief; or 2) because the current party's interests would be prejudiced if it was forced to defend the case w/o the indispensable party. The current party can force the indispensable party to join the case through compulsory joinder. By doing so, the current party is alleging the indispensable party is the one responsible to the plaintiff (not the current party). First, the current party must meet 1 of the above 2 requirements. Second, the joinder of the indispensable party cannot destroy diversity in the case. The rationale for this requirement is that defendant should not be allowed to torpedo the plaintiff's proper diversity jurisdiction by bringing in a non-diverse party.

Here, D wants to join T. T is an employee of D. Through the doctrine of respondeat

superior, D can be held liable for T's actions that were in the scope of and during the course of T's employment. Thus, whether T is joined or not, P will be suing D and attempting to collect his judgment (should he win) against D, the party with the deep pockets. Complete relief can be granted to P w/o T's presence. D is not going to sue its own employee and obtain relief from him. D may need T as a witness in the case, but it will suffer no damage if T is not a party to the case. Furthermore, T is a state X resident. By joining T, D would destroy diversity because P is a state X resident. Thus, the court should deny D's motion regarding joinder of T.

Counterclaims

A counterclaim is when the defendant asserts a claim against the plaintiff that is suing him. Compulsory counterclaims are claims against the suing party that arise out of the same conduct, transaction, or occurrence. Compulsory counterclaims must be plead [sic] or the claim is lost. (The defendant cannot sue on that claim later as a plaintiff.)

Here, D alleges that P damaged its truck as a consequence of the same accident P is suing for. This is the same transaction and occurrence. Thus, D's counterclaim is compulsory.

Supplemental Jurisdiction

Supplemental jurisdiction is the federal court's power to hear cases associated with the main claim (the plaintiff's claim which must meet all jurisdictional requirements) even though the associated claims may not meet all jurisdictional requirements. For a plaintiff w/a valid federal case, the federal court can hear a plaintiff's state claim if it comes from the same common nucleus of operative facts and has a common question of law or fact. Supplemental jurisdiction also covers a state law claim by the defendant against the plaintiff if the defendant's claim arose out of the same conduct, transaction, or occurrence. In a diversity case, supplemental jurisdiction includes compulsory counterclaims. The rationale is that it would not make sense to make a defendant sue in state court on a claim that arose from the same conduct, transaction, or occurrence for which the plaintiff is suing in federal court. It would help the parties and serve judicial economy to hear both claims at one time.

Here, D's counterclaim is compulsory. Thus, the federal court has supplemental jurisdiction to hear that claim.

However, P's claim will be dismissed from federal court due to D's 12b motion, as above. Once that happens, the federal court will not hear D's counterclaim because it is no longer associated w/a plaintiff's valid complaint. D's counterclaim would have to meet its own jurisdictional requirements, which it does not. So the court will, after dismissing P's claim, dismiss the whole case.

Jul 2003

California Bar Examination

Essay Questions and Selected Answers

ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2003 CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2003 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors and may not be reprinted.

ESSAY EXAMINATION INSTRUCTIONS

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your an swer contains only a st atement of your conclusio ns, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

Q1 Business Associations

Corp is a publicly held corporation whose stock is registered under Section 12 of the Securities Exchange Act of 1934. The following sequence of events occurred in 2003:

January 2: Corp publicly announced that it expected a 25% revenue increase this year.

March 1: A Corp director ("Director") sold 1,000 Corp shares for $25 each.

June 15: Corp learned that, because of unforeseen expenses, its revenues would decrease by 50% this year, contrary to its January 2 announcement.

June 16: A Corp officer ("Officer") consulted his lawyer ("Lawyer") for personal tax advice. Officer mentioned, among other things, the probable devaluation of his Corp stock.

June 17: Lawyer telephoned his stockbroker and bought a put option for $1,000 from OptionCo. The put option entitled Lawyer to require OptionCo to buy 1,000 Corp shares from Lawyer for $20 per share.

June 18: Corp publicly announced that its revenues would decrease by 50% this year. Its stock price fell from $30 to $5 per share.

June 19: Lawyer bought 1,000 Corp shares at $5 per share and required OptionCo to buy the shares for $20,000 pursuant to the put option.

July 1: Director bought 1,000 Corp shares for $5 per share.

1. In each of the foregoing events, which of the actions by Director, Officer, and Lawyer constituted a violation of federal securities laws and which did not? Discuss.

2. Did Lawyer violate any rules of professional responsibility? Discuss.

Answer A

Publicly Held Corporation

Corp is a publicly held corporation and is thus subject to federal securities laws. The two laws at issue in this question are Rule 10(b)5 and Rule 16(b).

Director Liability for violating Rule 16(b)

Rule 16(b) prohibits a director, officer or 10% shareholder of a publicly traded corporation on a national stock exchange or with assets of over $10,000,000 and 500 shareholders from purchasing and selling or selling and purchasing stock of the corporation in less than 6 months. This is deemed short swing trading. The policy behind prohibiting short swing trading is that short swing trading is against the interests of the corporation.

Corp is entitled to recover the maximum difference between an[y] sale and purchase during this 6 month period.

On these facts, Director sold 1,000 corp shares for $25 each on March 1. Less than 6 months later on July 1, director purchased corp shares for $5 per share.

The corp is entitled to recover $25-$5=$20 multiplied by 1,000 shares or $20,000 dollars from this violation of Rule 16(b).

Officer Not Likely Liable for violating Rule 10(b)(5)

Rule 10(b)(5) prohibits the use of an instrumentality of inter-state commerce in any scheme to defraud, make material misrepresentations or omissions or in any other way use fraud in the purchase or sale of securities. An insider must either disclose inside information or not trade in the securities. An insider may also be liable for tipping information regarding the company for an improper purpose.

On these fa cts, off icer had a fiduciary duty to Corp. That duty included not disclosing private informa tion regarding Corp. Officer violated his fiduciary duty to Corp when he improperly mentioned the probable devaluation of Corp stock on June 16th prior to public disclosure of this information on June 18th.

However, Officer is only liable for a 10(b)(5) violation if he tipped this information to his lawyer for an improper purpose. An improper purpose would be personal gain of Officer either by pecuniary gain or by gifting to Lawyer. It is unclear whether Officer used a telephone to speak with Lawyer or whether he met him in person. Thus, the instrumentality of inter-state commerce requirement may be lacking as well. The facts tell us that Officer was seeking tax advice, then he mentioned the devaluation. There is no other indication of personal gain by Officer resulting from telling Lawyer about the devaluation.

Officer is not likely liable for tipping for an improper purpose and thus did not violation[sic] Rule 10(b)(5).

Lawyer Not Liable under Rule 10(b)(2) but is Liable for Misappropriation

A tippee is only liable if the tippee knew that the tipper was giving them non-public information for an improper purpose. As detailed above, it is unlikely that Officer will be liable for tipping for an improper purpose. Thus, Lawyer is not liable under this section.

Note that if Officer had an improper purpose, it would be easier to find Lawyer satisfied the other tippee requirements because Lawyer should have known that the information from Officer was private information regarding Corp. Lawyer knew that Officer had a duty not to disclose such information. Nonetheless, Lawyer traded on such information.

Misappropriation Liability

Some courts would find that Lawyer is liable for misappropriation of non-public (insider) information in the purchase or sale of securities.

Lawyer used the insider information to purchase a put option from Option Co[.] prior to the public announcement on June 18th. This bound Option Co. to purchase 1,000 Corp shares from Lawyer at $20 per share. Lawyer then purchased Corp shares at the discounted rate of $5 per share after the public announcement (June 19th). Lawyer profited at $15 per share multiplied by 1,000 shares=$15,000. This $15,000 was ill gotten gain from misappropriating non-public information about Corp's revenue decline.

2. Lawyer's Violations of Rules of Professional Responsibility

Lawyer violated the duty of loyalty to Officer, the duty of confidentiality, the duty of care, and engaged in deceitful, dishonest/fraudulent conduct that both negatively reflects on Lawyer's ability to practice law and that harms the dignity of the profession.

Duty of Care

A lawyer has a duty to act as a reasonable lawyer of ordinary skill, judgment and preparation. Here, Lawyer's actions were patently unreasonable. Use of a client's corporat ion info rmation fell below the stand ard of care of a rea sonable attorney.

Duty of Loyalty

A lawyer has a duty to act in the best interests of the client and not to personally benefit at the client's expense. This includes a duty not to self-deal. Lawyer took advantage of a breach of Officer's fiduciary duty to keep Corp's information private for personal gain. Lawyer benefitted from the insider trading. Lawyer may also have created professional and legal liability for his client by using this information. Lawyer breached the duty of loyalty to

Officer.

Duty of Confidentiality/Confidential Communications

A lawyer has a duty to keep all communications from his client related to his representation of the client confidential. Courts interpret "related to the representation" quite broadly. Officer consulted Lawyer about personal tax advice. The equity value of Corp may have been related to this representation. This includes using any of such confidential communication. As discussed above, Lawyer used such confidential communication to do insider trading. Lawyer violated his duty to keep Officer's information confidential.

Attorney-Client Privilege

The attorney-client privilege is a more narrow evidentiary exception that prevents a court from obtaining information told to a lawyer by his client related to the litigation at issue. Here, there is no pending litigation discussed. Under the ABA rules, an attorney may disclose confidential communication to prevent a future crime involving death or serious bodily injury. California does not have a clear exception for death. On these facts, Officer's statement regarding Corp's shares would not likely fall under the attorney-client privilege.

Duty Not to Engage in Deceit, Fraud in Personal Dealings

A lawyer has a duty not to use deceit or fraud in private dealings. Here, the facts show that Lawyer deceitfully misappropriated insider information and used fraud to obtain a lucrative option from Option Co. Lawyer should be subject to discipline for these private acts as well.

Duty to Maintain Dignity of Profession

A lawyer also has a duty to maintain the dignity of the profession. For all of the reasons mentioned above, Lawyer violated this duty. A lawyer who acts with deceit and fraud in his private dealings stemming from improperly used information from a client lowers the reputation of the entire profession.

Answer B

Director's Actions

The Director ("D") may be liable for violations of federal securities law based on his sale and purchase of 1,000 Corp stocks during 2003. The Corp stock is an equity security, and therefore, is subject to federal securities laws. There are two bases for D's liability under federal securities law: violation of Rule 10B-5 and violation of Section 16B. Please note that D may also be liable for common law violations of his duty of loyalty as a corporate director, but that issue is not to be addressed here.

Rule 10B-5 Liability

Rule 10B-5 makes it illegal to use deceit or any fra[u]dulent scheme in connection with the purchase or sale of a security. Here, the issue is whether D used deceit and/or fraud when he sold Corp stock on March 1, and when he bought it at a lower price on July 1.

Rule 10B-5 Elements

The elements of Rule 10B-5 are as follows: (1) use of the instrumentalities of interstate commerce (which gives the federal government jurisdiction over the transaction); (2) a fraudulent scheme or device, which includes (a) misrepresentation of a material fact and (b) insider trading; that is, trading on the basis of material inside information; (3) in connection with the purchase or sale of a security; (4) with scienter, which must be at least recklessness; and (5) reliance by the person on the other side of the transaction, which is presumed in cases of misrepresentation and insider trading. Any person may be liable for insider trading, and plaintiffs include both private persons on the other side of the transaction and the SEC. In addition, "materiality" means that which a reasonable investor would want to know in making his investment decision.

With these elements in mind, I shall assess D's liability under Rule 10B-5.

March 1 Sale

D sold 1,000 Corp shares for $25 on March 1. This transaction will fall under the jurisdiction if D used the instrumentalities of interstate commerce, which includes the telephone, US mails or internet. Here, I will assume that he did so. Note that if D had not used interstate commerce, he could still be liable under state securities laws. In addition, since D actually sold his shares, the transaction is "in connection with a purchase or sale" and, thus, D will be liable if he used fraud or deceit in this sale with necessary scienter.

Misrepresentation of a Material Fact. The main issue is whether the Corp's public announcement that it expected a 25% increase in 2003 constituted a misrepresentation of a material fact for which D may be liable. Surely, an investor would consider it material that the revenue increase would not happen, and would instead decline.

If the corporation recklessly made that announcement in order to pump up its stock price, then D, as a corporate director, would be liable. However, the facts indicate that D sold his stock on March 1, many months before the Corp learned that its revenues would actually decrease by 50% during 2003. In addition, the facts also indicate that the revenue decrease was due to "unforseen expenses". If anything, Corp was negligent in making a bold revenue prediction that was reversed six months later. Therefore, Corp, and hence, D, did not have the necessary scienter to be liable under Rule 10B-5.

Insider Trading. For D to be liable for insider trading, he would have to had traded on material inside information. Since D is a corporate director, he is considered an "insider". Therefore, he may not trade on material inside information. The critical issue is whether D possessed any material inside information when he sold his shares on March 1. If D, in fact, knew on March 1 that Corp would not have a 25% revenue increase, and that revenues would drastically decline, then he may not trade based on that information.

Again, the facts indicate that D sold his shares 3 ½ months before the Corp learned that it would suffer a serious revenue decline, and, thus, probably did not trade on the basis of inside information. However, if he did suspect that the Corp would not reach its revenue target of 25% in his capacity as a corporate insider, then he would be liable under Rule 10B-5.

July 1 Purchase

On July 1, D purchased 1,000 Corp shares for $5. Since the revenue decrease of 50% had been publicly and accurately disclosed a few weeks earlier, D is not liable under Rule 10B-5.

Rule 10B-5 Conclusion

Because the revenue decline was due [to] "unforseen expe nses", D probably did not have material inside information, nor possess the necessary scienter to be found liable under Rule 10B-5. However, if the court did find him liable, he would have to disgorge his profits made or losses averted.

Section 16B

D may be liable under Section 16B of the '34 Act, which holds "insiders": directors, officers and 10% shareholders, strictly liable, if they make a "profit" on the purchase and sale of their corporation's stock within a 6 month period. Section 16B applies to public companies, that is, ones that are traded on a public exchange and/or meet the number of stockholders/asset test. Here, Corp is a public company, registered under Section 12 of the '34 Act, and thus, Section 16B applies to D's actions.

March 1 Sale D was an "insider" when he sold his 1,000 shares of Corp stock for $25/share on March 1, and, thus, must comply with Section 16B. The facts do not indicate that D

bought or sold any Corp shares before this date, so I will focus on the subsequent transaction. If D bought shares within 6 months following this sale for a lower price, then he is strictly liable under Rule 16B.

July 1 Purchase On July 1, 4 months following his sale of Corp stock, D purchased 1,000 shares for $5 per share. Since this occurred within 6 months of his sale, D is strictly liable and must disgorge his "profit." Here, D's profit is calculated by the difference between the sale price and purchase price multiplied by the number of shares, which totals $20,000 (1,000*(25-5)).

Officer Liability

The Officer's ("O") only action was consulting his Lawyer ("L") for personal tax advice on June 16, and mentioning that the value of Corp stock would probably go down, since the Corp had just learned that its revenues would decrease the day before.

Rule 10B-5 - Tipping

The elements of Rule 10B-5 are discussed above. As indicated, O did not purchase or sell any securities. Instead, the only basis for his liability would be "tipping". A corporate insider is liable for "tipping" if he has a fiduciary relationship with the corporation and discloses material insider information, at least recklessly, to a "tippee", who trades on the basis of that information. Here, O would be the "tipper" and Lawyer would be the "tippee." A tipper can be liable even if he discloses only to make a gift to the tippee or to enhance his reputation. A tippee will not be liable unless the tipper is first found liable.

O did disclose material insider information to Lawyer, but it does not appear that he did so recklessl y, that he intended to make a gift to Lawyer, or wanted to enhance his reputation. Instead, O consulted L for personal tax reasons. As a client, O had every reason to expect that L would keep this information confidential. If, however, O disclosed this information to L to make a gift, use it to pay for legal services, or to enhance his reputation; or if he was reckless in disclosing this info (by shouting it in a public place), he would be liable. However, the facts indicate that O was careful and confidential in disclosing this info.

Therefore, since O was not reckless in disclosing the inside information to L, and [sic] therefore, is not liable under Rule 10B-5.

Section 16B

Although O is an "insider" of a "public company" for Section 16B purchases, since O did not purchase or sell any securities, he has no liability here.

Lawyer Liability

Unbeknownst to O, L traded on the basis of the material inside information about Corp's

unexpected revenue decline that had not been made public as of June 17. On June 17, L bought a "put" option that entitled him to sell Corp shares for $20 per share. He presumably did so fraudulently in order to personally benefit from the inside information. The issue, is however, whether he is liable under Rule 10B-5 or Section 16B.

Rule 10B-5 L's liability would be based on his status as "tippee", since the facts do not indicate that he is an insider of Corp. As discussed above, a tippee is not liable if the tipper is not liable. Since O was not liable as a tipper, L is not prevented from trading on the basis of inside information.

Misappropriation theory. The Supreme Court had found non-insiders liable under a misappropriation theory, where the person uses and trades on inside information that he knows or should know is inside info. Here, L clearly knew that it was inside information since Corp did not publicly disclose its revised revenue forecast until June 18. Therefore, he could be found liable for the misappropriation theory, and be subject to sanctions by the SEC. He would have to disgorge his profits of $15,000 from the put option, which he made on June 19, when he purchased shares for $5,000 in toto and sold them for $20,000.

The misappropriation theory does not apply to individual actions under rule 10B-5.

2. L's Professional Responsibility

L violated several rules of professional responsibility when he traded on the inside information, including the duty of confidentiality, duty of loyalty, duty of fairness and duty to uphold the law.

Duty of confidentiality

A lawyer may not use or reveal anything learned in the course of representing his client without the client's consent. Here, O was L's client, who revealed confidential information to L about the possible devaluation of Corp stock. O did not consent for L to use this information or reveal it to anyone. Although it does not appear that L revealed this information, he certainly used it and therefore, violated the duty of confidentiality. He should not have traded on this information.

Duty of loyalty

A lawyer also owes a duty of loyalty to his client, and may not let personal interests, or the 3rd party or other client interfere with his representation of his client. Here, there is a conflict of interest between O and L. L may not use O's con fidential information for his own benefit, which L did so when he purchased the put option.

Duty of Fairness/Candor

A lawyer also owes a duty of fairness and candor to the public and 3rd parties. Here, L

violated that duty by “misappropriating” the inside informa tion and trading on it to his own advantage. By using this info, he acted unfairly to OptionCo, forcing it into a bad deal.

Duty to Uphold the Law

A lawyer also has a duty to uphold the law. Here, L violated the laws of securities trading and committed several breaches of his ethical duties when he used inside information. If he were in Ca lifornia, he would be required to “self- report” this fraudulent activity.

Q2 Remedies

In 1993, Polly and Donald orally agreed to jointly purchase a house on Willow Avenue. They each contributed $20,000 toward the down payment and jointly borrowed the balance of the purchase price from a bank, which took a first deed of trust on the property as security for the loan. Polly paid her $20,000 share of the down payment in cash. Donald paid his $20,000 with money he embezzled from his employer, Acme Co (Acme).

Polly and Donald orally agreed that the house would be put in Donald's name alone. Polly had creditors seeking to enforce debt judgments against her, and she did not want them to levy on her interest in the house. Polly and Donald further orally agreed that Donald alone would occupy the property and that, in lieu of rent, he would make the monthly loan payments and take care of minor maintenance. They also orally agreed that if and when Donald vac ated the property, they would sell it and divide the net proce eds equally.

Donald lived in the house, made the monthly loan payments, and performed routine maintenance.

In 1997, Acme discovered Donald's embezzlement and fired him.

In 1998, Donald vacated the house and rented it to tenants for three years, using the rental payments to cover the loan payments and the maintenance costs.

In 2003, Donald sold the house, paid the bank loan in full, and realized $100,000 in net proceeds. Donald has offered to repay Polly only her $20,000 down payment, but Polly claims she is entitled to $50,000.

Having made no prior effort to pursue Donald for his embezzlement, Acme now claims it is entitled to recover an amount up to the $100,000 net proceeds from the sale of the property, but, in any case, at least the $20,000 Donald embezzled. Donald has no assets apart from the house sale proceeds.

What remedies, based on trust theories, might Polly and Acme seek against Donald as to the house sale proceeds, what defenses might Donald reasonablyassert against Pollyand Acme, and what is the likely result as to each remedy? Discuss.

Answer A

Polly's Remedies Against Donald

Constructive Trust

A constructive trust, an equitable remedy, is a court-ordered obligation for one party who has been unjustly enriched at the expense of another to return the relevant property or assets to the injured party. To be entitled to an equitable remedy, a plaintiff must show that all legal remedies are inadequate. One of the situations in which a constructive trust has been used as a remedy by courts is that of an invalid oral agreement (i.e., one unenforceable at law) that is induced by fraud. Here, Polly and Donald entered into an oral agreement concerning the house they purchased together. Any agreement concerning the land must comply with the Statute of Frauds. Because the agreement between Polly and Donald was oral, it violated the Statute of Frauds [and] is therefore unenforceable at law. However, Polly can successfully argue that the agreement was induced by Donald's fraud. It appears from the facts that Donald made the oral promise to equally split proceeds from the sale of the house in order to get Polly to put up $20,000 for the down payment and that he never planned to abide by this agreement. When Donald ultimately sold the house for $100,000, he reneged on the agreement he had made with Polly, offering Polly her initial investment of $20,000. This resulted in unjust enrichment to Donald. Finally, Donald has no assets apart from the house sale proceeds. Where a defendant is insolvent, damages are not available and a court will look to equitable remedies such as a constructive trust. Because of Donald's fraud, unjust enrichment at Polly's expense, and insolvency, a court could feasibly impose a constructive trust on half of the proceeds from the sale of the house in favor of Polly.

Purchase Money Resulting Trust

Where one party has provided all or part of the consideration for purchase of property, but title to the property is taken in another party's name, a resulting trust will be imposed in favor of the party that has provided the consideration. Where the title holding party sells the property to a third party, the party providing consideration may impose a resulting trust on the consideration the title-holder received in exchange for the property. Here, Polly supplied half of the downpayment for purchase of the house, but title was taken in Donald's name only. Therefore, half of the house was held in a purchase money resulting trust for Polly. When Donald sold the house, half of the consideration he received for it ($100,000) would be subject to a resulting trust of which Polly is beneficiary. Polly would therefore be able to prevail on a purchase money resulting trust theory as well.

Donald's Defenses

Donald could assert a number of equitable defenses to the equitable remedy of constructive trust.

Unclean Hands

The unclean hands defense asserts that the plaintiff should not be entitled to equity because she herself has engaged in a wrong in the transaction for which she claims injury. Here, Donald could claim that Polly's having creditors seeking to enforce debt judgments against her, and thereby asking Donald to put the house entirely in his name, constituted unclean hands. However, Polly's debt issues areunrelated to Donald's fraudulentconduct. There is no sugges tion that Polly engaged in any wrongful conduct in her dealings with Donald. Therefore, this defense will likely fail.

Laches

The laches defense asserts that a plaintiff cannot bring an action once an unreasonable amount of time has passed after the injury and the delay has somehow prejudiced the defendant. Here, Donald will argue that he and Polly had agreed that, upon Donald's vacating the house, the property would be sold and the net proceeds divided equally. Donald vacated the house in 1998. However, at that time, Polly did not insist on the house being sold. After renting the house for five years, Donald finally sold it in 2003. Donald will argue that Polly's claim was actionable in 1998, but that she waited five years before bringing it. Donald will argue that five years is an unreasonable amount of time to wait before bringing the lawsuit and that he will be prejudiced by the delay. However, Polly can argue that the substantial part of the injury to her was sustained not in 1998, when Donald vacated the house and did not immediately sell it, but in 2003, when Donald sold the house and withheld Polly's rightful half share of the proceeds. This agreement will be successful, as Polly did not sustain a sustainable financial injury until Donald's 2003 withholding of the sale proceeds. Therefore, Donald is unlikely to prevail in establishing the laches defense.

Acme's Remedies Against Donald

Constructive Trust

Acme could seek the imposition of a con structive trust on Donald's proceeds from the sale of the house. Where a party has obtained property throu gh fraudulent conduct, courts will impose a constructive truston the defrauding party'sproperty to preventunjust enrichment. Here, Donald used funds he had embezzled from Acme to purchase the house and was thereby unjustly enriched. Aside from the proceeds from the sale of the house, Donald is insolvent. Therefore, a court could rightfully impose a constructive trust on Donald's half of the proceeds from the sale of the house.

One issue is whether the constructive trust would be imposed only to the extent of the $20,000 Donald embezzled from Acme or to the extent that Donald benefitted from the embezzlement, i.e., the full amount (or at least his half share) of the proceeds from the sale. Where a party is unjustly enriched at another's expense, restitution will be in the amount of the benefit to the unjustly enriched party. Because Donald benefitted at least $50,000 from the sale of the house, and because this benefit would not have been possible

without the $20,000 Donald initially embezzled from Acme, Acme will be entitled to Donald's half share in the net proceeds from the sale of the house. Acme is not entitled to the full $100,000, however, since this would lead to an inequitable result for Polly, who put up half of the downpayment and entered into an agreement with Donald for half of the proceeds.

Purchase Money Resulting Trust

Acme could also assert the remedy of purchase money resulting trust. Here, Acme unknowingly provided the consideration for Donald's purchase of the house. Title to the house was taken in Donald's name only. Donald therefore held his interest in the house in resulting trust with Acme as the beneficiary. When Donald sold the house, one half of the consideration Donald received would likewise be held in a resulting trust with Acme as the beneficiary. A court would likely award this remedy to Acme.

Donald's Defenses

Unclean Hands

There is no plausible basis on which to assert that Acme had unclean hands. To the contrary, Donald embezzled funds from Acme. Acme was a victim of Donald's fraud and perpetrated no fraud of its own.

Laches

Donald will assert that, because Acme discovered Donald's embezzlement in 1997 but did not bring the action until 2003, that the laches defense applies. Laches applies when an unreasonable time elapsed between the injury and the action and where this delay would result in prejudice to the defendant. Here, Acme let six years elapse between its discovery of the injury and its action against Donald. A court would likely conclude that six years is an unreasonable length of time which prejudiced Donald, since Donald likelyproceeded on the reasonable belief that Acme did not plan to press charges for the embezzlement. Therefore, Donald's laches defense against Acme will likely be successful.

Answer B

Polly:

Polly will assert a theory based on resulting trust. A resulting trust arises when one person takes title in his or her name for the benefit of the person who paid for the property. The presumption is that the one who paid for the property could not have meant to make a gift of the property to the one who takes title. The presumption does not apply when the parties are closely related; however, there is no evidence here that Polly and Donald are related, married, or otherwise within that presumption.

Here, both Polly and Donald contributed to the purchase price, yet title was taken in Donald's name alone. From that point on, Polly made no more payments on the property. However, she and Donald did have an oral agreement that in lieu of paying rent, he would make the monthly loan payments to the bank on their deed of trust. So she contributed to the purchase price, while title was taken in Donald's name alone. Therefore, equity should consider title to be in the name of both Polly and Donald.

Therefore, when Donald sold the property, Polly had a right to her portion of the proceeds. Their other oral agreement about vacating the property, selling and splitting the net proceeds, would not even be a factor. Polly is entitled to her share on the basis of the resulting trust.

Donald's Defenses:

First, Donald may argue for application of the "unclean hands" doctrine. This is an available defense to any equitable action. It states that someone may not avail himself of equity where the person's behavior was wrongful in that particular transaction on which the person is seeking relief.

Here, Polly and Donald made their original agreement in order to defraud creditors of their right to enforce their judgments against her. That is why they took title in Donald's name alone. So Polly should not be allowed to now seek an interest in the property due to her "unclean hands."

But the unclean hands doctrine is not available as a defense where the defendant profited from the plaintiff's wrongful behavior. Here, Donald did profit–he got title to the property, and it was not levied by Polly's creditors. Since Donald received a benefit, he will not be allowed to assert unclean hands, despite Polly's wrongful behavior.

Donald will also assert the statute of frauds as a defense. The statute of frauds requires that any contract for the sale of an interest in land must be in writing. Here, the oral agreement that Polly and Donald initially made was not in writing. However, that contract was not a contract relating to the sale of an interest in land–it was only a contract about how they would jointly purchase the house. Therefore, the statute of frauds is no bar to the

action.

Polly:

Polly can also assert a constructive trust theory. A constructive trust is imposed on a person to prevent unjust enrichment by that person where, for example, the property is obtained or held wrongfully.

Polly would seek to impose a constructive trust on the proceeds of the sale, which should have been split between them on the basis of their agreement to sell and divide the proceeds whenever Donald should move out.

Donald vacated the property in 1998 and the property should have been sold then and the proceeds divided. That did not happen. Therefore, when it was sold (in 2003) the proceeds should still have been divided. Donald is wrongfully holding Polly's half of the proceeds, and so a constructive trust should be implied on Donald to hold those proceeds and convey them to Polly.

Donald's Defenses:

Donald may assert a defense of laches. Laches is an equitable remedy, available in all cases where the plaintiff is seeking equitable relief. It bars an action where the plaintiff has unduly delayed seeking relief, causing prejudice to the defendant.

Donald will argue that he breached their oral contract in 1998, when he moved out and began renting to tenants. It was not until 2003 that Polly sought relief for the breach.

However, the unjust attachment stems from the 2003 sale of the property, not the initial breach by not selling the house in 1998. Polly could have (and likely did) waive any right to immediate sale of the property upon vacating. But she still remained entitled to her share of the proceeds, at whatever time the sale occurred. So Donald's laches defense will probably fail.

The same outcome is likely for any statute of limitations defense Donald might raise, based on the same analysis.

Donald may also argue for the statute of frauds as a defense. This was a contract for the sale of an interest in land. Therefore, it needs to be in writing.

But again, this contract was collateral to the sale of an interest in land. It did not invo lve the actual sale, only an agreement of what to do with the property and the proceeds of that property at a certain time upon the happening of a certain condition. The statute of frauds will probably not work as a defense for Donald either.

The bottom line is that Donald has the title in the property and/or its proceeds as a result

of his own wrongful behavior. In all likelihood, a court will not allow him to profit from his own wrongdoing, and so Polly will be successful. She will get $50,000, not just $20,000.

Acme:

Donald wrongfully converted the $20,000 of Acme when he embezzled it and used it to purchase the Willow Avenue home. Therefore, Acme could seek a constructive trust on the premises, and therefore the proceeds of the sale of the home.

Since Donald wrongfully used Acme's funds to acquire title to the property, Acme will argue that those funds should be traced to the property itself. Therefore, a construction trust should be imposed in its favor on the entire property. This is not a case where Donald used the embezzled funds to benefit property he already owned–he acquired his interest in the property due to the embezzled funds.

But a court in equity would probably not allow Acme to impose a constructive trust on the entire property. What is more likely is that (due to Polly's interest) the court would impose a constructive trust on only Donald's portion of the ownership interest. Therefore, if Donald owns one-half of the house, the constructive trust would be on one-half of the proceeds, or $50,000.

It is also possible that instead of a constructive trust, the court might impose an equitable lien on the property (and consequently the proceeds). Since Donald (and Polly) both contributed other funds to the purchase of the ho me, Acme 's equitab le lien would only give it an interest in the property to secure the repayment of the funds Donald misappropriated–$20,000. If an equitable lien is imposed, then Acme would get that amount from the proceeds: $20,000.

Donald's defenses:

The two biggest defenses available to Donald against Acme are laches and any applicable statute of limitations.

Laches (as indicated previously) is about unreasonable delay causing harm or prejudice to the defendant. Laches begins to run from when the plaintiff has reason to know of the injury. Here, the embezzlement occurred in 1993, but Acme is only now suing in 2003. If laches begins to run from 1993, there is probably prejudice to Donald; he has purchased the property and made additional payments and maintenance on it. Therefore, laches would likely bar the suit.

But Acme only discovered the embezzlement in 1997, at which time it fired Donald from its employ. If laches begins to run from this date (as is more probable), then there is less reason to apply the defense. Donald has not really been prejudiced from that time until the present. The most likely outcome is that laches will not prevent the relief being sought by Acme.

An applicable statute of limitations also could run from either date, 1993 or 1997. There is no requirement of harm to defendant, so if the applicable statutory period has expired, that would be a complete defense for Donald.

Q3 Evidence

Dan was charged with aggravated assault on Paul, an off-duty police officer, in a tavern. The prosecutor called Paul as the first witness at the criminal trial. Paul testified that he and Dan were at the tavern and that the incident arose when Dan became irate over their discussion about Dan's ex-girlfriend. Then the following questions were asked and answers given:

17. What happened then?

[1] A: I went over to Dan and said to him, "Your ex-girlf riend Gina is living with me now."

Q: Did Dan say anything?

[2] A: He said, "Yeah, and my buddies tell me you're treating her like dirt."

[3] Q: Is that when he pulled the club out of his pocket?

A: He sure did. Then he just sat there tapping it against the bar.

[4] Q: Tell the jury everything that happened after that.

[5] A: I said that he was a fine one to be talking. I told him I'd read several police reports where Gina had called the police after he'd beaten her.

Q: Do you believe the substance of those reports?

[6] A: You bet I do. I know Gina to be a truthful person.

Q: How did Dan react to this statement about the police reports?

A: He hit me on the head with the club.

Q: What happened next?

[7] A: I heard somebody yell, "Watch out– he's gonna hit you again!" I ducked, but the club hit me on the top of my head. The last thing I remember, I saw a foot kicking at my face.

Q: What happened then?

[8] A: Dan must have kicked and hit me more after I passed out, because when I came to in the hospital, I had bruises all over my body.

At each of the eight points indicated by numbers, on what grounds could an objection or a motion to strike have properly been made, and how should the trial judge have ruled on each? Discuss.

Answer A

1. The evidence is relevant. Logical relevance consists of a tendency in reason to support or contend a fact or issue of consequence in the case. Here, the statement is offered to show Dan's motive for attacking Paul. The statement is also legally relevant, meaning that it is not excluded on any extrinsic policy grounds and its probative value is not substantially outweighed by its prejudicial impact, confusion of the issues, misleading the jury, waste of time, etc.

The defense will likely object to hearsay. Hearsay consists of an out-of-court statement offered for the truth of the matter asserted. The statement is not an admission. An admission occurs when a party to the action admits a fact of relevance to the action. Here, Paul is not a party to the action. He is merely a witness for the prosecution. The prosecutor will argue that the statement is not offered for the truth of the matter asserted, but to show its affect[sic] on the recipient's state of mind. In other words, we don't care if the exact words themselves are true (whether Gina is in fact living with Paul), we are trying to explain why Dan would have become incensed enough to attack Paul.

The trial court should rule that the statement is not hearsay because it is not being offered for the truth of the matter asserted.

2. The evidence is relevant. It is logically relevant because it is being offered to show Dan's angry state of mind. It is legally relevant because there are no policy reasons for excluding it, and its probative value is not outweighed by its prejudicial impact.

The defense will object on hearsay grounds. The prosecutor will argue that Dan's statement is an admission. It is a statement by a party, and it tends to admit that Dan was in fact angry with Paul, a fact of consequence in this action. Admissions are not hearsay under the federal rules. However, contained within Dan's statement is another hearsay statement, a statement by Dan's buddies.

Thus, the defense would object to hearsay within hearsay. The prosecutor should respond that the statement by the buddies is not being offered for the truth of the matter asserted, but to show Dan's state of mind. In other words, it is immaterial whether Paul was in fact treating Gina like dirt, what matters is that Dan was told he was, and this made Dan angry.

Because the prosecutor has an adequate response to both hearsay objections, the statement should be admitted.

3. The defense will object to this question as leading. Leading questions are not allowed on direct examination. Because Paul is being directly examined by the prosecutor, the prosecutor may not lead Paul, subject to certain exceptions inapplicable here, such as Paul being declared a hostile witness, foundational questions, etc. This is a question of consequence in the matter, and the prosecutor's question suggests the answer sought by the prosecution. As such, it is leading, and should have been objected to and sustained

by the judge.

The question did call for relevant evidence. The evidence called for was both logically relevant (whether Dan had a club with him and brandished it) and legal relevance (no policy reasons and it is very probative).

4. The defense could object to this question on a variety of grounds, but would probably object to the question as vague and calling for a narrative response. Under the federal rules, direct questioning of witnesses is to proceed by question-and-answer. The attorney is supposed to give some structure to the question-and-response process. He may not simply ask an open-ended question a broad [sic] answer and allow the witness to answer as he sees fit. He also may not ask a question that has no degree of specificity with respect to the information sought. Here, "Tell the jury everything" provides no guidance to the witness as to the information sought.

5. "I said that he was a fine one to be talking."

This statement is relevant. It is logically relevant because it tends to show further Dan's anger towards Paul and it is legally relevant, because it is probative and there are no policy reasons for excluding it.

The defense will object that the statement is hearsay. It is not an admission, because Paul is not a party to this action. The prosecutor will again argue that it is not being offered for its truth, but simply to show its effect on Dan. In other words, it is not offered to show whether Dan has a right to be talking or not, but to show further its effect on Dan's state of mind and why Dan became angry enough to attack Paul. This is a close call, but the judge should probably admit the statement because it is not offered for its truth.

"I told him I'd read several police reports where Gina had called the police after he'd beaten her."

The defense will object to relevance. The statement is logically relevant (it tends to show Dan's violent nature). However, it is not legally relevant. Its probative value is substantially outweighed by the danger of prejudice. Here, there is no evidence that Dan was convicted of abusing Gina. This would be admissible. Here, the jury may be misled into thinking that Gina's calls are sufficient proof of Dan's guilt, and this is improper prejudice. The judge should exclude the evidence on legal relevance grounds.

The defense will also object on the grounds of the best evidenced rule. This rule requires that the contents of a writing be introduced where: (1) the writing is of consequence in the matter; or (2) a witness's knowledge comes from the writing and the witness testifies as to the actual contents of the writing. Here, Paul is testifying to the contents of the police reports. He's testifying that the reports stated that Gina called the police and told them that Dan beat her. The prosecutor must introduce an original or accurate copy (unless he establishes they were unavailable) of the reports into evidence to show this evidence. The

best evidence rule objection should be sustained.

The defense may also object on the grounds of hearsay within hearsay. The entire second sentence is an out-of-court statement by Paul, and is thus hearsay (not an admission because Paul is not a party). Unlike previous statements by Paul, this statement is arguably being offered for the truth of the matter asserted. It is being offered to show that Dan beat Gina. The prosecutor might argue that this is untrue, we don't care whether Dan beat Gina, we only care that Dan was upset about being accused in public. The judge might accept this as justification or it might not (even if it accepted the prosecutor's motivation, the jury might still take it to show that Dan is a "girlfriend beater", and this further supports exclusion of the evidence as more prejudicial than probative).

The police reports and the statements within the police re ports also constit ute hearsay. While the police report is admissible as an official record, because the statements are written by individuals with a duty to accurately convey the information in them, Gina's statements are still hearsay. They do not fit within the official record or business record exception, because Gina is not under a duty to convey the information. She had no obligation to make the calls to the police. Thus, Gina's statements are hearsay and must be excluded. (Note: the federal catch-all exception would also not allow introduction of Gina's statements.)

Finally, the defense might object that this is character evidence. Character evidence is evidence of one's proclivity to act in conformity with a specific character trait on the occasion in question. Here, the defense will argue that the evidence is being introduced to show that Dan has a character trait of violence, and that he acted in conformity with that trait here. This argument should be sustained. The prosecut ion may not introduce affirmative evidence of specific acts until the defendant has opened the door to such evidence, by either supporting his own character, or attacking the victim's character. Here, there is no evidence that either has occurred, and the evidence should be excluded as improper character evidence.

6. This evidence is relevant. It is logically relevant, because, if admitted, it would bolster any statements by Gina in the case. There are no policy grounds for its inclusion, and it is probative.

However, the defense will object that this is improper character evidence. A party may not bolster or support the credibility of its own witness (a hearsay declarant is a witness, and may be impeached or ha ve her character attacked as any other witness) until the witness's credibility has been attacked. Here, the prosecutor has offered opinion evidence by Paul to support Gina's credibility and character trait for truthfulness. The prosecutor may not do this until and unless the defense attacks Gina's credibility.

The defense should object on character grounds and the judge should sustain the objection.

7. “Watch out–he’s gonna hit you again!”

The statement is relevant. It is logically relevant because it tends to show that Dan hit Paul, and more than once. It is legally relevant because its probative value outweighs its prejudicial impact and there are no policy grounds for its exclusion.

The defense will object to this statement as hearsay. It is an out-of-court statement, and it is being offered for the truth of the matter asserted. However, the federal rules allow the admission of certain out-of-court statements that are admittedly hearsay when the circumstances surrounding the statement inherently support the reliability of the statement made. This applies to excited utterances, present sense impressions, statements of physical condition, and present state of mind. Here, the prosecutor will argue that the statement is an excited utterance. The statement was made spontaneously while under the stress of excitement, so there was little chance to fabricate the substance of the statement. Even though we do not even know the identity of the declarant, the statement is admissible. (Note: The statement would also qualify as a present sense impression, as it was made concurrently with one’s sensory (visual) inputs and thus is inherently reliable because there was no time to consider what one was saying).

“The last thing I remember, I saw a foot kicking at my face.”

The defense might object to this statement as not based on personal knowledge and lacking foundation, meaning that the statement is made under circumstances that indicate that Paul may not have the best recollection of the events. However, this is not a valid objection. The defense should cross-examine Paul about his ability to accurately recall these occurrences, however.

8. This statement, if admitted, is relevant. It is logically relevant because it indicates further malicious attacks by Dan and damages. It is legally relevant because it is probative and no policy grounds exist for its exclusion.

The defense will object that the testimony is not based on personal knowledge, is speculative, and there is a lack of foundation to support the statements. Paul has not indicated he personally observed the kicking, he is merely speculating that that is what occurred. Without more foundation, this objection should be sustained. Paul’s statement about the bruises all over his body, however, are based on personal knowledge and admissible.

Answer B

CD "Your ex-girlfriend is living with me now."

Relevance - to show that D became angry because P was living with D's ex-girlfriend.

Hearsay - Hearsay is an out-of-court statement offered at trial to prove the truth of the matter asserted.

D could object on hearsay grounds because the statement was made by P, outside of the court.

However, the prosecution could successfully argue that the statement is not being offered for its truth. The prosecution is offering the statement to show that it provoked a reaction in D which led to his assault on P. It is offered for its effects on the listener, not for its truth.

Admission– The prosecutor may also argue that if the statement were considered hearsay it would still be admissible under the exception for admissions of a party-opponent. This argument would lose, however, because P is not a party. He is a complaining witness but the government is the party.

@ "Yeah, and my buddies tell me you're treating her like dirt."

Relevance - to show D's anger over P's treatment of the ex-girlfriend.

Hearsay - An objection could be made because this is an out-of-court statement offered for its truth.

Not for its truth - However, the prosecution could successfully argue that the statement is not offered for its truth but rather to show D's state of mind, or motive for the alleged assault.

Exceptions

Admission - Even if considered hearsay, the statement is admissible because it is being offered against a party (D) by his opponent (the prosecution).

State of Mind - In addition, the statement would be admissible to prove D's state of mind when the statement was made. The statement tends to show that D was feeling ill will towards P and that this motivated the assault.

® "Is that when he pulled the club out of his pocket?"

Relevance - to show that D assaulted P with a club.
Leading Question - A leading question is one that suggests the correct answer to the

witness. Leading questions are permissible where questioning a hostile witness, clarifying background information, or where a witness has a difficulty remembering.

Here, P is not a hostile witness, he was called by the prosecution as their first witness. As none of the other circumstances are present, the leading question here (it suggested the right answer was yes) was impermissible and should have been disallowed.

Assumes Fact Not in Evidence - The question is also objectionable because it assumes facts not in evidence, namely, that D had a club, and that D the club [sic] from his pocket.

© "Tell the jury everything that happened after that."

Narrative - This question is objectionable because it calls for a narrative. The lawyer must interrogate the witness, not merely call him to the stand and let him tell a story.

Compound - The question could be construed as compound because it calls for the witness to answer what should have been multiple questions all at once.

® a. "I said he was a fine one to be talking." b. "I told him I'd read several police reports where Gina had called the police after he'd beaten her."

a. Is hearsay because it is an out-of-court statement offered for its truth and no exceptions apply.

a. Is also objectionable because it is irrelevant–it has no tendency in reason to make a material fact more or less probable.

403 - Undue Prejudice - Even where evidence is relevant, it may be excluded by the court due to its probative value being outweighed by its danger of unfair prejudice, confusing the issues, misleading the jury, or delay.

Here the evidence should be excluded under 403. The probative value is slight if existent and the danger of confusing the issues (D assaulting P versus D assaulting Gina) is great.

b. The Police Reports

Relevance - to show that D is a violent person or to show the effect this statement had on D.

Hearsay - The statement was double hearsay: **CD** It is the statement by P at the bar @ relaying the content of police reports. In order for double hearsay to be admissible there must be an exception or exclusion for each level of hearsa y.

CD P's Statement - The prosecutor could argue it is non-hearsay because it is offered to show its effect on D, not for its truth.

@ The Police Reports - Police reports may be admissible as business records if made by someone in the course of their employment with a duty to make such recordings. However, police reports are not admissible as a business record in a criminal case, as we have here. Further the reports contain a hearsay statement by Gina, who was under no duty to make accurate statements.

Therefore the statement should be stricken.

Best Evidence Rule (BER) - Where the contents of a document are at issue or a witness testifies to something known only from reading a document, the BER requires production of the original document or a valid explanation for its absence.

Here, P testified to contents of police reports. His only knowledge appears to derive from reading the reports. Thus the BER requires their production or an explanation.

Character Evidence - Evidence to show conduct in conformity therewith is inadmissible unless the defendant first opens the door by bolstering his own credibility.

Here, the defendant D has put on no evidence. Also, the prosecution could only rebut by opinion or reputation evidence, not by extrinsic evidence of specific acts, as P testified to.

Relevance - To show Gina told the truth and that therefore D is a violent person.

Personal Knowledge - P lives with Gina and is thus familiar with her character for truthfulness.

@ “I know Gina to be a truthful person.”

Improper Bolstering of a Witness/Declarant

P improperly testified to Gina’s character for truthfulness. A party may bolsterthe credibility on a witness/declarant with reputation/opinion evidence of truthfulness only after the credibility of the witness has been attacked.

Here, Gina has not testified, nor did D attack her credibility as a declarant, thus the testimony should be stricken.

® “Watch out–he’s gonna hit you again!”

Relevance - to show D attacked P

Hearsay - out-of-court, and offe red for its truth, therefore it is hea rsay.

Exceptions

Excited Utterance - A statement made concerning a startling event while under the stress of the exciting event is admissible as a hearsay exception.

Here, the statement concerned a startling event, an assault with a club, while the declarant was under the stress of the event. The statement appears to have been made in between blows and under great excitement.

Present Sense Impression - A statement made describing an event while the event is occurring or immediately thereafter is admissible as an exception to the hearsay rule.

Here the out-of-court statement was made while the declarant was observing the attack on P. Therefore the statement is admissible.

@ "D must have kicked me more after I passed out . . .

" Relevance - to show D assaulted P.

Lack of Personal Knowledge - A witness may only testify to things they have personal knowledge of.

Here, P testified to what happened after he had passed out. A person obviously has no personal knowledge of events taking place while they were unconscious. Thus the testimony should have been stricken.

Q4 Torts

Paula is the president and Stan is the secretary of a labor union that was involved in a bitter and highly-publicized labor dispute with City and Mayor. An unknown person surreptitiously recorded a conversation between Paula and Stan, which took place in the corner booth of a coffee shop during a break in the contract negotiations with City. During the conversation, Paula whispered to Stan, “Mayor is a crook who voted against allowing us to build our new union headquarters because we wouldn’t pay him off.”

The unknown person anonymously sent the recorded conversation to KXYZ radio station in City. Knowing that the conversation had been surreptitiously recorded, KXYZ broadcast the conversation immediately after it received the tape.

After the broadcast, Paula sued KXYZ for invasion of privacyin publishing her conversation with Stan. Mayor sued Paula and KXYZ for defamation.

1. Is Paula likely to succeed in her suit against KXYZ? Discuss.

2. Is Mayor likely to succeed in his suit against Paula and KXYZ? Discuss.

Answer A

1. Paula v. KXYZ

Paula can attempt to bring a suit against KXYZ for invasion of her privacy on several theories including false light publication, intrus[t]ion upon seclusion, and public disclosure of private facts. The question asks how likely she is to succeed in these suits and each is treated separate ly below.

A preliminary first amendment concern is appropriate. The Supreme Court has recently held that a broadcaster cannot be held liable for the broadcast of illegally obtained information even if it is aware of the illegality of the recording so long as the broadcaster was not a party to the illegality and the information involves a matter of public concern. Here, the facts suggest that KXYZ was not a party to the illegality which was the surreptitious recorder's acts, and even though it could be aware that the information was not legally obtained, because the subject matter of the statement involves the Mayor as well as the highly publicized labor disputes that Paula was involved in, KXYZ will argue that this is a matter of a public concern and they are protected by the First Amendment in making their broadcasts. Now, special attention will be paid to each of the causes of action.

FALSE LIGHT

An action for false light publication can be brought where the plain tiff shows that there has been widespread dissemination of information that places plaintiff's beliefs, thoughts, actions in false light that would be objectionable to a reasonable person. Here, Paula would claim that KXYZ's actions in immediately playing the recording of her private conversation with Stan placed her in false light because it imputed to her the belief that Mayor was a crook.

The widespread dissemination element is met in this case because KXYZ broadcast the information over the airwaves.

There is an issue as to whether the dissemination of the information placed Paula's beliefs, thoughts, or actions in a false light in such a way that would be objectionable to a reasonable person. KXYZ would argue that a reasonable person would not object to having their claim that the mayor is a crook be publicized because the corruption of the mayor is something that Paula herself wanted to correct. Paula will argue that taking the statement out of context and publishing it makes it seem like she is making a very broad accusation of the mayor. Moreover, Paula would argue that publishing such a statement puts her in jeopardy of potential tort liability, which is the case here, as Mayor has sued her. Upon hearing the arguments of both sides, a court would probably consider the statements disseminated by KXYZ as not being objectionable to a reasonable person because they do not distort Paula's opinion of the mayor but rather accurately represent them because they played the taping of her speaking.

As a defense, KXYZ would argue that the publication of this information is protected by the First Amendment to the Constitution. The First Amendment is incorporated through the due process clause of the Fourteenth Amendment and binds the states as well. Therefore, a state - - as a state actor - - cannot enforce a cause of action where the underlying conduct being adjudicated is protected by the First Amendment unless certain standards are satisfied. In a false light case, KXYZ would argue that because the corruption of the mayor is a matter of public concern and also because the labor dispute between the labor union and the city has been highly publicized, the public has a right to be informed about both the mayor and the labor union's interactions. If the court finds that the subject matter of the broadcast implicatingthe mayor in corruption and involving negotiations between the Labor Union and Mayor indeed involves a matter of public concern, the court will require Paula to show actual malice on the part of KXYZ to recover. Here, Paula would emphasize their immediate broadcast of the information and claim that such highly reckless broadcast without checking the accuracy of the recording or ensuring that there might be some basis to it constitutes reckless disregard for the consequences of their broadcast. This is a close question, but a court would probably ultimately decide that the broadcasting of the information was short of reckless for false light purposes.

In conclusion, because there was not a material misrepresentation of Paula's views in the broadcast, a court will probably find that the broadcast did not place her views in a false light and Paula will not recover on this theory.

INTRUSION UPON SECLUSION

An action for intrusion can be brought where a plaintiff can show that a defendant intruded, by an act of prying or intrusion objectionable to a reasonable person, into a space where the plaintiff had a reasonable expectation of privacy. The tort provides a remedy for the privacy of the plaintiff, so therefore the truthfulness of any information gained as a result of the intrusion does not exonerate the defendant. Here, Paula will have to show that KXYZ intruded upon her by taking a private conversation she had with Stan and that the information that KXYZ broadcast was taken from a place where Paula had a reasonable expectation of privacy. Because KXYZ did not itself intrude upon Pau la, Paula will have to pursue KXYZ on an agency theory. If Paul is not successful in linking KXYZ to the intrusion, then she cannot hold them liable for this tort.

The primary obstacle for Paula is in asserting that KXYZ is the party responsible for intrusion in this case. The tort does not protect the plaintiff's privacy interest as a result of the broadcast of the information, which KXYZ clearly did; rather, the tort provides relief for intrusion upon the privacy interest of the plaintiff. Paula will argue that KXYZ is vicariously liable for the surreptitious recording made by the unknown recorder of the information, the party most appropriately liable for intrusion. Here, Paula would have to draw a connection between KXYZ and the recorded [sic], perhaps by showing evidence that the recorded [sic] was an employee of KXYZ. If, for example, KXYZ by prearranged agreement paid the person to stakeout and follow Paula and record her conversation, Paula might be able to claim that there was an employer-employee relationship upon which vicarious liability could

be grounded. However, the facts suggest that the recorder acted on his own and sent the conversation anonymously to KXYZ. If the court believes that there is no relationship between KXYZ and the recorder, then KXYZ cannot be found liable for intrusion because it was not the party responsible for the intrusion.

Whether or not KXYZ is found to be vicariously liable, it is helpful to discuss the remaining elements of the tort. The first element of intrusion will be difficult to satisfy for Paula. Under the law of intrusion, an intrusion occ urs by some act of prying or meddling that is objectionable to a reasonable person. For example, some one using binoculars or high powered camera lens from across the street to spy on or take photographs of someone in a private place is a sufficient act of intrusion. Here, Paula will claim that the "surreptitious" recording of her conversation constitutes an act of intrusion. Paula will argue that a reasonable person would object to other people prying into their conversations. On the question of intrusion, KXYZ will emphasize that there is no intrusion where someone speaks in public. KXYZ will claim that it is not reasonable for a person to object that someone is listening to them when they speak in public, rather, KXYZ will argue, the speaker assumes the risk of an "uninvited ear" whenever they speak in public. This is a close question on intrusion, but because the facts suggest that the recording is surreptitious, a court will probably find that such secretive and intrusive recording of a conversation is sufficient to satisfy the first element of the tort.

On the question of whether Paula had a reasonable expectation of privacy in her place of seclusion, there will be difficulty. The tort of intrusion only protects the privacy interest of the plaintiff where they have a legitimate expectation of privacy in the place upon which their privacy was intruded. Here, Paula was in a coffee shop directly across the street from where contract negotiations were taking place. Paula will emphasize that she was in "the corner booth" of the coffee shop and that she was "whispering" to Stan when she made the statement, all suggesting that she subjectively intended, and that a reasonable person would objectively act that way, to keep the subject matter of her conversation private. KXYZ would argue, like on the intrusion element, that statements made in public, even if the speaker subjectively intends to keep them relatively secret, are not objectively reasonably private. KXYZ will emphasize that a speaker assumes the risk of "an unreliable ear" when they make statements in public. Paula will counter that she took reasonable precautions to keep her statement private despite beingin public by being in a corner booth and by whispering. Again, this is a close question, but because the facts suggest that Paula made an effort to keep her statement quiet and between her and Stan, a court could find that she had a reasonable expectation of privacy in the corner booth and in her statement.

PUBLIC DISCLOSURE OF PRIVATE FACTS

An action for disclosure can be brought where a plaintiff can show that a defendant caused widespread dissemination of information in which plaintiff had a reasonable expectation of privacy and which a reasonable person would object to. Because the interest protected by this tort is the privacy of the plaintiff and not the subject matter of the information

disseminated, truth is not a defense to the tort because even if the information is truthful, the injury to the plaintiff's privacy is still unremedied. Here, as discussed above, the primary obstacle for Paula is showing that she had a reasonable expectation of privacy in the contents of her statement.

Here, KXYZ clearlycaused widespread publicdissemination of the statements Paula made about the mayor. By broadcasting it over the airwaves, this element is met if the dissemination would be objectionable to a reasonable person. Here, KXYZ would argue that Paula was a public figure trying to settle the labor dispute with the city in the favor of her union. KXYZ would emphasize that the labor dispute has been highly publicized already and that it is a matter of public concern. These arguments, however, em phasize the subjective feelings of Paula regarding the information rather than what would be objectionable to a reasonable person. Nevertheless, a reasonable person attempting to put forward a cause, KXYZ would argue, would not object to the disclosure of information pushing for that cause. Paula will counter that the information disclosed would certainly be objectionable to a reasonable person because of the potential tort liability that could arise to the speaker if such information were widely disseminated. Here, in particular, Paula can show that she is being sued by Mayor for defamation and without KXYZ's disclosure of the statement, she would probably not be sued. This, again, is a close question but a court could reasonably find that the disclosure of the information here would be objectionable to a reasonable person because of the potential tort liability the speaker assumes and thus Paula will have satisfied the first element.

The second element is more problematic for Paula because she must show that the facts were private to her and that a reasonable person would consider them private. Here, Paula is a labor union leader and she ardently pushes for the positions of her union through publicity and in her negotia tions with the City. The alleged disclosure even concerns a contract to build the new union headquarters, something directly related to the public nature of Paula's position. KXYZ would emphasize this and say that the content of the statement is not private because it has to do with Paula's public actions, negotiating with the city and acting as president of the labor union. A court could find that, despite the private nature of the conversation in the coffee booth corner, the subject matter of the statement here is not private but rather a public matter because it involves the City and the labor union which is currently publicized a great deal. Only if the court finds that the statements contained private information to Paula, would an action for disclosure lie.

2. Mayor v. Paula & KXYZ

As a public figure, the mayor must prove additional elements in his case in order to recover for the tort of defamation. As the actions between the Mayor and Paula and the Mayor and KXYZ are of a different nature and have different defenses, they will be treated separately.

The common law elements for defamation include: (1) a defamatory statement, meaning a statement which a reasonable person would take as being harmful to a person's reputation, (2) that the statement be "of or concerning" the plaintiff, meaning a reasonable

person would understand it to refer to the plaintiff, (3) that the statement be "published," which requires only communication to a third person but may also include more widespread dissemination, and (4) damages, which may be presumed under certain circumstances.

When the plaintiff is a public figure, he must allow show [sic] (1) falsity of the statement as well as (2) some degree of fault on the part of the alleged defamer.

Mayor v. Paula

In Mayor's case v. Paula, he would focus on the actual conversation she had with Stan in the coffee shop. The allegation that Mayor is a "crook" is clearly defamatory particularly in the context of alleging that the Mayor required a payoff as a condition for allowing the union to build a new headquarters. A reasonable person would surely find that such a statement of alleged fact would be considered harmful to the reputation of the target of the speech. Moreover, it is clear from the content of the statement that it concerns the Mayor, a reasonable person hearing the statement would know that it refers to Mayor because it specifically calls him a "crook." Third, the statement was published because Paula made the statement to Stan. Regardless of the subsequent broadcast of the information by KXYZ, Paula's making the statement to Stan is sufficient publication for a tort to lie as between Mayor and Paul. There might be an issue as to whether Paula can be held liable for subsequent damage which occurs to Mayor as a result of the broadcast because Paula is not responsible for that part of the injury to Mayor's reputation.

Because this is spoken defamation, it is considered slander. In particular, Paula's statement would be considered slander per se because it was a statement relating to the Mayor's profession and it was also a statement involving the moral turpitude of the Mayor. Slander per se exists where the alleged defamatory statement concerns a loathsome disease, the unchastity of a woman, the moral turpitude of the defamed person, or the defamed person's business or professional capacity. The effect of slander per se is that damages are presumed and need not be pled, although plaintiffs often will anyway. Here, Mayor need not prove special economic damages from the tort although he almost certainly will want to, particularly to avoid damages being called too speculative because of the problem of KXYZ's broadcast which enlarged the damage to Mayor. This would not be a problem if Paula and KXYZ were found jointly & severally liable for the entire undivided injury to Mayor, although it is not clear that they would be jointly & severally liable because two distinct acts of defamat ion could be argued to have occurred, one in the coffee shop and then the second on the airwaves. Only if it can be shown that Paula created a foreseeable risk that the information would be let out and that the broadcast was within that scope of risk created by Paula's statement, then the limiting principle of proximate cause would not cut short Paula's liability and allow her to be held responsible for the entire injury.

Having established the basic elements of the tort, Mayor will still have to argue falsity and, because he is a public figure, actual malice on the part of Paula. He will almost certainly not be able to do so, although more facts are necessary to reach a determination. Under New York Times v. Sullivan, a public figure tying to collect damages for defamation must

prove the falsity of the information claimed to be defamatory. It is unclear whether the mayor is in fact a crook, but if he did require a payoff for the permission to build new labor headquarters, then he could not collect damages in this case. Moreover, Mayor will have to show that Paula acted with malice in making the statement, either reckless disregard for the truthfulness of the information itself or reckless disregard as to the consequences of making the statement. Here, because Paula can show that she was taking pains to keep the information between her and Stan private, a court will probably not find her statement to be malicious. If she had used a bullhorn, for example, and made the statements in front of City Hall, then malice might be more appropriately found, but liability would still only lie if the statements were false because Mayor is a public figure. The idea behind the heightened requirements is that the First Amendment protects rigorous debate and exchange of ideas over public issues.

Mayor v. KXYZ

As discussed above, Mayor would have to make the same showing as to KXYZ to recover. Because the broadcast involved the Mayor and defamed him, he has satisfied the basic requirements for defamation. However, special First Amendment concerns arise that further protect KXYZ.

First, KXYZ under the Constitution may broadcast even illegally obtained information if it is truthful so long as KXYZ was not a party to the illegality and the information conveyed was a matter of public concern. Here, the facts take special pains to say the recorder, although surreptitious, was not related to KXYZ. Unless Mayor could connect KXYZ to the taping, they cannot be held liable for the publication of the information.

Second, the falsity of the information might not be able to [be] proven by the Mayor, which alone would relieve KXYZ of liability.

Third, the Mayor may be able to show malice on the part of KXYZ because they broadcast the information so quickly upon receiving the recording. This might be interpreted as reckless disregard for the consequences of broadcasting the defamatory material and if Mayor can show the other [e]lements as well as the falsity of the statement, he might be able to recover by showing this level of actual malice. KXYZ would of course counter that at worst such behavior was merely negligent and should not expose them to liability given the First Amendment protections.

Answer B

1. Paula v. KXYZ

Invasion of Privacy – Generally

Paula is suing KXYZ for invasion of privacy for publishing her conversation with Stan. This tort consists of four branches of causes of action. They include: (1) misappropriation, (2) intrusion, (3) false light, and (4) disclosure of private facts. These four causes of action are discussed next.

Misappropriation

To prove a prima facie case of misappropriation, plaintiff must show that the defendant used plaintiff's name or likeness for plaintiff's commercial advantage. Misappropriation is considered an invasion of privacy tort because a person's name or likeness is a matter within plaintiff's control. When another person takes that name or likeness and uses it for their own gain, an invasion into plaintiff's private affairs occurs.

Here, Paula could claim that KXYZ's publishing of the tape misappropriated her name or likeness. Paula is the president of a labor union. Stan is the secretary of the same union. These are–or potentially are–high profile positions in any community. Thus, KXYZ could use a salacious scandal involving these two figures to help boost its ratings. In this case, Paula would argue that KXYZ replayed the tape for precisely that reason. The fact that the conversation had been surreptitiously recorded made the dialogue even more intriguing, which would also help KXYZ's attempts to publicize itself and draw attention to its station. For this reason, Paula would argue that the station used her name and reputation (and even Stan's, if he pled this cause of action) for its own commercial advantage.

Thus, Paula's misappropriation claim has some merit because KXYZ's likely intent was to use this conversation–and its participants – to boost its audience.

Defense to Misappropriation – Newsworthiness

Newsworthiness is a defense to misappropriation. The newsworthiness doctrine states that a person's name or likeness can be appropriated for public consumption if it involves a matter of public concern.

Here, because the union was involved with a bitter and highly-publicized labor dispute with the Mayor and because the conversation involved a discussion about the Mayor, KXYZ would likely claim that it was privileged to replay the tape for those reasons.

Thus, because the tape did involve a matter of public interest, KXYZ's defense in this situation is likely valid.

Defense to Misappropriation – Freedom of Speech

A radio station also possesses a First Amendment right to broadcast issues involving a public matter. The courts have ruled that a radio station may replay a tape that was surreptitiously recorded and not violate a person's rights to privacy. This defense is related–and often intimately commingled with–the newsworthiness defense, but it should be noted here for the sake of thoroughness because of the importance of the First Amendment in American constitutional jurisprudence. This defense also arises in the defamation context, but it might be applied here as well.

Here, KXYZ will argue that beyond mere "newsworthiness," the courts have previously ruled that a radio station may replay surreptiously recorded conversations and not be liable for the airing. While this has been handed down in a defamation context, KXYZ might argue that it should apply here as well.

Thus, KXYZ might have a pure freedom of speech defense based on court precedent in a related area.

Intrusion

To prove a prima facie case of intrusion, plaintiff must show that the defendant invaded a space within which plaintiff had a reasonable expectation of privacy. This tort typically involves cameramen taking pictures of persons in their private homes or even Peeping Toms. However, it can be applied to surreptitiously recorded conversations as well. But the issue is whether KXYZ did the intrusion, or whether the anonymous person was the tortfeasor.

Here, KXYZ did not actually physically intrude on an area where Paula had a reasonable expectation of privacy. KXYZ is not the entity or person that recorded the tape. KXYZ mere[ly] replayed the tape, which was recorded by an anonymous individual. Certainly, the anonymous person may be liable. However, even the anonymous person would argue that because the conversation took place in a corner booth of a coffee shop, it was in a public place where neither Paula nor Stan had a reasonable expectation of privacy. Paula would respond that she "whispered" her comments. However, courts have held that whispered comments in a public area are not afford ed a reasonable expectation of privacy (though they have done this in a Fourth Amendment search and seizure context). Even if KXYZ could be held liable under an "agency" theory for the intrusion of the anonymous individual, this argument concerning the public place would prevail in KXYZ's favor.

Thus, KXYZ would prevail on Paula's intrusion claim.

Defense to Intrusion – Public Place with No Reasonable Expectation of Privacy

As discussed immediately above, KXYZ would defend that even if it could be held liable under an "agency" theory for the anonymous person's actions (which may not be possible

under these facts), that Paula's comments in a public restaurant, even if whispered, were not private. The Court had held that "whispered" comments in a public area are not afforded a reasonable expectation of privacy, though it has done this in a Fourth Amendment context.

False Light

To prove a case of false light, plaintiff must show that defendant attributed to plaintiff actions she didn't take, views she doesn't hold, or even comments she didn't make. False light is a watered down version of defamation because it includes material that doesn't necessarily harm plaintiff's reputation, but it merely misportrays her beliefs or actions.

Here, Paula was not portrayed in a false light. Her conversation with Stan was accurately recorded. Her view[s] regarding the Mayor are her views and were not portrayed falsely.

Thus, Paula's false light cause of action is lacking.

False Light – Constitutional Considerations

It should also be noted that false light is likely subject to the same constitutional considerations as defamation. Meaning that plaintiff, if she were a public official or figure and the issue involved a matter of public concern, would have to demonstrate falsity (a prerequisite for false light in the first place) and fault, which would include actual malice if plaintiff were a public figure.

Here, Paula is most certainly a public figure. She is the president of the labor union and is involved in a highly publicized dispute with the Mayor. Paula may very well be an all-purpose public figure because of her position as president of the union, but at the very least, she is a limited-purpose public figure because of the controversy between the union and the Mayor. Thus, Paula might likely need to prove actual malice, which is clear and convincing evidence that KXYZ knew or had a reckless disregard for the falsity of the information. However, here, the conversation recorded truthful information.

Thus, Paula would likely not be able to prove falsity, as discussed, or fault.

Defense to False Light – Truth

As discussed above, Paula's views regarding the Mayor were accurately recorded. There is no false light here.

Private Fact

To prove revelation of private fact, plaintiff must demonstrate that defendant revealed private facts about plaintiff that were facts that a reasonable person would object to being revealed in a public fashion.

Here, Pau la would argue that her views regarding the major [sic] were private views that she did not want exposed to the rest of the world. This argument is somewhat diminished by the fact that Paula and Stan (and the union) were in a bitter and highly-publicized dispute with the Mayor. However, Paula would respond that even in bitter disputes a reasonable person would not want their private views toward the other person revealed to the world-at-large. Paula has a good argument in this regard. However, KXYZ might contend this was a newsworthy event and, additionally, that Paula's dislike for the Mayor is likely well-known. This would be a reasonable argument, if KXYZ could prove it.

Thus, Paula may have a cause of action under the private fact doctrine.

Private Fact – Constitutional Considerations

Again, it should be noted, as per the discussion above, that constitutional considerations are likely applied to the private fact cause of action (or at least some commentators and courts have so held). However, where – as here – there is not fault on KXYZ's behalf involving actual malice and because the material recorded was ostensibly truthful, Paula's cause of action suffers in this regard.

Defense – Truth

It should be noted that truth is no defense to private fact causes of action. In fact, what makes the private fact cause of action so unique is that the private facts may very well be truthful (in fact, they almost always are, which separates private fact from false light).

2. Mayor v. Paula

Defamation – Generally

To prove a prima facie case of defamation, plaintiff must demonstrate that defendant (1) made defamatory comments, (2) of or concerning the plaintiff, (3) published, (4) to third persons, and (5) that plaintiff suffered damage to her reputation. These issues are discussed next. Also, when the issue involves a public official, then the official must prove (1) falsity and (7) fault under a constitutional standard.

Defamatory Material

Defamatory material is material that harms plaintiff's reputation when it is published to the outside world.

Here, Paula was quoted as saying that the "[M]ayor is a crook who voted against us allowing us to build our new union headquarters because we wouldn't pay him off." Certainly, such comments are harmful to the Mayor's reputation, especially when they are released over a radio station.

Thus, in and of itself, the material here is certainly "defamatory" in the limited sense of how this term is defined.

Of or Concerning Plaintiff

The defamatory material must be of or concerning the plaintiff, or be reasonably construed to be of or concerning the plaintiff if the plaintiff's name is not explicitly mentioned.

Here, Paula refers directly to the "mayor." However, there may be other communities in the area with mayors. However, Mayor will likely be able to show that because of the controversy between the union and himself, that a reasonable person would construe the comments as being about him.

Thus, this element is satisfied.

Published

The defamatory material must be published to a third person.

Here, Paula "published" her comments to Stan, the secretary of her labor union. Paula might claim that this conversation was privileged between two officers of a union and that, thus, it was not "published" in the normal sense of the term. However, this is likely not an adequate defense. Since Paul revealed her comments to a third person capable of understanding those comments, she "published" the material. Also, it should be noted that Paula ran the risk of others hearing her comments in a public restaurant as well.

Thus, Paula published her comments.

To Third Persons

The comments must be published to a third person, not just to herself.

Here, as discussed, Paula published to Stan (and ran the risk of publishing to others in a public restaurant).

Thus, this element is satisfied.

Damage to Reputation

General damages are presumed when the comments involve libel, which are written statements. However, they are not presumed when it involves slander, which are oral comments. However, damages for slander per se are presumed when the comments involving [sic] the plaintiff's professional reputation.

Here, Paula's comments to Stan were oral. However, they also involved the Mayor's

professional competence and integrity, which would likely fall under a slander per se exception, which would then make damages presumed.

Thus, damages based on slander per se would likely be shown here.

Falsity

The Mayor would need to prove falsity as part of his prima facie case against Paula.

Here, the Mayor may have a problem showing falsity if in fact the comments are true (of course, this goes without saying). But, if the facts later demonstrate that this was a false accusation and that Paul was saying this to spite the Mayor, he can win this element.

Thus, we would need more facts here to satisfy the Mayor's burden on this element.

Fault

Because the Mayor is a public official (the mayor of a city), he would need to show actual malice because this matter involves a matter in the public concern (a highly publicized labor dispute). Actual malice is defendant's knowledge of the falsity or a reckless disregard for the falsity of the statements. Actual malice must be shown by clear and convincing evidence.

Here, again, the issue depends on whether Mayor can show that Paula's statements were false and, if so, whether she acted in knowledge of that fact or in reckless disregard of the fact when conveying her comments to Stan.

Thus, again, more facts are needed here.

Conclusion

The Mayor may not have a problem showing the traditional common law elements of defamation, but more information is needed to determine whether he satisfies the constitutional elements. If he can show falsity (perhaps not!) and fault on Paula's behalf (again, perhaps not, but more facts are needed), then he has a cause of action. Otherwise, his case may be weak.

Mayor v. KXYZ

Defamatory Material

As per above, the material here is defamatory insofar as it hurts the Mayor's reputation when it was revealed. A similar analysis as applied to Paul applies here.

Of or Concerning Plaintiff

Again, as per above, the material here likely concerns the Mayor. Although he is not mentioned by name, because of his dispute with the union, Paula's comments could reasonably be attributed as being about him.

Published

Here, most certainly, the comments were published by KXYZ over its airwaves.

To Third Persons

Again, here, using the same rule discussed above with regards to Paula, the tape was replayed over the airwaves and played to KXYZ's listening audience. This most certainly qualifies.

Damage to Reputation

Unlike the situation with Paula, the issue here is whether the tape, when replayed over the air, is slander or libel. The courts have held that such tapes replayed over the air (along with other planned comments over the radio or comments over television) are generally libel. Thus, here, damages would be presumed, assuming the other elements are true. However, because this is also slander per se, proving that this qualifies as libel is not essentia l. General damages would likely be presum ed either way.

Falsity

Again, Mayor would have to prove falsity as part of his prima facie case. The same problems arise here as arise above in the discussion regarding Paula.

Fault

Again, because the Mayor is a public official (the mayor of a city), he would need to show actual malice because this matter involves a matter in the public concern (a highly publicized labor dispute). Actual malice is defendant's knowledge of the falsity or a reckless disregard for the falsity of the statements. Actual malice must be shown by clear and convincing evidence.

Here, the same problems arise with respect to the radio station as applied to Paula. The Mayor must show that KXYZ knew or had a reckless disregard for the truth regarding the tape-recorded comments.

Thus, more facts are needed for Mayor to prove his case.

Defense – Privilege and Newsworthiness

The courts have held that a radio station is privileged to replay tapes secretly recorded over its airwaves involving matters of public concern. These holdings are most likely premised on the fact that some comments are generally newsworthy and of public importance. Thus, KXYZ can claim this privilege in its defense.

Defense – Truth

It should be noted that because Mayor is a public figure, as discusse d, he must prove falsity. This burden [sic] removes the burden of KXYZ proving truth as a defense.

Conclusion

Due to the absence of some critical facts that would help Mayor's case, along with the privilege and newsworthiness defense discussed above, KXYZ may likely win this suit, if for no other reason than Mayor may not meet his prima facie case.

Q5 Professional Responsibility

Lawyer is an in-house attorney employed by ChemCorp, a corporation that manufactures chemicals.

Smith is a mid-level employee whose job is to ensure that ChemCorp's activities comply with applicable governmental safety regulations. Smith asked to meet with Lawyer on a "confidential basis." At their meeting, Smith said to Lawyer:

> "I think ChemCorp might have a serious problem. Last year I inspected a ChemCorp facility and discovered evidence of dum ping of potentially toxic chemicals in violation of ChemCorp's internal policies and applicable governmental regulations. I told my supervisor about it, and he told me he would take care of the problem. My supervisor asked me to say nothing about the situation so they could avoid any legal hassles. I did not disclose the matter in my inspection report, despite internal policies and governmental regulations that require disclosure. I have discovered that the dumping is continuing, and I am very concerned about possible health threats because the dump site is located near several private residences and a river used for drinking water."

1. What ethical issues arise at the point at which Smith first asked to meet with Lawyer and later during their conversation? Discuss.

2. May Lawyer independently disclose the problem relating to the dumping of potentially toxic chemicals to governmental authorities? Discuss.

Answer A

CD Duty of Loyalty

As counsel for ChemCorp ("CC"), Lawyer owes a duty to act in good faith and in the Corp's best interests. This duty prohibits Lawyer from accepting representation that will result in a conflict of interest with another client. When such a situation arises, Lawyer may only accept the representation if he reasonably believes the potential conflict will not impact his ability to effectively represent each client, if he discloses the conflict to each client, if he gets consent from each client, and if the consent is reasonable. Consent is virtually never reasonable if each client's interest is opposed to one another.

Here, as soon as Smith asked Lawyer to speak on "a confidential basis," Lawyer should have told Smith that as in-house attorney to CC, he could not represent him in matters personal to him if they opposed CC's interests. Therefore, Lawyer should have advised Smith that he could not keep the conversation confidential if it related to his job at CC, and if it did, Smith should seek separate counsel.

However, if Smith advised Lawyer that he only wanted to talk in order to help the Corp to stay out of trouble, there was no loyalty issue in talking to Smith. The problem only arises once it becomes clear that Smith is primarily concerned about his own personal legal troubles stemming from the incidents.

Either way, Lawyer should have immediately warned Smith of these concerns and told him that it would be impossible for him to represent Smith at the same time he represented CC. Lawyer owed a duty of loyalty to CC which prohibited him from taking on another representation adverse to its interests.

Representation of Corp.

As Smith told Lawyer about the wrongful activity CC was engaged in, Lawyer, as in-house counsel for CC, owed a duty to go to the Supervisor and discuss the matter with him. If Supervisor either admitted to the wrongful activity or said that he was ordered to do so, Lawyer must continue to ascend the hierarchy of the Corp until he speaks with person making the decision. Lawyer's only duty runs to CC itself, so if he is ever told to sit back and permit the wrongful activity to continue, he must go directly to the Board of Directors and advise them that CC is violating the law and that it is within their best interests to stop.

Withdrawal

If Lawyer eventually discovers that CC's Board refuses to stop dumping illegally, the Lawyer may withdraw from his representation of CC. Permissive withdrawal is acceptable when the representation becomes financially burdensome to Lawyer, when the client has in the past engaged in a crime or fraud by using his services, when the client acts in a way

repugnant to him, or when the client refuses to stop engaging in conduct that the Lawyer tells him to stop doing. Withdrawal is mandatory if the client is presently using the Lawyer's services to engage in a crime or fraud. In such a case, the lawyer might have to make a "noisy withdrawal" by disclaiming work he prepared that furthered the crime or fraud.

There is no evidence here that CC is using Lawyer's services to further its illegal dumping scheme. Therefore, Lawyer need not resign.

However, if Lawyer goes to the Board, advises it to stop dumping, and it refuses, the ABA Rules would permit Lawyer to withdraw from its representation of CC. This is a relatively drastic measure, however, that should only be taken once Lawyer has done further investigation concerning Smith's allegations and the Board's knowledge of the illegal conduct.

After Smith Completed his Statement

At this point, Lawyer should again advise Smith that he owes a duty to the Corp, such that he cannot keep this information confidential. He should again advise Smith to get separate legal counsel if he is concerned about his civil or criminal liability. His interests are adverse to CC because Smith wants to end the dumping and possibly publicize CC's conduct, while CC wants to keep its conduct quiet. Therefore, under no circumstance should Lawyer give Smith any advise [sic] other than to seek separate counsel.

2. Duty of Confidentiality

While a lawyer owes a duty to disclose physical evidence of a crime that is in his possession, he must not disclose, use, or reveal any information relating to a representation, unless client consents.

Because Lawyer attained information highly relevant to his role as CC's counsel, he must not disclose the problem to the government, unless an exception to the duty of confidentiality applies. It is irrelevant that the source was a mid-level employee because Lawyer's duty extends to information attained from any source. He cannot tell this to the govt. because the dumping relates to his representation of CC.

Exceptions

A lawyer may only violate the duty of confidentiality if the client consents, if he's ordered to disclose information by law, if he does so to defend himself in a malpractice action or a suit to recover legal fees, or (under ABA Rules) to prevent a crime involving imminent death or serious bodily harm. The last exception is the only one that is arguably applicable here. It must be noted that the California Supreme Court has not found such an exception under its state law. While the CA evidence code has such an exception, the vitality of this exception is unclear in CA. Even if it did apply, it probably wouldn't apply here. Although the dumping creates a severe risk of serious bodily harm or even death, the risk is not of

an imminent nature. While others would argue that the harm from the toxic chemicals is an ongoing one, this exception is designed to deal with a case where an individual's safety is in danger from more obvious, and less latent, danger. Therefore, the duty of confidentiality prevents Lawyer from disclosing this information to the government.

Attorney-Client Privileges

The A-C privilege prevents the lawyer or client from having to disclose confidential communications discussed during the legal representation. The A-C privilege, however, has a wider crime-fraud exception, that would not require Lawyer to volunteer Smith's allegations, but would require him to disclose them if ordered to do so, since a crime is ongoing.

Answer B

1. Ethical Issues Arising From Lawyer (L)'s Meeting With Smith (S)

Duty of Loyalty to S

A lawyer owes a duty of uncompromised loyalty to his client which forbids him from taking actions which might create competing obligations except in specifically enumerated situations. An attorney representing a corporation is in a particularly precarious position because his duty of loyalty runs to the corporation, and not to any individual employees.

When a lawyer's duty of loyalty might be compromised by a conflicting obligation, he is said to have a potential conflict. In such a situation, an attorney must make a reasonable determination that he can continue to effectively represent his client in the face of such a conflict, disclose the potential conflict to his client, and obtain the client's objectively reasonable written consent to the situation. On the other hand, when the attorney's obligations are in present competition, he is said to have an actual conflict. In this situation, the attorney must either decline representation, advise separate legal counsel, or withdraw.

Here, Smith (S) asked Lawyer (L) to meet on a "confidential basis." L should have immediately been alerted to the potential conflict between his duties to Chem Corp (C), and any duties that might arise with respect to S based on the conversation. Thus, before allowing S to confide in him at all, L should have fully informed S that L was not his personal lawyer, and instead owed obligations to C. By failing to do so, and allowing S to confide damaging information to him, L created an actual conflict, which will likely require him to withdraw from his representation of both S and C, lest L breach his newly-arisen, ongoing duties of confidentiality and loyalty to S. L will have a duty to withdraw properly by giving both S and C timely notice of withdrawal, and returning all papers to them in a timely fashion.

Duty of Confidentiality to S

An attorney owes an ethical duty of confidentiality to his client which requires him to maintain inviolate all information he obtains that is related to his representation of that client. The ethical duty is broader than the attorney-client privilege, which is an exclusionary rule of evidence forbidding the government from compellinga lawyer to reveal any communication made by the client to the lawyer in furtherance of the provision of legal services. Rather, the duty of confidentiality forbids the attorney from revealing anything related to his representation of a client, from whatever source that information is derived, unless the client consents to disclosure, disclosure is necessary to prevent a crime (see below for further discussion), or to establish a personal defense.

Here, L became ethically obligated to keep confidential the conversation he had with S by allowing S to meet with him on a "confidential basis" and confide in him regarding crimes that he had committed. S informed L that S himself had violated company policies and

govt. regulations by failing to disclose the substance of his investigation in his inspection report, and may therefore have subjected himself to criminal or civil liability, and workplace censure for his failure to do so. Since S likely would not have confided in L unless he believed L was, for the purposes of the conversation, his attorney, L has incurred a duty of confidentiality to S by failing to properly inform him of his (L's) loyalties.

Duty of Loyalty to C

As discussed above, L owes a continuing duty of loyalty to C. As soon as L was put on notice that his loyalty to C might be compromised, he should have disclosed the conflict to C's Board of Directors and sought their consent to meet with S. By failing to do, L breached his duty of loyalty to C, and set himself up for the ripening of an actual conflict that would require him to withdraw from his representation of C, lest he breach his newly–arisen duties to S. Now, L cannot properly and effectively represent C, because to do so would require that he breach his duty of confidentiality to S by revealing the damaging information S provided to him during their confidential conversation. As such, L must withdraw by giving C timely notice and promptly returning all papers, so as not to compromise his duty of loyalty to C or S.

Duty of Competence to C

An attorney owes a duty of competence to his clients which requires that he behave with legal skill, knowledge, thoroughness, and preparation reasonably necessary for effective representation. The duty of competence entails both a duty of an attorney to communicate with his client, and a duty to diligently and zealously pursue his representation to its completion.

In this case, L's duty of competence to C would require a number of actions which he likely has conflicted himself out of by meeting confidentially with S. A competent lawyer would thoroughly investigate S's factual claims – that a C facility was engaged in illegal dumping activities, and was put on notice of their discovery when S spoke to his supervisor – as well as the legal implications of any illegal dumping and the alleged cover-up. Moreover, a competent attorney would communicate his findings to C's board, so that C could make a fully-informed substantive decision as to what course of action would be most appropriate. However, to do any of these things that a reasonably competent practitioner would do would require L to breach his duties of confidentiality and loyalty to S, which he is ethically forbidden from doing.

Duty of Confidentiality to C

Because L owes a continuing duty of confidentiality to C, he will not be permitted to reveal anything related to his representation of C gleaned from his conversation with S. The ethical duty of confidentiality is a broad proscription applying to all information from whatever source derived, and since S's statements related to C's representation of C in that they might implicate C in a criminal or civil fraud, L cannot breach his duty of

confidentiality to C by revealing them.

Duty of Not Assisting in Crime or Fraud

To the extent that L would be required to assist either C or S in perpetrating a continuing crime or fraud, he would have an ethical obligation to terminate his representation to prevent his services form being used in such a manner. However, it is unclear whether any alleged crime or fraud continues to be perpetrated after L's conversation with S.

@ May L Independently Disclose Information About Dumping?

Duty of Candor

As an attorney, L owes a duty of candor to the public and the legal system which requires him to produce evidence when he is reasonably certain that the evidence is the fruit or instrumentality of a crime. Here, however, L has not received any actual evidence, but only a confidential communication from his client concerning alleged illegality. Thus, L will not be ethically obligated to produce any evidence of alleged wrongdoing.

Duty of Confidentiality

Whether L may independently disclose the problem of C's alleged illegal dumping is another problem altogether, which will depend on which jurisdiction L is in.

Under the ABA Model Rules, an attorney is permitted to disclose otherwise confidential information in order to prevent immediate death or substantial bodily harm. Here, it is unclear whether S's revelation suggests any immediate danger, since S only opined that there were "possible health threats" because the dump site was located near private residences and potable drinking water. However, L could make the case that such dumping does pose an imminent threat because contamination will almost certainly lead to death or serious bodily injury, and is ongoing. Thus, in an ABA MR jurisdiction, L may be permitted to disclose the dumping.

In California, on the other hand, no exception to the ethical duty of confidentiality has been carved out for warnings of death or substantial bodily harm. The California Evidence Code does not explicitly include such info as being within the scope of the attorney-client privilege, but thus far, the courts of California have yet to recognize an exception for death/bodily harm like the ABA. Thus, if L is an attorney in California, he will most likely be forbidden from breaching his ethical duty of confidentiality to C & S by revealing information about dumping to government authorities.

Finally, under the Restatement of Law Governing Lawyers, L would be permitted to reveal confidential information not only to protect against death or bodily harm, but to prevent significant monetary loss. Since the dumping by C could arguably lead to significant monetary losses for either the government or private individuals, L might be permitted to

reveal the dumping in a Restatement jurisdiction.

Q6 Wills

In 1998, Tom executed a valid will. The dispositive provisions of the will provided:

"1. $100,000 to my friend, Al.
2. My residence on Elm St. to my sister Beth.
3. My OmegaCorp stock to my brother Carl.
4. The residue of my estate to State University (SU)."

In 1999, Tom had a falling out with Al and executed a valid codicil that expressly revoked paragraph 1 of the will but made no other changes.

In 2000, Tom reconciled with Al and told several people, "Al doesn't need to worry; I've provided for him."

In 2001, Beth died intestate, survived only by one child, Norm, and two grandchildren, Deb and Eve, who were children of a predeceased child of Beth. Also in 2001, Tom sold his OmegaCorp stock and reinvested the proceeds by purchasing AlphaCorp stock.

Tom died in 2002. The will and codicil were found in his safe deposit box. The will was unmarred, but the codicil had the words "Null and Void" written across the text of the codicil in Tom's handwriting, followed by Tom's signature.

Tom was survived by Al, Carl, Norm, Deb, and Eve. At the time of Tom's death, his estate consisted of $100,000 in cash, the residence on Elm St., and the AlphaCorp stock.

What rights, if any, do Al, Carl, Norm, Deb, Eve, and SU have in Tom's estate? Discuss.

Answer according to Californ ia law.

Answer A

1. AL

Al was initially provided with $100,000 under the valid 1998 will.

Codicil

A codicil is a supplement to an existing will executed with full formalities according to the statute of wills that revokes only inconsistent provisions of the prior will and adds new provisions. Both the codicil and prior will (consistent) are valid and deemed executed as of the date of the codicil.

Thus, by executing a valid codicil in 1999, T revoked the inconsistent paragraph 1. At common Law T may have been required to also make additions, but that is not the law in California.

Revocation

A will, and codicils, can be revoked expressly by a subsequent will or by physical act.

Expressly

A will can be revoked by a subsequent holographic express revocation. For a valid holographic will the Testator must sign and the material provisions must be in T's handwriting.

Here, Tom wrote the words "null and void" in his own handwriting and signed the codicil. Therefore he likely revoked the codicil expressly.

By Physical Act

Tom also may have revoked by physical act, which can be done by crossing out langua ge of the existing will or writing null and void so long as language of the revoked instrument is touched.

Here T wrote the words across the face of the codicil touching the language and therefore it likely also could be interpreted as revocation by physical act.

Therefore the codicil was validly revoked. . . .

Revival

Where a codicil to a will is revoked the validly executed will remains valid. Whether the inconsistent provisions are thus revived depends on evidence of the intent of the testator.

Al will point to the statements by Tom to several people that T said, “Al doesn’t need to worry, I’ve provided for him.”

However, SU will likely argue it is unclear whether these statements were made near time that T revoked the codicil. They were made, however, after T and Al reconciled, so likely Al can use these statements and their later reconciliation to show he intended to revive the will.

Dependent Relative Revocation

T likely cannot rely on Dependent Relative Revocation, which provides that where the T revokes a will under mistaken belief that a prior gift is valid the revoked will will be revived. This does not aid Al because he does not want the gift in the codicil revived, as there is no gift for him there.

Therefore, if the codicil is revoked, Al likely prevails under the existing valid will and will get the $100,000.

2. Carl/The Stock

Whether Carl will take the AlphaCorp stock depends on whether Tom’s initial gift was specific or demonstrative, because specific gifts generally are deemed if they do not exist when the T dries.

Specific vs. Demonstrative

Specific gifts are gifts of specifically identified property, like a piece of real estate or a watch. Demonstrative gifts are a hybrid of specific and general in that the T intends to make a general devise but identifies the source from which the devise should come.

Stock has proved difficult to characterize. Gifts of “my 100 Shares of ABC” are generally deemed specific, while ‘100 shares of ABC’ are demonstrative.

Here, T gives Carl ‘his OmegaCorp Stock’. This is more like a specific devise because it is phrased in the possessive which suggests T intends to give specific stock.

Ademption

Under the doctrine of ademption specific devises that are not present when T dies are adeemed by extinction. This rule of ademption is not applied to demonstrative gifts. Instead, such gifts are satisfied out of oth er property.

Here, the OmegaCorp stock has been sold and thus not present when T dies. Thus, if this is a specific devise, the gift to Carl is adeemed.

Change In Form, Not Substance

Carl may argue that the gift is not adeemed because it is still present. He could argue that Tom's purchase of the AlphaCorp stock with all the proceeds was a change in form not substance.

Intent of the Testator

Carl could also argue that in California if the T did not intend ademption to apply it will not be applied. Here, Carl is Tom's brother, a natural object of T's bounty and there is no indication of bad blood between the brothers. Therefore T can be argued there was [sic] no attempts to adeem.

Acts of Independent Significance

Carl may also argue that the doctrine of Acts of Independent significance applies. This allows blanks in a will to be filled in by acts that are not primarily testamentary. Selling stock has a lifetime motive and thus is not primarily testamentary. However, there is no blank in the will here, which expressly identifies OmegaCorp stock, not just 'my stock.' Therefore this argument will fail.

Norm, Deb & Eve/The Residence

Lapse

Under the common law doctrine of lapse, a beneficiary who predeceased the testator did not take the gift. It lapsed. Here, Beth died in 2001, one year before Tom. Under common law her gift would lapse.

Anti-Lapse Statute

In California, there is an anti–lapse statute that will save gifts to beneficiaries who predecease if:

1) they are related to T or to T's spouse;

2) they leave issue.

Here, Beth is T'S sister and thus is related. Further, she leaves issue, one child, Norm, and two grandchildren, Deb and Eve, who are the children of her predeceased other child. Therefore, California's anti-lapse statute applies.

Under California's anti-lapse statute, the gift goes directly to the decedent beneficiary's issue, not to devisees under the will.

Here, Beth's issue are Norm and Deb and Eve (the issue of her issue). Under California intestacy law, which applies Modern Per Stirpes [sic], the gift would go to Beth's issue.

Deb and Eve may then take by representation for their deceased parent. Thus Norm would take ½ and Deb and Eve would split ½, for 1/4 each.

4. Remainder/SU

SU will take all the remainder of the estate less costs for administration, etc. Here, if Earl's gift is adeemed, SU takes the AlphaCorp stock. If Al's gift in will 1 is not revived somehow, SU takes that as well.

Answer B

Rights of Al

A valid codicil may, expressly or impliedly, by conflict revoke a gift in a prior will. The codicil here expressly revoked the gift to Al.

Revocation of Codicil

In California, revocation by be [sic] express by a new instrument or by physical act of revocation by the testator, including mutilation, tearing, burning, etc that is intended to revoke. Writing "null and void" across the text of the will was a physical act of destruction and was coupled with the signature indicating that Tom performed the act. Because it was probably intended by Tom as a revocation of the codicil, the codicil was revoked.

Revival of the gift to Al

Generall y, revocation of a later instrument will not revive an earlier will. However, in California, where revocation is by physical act, a former instrument is revived based on testator's intent to revive the prior instrument, whole or in part. This intent may be shown by extrinsic evidence.

Comments to Several people

Al will wish to use the comments to other people that Tom provided for Al to show that Tom intended to revive his original bequest to Al. Hearsay is a statement made out of court offered for the truth of the matter asserted. Here, Al would be offering these statements for the truth of the matter. However, an exception to the hearsay rule exists for state of the mind of the declarant. Normally, this exception only applies to current state of the mind of the declarant. Normally, this exception only applies to current state of mind or future intent. However, and [sic] a testimony exception exists for prior statements concerning the declarant's will. Because Tom's statements are being offered to show that Tom intended to revive the gift, Tom's testamentary intent, it falls within the exception [to] the hearsay rule [sic] and will be admissible.

Given this evidence of intent, under California law, Tom's bequest to Al will probably be reinstated by revival.

Holographic Codicil & republication

In California, a holographic will or codicil is made when the testator writes the testamentary provisions in his own handwriting and signs the instrument. Thus, Al may also argue that by writing "null and void," then signing, created a valid holographic codicil that republished the original will with Al's gift.

Dependent Relative Revocation

Al may also argue that his gift is valid underthe doctrine of Dependent Relative Revocation. Under this doctrine, when a gift is cancelled, but [sic] it appears that the testator only did so in the mistaken belief that another valid bequest to that person made [sic] by a new instrument. This doctrine generally applies when a new larger gift is found invalid. Here, however, no new gift was made, thus Al cannot depend on this theory to validate his gift.

Conclusion

Because Al's gift was either revived or republished as part of a holographic codicil, Tom's gift to Al of $100,000 will be enforced.

2. Rights of Norm, Deb and Eve to Elm St. Residence

When a bequest in a will is made to a person who preceases testator, that bequest is said to lapse. Under common law, a lapsed gift failed and fell into the residue of the will. However, under California's anti-lapse statute, when a bequest is made to [a] close relative, the [sic] presumes that the testator intended for the issue of the dead devisee to stand in the deceased shoes and receive the gift. Thus because Beth was the sister of Tom the anti-lapse statute should apply with the bequest going to Norm, Deb, and Eve.

Note that SU may argue that the anti-lapse statute does not apply because Tom's revocation of his codicil was by a holographic instrument (the writing of "null and void", signed by Tom, see analysis above, re: Al) after the death of Beth. The anti-lapse statute does not apply when the will is executed after the death of the devisee. Here, however, the putative holographic codicil is undated, and Tom made his comments about providing for Al in 2000 before Beth's death. Thus this argument will likely fail.

Assuming that Norm, Deb, and Eve, Beth's issue, receive Elm St. under the anti-lapse statute, it will be distributed per capita with representation as defined by the intestacy code. In this case, it will be equivalent to the common law, per stirpes method: Norm will have an undivided ½ interest in Elm St., Deb and Eve 1/4 undivided interests, each as tenants in common.

3. Ademption of Stock gift to Carl

When a bequest of specific property is no longer owned by the testator at death, the bequest is adeemed, and falls into the residue of the estate. Here, SU, the residuary beneficiary, will argue that the gift of "My OmegaCorp" stock was a specific gift, and should thus be adeemed.

At common law, an exception exists when the new property was clearly intended to replace the property mentioned in the will. However, this exception is more likely to be applied to items such as autos or homes than stock. However, Carl will argue that when Tom

replaced OmegaCorp stock with AlphaCorp stock, that the value of the property was not changed and that Tom intended that Carl still receive the stock.

In addition, some common law courts would fudge the classification of a bequest from specific to demonstrative, if they thought it necessary in [sic] for justice and equity. Thus, such a court would classify the stock bequest as a demonstrative gift. Carl would then be entitled to the current market value that the OmegaCorp stock would now have (or the shares purchased for that amount).

In California, however, whether a gift is adeemed is determined solely be [sic] the intent of the testator at the time of the sale of the asset as to whether the new asset was to be a replacement and the bequest not adeemed. Carl would argue that when [sic] Tom directly exchanged the proceeds of the OmegaCorp stock for the AlphaCorp stock, and the act was done for reasons of making a better investment, and not with the intent to redeem. Carl would be able to produce intrinsic evidence in support of this assertion.

Overall, as discussed above, it appears that Carl has a reasonable chance of receiving the AlphaCorp stock, or at least the value of OmegaCorp stock.

4. Rights of SU

SU, as residuary devisee, will have the rights to anything remaining. As stated above, it appears that this will be nothingwith the possible exception of the AlphaCorp stock orsome remnant of that.

Abatement

As only the property mentioned in the will is available, the estate may not have sufficient funds to pay all of these bequests along with any debts or cost of administration of the estate. In that case, those debts would first come out of any general bequests, and from those, first from non-relatives. Thus regardless of how the gift to Carl is classified, Al's gift will be abated first. If that is insufficient, then the classification of Carl's gift made by the court would be relevant. If found to be a demonstrative gift, it would be abated next. If a specific gift, the abatement would be to both Carl and "Beth"'s [sic] gift proportional to the total size of their gifts.

Feb 2003

California Bar Examination

Essay Questions and Selected Answers

February 2003

ESSAY QUESTIONS AND SELECTED ANSWERS

CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2003 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors and may not be reprinted.

California Bar Examination

Answer all three questions. Time allotted: three hours

Your answer should demonstrate your ability to analyze the facts in question, to tell the difference between material and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discu ss all poin ts thorou ghly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

Q1 Civil Procedure

Petra, a State W resident, recently patented a new design for a tamper-free bottle cap for soft drinks. She contracted with Dave, who lives in State X, to design a manufacturing process to mass-produce the newly patented bottle caps. Under the contract, Dave was required to relocate to State W, where Petra had leased research and development facilities, and to keep confidential all design and production information concerning the bottle cap.

Dave promptly found someone to rent his home in State X. He moved all his belongings to State W. After working for six months in State W, Dave had perfected the manufacturing process, but when Petra denied Dave's request for additional compensation he quit his job and disclosed the bottle cap manufacturing process to Kola, Inc. ("Kola").

Kola is a regional soft drink bottler incorporated in State Y, with its principal place of business in State W. Kola flooded the market with bottled soft drinks capped with Kola's version of Petra's bottle cap months before Petra could begin production.

When Petra discovered what had happened, she filed suit against Dave and Kola in state court in State W for violation of State W's patent infringement law. Petra's complaint sought damages of $50,000 from Dave and $70,000 from Kola. Unknown to Petra's lawyer, a federal patent law enacted shortly before Petra filed suit encompasses the type of claim pleaded by Petra and expressly preempts all state laws on the subject.

Six weeks after being served with the complaint, Kola removed the entire action to the federal district court in State W. Petra immediately filed a motion to remand the case to state court in State W. The district court denied Petra's motion.

Petra immediately filed an appeal of the court's ruling denying Petra's motion to remand with the appropriate federal court of appeals.

1. Did the federal district court rule correctly on Petra's motion to remand the case to state court in State W? Discuss.

2. Should the federal court of appeals entertain Petra's appeal? Discuss.

Answer A

I. Did Federal District Court Correctly Rule On Petra's Motion to Remand Case to State W?

Petra filed suit in State W Court against Dave (D) & Kola based on a State W cause of action. State courts are courts of general jurisdiction and thus if State Court had personal jurisdiction over D & Kola the claim was properly filed in State Court W.

A court has pers[onal] juris[diction] if the defendant is a resident, consents to juris, or is subject to the State's long arm statute and meets the constitutional minimum contacts test. Here Kola is a corporation and thus a resident of its state of incorp (Y) and its state of principal place of business (W).

Dave's residence is determined by his domicile and intent. He begins as a resident of State (X). Because of his contract with Petra he agrees to move to State W. It does not appear he intended to make W his domicile as he only rented his home rather than selling it. Also it was uncertain how long his job would take; thus Dave is likely still a resident of X.

State W may still have jurisdiction over Dave under the Const. minimum contacts analysis. Dave moved to State W to do business there and enjoyed the benefits of State W's laws. He received compensation and performed services there. Because of the close contact between the claim and his contacts with State W, personal jurisdiction is fair provided he receives notice.

<u>Removal of Case</u>

A defendant may remove a case to the federal court in the state where the claim was filed provided the case could have initially been filed in federal court and the claim for removal is brought by all defendants within 30 days of filing of the complaint or the pleading which triggered the right of removal.

A Federal District Court is a court of limited jurisdiction, thus it may only hear claims based on federal questions (arising under the U.S. Constitution or statutes) or claims based on diversity of citizenship.

<u>Diversity Jurisdiction</u>

For a federal court to have diversity juris the plaintiff must be of diverse residency from

all defendants and the amount in controversy must exceed $75,000.

In the instant matter Petra is a resident of State W and so is Kola because of its principal place of business in W. Thus diversity does not exist and federal subject matter jurisdiction doesn't exist.

Addition ally, the amount in controversy must exceed $75,000 based on plaintiff's well-pleaded complaint (reasonable). A plaintiff may aggregate claims against multiple defendants provided the defendants are jointly and severally liable.

Petra's complaint lists damages of $50,000 against Dave and $70,000 against Kola. Because the total damages exceed $75,000 and it is foreseeable that Dave or Kola could be liable for the full amount the $75,000 jurisdictional amount is met.

Kola cannot remove the action based on diversity because it is not diverse from Petra. Kola may, however, remove based on federal question jurisdiction because of Petra's complaint, though pled under State W law, is really a claim under the new federal patent act. A plaintiff may not avoid federal question jurisdiction, knowingly or inad vertently, by failing to plead the federal statute.

In this case the claim is completely preempted by an express federal law and thus Petra has no claim based on the state statute.

Kola may therefore seek removal to federal court based on federal question jurisdiction.

The only remaining limitation is Kola's failure to remove within 30 days and Dave's failure to join in the removal action. Kola may be excused from the 30 day limitation because it was unknown initially that the case arose under a federal statute as opposed to the alleged state law basis.

Because federal juris is based on federal question and not diversity, not all the defendants must join in the removal. There Kola alone could remove.

A last limitation to removal is that a defendant may not seek removal if the case was initially filed in the state court of defendant's residence. Here, that rule doesn't apply because of federal question jurisdiction.

<u>District Court's Refusal to Remand to State Court</u>

The federal district court with proper jurisdiction may refuse to remand a case to state

court. In this instance, the federal court had federal question jurisdiction, thus properly retained jurisdiction.

II. Should a Federal Court of Appeals Hear Petra's Appeal?

A federal court of appeals may only hear an appeal from a final judgment. A final judgment is one where all matters before the district court have been resolved by a final order. The only exception to this rule is for certain interlocutory appeals based on denial or granting of injunctive relief or failure to certify a class in a class action.

Here the denial of remand to state court was not a final judgment. The plaintiff still had ample opportunity to pursue his case in chief against Dave and Kola.

Upon final judgment, if Petra then loses [s]he may raise lack of subject matter jurisdiction of the federal court on appeal, because SMJ is never waived.

Answer B

ISSUE I: Did the federal district court rule correctly on Petra's motion to remand?

In this case, plaintiff Petra ("Petra") sued defendants Dave ("Dave") and Kola ("Kola") in state court, alleging violation of state W's patent infringement law. Six weeks later, Kola removed the case to federal court, and Petra immediately moved to remand. The court denied Petra's motion. At issue is whether this ruling denying the motion was proper.

Federal courts are courts of limited jurisdiction, and only have subject matter over cases that either (i) involve a question of federal law (statutory, constitutional, etc), or (ii) diversity jurisdiction exists. Cases that were originally filed in state court (like this case), can only be removed to federal court if (i) they could have originally been filed in federal court, (ii) all defendants agree, (iii) defendant is not a resident of the forum state, and (iv) removal is sought within 30 days of learning of the grounds for removal. It appears that the court was wrong on all of these grounds.

A. Could Case Have been Originally Filed in Federal Court?

This case likely could not have been filed in federal court, because there is likely lack of subject matter jurisdiction. First, there is no federal question subject matter jurisdiction ("SMJ"). Petra's complaint is based on state patent infringement law. It is true that, as an affirmative defense, Dave and Kola will likely claim that Petra's claims are pre-empted by the federal patent law. However, for federal question SMJ, the court looks to plaintiff's well-pleaded complaint to determine whether a federal question is pled. Dave's and Kola's affirmative defenses - - even if they arise under federal law - - are irrelevant for federal question SMJ purposes. Because preemption by the federal patent law is an affirmative defense, it is irrelevant to federal question SMJ. Insofar as Petra's complaint raises no federal question, there is no federal question SMJ.

Second, there are potential problems with diversity. As a rule, diversity jurisdiction exists where: (i) plaintiffs have diverse citizenship from EVERY defendant, and (ii) the amount in controversy is $75,000. It appears that Petra has met the second element: she has claimed damages of $50,000 from Dave and $70,000 from Petra. Amount in controversy is determined by (a) the amount pleaded in good faith in the complaint, and (a) plaintiff can aggregate her claims against multiple defendants to reach the amount in controversy threshold. Because Petra has claimed $120,000 in damages against both D's combined, and we have no reason to suspect that this damages request was

not made in good faith, Petra has met the amount in controversy requirement.

However, Petra may not be diverse from BOTH Dave and Kola. Dave's residency: To be diverse from Dave, Petra and Dave must be residents of different states. Residency is determined by domicile - - where you live with intent to stay indefinitely. Although present living location is one factor, it may be offset by other factors that suggest that your current state is not your "domicile." In the facts, we are told that (i) Petra is a resident of state W, and (ii) Dave lived in state X (and had a home in state X), and because of the contract, was required to relocated [sic] to State W. The issue is, assuming that state X was Dave's domicile prior to the contract (and we have no facts to suggest otherwise, particularly becau se he owned a home in state X), did he change his domicile to state W?

Factors in favor of change of domicile: (i) he physically relocated to state W, and presumably got new living quarters; (ii) he moved all of his belongings to state W, suggesting that he was in it for the long haul; and (iii) this was not a short term project - - there are no facts to suggest that when Dave relocated to state W, he would only be there for a short time period. Although he quit his job after six months due to a contract dispute, this is not evidence that he had not inte nded to live in state W indefinit ely. Factors against change of domicile: Dave retained his house in state X, and he only rented it out to someone else. This is strong evidence that Dave still considered state X his domicile, and even though he was moving out for a long period of time (as suggested by moving all of his belongings), there is no intent to change domicile. Conclusion: Dave is probably a resident of state X, because of lack of intent to change domicile. Factors that would help, but are not present, are: where is Dave registered to vote, driver's license, etc. In the absence of more facts suggesting that Dave intended to live in state W indefinitely and make it his domicile, he should still be considered a resident of state X.

Kola's residency: A corporation is a resident of two states: (i) its state of incorporation, and (ii) its state where its principal place of business is located. Moreover, principal place of business is defined differently by different courts, and can mean either (i) where its headquarters are located, or (ii) where its main manufacturing plants are located. In the facts, we are told that Kola is incorporated in state Y, and that its principal place of business is state W. Assuming that by "principal place of business" the facts mean that either Kola's HQ or manuf. plants (as the case may be, depending on the jurisdiction) are located in state W, then Kola is a resident of BOTH state Y and W.

Mini-conclusion: There is no federal SMJ. In addition, there is no diversity jurisdiction, because of a lack of complete diversity between plaintiff and defendants: Petra is

resident of state W and Kola is a resident of both states Y & W (and, Dave may be a resident of state W, but likely resident of state X). Because the case could not be originally brought in federal co urt, remo val was improper, and the court should have granted the remand request.

B. All D's must agree

In addition, all defendants must agree to a removal. We have no facts to suggest that Dave consented to the removal. If he didn't, then removal was improper. If he did, this element is satisfied (but, still lose[s] because no jurisdiction). The case should have been remanded to state court as per Petra's timely motion.

C. D cannot be resident of forum state

An additional reason for remand is that the defendant cannot be a resident of the forum state. Removal is a process to protect def endants against "hostile" foreign state courts. Here, Kola, and possibly Dave (though less likely, see above) are residents of state W. As such, removal of this case to state W federal court, with state W defendant(s), was improper. The case should have been remanded to state court as per Petra's timely motion.

D. Motion must be bro ught within 30 days

A removal motion must be brought within 30 days of discovering the grounds for removal. In this case, Kola moved for removal 42 days after being served with the complaint. Assuming that Kola knew of the grounds for removal at the time it was served, its motion was untimely, and so the court should not have granted removal in the first place. (If Kola did not immediately know of the grounds, which is unlikely, then the original removal may have been timely, but case still should have been remanded because of lack of jurisdiction). The case should have been remanded to state court as per Petra's timely motion.

CONCLUSION: The court erred when it denied the remand motion, because (i) no subject matter jurisdiction, and (ii) proper procedure not followed (all D's didn't agree, untimely motion, D's resident of forum state).

ISSUE II: Should the Federal Court of Appeals entertain Petra's appeal?

Typically, the federal court of appeals can only entertain appeals from final judgments -- i.e., from a judgment disposing of the matter, whether because of dismissal, grant of

summary judgment, trial verdict, and the like. There are certain exceptions, however: the federal appeals court can hear certain interlocutory (i.e. not final) appeals involving grants of TRO's and preliminary injunctions (and other pretrial rem edies, e.g. attachment), collateral issues, as well as issues where the parties or court would be severely prejudiced - - or the right would no longer exist - - if they had to wait until final disposition to bring their appeal. In such an extraordinary case, where the parties or the court's resources would be wasted, the court can use its inherent writ power to force the trial court to act.

This is one such case. A party can attack subject matter jurisdiction at ANY point in the proceedings - - even on appeal for the first time. Likewise, the court can raise SMJ at any point. If, at any point, the court discovers that it lacks subject matter jurisdiction, the case MUST be dismissed. Moreover, this is a good cause to use the extraordinary writ power, because Petra's entitled to relief is [sic] clear.

In this case, it is conceivable that the parties could go through trial, never raising SMJ, and only on appeal the court discovers the issue and dismisses the case. This would result in a tremendous waste of judicial resources, a waste of the party's resources and time, and could severely prejudice Petra's ability to obtain relief , esp. if the pro ceedings are lengthy and there is a tremendous delay between now and when the SMJ problem is discovered. As such, the appellate court should entertain the appeal, either through its ability to award collateral relief, or more likely, through its inherent power to grant a writ of mandate in extraordinary circumstances.

Q2 Wills / Real Property

Olga, a widow, owned Blackacre, a lakeside lot and cottage. On her seventieth birthday she had a pleasant reunion with her niece, Nan, and decided to give Blackacre to Nan. Olga had a valid will leaving "to my three children in equal shares all the property I own at my death." She did not want her children to know of the gift to Nan while she was alive, nor did she want to change her will. Olga asked Bruce, a friend, for help in the matter.

Bruce furnished Olga with a deed form that by its terms would effect a present conveyance. Olga completed the form, naming herself as grantor and Nan as grantee, designating Blackacre as the property conveyed, and including an accurate description of Blackacre. Olga signed the deed and Bruce, a notary, acknowledged her signature. Olga then handed the deed to Bruce, and told him, "Hold this deed and record it if Nan survives me." Nan knew nothing of this transaction.

As time passed Olga saw little of Nan and lost interest in her. One day she called Bruce on the telephone and told him to destroy the deed. However, Bruce did not destroy the deed. A week later Olga died.

Nan learned of the transaction when Bruce sent her the deed, which he had by then recorded. Nan was delighted with the gift and is planning to move to Blackacre.

Olga never changed her will and it was in effect on the day of her death.

Who owns Blackacre? Discuss.

Answer A

Olga owned Blackacre and had a valid will leaving to her three children "in equal shares all the property I own at death." If the terms of the will were to take effect while Olga owned Blackacre, her three children would share in Blackacre equally. However, she had a reunion with her niece Nan, and had decided to make a present conveyance of Blackacre. She drew up a deed with the help of her friend Bruce, gave the deed to Bruce, and, without Nan's knowledge, instructed Bruce to "record it if Nan survives me." Later, Olga attempted to revoke her alleged gift to Nan by destruction of the deed, however, Bruce did not destroy the deed. When Olga died, Bruce conveyed the deed to Nan. In order to determine who owns Blackacre, the central question to answer is whether Olga made a valid conveyance to Nan. A second question is whether Olga appropriately revoke[d] the conveyance to Nan. If Olga is found to have appropriately conveyed Blackacre [to] Nan, the three children would not take any share of Blackacre under the terms of the will. On the other hand, if Olga did not appropriately convey Blackacre to Nan, the three children would take Blackacre in equal shares, and Nan would not get anything. A final consideration is whether there was any reliance on Nan's part that would allow Nan to take Blackacre.

Did Olga make a valid conveyance of Blackacre to Nan?

In order to find that Olga validly conveyed Blackacre by deed to Nan, three elements must be present. First, there must be an intent by the grantor, Olga, to convey Blackacre to the grantee Nan. Secondly, there must be a valid delivery of the deed to Nan. And thirdly, Nan must validly accept the deed and Olga's conveyance.

Did Olga have an intent to convey Blackacre to Nan?

In order to possess valid intent, Olga must have intended to convey Blackacre to Nan at the moment she made delivery. It is not enough that Olga possess the requisite intent to convey Blackacre to Nan years before delivery is made. The intent must match the moment of delivery.

Here, the facts indicate that Olga intended to "effect a present conveyance." This wording implies that her intent was to convey Blackacre at that precise moment. Olga therefore had Bruce draw up a deed which complied with deed formalities of description of property, names involved, and Olga's signature. Olga then handed the deed to Bruce, stating, "Hold this deed and record it if Nan survives me." When Olga handed the deed to Bruce, the facts state that she intended to transfer Blackacre to Nan at that precise moment. However, her conduct does not match the wording of "present

conveyance." Instead, Olga wanted Bruce to "hold this deed, and record it if Nan survives me." This language is indicative that Olga did not want to make a precisely present conveyance of Blackacre. Instead, Olga wanted Nan to receive Blackacre upon the happening of a condition, that Nan survive Olga. Olga manifested the intent that should Nan not survive Olga, Nan should not get Blackacre. Olga intended that at that moment, Nan was to receive a contingent remainder in Blackacre, and was not intended to be a present conveyance. Instead, Olga intended to remain holder of the deed to Blackacre, and leave open whether her children should take under her will.

This contingent remainder should be distinguished from a fee simple determinable. A fee simple determinable transfers an interest in land; however, should a condition occur, then the land will revert back to the grantor through possibility of reverter. Here, a court will most likely find that Olga did not intend to convey any type of defeasible fee, but instead wanted to convey a contingent remainder.

Nan would disagree with the characterization that Olga intended to convey a contingent remainder. Instead, Nan would argue that Olga intended to make a present possessory conveyance of Blackacre to Nan when she handed the deed to Bruce. However, the language which Olga used, indicating that there was a condition before the deed should be recorded, indicates that there was also a condition before the deed was to become possessory in Nan. This characterization will also depend on whether Bruce is an agent for Nan, or an agent for Olga as shall be discussed later.

Olga's children will argue alternatively that the intent does not match the delivery at all, that Olga's intent was to make a present possessory transfer of Blackacre, that her actions do not match, and therefore, the whole transaction should be invalidated. However, courts are unwilling to invalidate a transaction simply on technicalities. Instead, courts will try to look at the transferor's intent in giving effect to a transaction, use that for guidance, but still rely on legal principles, justice, and fairness in coming to a decision. Therefore, most likely, a court will not invalidate Olga's attempt to convey Blackacre to Nan, solely because her words do not match her actions. Instead, a court will construe her intent reasonably.

<u>Did Olga make a valid delivery of the deed to Nan?</u>

Conveyance of a deed also requires valid delivery of the deed from the grantor to the grantee. Such conveyance does not have to be a precise handing of the deed from the grantor to the grantee. Instead, there can be a constructive conveyance. The grantor could hand the deed to a third party, who could in turn hold the deed for the grantee. A finding of whether there was a valid delivery in such a situation rests upon which party

the third party is an agent for.

In the present case, Olga handed the deed to Bruce, with precise instructions to record the deed should Nan survive Olga. It is clear that there was a valid delivery from Olga to Bruce. But the question is whether Bruce is an agent for Nan, or Olga.
The facts support the conclusion that Bruce is an agent for Olga. The facts describe Bruce as a "friend" of Olga, and a person whom Olga could turn to for help in drafting a deed. Furthermore, Bruce helped Olga draft the deed with a form, and for all purposes, seems to be on Olga's side. The facts also indicate that Bruce was to act on behalf of Olga. Bruce was to convey the deed to Nan, and record the deed, should Nan survive Olga. T[he]se actions on behalf of Olga and other aid to Olga are indicative of an agency relationship. A court will most likely find that Bruce is an agent for Olga.

The facts do not support a finding that Bruce is an agent for Nan. The facts do not show that Nan even knew Bruce, and for all purposes, seems to have first heard from Bruce when Bruce sent her the deed. Because Bruce is not acting on behalf of Nan, but rather on behalf of Olga, a court w[il]l most likely find that Bruce is Olga's agent, and not Nan's.

A finding of this sort is significant. If Bruce is an agent for Olga, then when Olga gave the deed to Bruce, delivery was not yet made. Delivery would happen upon the occurrence of the specified condition, and Bruce would transfer the deed to Nan, using the power which Olga granted to Bruce to act on Olga's behalf. On the other hand, if Bruce is an agent for Nan, then delivery was complete upon Olga's delivery to Bruce. All that would remain is for the deed to be accepted.

Because a court will most likely find that Bruce is an agent for Olga, a court will also most likely not find that there was a valid delivery made to Nan at the moment Olga gave the deed to Bruce. Instead, a court may find that a valid delivery was made when Bruce, acting as agent for Olga, tra nsferred the deed to Nan, because Olga empowered Bruce to act in her interest.

<u>Was there a valid acceptance by Nan?</u>

In addition to an intent to deliver by the grantor and a valid delivery by grantor to grantee, there must also be a valid acceptance by the grantee in order for a valid conveyance of a deed to take place. As indicated above, Bruce will most likely be found to be an agent for Olga. Thus Bruce cannot accept on behalf of Nan. If Bruce had been an agent for Nan, Bruce could accept the deed on behalf of Nan. Instead, the facts indicate that Nan did not even know of anything of the transaction. Nan could not accept until Bruce sent the letter to Nan.

When Bruce did send the letter to Nan, Nan accepted the transfer. This is indicative as Nan "was delighted" and intended to move to Blackacre. Thus, if there was not an effective revocation of Bruce's power to transfer the deed to Nan, then the deed should be effective in favor of Nan.

Significance of Olga's revocation

These findings are significantbecause of the revocation which Olga made. A revocation is valid anytime up to the moment of acceptance. In the present case, there was not even a valid delivery, let alone a valid acceptance at the moment Olga handed the deed to Bruce. A court MAY find that there was a valid delivery and acceptance when Bruce transferred the deed to Nan, but only if Bruce was st[il]l empowered to transfer the deed to Nan. Nan would argue that Bruce remained empowered to transfer the deed because Bruce did not use substantially the same instrument and means to revoke her gift as she did to make it. Generally, such transfers are terminable by any reasonable means. Olga's children would argue that even if there was not a valid delivery or acceptance, the revocation was effective upon the phone call, that is, was reasonable to revoke her offer by telephone rather than in writing because Olga and Bruce were friends.

A court will probably hold that the revocation was not effective. Although this is a scenario for the transfer of land thus subject to the statute of frauds, a finding that a person can revoke or reinstate a transfer simply on a whimsical phone call would invite the danger of too much fraud. If Olga could effectively terminate her transfer by a phone call, then she could just as easily reinstate her offer. Such ease in a transfer of something as substantial as a transfer of land would invite too much danger of abuse and fraud. Hence, a court will probably hold that Olga's revocation was invalid.

Conclusion

A court will most likely hold that Olga had an intent to deliver land to Nan. Although her intent may not coincide precisely with her actions, a court will construe a reasonable intent to deliver. Olga conveyed the property to Bruce as her agent who in turn was empowered to deliver the deed to Nan. Olga's revocation was ineffective because it did not comply with the statute of frauds. Hence, when Nan accepted the deed, a court will probably find an effective conveyance.

Should the court not find an effective conveyance, Nan could also pursue a theory of reliance. However, the facts do not support too much of a finding of reliance, as Nan did not take any substantial action, and instead, "planned" to move to Blackacre. A plan

is not sufficient to justify a finding of reliance. There must be also a significant manifestation of intent to possess.

Answer B

The issue is whether the deed form was sufficient to pass title to Nan and make her the owner of Blackacre, or whether the deed was invalid, which would mean that Olga was owner of Blackacre upon her death and the property would pass through her will to her three children in equal shares.

1. Deed

In order for a deed to be valid there must be: (1) a writing that satisfies the statute of frauds; (2) delivery; and (3) acceptance.

A. Statute of Frauds

When conveying an interest in land, the conveyance must be contained in a writing that satisfies the statute of frauds. A deed is sufficient to satisfy the statute of frauds if it: (1) identifies the parties to the conveyance; (2) sufficiently describes the property to be conveyed; (3) and is signed by the grantor. In this case, Blackacre is a piece of real property that consists of a lakeside lot and cottage, and a sufficient writing must exist in order for the conveyance to be enforceable.

Here, the deed form is a written memorandum which identifies the parties to the conveyance. The deed names herself as grantor and Nan as grantee. The deed also sufficiently identifies the property to be conveyed. The deed designates that Blackacre is the property being conveyed and the deed includes "an accurate description" of Blackacre. Also, Olga, as grantor, signed the deed. In general, the signature of a deed does not have to be notarized; however, in this case the deed was notarized by Bruce after Olga acknowledged her signature. Therefore, it appears that the deed form was a written memorandum that is sufficient to satisfy the statute of frauds requirement for conveying an interest in land.

B. Delivery

To determine whether a grantor has sufficiently delivered a deed so as to affect a conveyance of real property, the focus of the inquiry turns on the grantor's intent. If the grantor intends to pass a present interest in the property, then delivery is complete. Actual physical delivery of the deed is not required, nor is knowledge of the delivery by the grantee, so long as the grantor possessed the requisite intent.

Here, Nan would argue that at the time Olga executed the deed form she had the

present intent to convey Blackacre to her. Olga and Nan were family members and had just had a "pleasant reunion" for Olga's seventieth birthday. In addition, Olga did not want her children to know that she was leaving Nan Blackacre while she was alive. Thus, this shows that Olga has the present intent to pass title to Nan while she was alive. Moreover, the deed form by its terms would effect a present conveyance of the property.
On the other hand, Olga' s children may argue that Bruce merely provided Olga with the deed form, and Olga did not know that it would effect a present conveyance. Even though the terms were sufficient, Olga's children would argue that she lacked the requisite present intent as evidenced by Olga handing the deed to Bruce and telling him to hold the deed and only record it if Nan sur[v]ived her. Olga's children would argue that this demonstrates that Olga did not intend for the deed form to pass to present title and therefore Olga never 'delivered the deed' to Nan. Olga's children would also note that Olga's intent not to pass present title to Nan is shown by Olga's telephone call to Bruce in which she instructed Bruce to "destroy the deed".

On balance, because at the time of the conveyance Olga executed the deed sufficient to convey title and she wanted to make a gift of the property to Nan at that point, even though she didn't want her children to know about it, a court would likely find the deed was sufficient to convey title to Nan at the point it was executed by Olga. Olga did not state that she only intended the deed to be effective upon the occurrence of an event, rather Olga merely stated that she wanted Bruce to record the deed if Nan survived her. A deed does not have to be recorded in order to be valid. Therefore, Olga likely delivered the deed.

C. Acceptance

A grantee must accept the deed of conveyance. In general, acceptance is presumed unless the grantee has specifically indicated an intent not to accept the conveyance. Instead, it is immaterial whether Nan knew about the conveyance or not when Olga "delivered" the deed. Therefore, Nan's lack of knowledge would not prohibit a finding that she "accepted" the deed. In fact, as further evidence of her acceptance, Nan "was delighted" with the gift and planned on moving to Blackacre. Thus, there was sufficient acceptance.

As a result, because there is a sufficient writing to satisfy the statute of frauds, and Olga intended to make a present transfer of the Blackacre when she executed the deed and Nan's acceptance can be presumed, Nan owns Blackacre. Because the property is not part of Olga's estate at the time of her death because she did not own it anymore, her three children would not receive Blackacre in "equal shares" pursuant to Olga's will. A

testator may not devise property which she does not own at her death.

However, if the court found that Olga did not possess the requisite intent to deliver Blackacre to Nan, Nan could still argue that Olga's deed form constituted a valid disposition by will and theref ore she wou ld still take the pro perty.

2. WILL - Is the Deed Form a Valid Will?

In general, a will is valid if the testator is at least 18 years old and of sound mind, possesses the requisite testamentary intent, signs the will in the joint conscious presence of 2 witnesses that understand the document is the testator's will and who sign the will. Some jurisdictions recognize the validity of holographic wills. To be valid, a holographic will must be signed by the testator, the testator must possess testamentary intent, and the material provisions of the holographic will must be in the testator's handwriting. Material provisions of the will consist of identifying the beneficiaries and the property to be devised.

In this case, the deed form would not be a valid formal will because Olga executed the document in the presence of only 1 witness, Bruce. Thus, even though Olga was over 18 and appears to be of "sound mind", and she signed the deed, the deed form does not qualify as a valid formal will.

Nan could argue that the deed form constitutes a valid holographic will. The deed form was signed by Olga, and it appears that "Olga completed the form" by naming herself as grantor and Nan as grantee, and by including the property to be conveyed, Blackacre, and accurately described the property. Thus, the [the] "material terms" of the will appear to be in Olga's handwriting. It does not matter that the document was a "form" so long as the material terms were in Olga's handwriting. Therefore, the court may conclude that Olga executed a valid holographic will if it concludes that at the time Olga possessed the necessary testamentary intent.

Nan would argue that Olga's statement to Bruce instructing him to hold the deed and record it if "Nan survives me" evidences a testimony intent that Nan only take the property upon Olga's death. Thus, Nan would not have an interest in the property until Olga dies, which is consistent with disposing of one's property by will. A court would likely conclude that the deed form constitutes a valid holographic will.

3. Revocation of Holographic Will

In general, wills are freely revocable during the testator's lifetime. A will may be revoked by a physical act or by execution of a subsequent instrument.

In order to revoke a will by physical act, the testator must (1) have the intent to revoke, and (2) do some physical act such as crossing out, destroying, obliterating which touches the language of the will. A testator may direct another person to destroy the will, however, the destruction must be at the testator's direction and in the testator's presence.
Here, Olga's children could argue that the deed form, which constitutes a holographic will, was revoked by Olga before her death. Olga intended to revoke the will when she called Bruce and told him to "destroy the deed". Olga's children may argue that even though Bruce did not actually destroy the deed, the court should still find that Olga possessed the intent to revoke. However, because Bruce was not in Olga's presence and did not do anything to the language of the holographic will, it is likely that Olga did not sufficiently revoke the holographic will before her death.

4. Revocation of Earlier Will

If the court found that Olga did not revoke the holographic will, then the issue becomes whether the holographic will is sufficient to revoke the earlier valid will leaving all of Olga's property to her three children equally. A testator may revoke a prior will by executing a subsequent instrument. In general, a subsequent written instrument that qualified as a will must be construed, to the exent possible, as consi[s]tent with the prior instrument. However, to the extent that a subsequent instrument is inconsistent with prior will, the prior will is revoked.

Here, the holographic will leaves Blackacre, which was part of Olga's "property" to Nan. Olga's original will left "all the property that I own at my death" to her three children. If the court finds that the deed form was insufficient to pass title to Nan during life because Olga lacked the necessary intent, she would "own" Blackacre at her death. If the deed form constitutes a valid holographic will, it disposes of Blackacre. Thus, this disposition would work a revocation of the original will to the extent that it is inconsistent. Therefore, Nan would take Blackacre under the holograph will, and Olga's children would take the rest of Olga's property since that would not be inconsistent with the original terms of the will.

Olga's children may argue that Olga never dated the holographic will, and therefore, when a testator is found to have a formal will and a holographic will that is undated, a

presumption exists that the holograph was executed before the holograph [sic]. Thus, the formal will would be inconsistent with the undated holograph, and the formal will would, to the degree of inconsistency, revoke the undated holograph. In that case, Olga's children would own Blackacre equally, and Nan would take nothing.

In sum, Nan likely own[s] Blackacre because the deed form was sufficient to pass present title to her, and therefore Olga did not own Blackacre at her death. As such, her original will would not pass Blackacre to her children since she did not "own" it at her death. In addition, even if the court finds that Olga lacked the requisite intent for a valid delivery, the deed form likely qualifies as a valid holographic will which Olga did not revoke in her lifetime.

Q3 Criminal Law & Procedure / Evidence

Don was a passenger in Vic's car. While driving in a desolate mountain area, Vic stopped and offered Don an hallucinogenic drug. Don refused, but Vic said if Don wished to stay in the car, he would have to join Vic in using the drug. Fearing that he would be abandoned in freezing temperatures many miles from the nearest town, Don ingested the drug.

While under the influence of the drug, Don killed Vic, left the body beside the road, and drove Vic's car to town. Later he was arrested by police officers who had discovered Vic's body. Don has no recall of the events between the time he ingested the drug and his arrest.

After Don was arraigned on a charge of first degree murder, the police learned that Wes had witnessed the killing. Aware that Don had been arraigned and was scheduled for a preliminary hearing at the courthouse on that day, police officers took Wes to the courthouse for the express purpose of having him attempt to identify the killer from photographs of several suspects. As Wes walked into the courthouse with one of the officers, he encountered Don and his lawyer. Without any request by the officer, Wes told the officer he recognized Don as the killer. Don's attorney was advised of Wes's statement to the officer, of the circumstances in which it was made, and of the officer's expected testimony at trial that Wes had identified Don in this manner.

Don moved to exclude evidence of the courthouse identification by Wes on grounds that the identification procedure violated Don's federal constitutional rights to counsel and due process of law and that the officer's testimony about the identification would be inadmissible hearsay. The court denied the motion.

At trial, Don testified about the events preceding Vic's death and his total lack of recall of the killing.

1. Did the court err in denying Don's motion? Discuss.

2. If the jury believes Don's testimony, can it properly convict Don of:
   (a) First degree murder? Discuss.
   (b) Second degree murder? Discuss.

Answer A

1. Did the court err in denying Don's motion?

The issue here is whether the court properly denied Don's motion to exclude evidence of the courthouse identification.

Right to Counsel:

Don's first ground for having the identification evidence excluded is that the procedure violated his federal constitutional rights to counsel.

Sixth Amendment: The Sixth Amendment of the US Constitution, which is applicable to the states through the Due Process Clause of the Fourteenth Amendment, affords citizens the right to counsel during all post-charge proceedings. The Sixth Amendment right to counsel only applies after a Defendant has been formerly charged. Here, Don was arraigned and therefore the Sixth Amendment right to counsel for his post-charge proceedings applies.

Don is arguing that the identification should be excluded on the grounds that it violated his federal constitutional grounds that the identification procedure violated Don's federal constitutional rights to counsel. However, Don's attorney was present with him during the identification. Don is going to argue that they were not made aware of the identification and given an opportunity to object to it. His lawyer was told of the identification and its methods, however, it is unclear as to when the attorney was advised of this information. It seems more likely that he was told after the identification had already been made.

However, the Sixth Amendment right to counsel does not apply to identifications of the suspect, since it's not a proceedings for purposes of the Sixth Amendment right to counsel.

Fifth Amendment: Miranda warning: Miranda warnings also afford the defendant of right to counsel. This right is to have an attorney present during all interrogation or questioning by the police. Miranda warnings are given to someone upon arrest. They include the right to remain silent and that everything said can be used in court against him, the right to have an attorney present and the right to have an attorney appointed by the court if the arrestee cannot afford one. [In] this case the right to counsel issue did not arise as a Miranda violation, since there was no questioning or interrogation of the police, and the Defendant has already been arraigned.

This case involves the Sixth Amendment right to counsel in all post charge proceedings. There are certain occasions where there is no right to counsel, for example, a photo identification of a suspect, taking of handwriting or voice samples, etc.

Because the identification of a suspect by a witness does not afford the Si[x]th Amendment right to counsel, and because Don's lawyer was actually present with him during the identification, the court was probably correct in denying Don's motion to exclude the evidence on this ground.

Due Process:

Don's second ground for having the identification evidence excluded is violation of due process of law.

Identification

The police may use different methods wherein witnesses can identify suspects as the crime doer. These methods include photo identification, lineups and in-court identifications. The identification proce ss must be fair to the suspect and not in volve prejudice and therefore not violate his due process rights. For example, the lineup must include others of similar build and appearance as the suspect.

The police in this case were going to have the Wes [sic]identify Don (or the murderer) through photo identification. However, they took him to the courthouse knowing that Don was having his preliminary hearing that day. The photo lin eup did not have to be at the courthouse, in fact it is usually at the police station. This questions the officers' conduct and intent. Don is going to argue that this was done with the express purpose of having Wes see him at the hearing and associate him to the crime. This is prejudicial to Don and a possible due process violation.

The police will argue that it was mere coincidence that they ran into Don in the courthouse and that their intent was to have Wes identify the murderer [sic] through a photo identification. They will further argue that Wes told the officer he recognized Don as the killer without any request by the officer. Therefore his identification was spontaneous and not prompted. Therefore it did not violate Don's due process rights.

However it is very suggestive to a witness to see a defendant charged with the crime and make the identification that way. If Wes had identified Don independent of that situation then the identification would have been valid and there would be no due

process violation. However, that was Wes' first and only identification of Don, and Don is going to argue that it was prejudicial and violated due proce ss of law.

Officer's testimony

Don is further claiming in his motion to exclude that the officer testifying to the identification would be inadmissible hearsay.

Relevance:

For any testimony or evidence to be admitted it must first be relevant. Here the officer's testimony will be established as relevant since it involves a witness' identification of the defendant as the murderer.

Hearsay:

Hearsay is an out-of -court sta tement made by a declarant that goes to the truth of the matter asserted. Hearsay is inadmissible generally because of the Defendant's right to confront and cross-examine witnesses. The officer is going to testify that he heard Wes tell him that he recognized Don as the killer. The statement was made out of court and goes directly to prove that Don is the killer. Therefore officer's testimony is hearsay. The question then is, is it admissible hearsay? There are exceptions to the hearsay rule depending on whether the declarant is available or unavailable to testify. There is no indication whether Wes is available or unavailable so we must look at the possible exceptions to the hearsay rule.

Present Sense Impression: Present sense impression is an exception to hearsay. This is when a declarant is expressing a present impression at that moment without an opportunity to reflect. The State will argue that Wes, upon seeing Don, merely expressed that he recognized him as the murderer. It was an impression at the present he was expressing. However this exception will probably not apply in this case since [sic].

State of Mind: The state of mind exception is a statement by the declarant that reflects the declarant's state of mind. For example, if the declarant said he was going to Las Vegas this weekend, that statement would be admissible to show that defendant intended on going to Las Vegas for the weekend. This is an exception to hearsay and would be admissible. The state of mind exception does not apply to this case.

Excited Utterance: A statement made when the declarant is an excited state caused by

an event and has not had a chance to cool down. Nothing in the facts here indicate that Wes' identification of Don was an excited utterance and therefore this exception does not apply.

Admission by Party Opponent: Statements made by the opposing party are usually admissible as an exception to hearsay. Here, since the statement the officer is going to testify to is not that of Don's but rather Wes, the exception does not apply here [sic].

Declaration Against Interest: When a declarant makes a statement that goes against his own interests, that statement is admissible as an exception to the hearsay rule. Again, Wes' statement was not againsthis own interest butagainst Don's interest and therefore this exception is not applicable here.

None of the other exceptions, including dying declaration, business record, are applicable here. It appears as though the officer's testimony is inadmissible hearsay. Therefore the court erred in denying Don's motion on this ground.

2. (a) First Degree Murder

Under common law, murder was homicide with malice aforethought. There were three types: murder, vo luntary ma nslaughter and invo luntary ma nslaughter. Statu tes have categorized murder into de [sic].

The issue here is that if the jury believes Don's testimony, can Don be convicted of first degree murder[?]

Murder is the killing of another human being. It requires an actus reus (physical act) and a mentus rea (state of mind). The defendant must have the requisite state of mind in conjunction with a physical act to be guilty of murder. The state of mind does not have to be the specific intent to kill; it could be a reckless disregard or an intent to seriously injure or harm.

First degree murder is murder with premeditation or murder during the commission of violent felony (felony murder).

Premeditation: Premeditation and thus first degree murder, is a specific intent crime. Premeditation involves the prior deliberation and planning to carry out the crime in a cold, methodical manner.

In this case there are no facts to indicate that Don planned or premeditated Vic's murder. In fact, according to the facts, Don was intoxicated and has no recollection of the killing.

Intoxication: There are two states of intoxication, voluntary and involuntary. Voluntary intoxication involves the voluntary ingestion of an intoxicating substance. It is not usually a defense to murder. Voluntary intoxication can be a defense to specific intent crimes, if it was not possible for the defendant to have the state of mind to form intent.

Involuntary intoxication is the involuntary ingestion of an intoxicating substance, such as with duress, without knowing of its nature, prescribed by a medical professional, etc.

In this case, Don was intoxicated since he ingested the hallucinogenic drug. Although Don was aware of what he was taking when he took it, he will argue that he was forced to take it under duress. Since Vic threatened Don that he would abandon him in freezing temperatures far from any town, Don was forced to take the drug. Although involuntary intoxication is not a defense to murder, it is a proper defense to the specific intent required for premeditation and thus first degree murder.

Since Don did not premeditate the murder nor have the specific intent for premeditated murder, he cannot be convicted of first degree murder.

Felony Murder: Felony murder is murder committed during the commission of an inherently dangerous felony. There are no facts to indicate that Don was committing an inherently dangerous felony, independent of the murder itself. Therefore felony murder probably does not apply in this case and Don cannot be convicted of First degree murder.

2. (b) Second Degree Murder

Second degree murder is all murder that is not first degree and is not made with adequate provocation to qualify for Voluntary Manslaughter. Second degree murder does not require specific intent.

The issue here is if the Jury believes Don's testimony, can Don be properly convicted of Second degree murder?

Don is going to use the defense of intoxication. Although intoxication is not a defense to murder, involuntary intoxication can negate a required state of mind. Since it will

probably be determined that Don's intoxication was involuntary due to duress (see discussion above), Don will argue that he did not have the state of mind required to commit second degree murder. He will be compared to a person who is unconscious. An unconscious person cannot be guilty of murder. Don will argue that he was so heavily intoxicated that he has no recollection of the occurrences and therefore could not have had even the general intent to kill or seriously injure.

Voluntary manslaughter: in order for a murder charge to be reduced to voluntary manslaughter there must be adequate provocation judged by a reasonable standard and no opportunity to cool down and the defendant did not in fact cool down. Nothing in these facts suggests that Don acted under the heat of passion or was provoked in any way. In fact Don does not remember the killing and therefore there is no evidence of provocation.

Since was [sic] involuntarily intoxicated, he could not have the requisite state of mind for murder. Therefore he cannot be convicted of either first degree or second degree murder.

Answer B

I. Court's Denial of Don's (D's) Motion

A. Violation of D's right to counsel

The Sixth Amendment guarantees defendants the presence of counsel at all critical stages of a criminal proceeding which results in imprisonment, as well as providing that the police may not elicit information from a defendant in the absence of counsel once criminal proceedings have been initiated against the defendant, usually in the form of an arraignment. Among those stages of a criminal proceeding which are considered critical are a preliminary hearing, at trial, when making a plea, at sentencing, and at any lineup or show-up conducted following the filing of charges against the defendant.

In this instance, the identification of D occurred after he was arraigned, and thus D did have a right to have counsel present during any lineup or show-up. However, this right to counsel does not extend to photographic identifications, which are not considered adversarial proceedings, but instead only to in-person lineups or show-ups. Thus, the police in this instance will claim that they simply took Wes (W) to the courthouse for the express purpose of having him attempt to identify the killer from photographs of several suspects, something for which D was not entitled to the presence of counsel, and the fact that W witnessed D emerging from the courthouse was not part of their plan, and something for which they should not be held responsible. Further, the police will refer to the fact that when D emerged from the courthouse they made no request that W identify D, but rather W made such an identification completely of his own volition.

D's counsel will most likely argue that the police were well aware that D would be at the courthouse at that particu[la]r time, and that bringing W to the courthouse ostensibly to view photographs was in reality simply a veiled effort to conduct a one-on-one show-up in which W could identify D, and that D thus had the right to counsel at such a proceeding.

In this instance, the court did not err in denying D's motion based on grounds that the identification procedure violated D's Sixth Amendment right to counsel. The Sixth Amendment guarantees the right to counsel at any post-charge lineup or show-up in part to ensure that the defendant's attorney will be aware of any potentially unfair methods utilized in the identification process, and can refer to these inequities in court. Because D's counsel was in fact present when W saw and identified D, D's attorney would be able to raise any objections he had to the identification, and thus D was not ultimately denied his right to counsel. Thus, even if the court were to find that the police bring[ing]

W to the courthouse amounted to a show-up in which D was entitled to the presence of counsel, D was with his attorney when the identification was made, and therefore his right to counsel was satisfied.

B. The identification as violative of due process of law

The Due Process Clause of the 14th Amendment, made applicable to the federal government by the Fifth Amendment, ensures that the prosecution bears the burden of proving each element of a criminal case against defendant beyond a reasonable doubt, and also guarantees that a defendant will be free from any identification which is unnecessarily suggestive or provides a substantial likelihood of misidentification.

In this instance, D's attorney would probably contend that the police bringing W to the courthouse on the date of D's prelimi[na]ry hearing to view photographs of suspects in fact raised a substantial probability that W would in fact observe D emerging from the courthouse, which is exactly what occurred. D's attorney would contend that any identification made in this context is extremely suggestive, as the fact that D is emerging from a court of law and was in the presence of an attorney places D in a situation in which he appears to be of a criminal nature, and is likely to lead an eyewitnesses to mistakenly identify D based solely on these circumstantial factors. Further, D's attorney would argue that the situation was unnecessarily suggestive because the witness could believe the fact that criminal proceedings had already been initiated against D, thus warranting his appearance in court, sufficient evidence, perhaps even in the form of testimony by other eyewitnesses, exists which incriminates D, and may make W more likely to believe that D was the man he had seen commit the killing.

The court probably did not err in denying D's motion based on the fac[t] that W's identification was violative of due process of law. The 14th Amendment guarantees against unnecessarily suggestive identifications, or identifications posing a substantial likelihood of misidentification, are intended primarily to remedy lineups in which a criminal defendant is placed in a lineup with other individuals to whom he bears no physical similarities whatsoever. It is unlikely that a court would find that a witness seeing an individual emerging from a courthouse would be so prejudicial as to lead to an unnecessarily suggestive identification.

C. Hearsay

Hearsay is an out-of-court statement being offered to prove the truth of the matter asserted. In this instance, the officer's planned testimony that W had identified D at the courthouse would qualify as hearsay, as the officer would be testifying to a statement made by W ou[t] of court in order to prove that W identified D.

However, instances in which a witness has previously identified a suspect are admissible as exceptions to the hearsay rule even if the defense is not attacking the identification. Such statements of prior identification are considered to possess sufficient guarantees of trustworthiness that the party against whom they are offered is not denied his Sixth Amendment right to confront witnesses against him. Therefore, the court did not err in denying D's motion to exclude the evidence of the courthouse identification because the officer's testimony would in fact not be inadmissible hearsay.

II. Crimes for which D may be properly convicted

A. First degree murder

In order to convict a defe ndant of first degree murder, the prosecution must pro ve beyond a reasonable doubt that the defendant unlawfully killed a human being with malice aforethought, and that the killing was either premeditated and deliberate or was committed during the commission or attempted commission of an inherently dangerous felony (felony murder). In order to prove malice aforethought, the prosecution must show that defendant acted with an intent to kill, an intent to inflict serious bodily harm, acted with a depraved and malignant heart, or was guilty of felony murder.

In this instance, D's acts appear to be both the actual and proximate cause of Vic's (V's) death, as the facts indicate that D killed V and dumped his body beside the road. However, D would probably be found not to possess the requisite intent to kill or to inflict serious bodily harm by way of his raising the excuse of involuntary intoxication. Intoxication, whether voluntary or involuntary, may be raised to negate the presence of an essential element of a crime, generally intent. In this instance, D's intoxication would be involuntary, as he did not wish to take the hallucinogenic drug V offered, but was forced to when he feared that if he did not, he would be abandoned in freezing temperatures and his life would be in jeopardy. Ingesting a drug under such circumstances is the virtual equivalent of being unknowingly slipped the drug, or being forced to ingest the drug upon threats of death. As such, D was involuntarily intoxicated, and his intoxication resulted in his having no recall of the events between the time he ingested the drug and his arrest. D thus will be found not to have posssessed the requisite intent to kill or intent to inflict serious bodily harm necessary for a finding of first

degree murder. Further, even if D were not able to rely on the excuse of intoxication in order to negate a requisite mental state, there is no evidence that the killing was premeditated or deliberate, and because it did not occur during the commission or attempted commission of an inherently dangerous felony, there is no basis for finding D guilty of first degree murder.

2. Second degree murder

The jury most likely could not properly convict D of second degree murder, either. Second degree murder also requires the prosecution to prove beyond a reasonable doubt that the defendant intentionally killed a human being with malice aforethought, though it relieves the prosecution of proving the additional elements of premeditation and deliberation or felony murder.

In this instance, D's involuntary intoxication resulting from his unwillingly ingesting a[n] hallucinogenic drug should sufficiently relieve him from being found guilty of second degree murder, as it negates the requisite mental states of intent to kill or intent to inflict serious bodily harm as discussed above. Further, D should not be convicted under a theory of depraved or malignant heart, as such a finding requires proof of reckless conduct which created a substantial and unjustifiable risk of death or serious bodily harm. A defendant must be consciously aware of the risk he is creating to be guilty of a depraved heart killing, and D's involuntary intoxication would most likely relieve him of guilt, since he had no recall of the events between the time he ingested the drug and his arrest, and would most likely not be considered to have appreciated the risk of his conduct.

If D were found to have been intoxicated voluntarily, rather than involuntarily, he could be properly convicted of second degree murder for V's killing. However, if the jury believes D's testimony that he only ingested the hallucinogenic drug because he feared if he did not he would be left out in the cold and could potentially die, they must find that D was involuntarily intoxicated, which would relieve him of guilt for second degree murder.

Q4 Professional Responsibility

In 1995, Lawyer was hired by the City ("City") as a Deputy City Attorney to handle litigation, bond issues, and zoning matters. In 1998, she was assigned by the City Attorney to perform the preliminary research on the feasibility of a new land-use ordinance. Subsequently, the City Attorney retained outside counsel to draft the ordinance, which established new zoning districts and created a wetlands preservation zone restricting development in designated areas.

In 2000, Lawyer resigned from the City Attorney's office and became employed as an associate attorney in W & Z, a private law firm. In 2002, W & Z was retained by Developer to represent it in connection with a condominium project in City, and Lawyer was assigned to the matter. Developer's project was within the wetlands preservation zone, and City had denied Developer a permit for construction of the project on the basis that the newly enacted ordinance would not allow it to be built as planned. Developer requested that Lawyer file a lawsuit challenging the validity of the wetlands provision of the ordinance as applied to its project.

Association, an organization of City landowners, independently approached Lawyer and requested that she file a lawsuit on its behalf challenging the validity of the wetlands provision of the ordinance. Developer encouraged Lawyer to represent Association, since a lawsuit by Association would put pressure on City to reach a compromise concerning Developer's project. Developer told Lawyer it would pay half of Association's legal fees.

What ethical issues confront Lawyer and W & Z? Discuss.

Answer A

1. LAWYER'S DUTY OF LOYALTY/CONFIDENTIALITY TO FORMER CLIENTS

Lawyer ("L") was retained by City as a Deputy City Attorney for 5 years. L thus owes a duty of confidentiality to City as his [sic] former client. The duty of confidentiality means that L may not use or disclose any confidential information obtained through the representation of City in any matter. The duty of confidentiality is broader then [sic] the attorney client privilege because it covers communications from any source, and it is imposed regardless of whether the attorney is being compelled to testify.

Here L has resigned his [sic] position with City, but he [sic] is now employed by W & Z. He [sic] may not represent clients for W & Z in a manner that uses information obtained through his [sic] representation of City. Therefore by being assigned to Developer's case L should consider whether his [sic] duty of confidentiality to City is implicated.

The duty of confidentiality is designed to foster the full, open and candid communication of clients with their attorneys. If L violates this duty owed to his [sic] former clie nt City, he [sic] will be subject to discipline.

2. W & Z'S DUTY OF CONFIDENTIALITY TO L'S FORMER CLIENT -- IMPUTED DISQUALIFICATION

Here the issue of confidentiality arises again because if one lawyer employed by a firm is unable to take on the representation because of a conflict of interest or confidentiality problem with a former client, the disqualification is imputed to the entire firm and no lawyer in the firm may take on the representation.

Here however, L's former client is a government employer. Because the government has a strong interest in employing qualified attorneys, special rules have been created to allow firms to represent clients against the government even if one of the attorneys in the private firm formerly represented the government.

If a lawyer is employed by a firm and has conf idential information regarding a government matter obtained through previous representation of the government, the firm may properly represent another client against the government if:

1. The lawyer who previously represented the government is completely screened from handling any portion of the representation against the government;

2. The lawyer who previously represented the government shares in NO PART of the fees produced from the representation of a client against the former government client; and
3. The firm notifies the government of the possible conflict of interest so that the government can ensure that proper preventative measures are taken.

Therefore, if [sic] W & Z may properly represent developer if L is properly screened off of the case. Here, however, L has actually been assigned to the case of Developer against the City. Therefore the proper screening techniques have not been used. This will be improper for both L and W & Z if L formerly represented the City on a "matter" concerning Developer's case.

Does Developer's case involve a "matter" on which L formerly represented the City?

Although L formerly represented City, if L has no confidential information regarding the current pending representation against City, neither L nor W & Z would be disqualified. L will be deemed to have confidential information if L represented City on the same "matter" the current representation now involved.

Unlike the prosecution of a criminal, the drafting of regulations, ordinances or codes will not be considered a matter that would disqualify L from representing a private sector client against City. Part of L's duties were litigation though, so it is possible he [sic] could be deemed disqualified. Moreover, the private sector client is directly asserting a direct claim attacking the validity of the rules, precisely the work that L was performing for City. However L performed only preliminary research on the feasibility of the proposed ordinance; the actual drafting was performed by outside counsel. Therefore, even if this was considered a matter for which L could be disqualified, a strong argument exists that L probably did not obtain any confidential information.

Therefore L probably is not disqualified, but L must encourage W & Z to notify the government regarding the proposed representation to see whether City has any objection to L's participation in the case. If City does not object (L and W & Z should get consent in writing) then L may represent Developer so long as he [sic] does not use any confidential information obtained from City. If City does object, then L must be completely screened from the case, and take no part in the representation, and must receive no portion of the fees paid by Developer.

3. L'S DUTY OF LOYALTY TO CURRENT CLIENTS - - MAY L REPRESENT ASSOCIATION?

If it is proper for L to represent Developer ("D"), then L owes D a duty of zealo us loyalty. This loyalty may not be compromised by an [sic] conflict of interest that L might have personally, economically or professionally. No lawyer may represent a client in any matter that is directly adverse to the interests of another current client.

Here Association ("A") has asked L to represent it in a suit challenging the validity of City's ordinance (all of the above discussion regarding loyalty and confidentiality to former clients applies to A). L is presumably already representing D in a suit regarding City's ordinance. Therefore A's proposed representation falls precisely within a matter that involves the subject matter of a current client.

Dual representation, or representation of two clients involving the same or similar subject matter may be permissible if:

I. The lawyer subjectively reasonably believes that the representation of both clients may be undertaken without compromising his professional judgment or threatening his zealous representation of either client;

II. Objective ly, a reasonable uninvolved lawyer would agreed [sic] that the representation of both clients may be undertaken without compromising professional judgment or threatening zealous representation of either client; and

III. Both the current and future client consent after full disclosure and consultation of the possible conflict of interest. In California the consent must be obtained in writing.

Here L may subje ctively believe that it is reasonable to represent both clients. Both D and A are challenging the validity of City's ordinance. Therefore the goals appear to be the same. As noted by Developer, A's suit may actually pressure City into settling his claim early. Howeve r, L must be extremely careful, because it is very, very likely that a conflict that does not currently exist may arise later in the representation. If the City wants to grant a special use exception or a variance to D, in order to make his suit go away, but leaving the ordinance intact, then D and A's interests are materially adverse and dual representation is improper.

An objective uninterested lawyer may agree dual representation is proper, depending

on D and A's final goals. It is likely that a third party lawyer would disagree.

Therefore L must fully advise D and A of the possible conflict, especially the likelihood of a waiver, variance or special use exception for D. If both clients consent (in writing in CA) after full consultation, and both the objective and subjective tests are satisfied, then L may undertake the representation. However it appears in this case that such representation would be inappropriate.

4. DUTY OF CONFIDENTIALITY TO CURRENT CLIENTS

In addition to the duty of loyalty implication discussed above, dual representation presents a confidentiality issuebecause L will necessarily obtain confidential information from both D and A if he [sic] undertakes dual representation. Therefore in the event that an actual conflict of interest arises later in the representation, then it would be improper for L to continue representing either D or A, because he [sic] has obtained confidential information that could potentially be used against the former client. Therefore the only proper remedy would be to withdraw, and it could possibly present substantial prejudice to withdraw late in the representation.

W & X are also prevented from continuing the representation of either D or A if L would be, because of the imputed disqualification rules. There is no screening procedure available for representation of current private sector clients with actual conflicts of interest.

The fact that L was approached by A independent of his [sic] employment with W & X will not allow W & X to represent D. L's employment with W & X prevents either L or W & X from representing D and A if the interests are adverse.

5. DUTY OF LOYALTY AND INDEPENDENT PROFESSIONAL JUDGMENT

Payment of a client's legal fees by a third party is proper only where the payment is consented to by the client, where the lawyer reasonably believes that the payment by a third party will not affect his independent, professional judgment, and so long as no confidential information is disclosed to the third party paying the fee.

Here D has offered to pay half of A's legal fees. L may only allow this arrangement if A consents, and if L reasonably believes that his decisions will be completely unaffected by D's payment. L must zealously, competently and single mindedly represent A if he takes on the representation. L must not make decisions on A's behalf, while considering the fact that L is paying part of the fee. Moreover L must not disclose any of A's

confidential information to D even though D is paying part of the fee.

Here, because of the possibility of an actual conflict between D and A, D's payment of A's fees is probably inappropriate.

Answer B

Ethical Issues Confronting Lawyer and W & Z

The ethical issues that confront both Lawyer and her firm W & Z arise as a result of Lawyer's past employment with City and a possible conflict between clients. Because Lawyer is a member of W & Z, any conflicts that she may have are imputed to the firm. The ethical issues that arise, and the steps that Lawyer and W&Z can take to avoid them, are discussed below.

A. Lawyer for the Government Now in Private Practice

The Model Rules provide that a lawyer who has worked personally and substantially on a matter while working for the government shall not represent that matter in private practice. The issue, therefore, is whether Lawyer worked personally and substantially on a matter involving City's ordinance respecting the wetlands preservation zone.

It does not appear that Lawyer worked personally and substantially on the wetlands preservation zone ordinance. The facts provide that the city attorney merely asked Lawyer to do the preliminary research for the project, and that outside counsel actually drafted the ordinance. Conducting this preliminary research would probably not qualify as "personal and substantial" involvement.

Furthermore, the drafting of the wetlands ordinance does not qualify as a "matter" under the Model Rules. A "matter" involves an actual dispute between parties. Drafting an ordinance is not a "matter" because it does not involve a dispute between ascertainable parties.

Thus, because Lawyer did not work personally or substantially on any "matter" and [sic] there is no conflict between her employment with the City and her representation of Developer or Association's matters challenging the ordinance.

Duties of W & Z if there is a Conflict

Even assuming there is a conflict under the Model Rules between Lawyer's representation of Developer & Association challenging the ordinance and her employment with City, W & Z may still take on the representation if Lawyer is not the individual representing the parties.

Conflicts of an attorney in a firm are imputed to the entire firm. However, if an attorney

in a firm worked personally and substantially on a matter while employed with the government, the firm may take steps to prevent the conflict from becoming imputed to all other attorney[s].

The Model Rules provide that a firm in this situation can prevent imputation by screening the ex-government attorney from the matter, not sharing any fees from the matter with that attorney and notifying the government employee. If W & Z thus screens Lawyer from its representation of Develop er, did not share fees with lawyer and not ified Cit y, they could represent Developer even assuming there was a conflict. However, because Association approached Lawyer personally and not W & Z, Lawyer may not be able to represent Association if there is a conflict.

However, because as explained above there should be no conflict between Lawyer's representation of Developer & Association and her work on the zoning ordinance for City, W & Z should be able to keep lawyer on the case.

Conflict Between Developer & Association

If an attorney's representation of a client may interfere with her representation of a present or former client, a potential conflict of interest is presented and the attorney must take appropriate measures to avoid such conflict.

Association approached Lawyer and asked her to represent them in a matter that would involve similar issues as her representation of Developer. Although both Association and Developer are seeking the same result — a declaration that the ordinance is invalid — potential conflicts may still arise. For example, Lawyer may learn information during her representation of Developer that may be pertinent to her representation of Association. However, an attorney's duty of confidentiality to her client would prevent attorney from disclosing such information during her representation of Association. Because an attorney also has a duty of loyalty to her client to always represent her client's best interests, her inability to use this confidential information could create a potential conflict with her duty of loyalty to her other client.

Lawyer may still represent both Association and Developer if she obtains proper consent. Developer has already expressed its interest in having Lawyer represent both it and Association. However, Lawyer should still explain the potential conflicts to Developer and Association. If Lawyer reasonably believes that she can represent both Association and Developer adequately discloses all potential conflicts toboth Developer and Association and obtains their consent, she should be able to represent both clients

under the Model Rules. The consent of the clients must also be reasonable, meaning that a reasonable attorney would advise the client of consent. Here, because Developer and Association's interests are not in conflict, consent should be reasonable. Furthermore, the California Rules require that consent be in writing.

Thus, if Lawyer obtains the written consent of both Association and Developer to represent them both on a similar matter, the Model Rules and California Rules would permit such representation.

Payment of Fees By a Third Party

An attorney's duty is to her client and not any third party. If a client's fees are being paid by a third party, a potential conflict of interest is presented between the interests of the third party and the client.

Here, Developer has offered to pay half of the attorney's fees of Association because he believes that Association's case will advance his cause. However, accepting payment from Developer for Association's fees presents a conflict for Lawyer. Developer may attempt to direct the course of Lawyer's representation of Association in order to protect his own interests. However, taking direction from a client would violate Lawyer's duty of loyalty. Lawyer should probably not accept Developer's offer to pay Association's attorney's fees.

However, if Lawyer believes that accepting payment from Developer will not interfere with her representation of Association, she may be able to accept the payment after explaining the potential conflict to both parties. Lawyer should explain to Developer that she represents Association's interests in her representation of Association, and that Developer may not influence this representation. She must also explain the potential conflicts to Association. Under California Rules, she must obtain both parties' consent in writing. However, because she would be accepting payment from a current client in her representation of a second client, this consent may not be reasonable under the Model Rules.

Whether or not Lawyer accepts payment for her representation of Association from Developer, if an actual conflict arises during her representation of Developer and Association, she must withdraw from representing one or both of the clients in order to satisfy her ethical duties.

Q5 Constitution

Paul, a student at Rural State University ("Rural"), wishes to sue Rural, a public school, for violation of his rights under the U.S. Constitution because Rural refused to select him for its cheerleading squad solely on the basis that he is a male. Paul is indigent, however, and cannot afford to pay the costs of suit, including filing and service of process fees.

State law permits court commissioners to grant a prospective state court litigant permission to proceed *in forma pauperis*, which exempts the litigant from any requirement to pay filing and service of process fees. Paul applied for permission to proceed *in forma pauperis*. At a hearing, the state court commissioner conceded that Rural's refusal to select Paul was constitutionally discriminatory, but nevertheless denied Paul's application on the ground that Paul's prospective lawsuit "involves merely cheerleading."

What arguments could Paul reasonably make that the denial of his *in forma pauperis* application violated his rights under the U.S. Constitution, and what is the likely outcome? Discuss.

Answer A

Paul has a claim that the commissioner's decision violated his procedural due process rights and his First Amendment rights. An individual's procedural due process rights have been violated when he or she is denied a life, liberty, or property right in that due process of law. To succeed, Paul must demonstrate that his claim that his substantive due process rights were violated when he was the victim of gender discrimination was a life, liberty or property right which he was denied, and that the process by which that right was denied was inadequate when balanced with the state's interest in efficiency and fairness.

Paul's right to pursue his claim was not a right to life or libe rty. Arguably, however, he has a property right to his claim. Typically, whether or not on[e] has a property right depends on whether a property interest has vested (for instance, at will federal employees do not have a vested property interest in their jobs, but contractual employees do). Here, Paul's claim vested where his job due process rights were violated. At that time, his standing to indicate his rights became ripe. Arguably, his ability to indicate his claim is a vested property right, which was undeniably denied by the commissioner. The state my suspend process in denying rights only in emergency situations but no emergency existed here. Thus, in order to constitutionally deny Paul's property right, the state must exercise due process.

There is some question as to what process is due. An indigent individual may not be denied fundamental rights because of their indigent states, but because indigency itself is not a susp ect class entitled to constitutional protection, the state may deny other privileges to the indigent so long as its means are rationally related to its purpose in doing so. For example, marriage and divorce are fundamental rights, and so an indigent individual may not be denied his or her right to marry or divorce based on an inability to pay a filing fee. However, this is no fundamental right to declare bankruptcy, or another example, and as a pe rson's bankruptcy petition may be denied on the basis of their inability to pay a filing fee. Here, Paul is unable to pay filing fees associated with filing his claim of gender discrimination, a substantive due process claim, in state court. The issue is whether his right to bring suit is a fundamental one. It is certainly outside the scope of the fundamental rights recognized by the courts in their interpretation of the Constitution, which typically involves privacy issues such as family rights (marriage, divorce) and bodily integrity (medical care, abortion). However, Paul's right to bring suit is undoubtedly very important, though not fundamental. So, the process in denying him his right must be balanced against his important rights.

State law permits commissioners to grant or deny prospective litigants the ability to

proceed in forma pauperis at their sole discretion, but in a hearing. A court-like hearing, in which the applicant is permitted to present evidence and argument, is typically sufficient to preserve procedural due process. What is troubling about this situation, however, is that the state co mmissioner is able to single-handedly, and arb itrarily, determine who may and who may not proceed to the courthouse door.

In a first amendment situation, where free speech is the issue, such sole discretion on the part of a state official, able to grant or deny permits to speak or gather in public, for example, is unconstitutional as an impermissible prior restraint on speech. The state may regulate speech in a public forum so long as the regulation is not based on the expression content or viewpoint, and in a non-public forum (which is open to same types of speech, but not others) so long as its regulation is not based on viewpoint. The courthouse, arguably, is a non-public forum, which is open to some types of speech, but not others. For example, it is appropriate to have arguments in an appropriately filed lawsuit, but not to hear a lawsuit in which the court has no jurisdiction, or to hear a poetry reading, or to hear a rock concert, or an anti-war demonstration. The state may regulate the types of speech that are heard in that forum, but not the viewpoint — it may not decide to hear one side as an appropriately filed suit and not the other, as an example. Here, the state commissioner is able, in the commissioner's sole discretion, to determine which litigants may be heard and may not be heard in a non-public forum. The commissioner even stated that Paul's case was valid — so it would otherwise be appropriate to be heard, but for the commissioner's sole opinion that "it involves merely cheerleading." This arbitrary decision violated Paul's first amendment rights, in denying him equal access to a non-public forum and the basis of his viewpoint, and it denied him his procedural due process in providing him with a forum inadequate to protect his very important right to see his substantive due process rights indicated.

Unfortu nately, with the procedures in place, to bring suit against the state for these new violations of his procedural due process rights and his first amendment rights, Paul must go through the same procedure — in order to bring suit to indicate his rights, he must either pay the filing fee or present his case to the commissioner, but the very commissioner whose position violated his procedural due process and first amendment rights in the suit he is attempting to bring. He will be successful in indicating his rights, but he should bring suit in federal court, instead. (Though he can't sue the state in federal court for money damages, under the 11th Amendment, he must seek an injunction or sue the commissioner in his individual capacity, instead.)

The state's system at granting permission to litigants to file suit regardless of whether or not their underlying claims are valid and they have standing, also raises equal protection concerns. This system does not discriminate against indigent individuals per

se (they are not entirely prohibited from filing suit) and indigency is not a suspect class under substantive due process, so a substantive due process claim is not appropriate. However, the state system is denying a right to a certain class of individuals, raising an equal protection question. Filing a lawsuit is not a fundamentally protected right under equal protection, as are some privacy rights. However, participating in a non-public form is, arguably, a fundamental right, as recognized by the First Amendment. If so, the state must show that this screening process is necessary to protect a compelling state interest; a sharing that is likely impossible under these circumstances. (Lightening the loads of the courts, preventing frivolous claims and requiring filing fees for all but the most essential of lawsuits might be admirable state interests, but none are compelling.) And, the discriminatory way in which this system operates, by permitting a single hearing officer in his sole discretion to determine what are important and what are unimportant rights, is not an appropriate method of seeing those interests, even under rational basis scrutiny simply because that system, in itself, is violative of the First Amendment and Procedural Due Process. Though Paul's right to sue is not fundamental under substantive due process, he may also have a valid equal protection claim.

Answer B

Under the Constitution, an indigent's inability to pay filing and service of process fees will not prevent him from being able to vindicate a fundamental right through the courts. In situations such [as] a termination of parental rights, for example, the indigent's costs will be borne by the state, because the right to raise one's child is considered a sufficiently important interest.

In determining whether the denial of the in forma pauperis application violated Paul's constitutional rights, the threshold question will be whether Paul's interest in freedom from gender discrimination is a sufficiently fundamental interest to allow him to proceed in forma pauperis. Paul will likely raise arguments based on the 14th Amendment - - specifically procedural due process, substantive due process, and equal protection. Because the principal actor here is the State of Rural (the State University [sic] in excluding him from the cheerleading squad, and state commissioner in denying his in forma pauperis petition), the state action requirement of the 14th Amendment has been met.

Paul's Underlying Claim

Paul's underlying claim is most obviously supported by the Equal Protection clause of the 14th Amendment; indeed, the state commissioner has already acknowledged that Paul's constitutional rights have been violated. If Paul becomes able to proceed with his claim, the court will find that the state university's [sic] cheerleading program discriminates on the basis of a quasi-suspect classification-- gender. The government will be unable to show that the discrimination is substantially related to an important government interest, or supported by an exceedingly persuasive justification, as they are required to do. Keeping a state cheerleading squad all female is hardly and [sic] important government interest, and possibly not even supported by a rational basis.

It is therefore clear that Paul's constitutional rights have been violated. The question is whether the interest he seeks to vindicate is important enough to compel the government to pay his litigation costs.

Procedural Due Process

Paul will first claim that the state accorded him insufficient process in denying his in forma pauperis petition. The denial of the petition will effectively preclude Paul from filing a lawsuit to enforce his constitutional rights, and this is sufficient to constitute a liberty interest. Paul is therefore entitled to some process before it is taken away. In

order to determine how much process is required, the three "Eldredge factors" are considered: the importance of the right being protected, the value of additional procedural safeguards, and the gove rnment's interest in efficiency.

In terms of the right being protected: it is not, as the state commissioner described it, the right to engage in "merely cheerleading." Rather, it is the right to be free from gender discrimination, and the right to enforce that guarantee in the courts. His interest is therefore considerably less trivial than the commissioner has intimated.

Paul's problem arises from the second two factors: the value of additional safeguards, and the government's interest in efficiency. Paul has already been given a hearing here, and that is likely to constitute sufficient process. It's difficult to see what more process he could receive without seriously implicating the government eff iciency prong. Therefore he will be found to have received sufficient process.

Equal Protection--14th Amendment

Paul will also assert that in denying his in forma pauperis petition, the state has denied him equal protection under the laws.

Paul may argue that the fact that the commissioner has seemingly wide discretion to grant in forma pauperis petitions constitutes an equal protection violation. However, as long as the commissioner acts consistently and operates within a set of specific guidelines this argument is likely to be unsuccessful.

Suspect Classification

The next question is whether there is a suspect or quasi-suspect classification at work here, which would trigger strict or intermediate scrutiny by the courts. Paul may argue that preventing indigents from filing a lawsuit to vindicate their constitutional rights discriminates on the basis of poverty. However, poverty is not a suspect classification, so the state will merely need to show that its actions are rationally related to a legitimate government interest. Here, the government interest would be in preserving its resources while still allowing access to the courts for those asserting the most fundamental of rights. Providing limitations on in forma pauperis petitions is rationally related to this interest.

Fundamental Rights – Possibly First Amendment

Paul may next argue that a fundamental right has been violated. Paul is actually

seeking to vindicate a right within a right here — he seeks access to the courts, to enforce the underlying constitutional right. So determining whether his right to access to the court has been violated depends on how the underlying right is characterized. Access to the courts in itself is not a fundamental right; however, if the underlying right is fundamental, the access becomes a protectable interest.

Paul's underlying interest might first be characterized as a right to be free from gender discrimination. But this in itself is not a fundamental right, and is more properly analyzed under a suspect classification analysis.

Paul may have more luck arguing that the exclusion from the cheerleading squad on the basis of gender (and then his inability to enforce the right in court) violates his First Amendment Rights of free expression and possibly even free association. First Amendment Rights are in fact considered fundamental rights for purposes of 14th Amendment equal protection analysis. The state appears to have no compelling justification for curtailing the rights of males to join the cheerleading squad, to thereby express their school spirit, and associate with others of like mind.

Because free expression and free association are fundamental rights for purposes of the 14th Amendment, Paul should be allowed to proceed in forma pauperis to attempt to vindicate those rights.

Substantive Due Process

The substantive due process analysis turns on whether a fundamental right is implicated. The analysis mirrors the fundamental rights analysis under the Equal Protection clause. Again, we are required to consider Paul's "claim-within-a-claim": his seeking access to the courts to vindicate an underlying right. And again, if the underlying right is described as a First Amendment Right, the denial of his in forma pauperis petition was unconstitutional.

Q6 Community Property

Henry and Wanda married in 1980 when both were students at State X University. State X is a non-community property state. Shortly after the marriage, Henry graduated and obtained employment with a State X engineering firm. Wanda gave birth to the couple's only child, and Henry and Wanda agreed that Wanda would quit her job and remain home to care for the child. They bought a house in State X using their savings for the down payment and obtained a loan secured by a twenty-year mortgage for the balance of the purchase price. Mortgage payments were subsequently paid from Henry's earnings. The title to the State X house was in Henry's name alone.

In 1990, Henry accepted a job offer from a California engineering firm. The couple moved to California with their child and rented out the State X house.

In 1992, Wanda's uncle died and left her an oil painting with an appraised value of $5,000 and a small cabin located on a lake in California. Wanda took the painting to the cabin and hung it over the fireplace.

In 1993, after reading a book entitled "How to Avoid Probate," Henry persuaded Wanda to execute and record a deed conveying the lake cabin to "Henry and Wanda, as joint tenants with right of survivorship." Wanda did so, believing that the only effect of the conveyance would be to avoid probate.

In 1995, after three years of study paid for out of Henry's earnings, Wanda obtained a degree in podiatry and opened her own podiatry practice. Her practice became quite successful because of her enthusiasm, skill, and willingness to work long hours. Henry continued to work for the engineering firm.

In 2002, Henry and Wanda separated and filed for dissolution of marriage. Wanda had the painting reappraised. The artist, now deceased, has become immensely popular, and the painting is now worth $50,000.

Upon dissolution, what are Henry's and Wanda's respective rights in:

1. The lake cabin? Discuss.

2. The painting? Discuss.

3. The State X house? Discuss.

4. Wanda's professional education and podiatry practice? Discuss.

Answer according to Californ ia law.

Answer A

HENRY & WANDA'S RIGHTS

1. The Lake Cabin

California is a community property state. All assets acquired by earnings during the marriage are presumed to be community property. Assets acquired by gift, inheritance or devise or otherwise acquired before the marriage or after a permanent separation are separate property.

Property can change form and be transmuted from community or separate property and courts will consider the source of funds if they can be traced.

Here, the lake cabin was initially separate property because Wanda acquired the lake cabin from her inheritance. When Wanda transferred the lake cabin to Henry a transmutation occurred and the house was placed in joint names. This occurred in California.

Previously in California, a gift would be presumed to Henry based on the Lucas case. After 1987, however, any property in any jo int title is presumed commu nity prope rty. Wanda can, however, receive the initial separate property value of the lake cabin back if she can trace the assets, such as through the title and probate documents and show it was hers. Then, if it is traced properly, any value over the separate property contribution would be divided equally. Henry would alternatively argue a gift and that each spouse receive ½ but Wanda could rebut this and rebut the community property presumption with her testimony that Henry told her it was jut to avoid probate without donative intent.

2. The Painting

Wanda inherited the oil painting so it is separate property. Wanda kept the painting at the cabin, so it could be argued that she intended to keep the painting as her separate property. No community earnings or funds were used to enhance the value of the painting and no skill or labor was used to enhance the value of the painting. Wanda should keep the painting as her separate property.

3. The State X House

The community property laws of California create a presumption that all property acquired with earnin gs during the marriage is community property.

Quasi community property is property acquired in another state that would be considered community property if it were acquired in a community property state. Quasi community property is treated the same as community property in the event of a divorce.

Here the house was bought in another state — non-community property with earnings, a loan and savings that were all acquired during the marriage. Although the house was in Henry's name, all contributions to the house were community contributions. Henry's earnings were community earnings, the loan was acquired by both after the marriage, so the lender's intent was to rely on the commu nity for repaymen t. Also the savings were their joint savings; it appeared they were acquired during the marriage. If the house would be community property in California, since it was acquired from all community sources, then it is quasi community property and would be treated as community property in a divorce. Each spouse received one-half of community property in a divorce unless there is some exception that applies (one spouse cares for a minor child in the house, one spouse misappropriates funds, one spouse is injured and should receive personal injury proceeds). No exceptions apply here, so each spouse receives one-half of the quasi community property State X house.

4. Wanda's Education & Practice

Wanda's education is not community property. However, the community estate is entitled to repayment of her educational expenses if there is a time of 10 years or less. If less than ten years has passed there is a presumption the community has not yet received all the benefits of the enhanced earning capacity from the education.

If, however, Wanda can show the community has already received sufficient benefits, she would not have to repay the community. If she cannot prove this, then she would have to rep ay the education exp enses (½) to Henry.

The podiatry practice was acquired exclusively from community funds (Henry's earnings) and from Wanda's enthusiasm, skill, and labor during the marriage. These are all community sources so that the practice and the goodwill of the practice should be valued and divided one-half to each spouse.

Because all sources of labor and capital are community sources, the Pereira and Van Camp methods of accounting do not apply. Pereira would allow a spouse their initial investment back if it is separate property plus a reasonable rate of return (10%) on the initial investment. Because Henry's investment in Wanda's education was community earnings, there is no initial separate property to return and Pereira does not apply, for either Henry or Wanda, since Wanda's labor was all during the marriage and was all community labor.

Similarly Van Camp accounting does not apply because this principle allows a reasonable salary to be deducted from the business, multiplied by all years of the marriage, less any community expenses paid from the business and that would be considered community property with the balance of the value of the business returned as separate property. It is inapplicable because all community labor and earnings were used for the business, resulting in a community property podiatry business.

Van Camp is used where a unique separate property business has appreciated during

the marriage due to circumstances rather than community labor. It does not apply here because there was no separate property contribution to the podiatry practice, so each spouse receives one-half of Wanda's practice.

Answer B

2. Quasi Community Property

The threshold issue is whether the laws of California community property govern property that Harry and Wanda acquired in State X, a non-community property state. Property acquired in another state that would be considered community property if acquired in California is treated as quasi community property and is treated as community property on the dissolution of marriage.

Here, at the dissolution of Harry and Wanda's marriage, the property they acquired in State X will be treated exactly under the same principles as the property they acquired in California. Both will be governed by California community property laws.

As mentioned, California is a community property state. All property acquired during the course of marriage is presumptively community property (CP). All property acquired prior to marriage or after separation is presumptively separate property. In addition, a gift, devisee, or bequest is presumptively separate property (SP).

In order to determine the character of a property, courts will trace back the source of funding used to acquire the propert y. A mere change in the form of a property will not change its characterization. At divorce, each item of community property is split equally, absent special circumstances.

With these principles in mind, we can turn to the specific assets involved.

3. The Lake Cabin

The lake cabin was a gift to Wanda from her uncle and as such is SP.

Henry will argue that Wanda made a gift of the property to him in 1993 and therefore the property became CP.

Prior to 1985, gifts to a spouse did not have to be in writing. Post 1985, however, transmutations of property required writing. Henry will argue the execution and recording of the deed was a writing satisfying this requirement and, therefore, the gift should be treated as CP and he should have half of the she [sic].

Henry will also argue that, under Lucas, taking time in joint and equal form creates a presumption of community property and a relinquishment of the separate property rights. Moreover, the Anti-Lucas statutes provide that this presumption of CP holds true even for property taken as joint tenants on dissolution. While joint tenancy would not creat[e] a presumption of CP on death, it does on dissolution. Therefore, Henry will argue the fact that the property was in joint tenancy is further indication that it is community property.
Wanda, however, will counter that the only reason she put the property in her and

Henry's name was to avoid probate of the cabin. The courts have held under the Married Women's Presumption that a gift is not presumed when a party does so for improper purposes, such a shielding from creditors. By analogy, in this context the court may nor presume a gift or title in joint and equal form because it was done for an improper purpose.

In sum, if Wanda had given Henry a share in the lake cabin for a proper purpose, the Lake Cabin would be CP. But since it was done for an improper purpose, a court will probably hold it is SP and that Wanda should keep it.

4. The Painting

The painting was a gift to Wanda from her uncle, and as such was SP. Wanda is entitled to the appreciation of the painting that is now worth $50,000. This appreciation was not in any way commingled because the painting was never sold. Moreover, Wanda committed no labor in the appreciation of the painting. Therefore, Wanda is entitled to the entire appreciation of $50,000 which is simply a capital return on separate property.

5. The State X House

The State X house was bought using savings (quasi CP) and payed off using Henry's earnings (quasi CP). Therefore, it is presumptively quasi CP which is treated as CP for the purpose of dissolution. There is no need to apply Marriage of Moore because the house was entirely purchased by CP, and there is no division of CP and SP in acquiring the interest.

Henry will argue, though, that the fact that he took title alone creates the presumption of a gift to him. Prior to 1975, when a women took title alone in a property, that property was presumptively considered a gift to the women. But, this presumption did not apply to men. It also does not apply post 1975. But, Henry will still argue that this property was a gift because he was the sole title owner.

This argument is unlikely to succeed because Wanda remained in the home and cared for the child in the home. Courts will look beyond the facade of sole title, and will not interp[r]et the title as a gift to Henry. Instead, they will loo[k] at the property as jointly owned by Wanda and Henry who lived there together.

The question, then, becomes if the house is quasi CP how can it be split given that it is in a different state. California, after all, does not have juri[s]diction over property that is in State X.

Courts, however, will either give Wanda and [sic] equivalent amount of resources from other assets to compensate for the State X house, or they will force Henry, given their personal jurisdiction over him, to sign over half of the property to Wanda.

In short, Wanda is entitled to her share of half the house despite the problems of jurisdict ion given th at Califo rnia has personal jurisdicti on over Hen ry.

6. Wanda's Professional Education

The issue is whether Wanda's podiatry degree is community prop erty.

The law is that an educational accreditation is not CP. However, the community is entitled to reimbursement for the education expenses unless: (1) 10 years have passed since the spouse acquired the degree creating a presumption that the community has reaped its benefits; (2) the other spouse also received a professional degree or (3) the education that the spouse receive[s] will lessen the need for spousal support[.]

Here, seven years passed after Wanda acquired the property, so the community is not presumed to have benefitted. Also, there is no indication that Henry received an education.

Wanda may argue that her education helped her open a successful practice and lessened her need for spousal support. Thus, the community should not receive any reimbursement. This will be persuasive only if W anda can show that she would have been entitled to significant spousal support, absent the degree, which is a dubious proposition considering she had a job prior to giving birth. In other words, it is not clear that she would not have been capable of earning a good income, even without the degree.

A fair solution would probably be to reimburse the community 3/10 of the money it spent on Wanda's education. This would represent amount of benefit the community did not receive, under the 10 year presumption.

Henry then would be entitled to ½ of 1/3 or 1/6 of the expenses spent on Wanda's education degree.

7. Podiatry Practice: Accounting and Goodwill

The issue is whether Wanda's podiatry practice is community property or separate property. Here, Wanda did not inherit a business, butrather opened the business during the marriage. Therefore, the earnings are presumptively all community property since the entire business was a result of her "enthusiasm, skill, and willingness to work long hours."

Pereira and Van Camp accounting principles **do not** seem to apply to this situation. Under Pereira, an independent business's rate of return at 10% is SP, and the rest is CP. This test applies when the growth of a business is primarily the result of a spouse's labor. Under Van Camp, CP is determined by subtracting a community's family expenses from the FMV of the spouse's labor, and the rest of the business value is SP. This test is appropriate when a large part of the business is a result of capital as

opposed to community labor.

Wanda may try to argue that the business is her separate property. She may concede that it grew as a result of her labor, but may argue that the Pereira principles must govern, entit[ling] her to a 10% per annum share as SP.
But, Henry will counter that Wanda started the practice while they were married, and as such, the entire business is a result of her labor. She did not inherit the business, Hen[r]y will argue, but rather opened it during the course of marriage. As such, all of the business earnings are presumptively CP.

Given that Wanda opened the practice after marriage and her labor is solely responsible for the practice, Henry is entitled to half of the practice.

If the court gives Wanda the practice, then it must compensate Henry for half the value. In such a scenario, Henry is also entitled to the value of the **goodwill** of the business. The goodwill is calculated by looking at the total revenue and subtracting the value of Wanda's services as well as cost. The remainder can be attributed to goodwill. In short, if the court decides to grant Wanda control of the business because she is responsible for managing it, it must grant Henry half the value of the business, including the value of goodwill for the foreseeable future discounted to present value.

Jul 2002

California Bar Examination

Essay Questions and Selected Answers

ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2002 CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2002 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors and may not be reprinted.

ESSAY EXAMINATION INSTRUCTIONS

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertine nt principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

Q1 Wills

Theresa and Henry were married and had one child, Craig. In 1990, Theresa executed a valid will leaving Henry all of her property except for a favorite painting, which she left to her sister, Sis. Theresa believed the painting was worth less than $500.

On February 14, 1992, Theresa typed, dated, and signed a note, stating that Henry was to get the painting instead of Sis. Theresa never showed the note to anyone.

In 1994, Theresa hand-wrote a codicil to her will, stating: AThe note I typed, signed, and dated on 2/14/92 is to become a part of my will.@ The codicil was properly signed and witnessed.

In 1995, Theresa=s and Henry=s second child, Molly, was born. Shortly thereafter, Henry, unable to cope any longer with fatherhood, left and joined a nearby commune. Henry and Theresa never divorced.

In 1999, Theresa fell in love with Larry and, with her separate property, purchased a $200,000 term life insurance policy on her own life and named Larry as the sole beneficiary.

In 2000, Theresa died. She was survived by Henry, Craig, Molly, Sis, and Larry.

At the time of her death, Theresa=s half of the community property was worth $50,000, and the painting was her separate property. When appraised, the painting turned out to be worth $1 million.

What rights, if any, do Henry, Craig, Molly, Sis, and Larry have to:

1. Theresa's half of the community property? Discuss.

2. The life insurance proceeds? Discuss.

3. The painting? Discuss.

Answer according to California law.

Answer A

Theresa's half of the Community Property

The parties' rights to Theresa's (T) one-half of the community property (CP) depends upon the validity of her will and upon CP legal principles.

California is a CP State. All property acquired during marriage is presumed CP. All property acquired before married is presumed separate property (SP). Also, property acquired after permanent physical separation is presumed SP. In addition, property acquired any time through gift, devise, or descent is presumed SP.

In order to characterize assets, courts allow tracing to the source of funds used to acquire the asset. Generally, a mere change in form will not alter the characterization of an asset.

At death, a testator has testamentary power to dispose of one-half of her CP and all of her SP.

Here, T had the power to dispose of her ½ of the CP.

Validity of T's 1990 Will

In 1990, T executed a valid will. Thus, it is presumed that the will was properly signed and attested by two witnesses.

T left "all of her property" except the painting to Harry (H). Thus, H is the beneficiary of T's ½ of the CP.

A will can be revoked by a subseque nt express written ins trument or by an inconsistency. Here, T wrote a note in 1992 and a hand-written codicil in 1994. Both of these documents relate to the painting and not T's CP.

It does not appear th at either document express ly revoked the 1990 will. Also, there are no facts indicating that the 1990 will was revoked by physical act.

As a result, H would offer the 1990 will into probate and argue he is entitled to all of T's ½ of CP valued at $50,000.

Molly's Rights as Pretermitted Heir

Molly may argue she was omitted from T's will because she was not born yet. Thus, Molly may argue she is entitled to share of T's CP.

A pretermitted child is one born or adopted after a will was executed. The omitted child is entitled to an intestate share unless the omission was intentional; the child was provided for outside the will or the property was left to a parent when another child was alive at the time of the execution.

Here, Molly was born in 1995, which is af ter the 19 90 will was executed. However, all of the property was given to H. Furthermore, Craig, another child, was alive when the 1990 will was executed. As such, Molly would be unable to recover under this exception.

Also, Molly would only by entitled to her interstate share. Under California law, when a person dies without a will allows their CP goes to a surviving spouse. Here, even if T died without a valid will, H would take all of the property under intestacy laws. Molly would only be entitled to a portion of T's SP.

Thus, Molly has no right to T's CP.

Craig's Rights to T's CP

Craig is not a pretermitted child because he was alive at the time the 1990 will was executed. Also, similarly to Molly, Craig would have no right to T's CP under intestacy laws.

Sis and Larry's Rights to T's CP

Sis is T's sister. The intestate laws do not allow a sibling to take the testator's CP when the surviving spouse with rights to that CP is still alive. T did not devise any of her CP to Sis. As such, Sis has no rights in T's CP.

Larry appears to have been someone T fell in love with after H left. T never devised any of her CP to Larry. Larry has no rights in T's CP.

H will take T's CP worth $50,000.

T's Life Insurance Proceeds

Ordinarily under CP principles, proceeds from a whole life insurance are CP to the extent they were acquired during marriage. The time rule is applied to determine the CP interest. Proceeds from a term life insurance policy are generally the type of the last premium paid.

H may argue in 1999 when T bought the life insurance policy they were still married and therefore the $200,000 is CP. If so, Larry as the named beneficiary would only be entitled to $100,000 as T has power to dispose of her ½ interest.

Larry would argue T and H's marriage had ended. A community ends with a physical separation with the intent not to resume. Larry will argue H left and joined a commune. Larry would assert this shows H's intent to end the marriage.

Larry will also argue and CP presumptions will be rebutted by tracing the source of the life insurance proceeds. T bought the life insurance with her own SP. Therefore, Larry will successfully argue even if T was still married and her economic commun ity had not yet ended, she used her SP to acquire the policy.

Since T used SP to buy the policy, the $200,000 proceeds would be SP as well. A mere change in form does not alter the characterizations of property. Thus, Larry would argue as the sole beneficiary he should take all the proceeds since T has the power to dispose of all her SP.

Craig and Molly's Rights to the Life Insurance Proceeds

The children may attem pt to argue they have a right to a portion of the $200,000. However, they will not succeed. They were both alive when T made this "will

substitute" and T had the power to give the proceeds all to Larry and none to them.

Sis also has no claim to the proceeds.

Thus, Larry is entitled to all of the life insurance proceeds valued at $200,000.

The Painting

T's 1990 Will

In her 1990 will, T devised the painting she thought was worth $50,000 to Sis. Therefore, under the 1990 will, Sis is entitled to the painting.

The Effect of the 1992 Note

A codicil is an instrument made after the execution of a will that disposes property. A codicil must be executed with the formalities of a will.

Formal Attested Codicil

In order for typewritten codicil to be given effect it must be signed by the testator. Also, the testator must sign or acknowledge her signat ure or will in front of two witnesses. Those two witnesses must sign the will with the understanding that it is a will.

Here, T did type, date and sign a note in 1992. This note purported to change her 1990 will so that H got the painting and not Sis.

However, T never showed the note to anyone. That implies she never had two witnesses sign the note. Also, she never acknowledged her signature or will to two witnesses. Therefore, it was not properly attested to. As a result, the codicil will not be given effect.

Holographic Codicil

A holographic codicil is valid when all material provisions are in the testator's handwriting and she signs it.

Here, the note was typed and so it was not handwritten. Thus, it will not be given effect.

Revocations by Express Subsequent Codicil

A will can be revoked by a codicil. However, the codicil must be valid and meet the formalities of a will in order to be given effect as a revocation.

Here, as shown above the codicil was not executed by proper formalities. Thus, it did not revoke the 1990 will.

By itself, the 1992 note has no effect on the 1990 will. Thus, Sis would still be the beneficiary.

Effect of the 1994 Codicil

The codicil written in 1994 was handwritten. It was also properly signed and witnessed. It appears T was attempting to validate her 1992 not by stating "the note I typed on 2/14/92 is to become a part of my will."

Incorporation by Reference

A document can be incorporated by reference. It must have been in existence at the time of the will execution, sufficiently described in the will and reasonably been the document the will was referring to.

Here, the note was in existence at the time the codicil was written. The codicil was written in 1994 as is attempting to incorporate the 1992 note. The codicil did sufficiently describe the note by stating "The note I typed, dated and signed on 2/14/92." The description accurately gives the date the note was made.

H would offer the note and argue it sufficiently was described. Also, H will argue the note is the document the codicil was referring to.

As such, a court may find that the prior defective note has now been republished and reexecuted by this 1994 codicil that was handwritten and signed. Even though a holographic codicil does not require attested witness, the fact that it was properly witnessed should not preclude the court from finding it a valid holographic codicil.

Therefore, it is very likely H will prevail and will take the painting over Sis.

Craig and Molly's Rights to the Painting

The children may argue since T was significantly mistaken about the painting value, the gift to either Sis or H is invalid.

The children will attempt to argue if T knew the paint ing was worth $1 million she would have not given it to Sis. Rather she would have left it to them.

A court will not likely agree with this argument. Existing evidence of a mistake is generally allowed if it is reasonably susceptible with the will.

Here, it is not reasonable to assume T would have given it to Craig and Mol ly. She may have left it to H as she did not in the codicils.

Therefore, the children likely have no right to the painting.

They may argue H's rights were revoked by operation of law.

A gift to a spouse is revoked upon divorce.

Here, T and H never divorced. As such, H likely takes the painting because a legal sepa ration may not be enough to invoke revoca tion by law.

Answer B

1. Theresa's (T's) Half of Community Property

California is a community property state. Under California law, a spouse may dispose of one half of the community property through her will. The provisions of T's will will control the $50,000 (her half of the community property) unless a legal presumption prevents or alters application of the will.

1990 Will

The 1990 will was "validly executed" (a will is validly executed when signed with testamentary intent by a testator before two witnesses who know that the document is a will). The devise of $50,000 to Henry (H) and the painting to Sis (S) are therefore valid unless modified by later wills or legal presumptions.

1992 Note Is Not Valid Alone But Is Valid After 1995 Codicil

The 1992 note was not a valid modification when written. The note is typed and unwitnessed (never shown to anyone). A codicil to a will must satisfy the same formalities of execution, as the original will. A codicil is valid if made with testamentary intent before two witnesses who knows the document is a will. Here, T never showed the note to anyone, so it is unwitnessed.

Holographic Wills – unwitnessed wills prepared by the testator – are valid only if signed and if the material provisions are written in the testator's handwriting. Here, the codicil was typed and therefore the material provisions are not handwritten, and the codicil is not a valid holographic codicil.

1994 Codicil Validly Incorporates the 1992 Note For Reference

The 1994 Codicil was handwritten, signed and properly witnessed, and affirmed to the disposition of the 1992 note. Under the doctrine of incorporation by reference, a valid will can incorporate disposition in the other documents so long as the other documents are (1) clearly identifiable from the instrument's language and (2) in existence and the time of the referencing document's creation. Here, the 1992 note is clearly identified by date and character (typed, signed), and was in existence when 1994 codicil was executed.

The facts indicate that the 1994 note was properly witnessed, indicating that it satisfied the requirements of a formally attested will. Even if it did not, it is handwritten and signed, so would be a valid holographic will. Typed documents may be incorporated by reference into a holographic will.

The wills clearly leave the $50,000 share of T's community property to H, who will take unless some legal presumption prevents him from doing so.

Separation is No Bar to H's Taking

After Molly executed her last codicil, H left her and joined a commune. Under California law, when a married couple divorces after execution of a will, neither takes under the other's will executed before divorce (each spouse's will is read as if the other had died), unless the will has been republished or the gift reaffirms through conduct.

Here, however, T & H have not divorced but have only separated. The divorce presumption will not apply unless T & H reached a legally binding property settlement. If they did so, H does not take under the will and the community property passes heirs through intestacy statutes – her children Molly (M) and Craig (C) will each take $25,000. If no settlement was reached H still stands to take all $50,000.

Pretermitted Child

M was born after the T executed all wills. Under California law, a pretermitted child (one born after execution of all wills and not provided for in wills by class gift) may take an intestate share of the parents' property.

In this case, Molly's intestate share would be a of the estate (including the painting) since there is one surviving spouse of T and two surviving children. Craig is not pretermitted since he was born prior to the execution of the last will – his omission is presumed to be intentional.

The pretermitted child presumption does not apply if there is evidence the testator allocated funds for the child in another way, such as a separate inter vivos gift, or if there is an older non-pretermitted child who is omitted, with the bulk of funds left to their children's parent. The latter situation is the case here – by omitting Craig from her will and leaving the bulk of her estate to H, T evidenced intent to allow H to provide for the children. Their separation

does not affect this presumption. The pretermitted child rule will not apply, and H will take the full $50,000.

2. H will take the Painting under the 1994 codicil

As discussed above, the 1994 codicil is valid and validly incorporates the 1992 note by reference. A codicil to a will will be read as consistent with the will wherever possible. Where inconsistent, the later document controls.

Here, the 1994 codicil's incorporation of the note giving the painting to H not S is inconsistent with the prior gift to S, so the later gift to H controls. Again (see above), H will take the painting despite the marital separation, unless H & T signed a valid property distribution agreement, in which case the divorce (see above for discussion) presumption will apply and H will take nothing under the will and the painting will pass through intestacy to M & C.

3. Life Insurance

Life insurance is will [sic] a named beneficiary does not pass through probate with the will. The named beneficiary will receive so long as the insurance policy is wholly separate property.

California is a community property state. Earnings during marriage are presumed community property (CP), while earnings outside of marriage, gifts, devices and inheritances are presumed separate property (SP). The character of any asset can be determined by tracing it to funds used to purchase it, unless a legal presumption or conduct ap plies to change characterization.

A marriage community ends upon separation with permanent intent (intent not to reunite). T & H separated in 1995 and H went to live in a commune – a court would likely regard this as intent to separate permanently which dissolved the comm unity.

A term life insurance policy buys the designated protection for a term of one year. Therefore a term policy is designated CP or SP by tracing to the most recent payment. T took the policy out in 1999, after the community dissolved. Assuming she used post-community earnings or other SP to pay for the policy, it will be SP and pass com pletelyto Larry.

Q2 Real Property

Able owned Whiteacre in fee simple absolute. Baker owned Blackacre, an adjacent property. In 1999, Able gave Baker a valid deed granting him an easement that gave him the right to cross Whiteacre on an established dirt road in order to reach a public highway. Baker did not record the deed. The dirt road crosses over Whiteacre and extends across Blackacre to Baker=s house. Both Baker=s house and the dirt road are plainly visible from Whiteacre.

In 2000, Able conveyed Whiteacre to Mary in fee simple absolute by a valid general warranty deed that contained all the typical covenants but did not mention Baker=s easement. Mary paid Able $15,000 for Whiteacre and recorded her deed.

Thereafter, Mary borrowed $10,000 from Bank and gave Bank a note secured by a deed of trust on Whiteacre naming Bank as beneficiary under the deed of trust. Bank conducted a title search but did not physically inspect Whiteacre. Bank recorded its deed of trust. Mary defaulted on the loan. In 2001, Bank lawfully foreclosed on Whiteacre and had it appraised. The appraiser determined that Whiteacre had a fair market value of $15,000 without Baker=s easement and a fair market value of $8,000 with Baker=s easement. Bank intends to sell Whiteacre and to sue Mary for the difference between the sale price and the loan balance.

The following statute is in force in this jurisdiction:

> Every conveyance or grant that is not recorded is void as against any subsequent good faith purchaser or beneficiary under a deed of trust who provides valuable consideration and whose interest is first duly recorded.

1. What interests, if any, does Baker have in Whiteacre? Discuss.

2. What interests, if any, does Bank have in Whiteacre? Discuss.

3. What claims, if any, may Mary assert against Able? Discuss.

Answer A

1. Baker's Interest in Whiteacre

Easement

An easement is an interest in land that grants someone a right to use the land of another. An easement can be created in a number of ways. One way an easement can be created is by express writing. Here, Able gave Baker a valid deed granting the easement for the right to cross Whiteacre to reach the public highway. Therefore, the easement was created at that time.

An easement will be perpetual in duration unless otherwise specified in the instrument creating it. Here, Able did not include any termination date for the easement. Therefore, the easement to Baker was to be perpetual in duration.

There are two types of easements: easements appurtenant and easements in gross. An easement appurtenant is one that involves two adjacent parcels of land where one piece of land is used to benefit the other. The benefited estate is called the dominant estate, while the burdened estate is called the servient estate. Here, Blackacre is the dominant estate and Whiteacre is the servient estate.

An easemen t, even though perpetual, can be terminated by the parties. A dominant estate can release the servient estate from the easement by writing. The writing would have to meet deed formalities to satisfy a valid release. The easement can also be abandoned. However, it cannot simply be an oral abandonment. The oral aban donment must be coupled with some action by the dominant estate showing that they are abandoning the

easement. The servient estate can also terminate the easement by prescription. Here, none of these actions of termination have occurred. So, at first glance, Baker's easement across Whiteacre should still be in existence.

Recordation

An interest in land can be protected by recodation. At common law, an interest in land was protected by the first in time, first in right doctrine. The problem with the doctrine was that it did not protect bona fide purchasers. Modern law has produced recording systems and recording statutes that spell out the protection afforded to those that record their interests. At common law, since Baker was first in time the easement, then his interest would be protected against subsequent purchasers. But, as we are told, there is a statute in this jurisdiction that controls.

An important concept in recordation is the concept of the bona fide purchaser ("BFP"). BFPs are granted special status in many recordation statutes. A bona fide purchaser is one who purchases for value and without notice of any other interests. There are three types of notice. Actual notice is, of course, characterized by the actual knowledge on the part of the purchaser of the previous interest. Constructive notice is that which comes about by there being a deed or interest recorded in the buyer's direct ch ain of title. Finally, there is inquiry notice. Inquiry notice comes about whenever an inspection of the property or title records would lead a reasonable purchaser to launch a further inquiry. Here, we are told that Baker did not record his deed granting the easement. Therefore, we know that Mary and Bank could not have had constructive notice of easement. However, we are also told that the easement road leading to Baker's house on Blackacre was plainly visible from Whiteacre. This visibility is enough to put a subsequent purchaser on inquiry notice. Therefore, Mary and Bank are not BFPs.

There are three types of recordation statues. There is a race statute which will protect the first person to record their deed or interest regardless of their status. There is a notice statute which will protect any bona fide purchaser who records against any subsequent purchaser who is also not a bona fide purchaser. There is also [a] race-notice statute which will protect a bona fide purchaser, but only if he is the first to record. Notice and race-notice statutes give protection only for BFPs; therefore, we know that if the statute in this jurisdiction is a notice or race-notice statute, then Mary and Bank will not be

protected against Baker's easement. Baker's easement, rather, will protected [sic] by the common law rule of first in time, first in right. The statute here a race statute [sic]. It will protect any good faith purchaser for value or beneficiary under a deed of trust as long as they recorded first. Here, we know that Mary was a good faith purchaser for value. We are also told that Mary recorded her deed. Therefore, the statute will protect her interest in Whiteacre and will make Baker's deed void as against Mary.

Necessity

An easement can arise by necessity. Necessity arises when one parcel of land is cut off from any viable road or passageway. If the land is cut off, an easement by necessity will arise across an adjacent piece of land for right of way to the highway or other means of travel. The servient estate has the right to place the easement anywhere on the property as long as it is reasonable. Here, if the voiding of Baker's deed of easement will cut off Blackacre from any public highway, then an easement of necessity will arise and he will still be able to cross Whiteacre. However, the holder of Whiteacre will be able to place the easement wherever they wish as long as it is reasonable.

2. Bank's Interest in Whiteacre

Deed of Trust

A deed of trust acts like a mortgage. The title is held by a trustee until such time as the loan is paid back and then title reverts back to the landowner. Because this acts like a mortgage, courts will treat it like a mortgage and will require the procedures of a mortgage. These procedures will include a judicial proceeding (foreclosure) before a sale of the property to satisfy the loan. The deed of trust will also be a recognized interest in property, as is the mortgage. Therefore, it can be recorded and protected like a mortgage.

BFPs

As stated earlier, we know that a BFP is a purchaser for value that takes without notice of a previous interest. Here, we are told that Bank does not make a physical inspection of Whiteacre before making the loan and taking their interest. If they had done so, as a reasonable party would have, then

they would have seen the dirt road leading to Bakers' house. Therefore, Bank was inquiry notice and is not a BFP.

Shelter Rule

Under the shelter rule, a subsequent purchaser can be sheltered under a BFP's protection. This means that if a jurisdiction has a statutory scheme that only protects BFPs, that there is still a loophole that will allow a non-BFP to get protection. The subsequent purchaser must take in a line descending from the BFP. If the subsequent purchaser takes from BFP, he can use the BFP's protection under the statute for himself. The purpose of the rule is protect [sic] the alienability of the property for the BFP. Here, we know that Mary is not a BFP. We also know that the statutory scheme does not require that one be a BFP. However, if we did have a notice or race-notice statute, then Bank would not be protected under the shelter rule because Mary is not a BFP.

Recordation

As stated above, one who holds an interest in land can protect that interest by recording it pursuant to the recording statutes of its jurisdiction. He re, we know that the recording statute applies to the beneficiary of deeds of trust. Here, Bank was the beneficiary of the deed of trust on Whiteacre. The statute requires valuable consideration be paid for the interest. Here, Bank loaned Mary $10,000 for its interest in the deed of trust. Bank also recorded its interest. When Bank recorded its interest, it made Baker's deed of easement void as to Bank's interest. Therefore, Bank has an interest superior to Baker's.

Foreclosure

Bank's deed of trust was secured by Mary's interest in Whiteacre. As stated before, the deed of trust acts like a mortgage so it will be treated as such by the courts. This will require a foreclosure proceeding. Once the proceeding has been established, Bank will be able to force the sale of Whiteacre to satisfy its claim. Because Baker's easement will be void as to Mary and Bank, there will be no deficiency against Mary.

3. Mary v. Able

Easement

An easement on a servient estate passes with the servient estate. Therefore, when Whiteacre passed from Able to Mary, Mary took subject to the easement. However, the recordation statute has saved Mary from this.

At common law, a seller of land did not have to disclose anything to the buyer. The buyer took at his own peril under the doctrine of caveat emptor. However, a general warranty deed did require disclosures.

General Warranty Deed

Able passed Whiteacre to Mary on a general warranty deed. A general warranty deed comes along with six covenants of title. There are three present covenants and three future covenants. The present covenants are the covenants of: seisin, right to convey, and against encumbrances. These present covenants are breached, if at all, at the time that title is passed. The future covenants are the covenants of: warranty, quiet enjoyment, and further assurances. The future covenants are breached, if at all, at some later time when another party makes a claim of paramount title.

Covenant Against Encumbrances

The covenant against encumbrances basically says that the title will be free of any encumbrances not previously disclosed by seller. Encumbrances include easements, restrictive covenants, and mortgages, among other things. Here, Able did not disclose the easement held by Baker. This was a breach of the covenant against encumbrances at the moment that title passed. Therefore, Mary can sue for this breach and can collect any damages that she suffered as a result.

Answer B

Baker's interest in Whiteacre:

Easements:

An easement in a non-possessory interest in land that allows the easement holder to use the property of the true owner. Baker's easement can be described as an easement appurtenant. Whiteacre is the servient estate. Blackacre is the dominant estate. As the holder of the easement appurtenant, Baker can use the road over Whiteacre to travel from Blackacre to the public highway.

Unless they qualify as easements by necessity or by prescription, easements must be in writing to be valid, and must satisfy the statute of frauds. Here, Able granted Baker a valid deed, which will satisfy the writing requirements. Therefore, it appears that Baker has a valid express easement to use the road over Whiteacre for access to the public highway.

Addition ally, easements are presumptively perpetual. They are terminated by the terms of the instrument themselves, by express writing, by abandonment, by condemnation of the servient estate, or by merger of the servient and dominant estate. None of those things appear to have occurred here, so Baker's easement has not been terminated.

Failure to record:

Although Baker appears to have a valid easement, his failure to record may affect his rights here. Recording statutes, such as the one in this jurisdiction, are primarily for the purpose of protecting subsequent BFPs. They do not effect the validity of land transfers themselves. Thus, despite his failure to record, Baker had a valid easement when Able conveyed the deed to him, assuming it was properly delivered and accepted.

Mary as a BFP

The next issue is whether Baker's easement fails against a challenge by Mary, because she purchased the dominant estate, Whiteacre, after Baker did not record his deed to the easement. There is a recording statute in this jurisdiction. The recording statute can best be described as a race-notice

statute. This means that in order to be protected under the statute, the subsequent purchaser must take the property without notice and record their deed first. Because Mary recorded her deed, and Baker never recorded his, the race component of the race-notice statute has been satisfied, as Mary recorded first.

The issue then becomes whether or not Mary satisfies the requirement of being a subsequent good faith purchaser, which I will refer to a[s] BFP for short. A BFP is a purchaser who pays valuable consideration and who takes without no tice of the other interest in the property. Mary paid $15,000, so she did pay consideration.

Notice:

The main issue is whether Mary took without notice.

Subsequent purchasers are not good faith BFPs if they have either actual notice, constructive notice, or inquiry notice. Here, there are no facts that suggest that Mary in fact know about the easement, so we cannot simply conclude that she had actual notice. Constructive notice is the type of notice that comes from recording. Because Baker did not record his deed, Mary did not have constructive notice. Inquiry notice comes from physical inspection of the land. Here, the facts indicate that both Baker's house and the dirt road were plainly visible from Whiteacre. This indicates that upon inspection of Whiteacre, Mary could have discovered the easement and inquired about it before purchasing Whiteacre from Able. Thus, it can be said that Mary did indeed have inquiry notice. As such, Mary fails as a BFP, and cannot defeat Baker's interest in Whiteacre. Therefore, it appears that Baker's easement over Whiteacre is valid.

Bank:

Moreover, the race-notice statute also protects mortgagors, such as the Bank. The bank also satisfies the recording first component of the statute, but did not physically inspect the land before taking its security interest in it. Therefore, the Bank also had inquiry notice, and cannot simply defeat Baker's easment.

Bank's interests in Whiteacre

Bank v. Baker

The race-notice statute in this jurisdiction protects beneficiaries under a deed of trust. The bank is a beneficiary under a deed of trust, and therefore the bank is protected by the recording statute. As discussed above, the Bank satisfies the"race" component of the recording statute, as it recorded the deed of trust and Baker never recorded his easement, therefore the Bank recorded first.

Also as discussed above, the Bank did not inspect the land, but if it had it would have discovered the easement. Therefore, the Bank had inquiry notice of the easement and cannot defeat Baker's interest in Whiteacre.

Bank v. Mary

The Bank lent Mary $10,000. In exchange, the Bank received a note secured by a deed of trust in Whiteacre. In a title theory jurisdiction, this would have meant that Bank held title to Whiteacre at equity. In a lien theory jurisdiction, this would have meant that Bank simply had a lien on Whiteacre. In any case, when Mary defaulted on the loan, Bank had a right to foreclosure on the property. Mortgage law requires that a valid foreclosure sale takes place, and the facts state that the Bank lawfully foreclosed.

Following foreclosure, the Bank became the owner of Whiteacre. Thus, the Bank owns whatever interest in Whiteacre Mary owned, which means it owns Whiteacre in fee simple absolute, subject to Baker's easement.

The issue then is whether the Bank has a valid claim against Mary for the $2000 difference between the loan amount and the value the land has been appraised [at] first. Before the Bank can actually bring an action against Mary for the difference, it must sell Whiteacre. Only after it sells Whiteacre on the market can the Bank actually assert a deficiency judgment against Ma ry. Had the Bank had the property appraised before granting the security interest, the Bank likely would have discovered the easement and would have discovered that the land was not worth $10,000. For this reason, Mary will argue that the Bank assumed the risk of this deficiency.

Mary's claims against Able

Abel conveyed Whiteacre to Mary in fee simple absolute by a valid general warranty deed that contained all the typical covenants, but did not mention Baker's easement. Although land sale contracts contain implied warranty of marketable title, the land sale contract merges into the deed at closing, therefore Mary's only claims against Able must be based on the deed, and Mary must proceed under the principles of real property law. The issue here is what actions Mary has against Able based on the deed.

Deed covenants:

Warranty deeds contain present and future covenants. The present covenants can only be breached at the time of the conveyance, and are therefore not an issue here. However, the future covenants can be breached later. Here, at a time following the conveyance, Mary took a mortgage out on Whiteacre based on the value of the land without Baker's easement. This occurred after conveyance, and therefore Mary can bring an action against Able under the future covenants. The future covenants are for quiet enjoymen t, further assurances and warranty.

These covenants represent guarantees made by Able that Mary owns the land outright, free from encumbrances and from challenges to her ownership interests by third parties. Here, the bank is threatening to sue Mary for the $2000 deficiency between what she thought she owned and the value of Whiteacre with Baker's easement on it, as with the easement, the value of Whiteacre is insufficient to pay off the $10,000 mortgage. Mary can sue Able for the $2000 different [sic] under the future covenants, and she should prevail because Able failed to inform Mary about the easement and the easement was not mentioned in her deed. The facts regarding inquiry notice and Baker's failure to record are irrelevant here, as recording statutes do not affect the validity of the deed conveyances.

Q3 Professional Responsibility

Betty, a prominent real estate broker, asked her attorney friend, Alice, to represent her 18 year-old son, Todd, who was being prosecuted for possession of cocaine with intent to distribute. Betty told Alice that she wanted to get the matter resolved Aas quickly and quietly as possible.@ Betty also told Alice that she could make arrangements with a secure in-patient drug rehabilitation center to accept Todd and that she wanted Alice to recommend it to Todd. Although Alice had never handled a criminal case, she agreed to represent Todd and accepted a retainer from Betty.

Alice called her law school friend, Zelda, an experienced criminal lawyer. Zelda sent Alice copies of her standard discovery motions. Zelda and Alice then interviewed Todd. Alice introduced Zelda as her Aassociate.@ Todd denied possessing, selling, or even using drugs. Todd said he was Aset up@ by undercover officers. After Todd left the office, Zelda told Alice that if Todd=s story was true, the prosecution=s case was weak and there was a strong entrapment defense. Alice then told Zelda that she, Alice, could Atake it from here@ and gave her a check marked AConsultation Fee, Betty=s Case.@

Alice entered an appearance on Todd=s behalf and filed discovery motions, showing that she was the only defense counsel.

At a subsequent court appearance, the prosecutor offered to reduce the charge to simple felony possession and to agree to a period of probation on the condition that Todd undergo a one year period of in-patient drug rehabilitation. Alice asked Todd what he thought about this, and Todd responded: ALook, I=m innocent. Don=t I have any other choice?@ Alice, cognizant of Betty=s wish to get the matter resolved, told Todd she thought it was Todd=s best chance. Based on Alice=s advice, Todd accepted the prosecution=s offer, entered a guilty plea, and the sentence was imposed.

Has Alice violated any rules of professional responsibility? Discuss.

Answer A

Alice's Professional Responsibilities

Who does Alice represent?

Despite the fact that Betty, Alice's friend, requested that Alice represent her son in a "possession of cocaine with intent to distribute" matter, it should be noted that Alice's client in this situation is Todd. Todd is legally an adult, and it is Todd whom Alice has a professional relationship with – not Betty. Therefore, this could create potential conflicts for Alice.

Duty of Loyalty

An attorney owes his client a duty of loyalty. This duty arises in situations where the interests of a third party, the client or the attorney, might materially limit, or adversely affect the attorney's ability to effectively represent his client. When there is a possibility that this may occur at some point during the course of the representation, it is called a potential conflict of interest. When the conflict does in fact exist, it is called an actual conflict of interest.

In situation where this arises, under the ABA, an attorney should not undertake (or continue) representation unless (1) he reasonably believes the [sic] he can effectively represent his client despite the potential conflict of interest, or that an actual conflict of interest will not adversely affect his representation; (2) disclose the conflict to his client; (3) obtain the client's consent; and (4) the consent must be reasonable (in the opinion of an independent outside attorney). California has stricter requirements, requiring that the attorney obtain the client's consent in writing.

Betty's Involvement

Under the facts of this case, a potential conflict of interest exists. For starters, Betty is a friend of Alice's. This could affect Alice's judgment. However, if she reasonably believes that it would not, and meets the other requirements, this should be acceptable.

Second, Betty informed Alice that she "wanted to get the matter resolved "as quickly and quietly as possible'." This definitely creates a potential conflict of interest, since Alice does not know at this point what it is that Todd wants to do. She should have consulted with Todd, and informed him that his mother wanted to have the matter resolved quickly. Furthermore, she should have obtained his consent to continue with the representation.

Third, she is asking Alice to recommend to Todd to go to a drug rehabilitation center. As mentioned above, this also creates the potential for a conflict of interest, since she is unaware of what Todd wants at this point. Again, she should have disclosed this to him during their meeting, and obtained his written consent.

Lastly, Betty is paying Alice for her representation of Todd. This creates a potential conflict of interest, since a third party is paying for a client's legal fees. Alice should have informed Todd of this and obtained his consent. Furthermore, Alice must keep in mind that despite the fact that Betty is paying for Todd's legal fees, it is Todd who is her client. Alice should have also pointed this out to Betty at the time, so that all parties understand their relationship to another.

Actual Conflict of Interest

The duty to disclose to a client a conflict of interest and to obtain that client's consent is a continuing duty, and the duty of loyalty requirements must be met each time a conflict arises, before the attorney should continue representation. After consulting with Tod d, Alice sh ould have realized that an actual conflict on [sic] interest existed. Betty desired to have the matter resolved quickly. Todd, Alice's client, on the other hand insisted that he was "set up" and was innocent. The two interests are incompatible, since pleading innocent to such a charge would prolong the process of resolving the matter. Alice should have again disclosed her conflict of interest to Todd. Furthermore, Alice should have withdrawn from representation if she did not believe she could effectively

represent Todd or if she had failed to disclose the conflict and obtain his consent.

Todd's Guilty Plea

Alice's violation of her duty of loyalty to her client culminated in her advice that Todd accept the guilty plea. Clearly, Todd did not want to accept the plea, as he maintained his innocence. However, Alice, in attempting to comply with Betty's wishes, insisted that he accept it, info rming Todd that it was his "best chance." Her actions were unacceptable and violated her professional responsibilities to Todd as an attorney. She should be subject to discipline and Todd would have a good chance at success if he were to sue her for malpractice.

Duty of Competence

A lawyer also owes his client a duty of competence. This duty requires that the lawyer have the legal knowledge, the skills, the preparation, and thoroughness necessary for eff ective representation of his client. If a lawyer does not have experience in a certain field of law, he can still undertake representation if he can learn the necessary knowledge within a reasonable time that does not cause delay to the client, or if he associates with an attorney that does have such experience.

Here, the fact that Alice had never handled a criminal case before would not necessarily preclude her from taking the matter, if she reasonably believed she could prepare herself for effective representation, or if she associated herself with someone who had such experience. Here, Alice associated with Zelda, an experienced criminal lawyer. Zelda assisted Alice in interviewing Todd. However, Alice should have made clear to Todd that Zelda was there merely to assist, so as to not lead him to believe that he was forming the same attorney- client relationship with Zelda as he had with Alice. W hile obvio usly, an at torney- client relationship had been formed between Zelda and Todd, the parties should have been clear that Zelda's scope of representation was limited to assisting in preliminary matters.

While Alice did associate with Zelda for the interview with Todd, she may have breached her duty of competence to Todd when she told Zelda that she "could take it from here." There is nothing in the facts that suggest that [she] had taken the time to learn the appropriate law in order to effectively represent Todd. Rather, it appears that she made this decision to continue alone, only after Zelda

informed [her] that if Todd's story was true, the prosecution's case was weak and that he had a good entrapment defense. If such was the case, Alice should have continued to associate with Zelda throughout the trial, or should have taken the time to learn the necessary knowledge if she believed she could have done so in a timely matter. Instead, she entered an appearance on Todd's behalf, and filed motions suggesting she was the only defense counsel.

Duty to Maintain the Proper Scope of the Relationship

In an attorney-client relationship, a client is the one that makes the substantive decisions regarding, among other things, whether or not to plead guilty. The attorney is the one who makes the decisions regarding procedural matters, such as which witnesses to depose, etc.

Here, the decision of whether or not to plead guilty to the simple felony possession was Todd's. Alice breached her duties owned to him, when she encouraged him to take the plea. While it was true that it was Todd that made the final decision, this was not an informed decision, but rather Alice's will. Thus, she improperly made a decision as to a substantive issue of Todd's matter.

Duty to Render Competent Advice and to Pursue Matter Diligently

A lawyer also owes his client a duty to render competent legal advice. If she is unaware of the current state of the law, she should research it. Furthermore, a lawyer owes his client a duty to pursue the matter zealously and diligently.

Alice breached all of these duties she owed to Todd. First, she failed to give him competent legal advice. She informed him that pleading guilty to the charge was his "best choice" without really understanding criminal law, or considering his options. Instead, she based her decision on Betty's wishes to resolve the matter "quickly and quietly."

Furthermore, she did not pursue his matter zealously, but instead, pursued it according to Betty's wishes and not Todd's interests.

Duty of Confidentiality

A lawyer also owes his client a duty of confidentiality. This duty requires that an attorney not use or reveal anything relevant to representation of a client without his consent, regardless of whether or not the client asked him to keep it confidential, or whether the attorney believes it would be harmful to the client or cause him embarrassment.

While the facts do not necessarily suggest that Alice breached this duty, Alice should be careful that she not reveal anything relevant to Todd's representation to any other party (excluding her agents assisting her in representation) INCLUDING BETTY. It is likely that Betty would like to know the progress of Alice's representation, however, Alice cannot divulge this information since Todd, and not Betty, is her client.

Fiduciary Duties

A lawyer also owes her client certain fiduciary duties, relating to among things, the fees of representation. Under the ABA, an attorney's fees must be reasonable. A lawyer is allowed to split fees with another attorney as long as he obtains his client's consent, and the fee is proportional to the amount of work done. In California, an attorney's fees must not be unconscionable. Furthermore, the lawyer can split fees with another lawyer, [as] long as he obtains his client's written consent. Unlike under the ABA, there is no proportionality requirement and referral fees are acceptable as long as it does not increase the overall fee.

Here, Alice has paid Zelda a consultation fee for assisting her in interviewing Todd. Before paying Zelda, however, Alice should have gotten Todd's written consent. If she had done so, then the payment to Zelda would be appropriate under the ABA if it proportionately represents the amount of work Zelda did in the interview. In California, upon consent, such a payment is acceptable regardless of the amount of work Zelda did, as long as it does not increase the overall fee.

Duty to Communicate with the Client

A major theme running through all of Alice's breaches also constitutes a breach in it of itself – Alice failed to communicate with Todd. Alice failed to communicate with Todd her conflicts of interest, her inexperience in the field of criminal law, and the options he had at plea hearing.

Duties Owed to the Court and Third Parties

Alice not only breached some duties to Todd, but she also breached duties owed to the court and third parties. Alice was not candid with the court, when knowing [she] allowed Todd to submit a guilty plea which she knew did not represent Todd's wishes, but rather those of her own and Betty. Furthermore, she breached her duties of dignity to the profession, in that she allowed herself to continue representation despite the countless conflicts of interest and breaches on her part.

Answer B

Duty of Confidentiality

The duty of confidentiality arises any time a person seeks legal representation and discloses confidential info rmation in the cou rse of establishing an atto rney-client relationship. The duty of confidentiality extends to all communications between the attorney and her client, whether or not the client has asked that they be kept confidential or whether or not use of them will damage the client. The duty of confidentiality attaches when a client seeks legal representation, whether or not it attaches. The duty of confidentiality extends to any information obtained in representing a client –whether from the client or her agents or other parties.

The facts are silent as to whether Betty thought she was entering an at torney-client relationship with Alice when she sought representation for her son, Todd. Perhaps Betty's statements to Alice were made in confidence, friend-to-friend. If so, then Alice likely did not even owe a duty of confidentiality to Betty at all. However, if Betty was impliedly seeking legal counsel from Alice—either erroneously thinking that Alice 's relationship with Todd would extend to her, or seeking approval of her goals for the litigation as a separate attorney, then an attorney-client relationship attached. If it is the case that Betty was seeking legal representation for Alice or reasonably thought a relationship attached to her, then Betty's communications with Alice that she wanted the matter resolved "as quickly and quietly as possible" and that she wanted Alice to recommend an in-patient drug rehabilitation treatment program to Todd were confidential information that Alice could not use in any way in her representation of Todd.

If Alice violated her duty of confide ntiality to Betty, she is subject to discipline and civil liabil ity.

Duty of Loyalty: Potential Conflict

The greatest duty that an attorney owes her client is to act with great loyalty. An attorney's duty of loyalty to a client supercedes her duty to all other people. If an interest of another client, the attorney, or a third party stands in the way of this duty or threatens to materially limit the representation of a client, then an actual or potential conflict of int erest exists and the duty of loyalty is in danger of being compromised.

When Alice agreed to represent her friend Betty's son on criminal drug charges, she faced a potential conflict. First, Betty was seeking representation on behalf [of] her son, who was not at the meeting. Alice likely wanted to do a good job for her friend who was in a tight spot and she also likely felt that it was important to protect Betty's reputation as a prominent real estate broker in the area whose reputation likely matter[ed] to the success of her business. When approached by Betty, Alice should have realized that a potential conflict existed between her representation of her friend's son, Todd, and Betty both paying for the representation and attempting to direct the representation, as well as the feelings of loyalty that one feels toward a friend.

With the existence of this potential conflict, Alice should have determined whether she thought she could have provided Todd with effective representation, and whether or not Betty's payment for the services and influence as a friend and person seeking to direct litigation would materially limit her representation of Todd. Perhaps Alice could have provided adequate representation to Todd if she had explained to Betty that Todd would be the client and made each person's role in the litigation and representation clear. It seems that even if Alice tried to make Betty's limited role very clear, it would have been very difficult for Alice to honor Betty's wishes to get the matter resolved "as quickly and quietly as possibly" and to recommend an in-patient drug rehabilitation program and at the same time to reach a conclusion that would be the one that Todd wanted from the litigation. The potential conflict between the two parties is obvious. Alice likely should have realized that her effective representation of Todd would be materially limited by her friendship with Betty and Betty's payment for the services.

Even if Alice did reasonably believe that she could provide Todd with representation that would not be materially limited by Betty's influence, payment for the services, or friendship, Alice still breached the duty of loyalty. In addition to determining whether she believed she could provide Todd with adequate representation despite the existence of the potential conflict, Alice also should have (1) disclosed the actual or potential conflict to Todd, (2) received consent from Todd (in California, this consent should have been in writing), and (3) determined if such consent was reasonable.

Clearly, Alice did not disclose the potential conflict to Todd, nor did she receive consent – written or otherwise – from Todd. Even if Todd had consented, however, it is unclear whether such consent would have been reasonable. The reasonableness standard is whether or not a disinterested, independent attorney

would have counseled the client to consent to such representation. If it was impossible for Alice to keep Betty at bay (i.e. to keep her from interfering with Todd's representation), then the consent would not have been reasonable.

In sum, Alice violated her duty of loyalty to Todd by not dealing adequately with the pote ntial con flict that existed. Alice is sub ject to discipline and civil lia bility.

Duty of Loyalty: Actual Conflict

An attorney also has a duty to keep her guard up for evolving conflicts of interest that arise as representation continues. While it is clear that Alice should not have taken on Todd's representation without adequately disclosing and obtaining reasonable consent regarding the potential conflict between Betty and Todd, she should have handled the actual conf lict that arose later in the litigation differently.

When the prosecutor offered Todd one year of probation if he underwent a one-year period of in-patient drug rehabilitation, Alice should have realized that any recommendation she made to Todd about the program was an actual conflict. Alice was right to ask Todd what he thought about the program as an altern ative to not reducing the charges. However, Alice responded to Todd's uncertain inquiries about what he should do by honoring Betty's wishes. Alice compromised her duty to Todd, which should have come before any other duty to any other party concerned in the matter. She recommended a course of action to Todd that Alice knew Betty wanted: a quick, hassle-free resolution with an in-patient drug rehabilitation program.

When Alice realized the actual conflict existed, she should have reevaluated whether or not she could continue the representation of Todd. In the unlikely event that Alice thought she could still proceed with the representation of Todd, Alice should have disclosed the actual conflict that existed, sought consent from Todd (in writing in California), and proceeded only if she determined that consent was reasonable. It seems that few disinterested attorneys would find consent reasonable in this instance, as Todd's interests in his liberty and having a guilty plea entered on the record against him was materially adverse to his mother's interest in a speedy resolution and getting Todd into an in-patient drug treatment program.

Knowing that she likely could not provide Todd with adequate representation because of the conflict and because of confidential information she obtained

from Betty, Alice should have withdrawn, as continuing to represent him would violate ethical duties of loyalty and confidentiality owed to clients.

As discussed above, if Betty was seeking an attorney-client relationship with Alice when she sought representation for Todd (not knowing that the relationship would only extend to Todd), Betty disclosed confidential information that would make it impossible for Alice to provide adequate representation to Todd while ignoring Betty's wishes. By acting on the information that Betty provided to Alice, Alice breached her duty of loyalty to Todd, her duty of loyalty to Betty if a relationship attached, and her duty of confidentiality to Betty by acting on information she gave Alice rather than Todd's wishes.

In sum, Alice violated her duty of loyalty to Todd by not dealing adequately with the actual conflict that arose during the course of litigation. Alice is subject to discipline and civil liability.

Client Decides Substantive Rights/Counsel Decides Legal Strategy and Procedure

The duty of loyalty also provides that the client must make all decisions regarding substantive rights, including such decisions as whether or not to testify in criminal prosecution or whether to accept or reject a settlement offer. Alternatively, the attorney makes decisions regarding procedure or legal strategy. Alice in effect usurped Todd's ability to decide whether or not to accept the prosecutor's "settlement" offer for a plea bargain. While at first blush it seems that Alice did allow Todd to make the decision as to whether he should accept the plea agreement, she did not provide him with all of the necessary information he needed to make that choice. Alice did not disclose that she was giving him advice based on his mother's wishes, rather than what Alice thought was the best possible choice for him.

Thus, Alice breached her duty of loyalty to Todd by not allowing him to make an informed decision as to his substantive rights. Alice is subject to discipline and civil liabil ity.

Duty as a Fiduciary

An attorney owes her client a fiduciary duty to reach all agreements clearly and quickly. In California, the agreement must also be in writing, disclose how the fee is calculated, what services are covered, and the rights and obligations of the

client and attorney. In addition, fee splitting is generally disfavored under the Model Rules. In order to engage in fee splitting with another attorney under the Model Rules, (1) the fee must be reasonable, (2) the client must consent, and (3) the fee splitting must be proportional to the work done. In California, fee splitting is appropriate between attorneys where (1) the fee is not unconscionable, (2) the fee arrangement is disclosed in writing, (3) the client consents in writing, and (4) the fee is not increased in order to cover the split. In addition, California does not require a proportionality principle.

Under both standards, Alice's paying of Zelda with the check marked "Consultation Fee, Betty's Case" was improper. While it may have been reasonable, neither Betty nor Todd consented and the fee was not proportional to the work done because Zelda did no more than sit in on one meeting with Todd. Under California law, the fee was likely not unconscionable (the facts are silent here) and it is not certain from the facts whether the overall fee was increased in order to cover the split. However, it is fatal that the fee split was not disclosed in writing to Todd or Betty and no consent in writing from either was obtained.

Thus the fee splitting with Zelda was improper. Alice is subject to discipline and civil liabil ity.

Duty of Competence

An attorney owes a duty of competence to act as a reasonable lawyer would with respect to the skill, preparation, and thoroughness required for adequate representation. This duty includes not taking on a case where the attorney is not knowledgeable in an area unless she will be able to seek help from an attorney with experience in the area without undue delay, burden or financial harm to the client. Alice had no idea how to handle a criminal case, much less on[e] that involved a serious drug felo ny. Alice did not disclose to Betty when she (Betty) sought Alice's representation for Todd that she had no criminal experience. It certainly would have been prudent to disclose her inexperience in this area to Betty at the time she accepted the representation. It may have been more prudent to recommend an attorney (i.e. make an appropriate referral, perhaps to Zelda who was familiar with such matters or alternatively to the State Bar so that they could suggest an alternate attorney) so that Todd could have counsel experienced in the area of criminal law, particularly serious drug charges.

While Alice was prudent in seeking help from Zelda, she only sought her help with respect to the first interview with Todd. Zelda only informed Alice that "if Todd's story was true" the prosecution had a weak case. However, Alice did not use Zelda to further inquire what kind of situation Todd would face if his story was not true. Zelda did not have the adequate knowledge to handle such a case. While consulting Zelda was proper, she should have sought more help from her in representing Todd, and she should not have shown herself as the only defense counsel on the case. In addition, she should have disclosed to Todd and Betty that she would need to employ Zelda's help to get familiar enough to take the case and obtained their consent to using Zelda (in California, in writing).

Alice is subject to discipline and civil liability for her breach of the duty of competence to Todd.

Diligence

Finally, Alice has the duty to zealously pursue [the] case to completion for client's best interests. She did not do this when she breached her duty of loyalty to Todd by honoring Betty's wishes over his. She did not use diligence is [sic] advocating zealously for what was best for her client. When she knew that Todd was unsure about what to do when the prosecution offered a plea bargain and when he insisted on his innocence, Alice should have zealously pursued whatever cause or goal Tood wanted rather than what Betty wanted.

Alice is subject to discipline and potential civil liability for breach of her duty to treat Todd's case with due diligence.

Duty to Communicate

Alice also has a duty to communicate with her client, keeping them abreast of the developments in his or her case. Alice should have kept in constant communication with Todd both inside and out of court about Zelda's involvement or lack thereof in the case, the actual conflict that emerged, and her inability to advise Todd adequately about the plea agreement.

Duty of Candor/Truthfulness, Fairness, and Dignity/Decorum

Alice owes a duty of candor and truthfulness to all third parties and to the court and her adversaries to st ate the law truthfully and pursue her representation of

clients with honesty and integrity. When the actual conflict between Betty and Todd arose during Alice's representation of Todd, she should have sought withdrawal of her representation of Todd from the court. In addition to being honest with her client and notifying him of the actual conflict that existed, Alice also should have been up front with the court and the prosecutor that she was unable to properly and adequately advise her client on the option of the plea agreement in exchange for one-year probation that included a year-long in-patient drug rehabilitation program.

Q4 Contracts

Travelco ran a promotional advertisement which included a contest, promising to fly the contest winner to Scotland for a one-week vacation. Travelco=s advertisement stated: AThe winner=s name will be picked at random from the telephone book for this trip to >Golfer=s Heaven.= If you=re in the book, you will be eligible for this dream vacation!@

After reading Travelco=s advertisement, Polly had the telephone company change her unlisted number to a listed one just in time for it to appear in the telephone book that Travelco used to select the winner. Luckily for Polly, her name was picked, and Travelco notified her. That night Polly celebrated her good fortune by buying and drinking an expensive bottle of champagne.

The next day Polly bought new luggage and costly new golfing clothes for the trip. When her boss refused to give her a week=s unpaid leave so she could take the trip, she quit, thinking that she could look for a new job when she returned from Scotland.

After it was too late for Polly to retract her job resignation, Travelco advised her that it was no longer financially able to award the free trip that it had promised.

Polly sues for breach of contract and seeks to recover damages for the following: (1) cost of listing her telephone number; (2) the champagne; (3) the luggage and clothing; (4) loss of her job; and (5) the value of the trip to Scotland.

1. What defenses should Travelco assert on the merits of Polly=s breach of contract claim, and what is the likely outcome? Discuss.

2. Which items of damages, if any, is Polly likely to recover? Discuss.

Answer A

1. What defenses should Travelco assert on the merits of P's breach of contract claim, and what is the likely outcome?

First, Travelco should defend on the grounds that no valid contract was formed.

Formation – Offer, acceptance, consideration.

First, Travelco ("T") will argue that the promotional ad was not an offer at all. Usually, ads are a mere invitation to deal; an offer requires, on the other hand, a manifestation of an intent to commit, communication, and definite terms—ads don't usually show an intent to commit. However, this ad could be construed as an offer to enter into a unilateral contract ("K")—it is like a "first come, first served" ad—where even if the offeree is not named, there can still be a binding offer; here, the language you will be eligible if you're in the book expresses enough intent to be bound for the ad to constitute an offer.

Next, T should argue that even if they made an offer, offers are generally revocable until accepted and that T validly revoked. Offers are revocable before acceptance unless supported by consideration; also, in a unilateral K, which is an offer that can only be accepted by performance, once performance is begun the offer is to be held open for a reasonable time. T's argument here will probably fail, because T notified Polly ("P") before revoking the offer, so P probably had already accepted.

Consideration

T should argue that there was no contract because there was no consideration. Contracts require some mutuality of obligation, a bargained for exchange, to be enforceable. Some courts require a bargained for legal detriment, and others allow a bargained for benefit. T will argue that the ad was a gratuitous promise, and that P cannot enforce against T because P was not mutually bound—P did not give up anything. P may argue that getting listed in the phone book was consideration, but this is not a good argument because that did not confer any benefit on Travelco (unless Travelco owns the phone book company…). In fact, there is no consideration supporting this agreement because P is not bound to do or give up anything.

Promissory Estoppel/Detrimental Reliance

If T defends on the grounds of no enforceable contract, T will have to defend against P's claim of detrimental reliance. Even when an agreement also lacks consideration, it may still be enforceable if P foreseeable and reasonably detrimentally relied on the agreement. Here, P did detrimentally rely — she spent money by buying new luggage and clothes, and quitting her job, after being notified by T she had won.

T will argue that P's reliance was unforeseeable and unreasonable. However, things like buying luggage and clothes, for a vacation you have won, is reasonable, and T should have foreseen P's change in position in reliance on T's notification she had won the trip.

T will correctly argue that P's quitting her job was not foreseeable (see below); but because the luggage, clothes, champagne were foreseeable, P can enforce the contracts, and T will raise this in the damages phase.

Statute of Frauds

The facts don't indicate whether the contract was in writing; but regardless, SOF is not a good defense to formation because this agreement, (not for the sale of goods, can be performed within one year…) is not required to be in writing. Also, P's reliance would wipe out this defense.

Impossibility

T will argue that they are excused from performance by impossibility. This is judged from an objective standard, and applies when because of unforeseen events judged at formation, there is truly no way at all that T could perform. T is nolonger financially able to perform. However, mere difficulty in paying is unlikely to rise to the level of impossibility so this defense is unlikely to work.

Impracticability

This defense applies where circumstances unforeseeable at formation would cause T severe economic hardship if T had to perform. Here, there is no indication how severe the hardship would be to T; also, the short time between the ad and breach make it look like T should have forese en finan cial diff iculty.

Frustration of Purpose

This applies where changed circumstances unforeseeable at formation completely wipe out the purpose, known to both parties, of the contract. This defense will not work for T, because P still wants a trip; it has merely become financially diff icult/impossible for T to pay.

Mistake

T may try to argue their unilateral mistake in their solvency should void the contract. However, unilateral mistake is not a good defense unless P knew of T's mistake, where here, P did not.

Good Faith

Because it appears that T's breach may be in bad faith—that they placed the ad to drum up business, never expecting to award the trip—they may have to defend on good faith—this will not relieve them of their underlying of obligations, however.

Therefore, T is liable because their K became enforceable on P's foreseeable detrimental reliance; or because there was a valid unilateral contract supported by P's putting her name in the telephone book.

2. Damages

Generally, for breach of K, P will be entitled to her expectancy—the benefit of the bargain—plus any consequentials not unduly speculative reasonably foreseeable to T. Punitive damages are generally disallowed in breach of K.

(2) The cost of listing her phone number:

This took place before any K was formed, and may even be viewed as P's consideration for the deal. There was no K until P actually won the trip, so she won't collect this.

(3) The champagne:

P will argue that the cost of the champagne is recoverable as a consequential—it was not part of the K, but it was foreseeable that some one would buy champagne after winning—basically, she will argue reliance damages.

T will argue that buying costly champagne was unforeseeable, thus not recoverable.

P will recover if the court takes a reliance view, but possibly not on a benefit-of-the bargain view.

Probably she will recover because champagne is foreseeable.

(4) Luggage and Clothing

P and T will make the same argum ents as ab ove; the lu ggage was pro bably a foreseeable consequential, but the clothes may not have been, if they were too "costly".

(5) Loss of her Job

T will not be liable for the loss of P's job, because under either a reliance or expectancy theory, it was unreasonable and unforeseeable that P would quit her job just to take a vacation. Also, P would have a duty to mitigate, by searching for comparable employment, which she probably will be able to find, since she thought she could look for a new job when she returned.

(6) Value of Trip

If the court takes a pu re reliance approach, based on promissory estoppel, P will not be awarded the cost of the trip.

But under the standard breech of K expectancy, which is the standard measure of K damages, P is entitled to what she would have gotten absent T's breach, which is the value of the trip.

Note that restitutionary damages are not available, because T has not been unjustly enriched.

Answer B

TRAVELCO'S DEFENSES

No Valid Contract was Formed: Lack of Consideration, Promissory Estoppel

The first defense that Travelco will assert is that there is no valid contract for them to breach. The issue is whether there was consideration for Travelco's promised prize. For a valid contract to form, there must be a bargained for exchange. The court will not look into the sufficiency of the consideration, whether it was a fair exchange, only if there was some legal detriment exchanged by the parties. Here, Travelco will assert that they made a gratuitous promise to award a travel prize at random to someone listed in the phone book. The winner did not have to give anything in exchange for the promise, therefore there was no consideration given by the winner for the promised prize. Without consideration, Travelco will assert that there was not valid contract, and therefore they could not be in breach of the contract.

Polly will respond with two arguments. First, she will try to assert that being listed in the phone book was the consideration required. The Trave lco prize stated that a person must be listed in the phone book to be eligible. Polly took the step of changing her unlisted number to a listed one in order to qualify for the contest. While this is not a significant legal detriment on Polly's part, she was not required to list her number, and therefore it would qualify as consideration. As mentioned, the court will not examine the amount of consideration. Travelco will respond that there was no bargained for exchange because the advertisement was not asking for persons to be listed in the phone book in exchange for the prize. Had the advertisement been run by the phone company, the situation may be characterized as an exchange. However, here the advertisement was run by what appears to be a travel agency. Therefore, it appears that Travelco has the better argument, and there was no bargained for exchange. Without the exchange, lack of consideration means that no valid contract was formed unless there is a consideration substitute.

Polly's second argument is that even though there was no consideration for the promise, she can claim contract rights by promissory estoppel. Here, the issue is whether Polly detrimentally relied on Travelco's promise to award a trip in a reasonable matter that would make it unjust for Travelco not to honor their promise. Polly can assert that she detrimentally relied on the promise in several ways. First, she listed her number in the phone book. Polly will claim that

changing her number from unlisted to listed was a detrimental reliance. The detriment is that she will now be more likely to receive unwanted phone calls. Her second claim is that purchase of champagne. Her reliance will be the cost of the champagne. Third, she purchased golf clothes and luggage. Again, the lost purchase price is her reliance. Finally, she quit her job. Clearly this is a detrimental reliance.

Travelco will respond that the changing of the phone number is not sufficient because it was done before the awarding of the prize, not in response to it. And even if it was in response to their ad it was not a foreseeable result of running the ad and it is not a sufficient detriment to require equity to award a week long trip. They will assert the same argument concerning the bottle of champagne, clothes, luggage and quitting the job: not a foreseeable response, and/or it is not sufficient to warrant requiring that they comply with their promise.

The court should find that there was sufficient foreseeable detrimental reliance to warrant enforcement of the promise by promissory estoppel. While Travelco may be right concerning the listing of the phone number, the actions taken by Polly after the prize was awarded are sufficient. It is clearly foreseeable that someone would celebrate winning a prize as well as purchase clothing and luggage for the trip. Whether this is sufficient to warrant equitable enforcement of the promise depends on the cost of the trip and the price of the purchased items. It appears to be sufficient. The quitting of the job will not be considered because it is not a foreseeable response to winning a 1 week trip. However, given Polly's other actions, the promise should be enforced by promissory estoppel.

Impossibility

Travelco's next defense will be that they no longer able to perform their promise because they are not financially able to do so. Whether this excuse will be accepted depends on whether there is true impossibility, or if it is simply financially difficult. If in fact Travelco has gone broke or will be forced into bankruptcy in awarding the trip, they may be excused. However, this seems unlikely, and the court will probably reject this claim.

POLLY'S DAMAGES RECOVERY

The purpose of damages is to put the plain tiff in the positi on they would have been in had the other party not breached. Damages include the compensatory,

as well as incidental and consequential damages. Consequential damages must be foreseeable by the party at the time the contract was fo rmed. Punitive damages are not typically awarded in contract cases unless the breach can be characterized as a tort (e.g. fraud or misrepresentation) and then punitive damages may be appropriate if the breach was intentional.

Phone Listing

Polly wishes to claim the cost of listing her number in the phone book. The question is whether this cost is something that Polly would have had to bear had Travelco performed as promised, because listing her number was not in response to the promised prize, but was instead a cost that Polly had to incur to be eligible, she should not recover this cost. If the court awards this cost, Travelco will argue that this is a cost Polly would have borne, and should not be recovered if she is awarded the value of the trip. (See below).

Champagne

Here, the question is whether that purchase of an expensive bottle of champagne is a foreseeable respond to the awarding of the prize. It appears to be a reasonable response, since it could be expected that a person would celebrate. Therefore, Polly should recover this cost. Travelco will argue that this is a cost Polly would have borne, and should not be recovered if she is awarded the value of the trip. (See below).

Luggage, Clothing

As with the champagne, this is a foreseeable cost that would be incurred in response to the awarding of the prize, and therefore will be recovered as a consequential damage. Travelco will argue that this is a cost Polly would have borne, and should not be recovered if she is awarded the value of trip. (See below).

Loss of Job

Travelco will argue that this is not reasonable cost in response to the awarding of a 1 week vacation. They will claim that at the time they awarded the prize, they could not have foreseen that someone would quit their job to take a one week vacation. Polly will respond that it is a foreseeable response, and therefore she should recover as a consequential damage. The court is likely to agree with

Travelco, that this is not a foreseeable result of the promise of the vacation. Therefore, Polly should not be able to recover damages for the loss of her job.

The Price of the Vacation

Here, Polly will argue that she should be awarded the cost of the promised vacation. This is the purpose of compensato ry damages, to put Po lly in the position she would have been in had Travelco not breached. The court will therefore award Polly the value of the vacation. Because money damages are sufficient in this case, and there is no indication that Polly sought specific performance anyway, the court will not force Travelco to actually award the trip.

Travelco will try to argue that because Polly is being awarded the value of the trip, she should not be awarded damages for the phone, champagne, clothes, or luggage. To award these damages and the trip would put Polly in a better position than she would have been had Travelco performed. Had Travelco awarded the trip as promised, the cost of these items would have been borne by Polly, not Travelco. Therefore, Polly should either be able to recover the value of the trip and not these other damages, or alternatively, Polly should recover these damages and not the trip. The latter solution would put Polly in the position she would have been in before the promise was made (except for the job, which is not recoverable because it was not reasonable or foreseeable).

The court should find Travelco's argument persuasive. Therefore it will award Polly only the value of the trip, or alternatively, it will award Polly damages for the champagne, luggage, clothing, and possibly the pho ne listing.

Q5 Torts

Manufacturer (Mfr.) advertised prescription allergy pills produced by it as Athe modern, safe means of controlling allergy symptoms.@ Although Mfr. knew there was a remote risk of permanent loss of eyesight associated with use of the pills, Mfr. did not issue any warnings. Sally saw the advertisement and asked her Doc (Doc) to prescribe the pills for her, which he did.

As a result of taking the pills, Sally suffered a substantial loss of eyesight, and a potential for a complete loss of eyesight. Sally had not been warned of these risks, and would not have taken the pills if she had been so warned. Doc says he knew of the risk of eyesight loss from taking the pills but prescribed them anyway because Athis pill is the best-known method of controlling allergy symptoms.@

Bud, Sally=s brother, informed Sally that he would donate the cornea of one of his eyes to her. Bud had excellent eyesight and was a compatible donor for Sally. This donation probably would have restored excellent eyesight to one of Sally=s eyes with minimal risk to her. The expenses associated with the donation and transplantation would have been paid by Sally=s medical insurance company. Sally, however, was fearful of undergoing surgery and refused to have it done. Thereafter, Sally completely lost eyesight in both of her eyes.

Sally filed a products liability suit against Mfr. seeking to recover damages for loss of her eyesight. She also filed a suit for damages against Doc for negligence in prescribing the pills.

What must Sally prove to make a prima facie case in each suit, what defenses might Mfr. and Doc each raise, and what is the likely outcome of each suit? Discuss.

Answer A

Sally will bring products liability actions against Mf r. based on strict lia bility, negligence, intentional torts and warranty theories.

Strict Products Liability

A strict products liability prima facie case requires a manufacturer or (dealer) of the goods, an unreasonably dangerous product that could have been made safer with adequate warning, a foreseeable user of the product and a foreseeable use of the product that results in injury.

Mfr. is the manufacturer of the prescription allergy pills. The pills were rendered unreasonably dangerous by Mfr's failure to include a warranty that there was a remote risk of permanent loss of eyesight associated with the use. Sally was a foreseeable user because she was an allergy sufferer who read the Mfr's advertisement. Sally was injured because she suffered a substantial loss of eyesight as a result of using the pills, with eventual, total loss of eyesight.

Mfr's Defenses

Mfr. will first assert that the allergy pills are available by prescription only and they had informed doctors of the remote risk (Doc here was aware of the risk), and they were entitled to rely on Doc as a learned intermediary that would adequately warn patients as part of his prescription analysis and treatment.

This will not succeed as Mfr. directly advertised the availability of the allergy pills as "the modern, saf e means of controlling allergy symptoms" directly to Sally. Sally relied on the advertisement in requesting Doc to prescribe the pills.

Next Mfr. will assert Sally assumed the risk by taking the prescription pills. This will surely fail. Sally was not aware of the risk, much less willing to take it.

Finally, Mfr. will assert Sally had a duty to mitigate her damages. If a person unreasonably fails to seek medical care that could prevent or lessen damages, the defendant will not be liable for that preventable danger.

Here Sally had the opportunity to undergo surgery to replace a cornea. Her brother Bud was a willing and compatible donor and the surgery would likely

have been a complete success. Additionally, Sally's insurance would have paid all expenses.

Because Sally was fearful she was unwilling to undergo the surgery. The issue is whether Sally was reasonable in that fear and whether Mfr. should be liable for her resulting complete loss of eyesight.

Normally a defendant is liable for all a plaintiff's injuries caused by the defendant even if the extent is more serious than expected. It is likely though that a jury would find Sally unreasonable under the circumstances here because of the low risk, the likelihood of success and the full coverage by insurance. Mfr. will be liable for some damages for Sally's loss of eyesight but not for permanent and total loss.

Mfr. Negligence Products Liability

Sally must establish Mfr. owed her a duty of care, that they breached that duty and the breach is the actual and legal cause of her damages.

Duty

Mfr. owes a duty of care to all foreseeable users of its product. All allergy sufferers are fo reseeable users; Sally is owed a duty.

Standard of Care

Mfr. owes Sally a standard of care of the reasonably prudent manufacturer of prescription drugs.

Breach

Mfr. breached its duty to Sally by failing to provide a warning with the allergy pills Mfr. was aware of a remote possibility of risk of permanent loss. The burden of providing a warning is minor compared with the magnitude of potential harm. Mfr.'s failure to provide this warning was a duty breach and resulted in Sally's injury.

Actual Cause

The facts state that the allergy pills were a direct cause of Sally's loss of eyesight.

Legal/Prox Cause

It is foreseeable that a failure to include a warning could result in injury. Sally is entitled to rely on the presumption that she would have heeded the warning had she been informed.

Damages

Sally suffered permanent total loss of eyesight in both eyes.

Defenses

In addition to those described above under strict liability, Mfr. will assert contributory negligence. They will assert that Sally failed to use a reasonable standard of care to prevent injury to herself. This defense will not succeed. Sally was not aware of the risk of danger and this defense is not successful if her only negligence is in failing to discover the defect, here the lack of warning.

Intentional Tort Battery

Sally will assert that Mfr. acted to cause a harmful or offensive contact.

Mfr.'s act was intentional in that they knew with substantial certainty that there was a remote risk of eye damage. They intentionally did not include a warning. The harmful or offensive contact was Sally's loss of eyesight.

Damages as discussed above.

Mfr. will assert the defense of consent. Sally will argue Mfr. exceeded the scope of her consent by failing to include the warning that eye damage could result.

Because Mfr. knew of the risk and intentionally failed to warn Sally may prevail here as well.

Additionally Sally will assert warranty theories.

Express Warranty

Mfr. advertised “modern safe means of controlling allergy symptoms.” No disclaimers are given in the facts, but disclaimers not valid as to express warranties anyway.

Sally will be entitled to recover here as well.

Implied Warranty of Merchantability

Implied in all sales of goods is the warranty by a merchant seller – here Mfr. – that the goods conform to reasonable standards of the use for which they are designed. While remedies could be limited here, they couldn’t be eliminated and disclaimers are deemed unconscionable when personal injury results.

Implied Warranty of Fitness for Particular Purpose

Sally may bring this action against Mfr. or Doc or both. Sally was seeking relief from allergy symptoms. While there is no evidence she did get relief for allergy, it isn’t reasonable that the loss of eyesight accompanies such relief. Sally will seek damages from Doc for negligence in prescribing the pills. Sally must show duty, breach, causation and damages.

Doc’s Duty to Care and Standard of Care

Doc owes Sally the duty of a member of good standing practicing medicine in a similar area. It is minimally the duty of a reasonably prudent professional. If Doc is an allergy specialist he will be held to a higher standard.

Sally is owed a duty as a reasonably foreseeable plaintiff. As Doc’s patient, Sally is clearly owed a duty.

Breach

Doc breached his duty to Sally by failing to give her informed consent about the allergy pills he was prescribing.

The standard of breach here is judged two ways:

1) What a reasonable person would have wanted to know about the risk;

2) What Sally would have wanted to know.

Causation

If a reasonable person wouldn't ha ve consented or Sally wouldn't have consented if the risks were known and if the risks did in fact occur, Doc's breach was the act ual and prox cause of injury.

Sally said she had not been warned and would not have consented to take the pills if she had known of the risk. Perhaps Sally had a[n] unusually high sensitivity to concern over eyesight. It doesn't really matter why she wouldn't have consented.

The lack of warning was the actual cause and prox cause of breach.

Damages are discussed above.

Doc will raise same defenses as above.

Doc and Mfr. will each seek contribution on the negligence claims.

Answer B

Sally v. MFR – Strict Products Liability

Sally may assert a claim of strict products liability against manufacturer. Manufacturers are held strictly liable for products they put into the market in a defective condition creating an unreasonable risk of injury or danger to the consumer. In this case, Sally has the burden of showing that the allergy medication produced by Manufacturer (Mfr) were [sic] defective when it left Mfr's control and the defect created an unreasonable risk of danger or injury to the consumer.

Failure to Warn

A product may be properly deemed "defective" for the purpose of strict liability if the manufacturer fails to place proper warnings on the product. If consumer warnings may be affixed to the product at relatively low cost to the manufacturer, it may be held liable on a products liability for failure to do so.

Here, Mfr will assert that its medication presented a remote risk of permanent eyesight. Inherent in almost all medication is the risk of some sort of unwanted side effect. Mfr will claim that the "remote" nature of the risk means that the product did not pose an unreasonable risk of danger or injury. However, the degree of harm that may be incurred by takers of Mfr's allergy medication is significant. Permanent blindness is a serious debilitating condition. As such even a remote risk may be something a reasonable person may not be willing to assume. As such, it is likely the court will find that the allergy medication produced by Mfr posed an unreasonable risk of danger or injury due to the fact that Mfr failed to place in warnings in its advertisements or on its packaging. Although the facts do not indicate the cost involved in making such warnings, it is unlikely that a label on a package or a statement in advertising is so cost prohibitive to warrant excuse from its duty to warn. As such, Sally will be able to prove that the allergy medication produced by Mfr is defective for failure to make adequate warnings.

Duty

As mentioned above, Mfr had a duty to warn of the damages inherent in its product.

It breached that duty when it failed to make such warnings. In order to recover, Sally must show that she is a foreseeable plaintiff to whom that duty was owed.

Under the majority test, a plaintiff is foreseeable if she is in the "zone of danger" created by defendant's conduct. Here, any person who received a prescription for the allergy medication produced by Mfr was within the zone of danger created by the risk involved in taking the pills. As such, Sally is a foreseeable plaintiff within the zone of danger under the majority approach.

A minority of jurisdictions follow the Andrews approach which holds that all plaintiffs are "foreseeable." As such, Sally would be a foreseeable plaintiff under this approach as well.

Causation

Once Sally has shown that the allergy medication was defective when it left the control of Mfr and Mfr breached a duty owed to her, she must then establish that the defect was the actual and proximate cause of her injuries.

Actual Cause – But for Test

Sally should ha ve no problem proving the defect caused by failing to adequately warn caused her injury. The facts state that Sally would never have taken the pills if she had been warned of the possible side effect of blindness. Therefore, but for Mfr's failure to warn, Sally would not have ingested the pills and subsequently lost her eyesight.

Proximate Cause – Foreseeability Test

Even though Mfr is the "but for" cause of Sally's injury, Sally must also prove that her injury was foreseeable. Here, Mfr was well aware of the risk presented by its allergy medication. Mfr should have been aware of the fact that its failure to warn would cause users of the medication to unwittingly subject themselves to the risk and some of them would in turn suffer blindness. Here, Sally actively sought a prescription for the pills. There was no warning in the advertisements nor on the package and therefore Sally took the medication unaware of its incumbent risks. As a result, Sally lost her sight. Her injuries were foreseeable and therefore proximately caused by Mfr's breach of duty in failing to warn.

Mfr may assert that Doc's failure to inform Sally of the risks involved in the use of the medication was a supervening factor operating to relieve it of liability. A supervening factor is one that is unforeseeable and extraordinary. It is well established that ordinary negligence in the world is foreseeable and not extraordinary. Consequently, Doc's failure to warn is not a supervening factor because his conduct amounts to negligence and is not so extraordinary or unforeseeable as to amount to a supervening factor. As such, Mfr's conduct survives proximate cause analysis.

Damages

Lastly, Sally must prove that Mfr's failure to warn resulted in damages to her. As mentioned, Sally went blind and so damages are easily established.

Sally v. Mfr – Products Liability – Negligence

In the alternative to strict products liability, Sally may also pursue under a negligence theory. The analysis would be the same as for products liability; however, Sally's burden with respect to breach of duty would be different. In pursuing a negligence claim, Sally must show that Mfr was negligent in its production of the allergy medication or failure to include a warning. In other words, Sally must show that Mfr could have taken reasonable steps to prevent the harm caused. Once shown, the analysis would proceed for causation and damages as stated above. Here the facts support equally a theory of negligence and strict liability. Because strict liability is an easier approach to pursue, Sally will likely proceed under this theory.

Breach of Warranty

Express Warranty

Sally may also assert that Mfr breached an express warranty made in its advertisement claims that the allergy medication was the "modern, safe means of controlling allergy symptoms." Sally may assert that the risk imposed means that the medication is not in fact "safe," and therefore Mfr's representations otherwise are unfounded.

Misrepresentation

In addition, Sally may assert that Mfr engaged in intentional misrepresentation. Sally will claim that Mfr's omission with regarding to the risks amounts to a misrepresentation of safety with knowledge of the falsity of the communication. In addition, Sally will claim such communication was made with the intent that consumers rely. Sally, as a consumer, relied on the representation of product safety and was injured. As such, she can proceed under this claim as well.

Defenses

Contributory Negligence and Comparative Fault are NO DEFENSE to Strict Liability and Intentional Misrepresentation

Mfr cannot assert any contributory negligence or comparative fault of Sally as a defense to her strict liability and intentional misrepresentation claims.

Contributory Negligence and Comparative Fault Available for Negligence

Although contributory negligence and comparative fault are available defenses under negligence, the facts do not indicate that Sally was negligent in taking the medication and so Mfr will not be able to assert these claims.

Assumption of Risk

Assumption of risk is a defense to strict liability if defendant can show that plaintiff went forward in face of a known risk. Mfr may try to assert assumption of risk in that Sally actively sought and procured a prescription for the allergy medication and thereby assumed the risk involved in taking the new medication. However, Sally's conduct was in response to Mfr's advertisements and as mentioned above, such advertisements did not contain any warnings of the risks. In addition, the packaging did not contain any warnings. Crucial to the defense of assumption of risk is the element of "knowledge" on the part of the plaintiff. Here, Sally clearly did not have knowledge of the risk of blindness and therefore cannot be said to have assumed the risk.

Duty to Mitigate

A plaintiff has a duty to mitigate her damages. In other words, plaintiff must act to minimize her loss. Failure to do [so] limits the liability of a defendant for any

aggravation of injury caused by the failure to mitigate. Here, Mfr may attempt to limit its liability for Sally's blindness by pointing to her refusal to engage in the cornea transplant operation that could have been accomplished with minimal risk and no cost to her. Sally opted not to go through with the surgery out of her fear of the operation. Plaintiff's duty to mitigate is judged by the reasonable person standard. If the court determines that Sally's decision not to undergo the surgery was not reasonable, Mfr's liability for damages will be seriously curtailed. However, because the mitigation at bar involves major surgery, it may will be likely that a reasonable person would not choose to undergo the risk involved. Even though the risk is stated to be minimal, this is not the same as involving not the same as involving no risk at all. In fact, Sally may well point to the "remote" risk realized by taking Mfr's medication as grounds for her decision not to undertake any further risks with her health and well-being. Depending on the court's determination of the reasonableness of Sally's decision, Mfr's responsibility for damages may or may not be reduced.

Sally v. Doc – Negligence

Sally may assert a claim against Doc in negligence for his failure to warn Sally of the risks involved in taking the allergy medication.

Duty

Here, Doc had a duty to conform his conduct to the reasonable doctor in good standing in the professional community in which he is situated. This means that if Doc fails to act as a reasonable doctor in good standing in his community, he will be held to have breached his duty of care.

Breach of Duty – Failure to Inform

Doctors have a duty to obtain informed consent of their patients with respect to medical treatment. The duty to "inform" is judged by what a reasonable patient would want to know in making health care decisions. This standard is judged from the patient's perspective, not the doctor's. It is irrelevant that the average doctor would not make a disclosure if the court finds that a reasonable patient would want to know the relevant information at bar.

Here, the risk of blindness is information that a reasonable patient would want to know in deciding whether or not to take medication. This is supported by the fact

that Sally states that she would never have ta ken the medication had she known of the risks. Therefore, Doc's fail ure to advi se is a brea ch of dut y.

Causation

Here, the facts indicate that Doc's failure to warn was both the actual and proximate cause of Sally's injury. Similar to Mfr, Doc cannot point to Mfr's failure to provide a warning as a supervening cause that relieves him of proximate liability. Doc was aware of the risk and therefore had a duty in his own righ[t] to warn Sally. His failure to do so caused Sally to take the medication uninformed and she suffered injury because of it.

Damages

As mentioned above, Sally's blindness amounts to sufficient damages for recovery.

Defenses

Contributory Negligence & Comparative Fault

As mentioned above, the facts do not support a defense on grounds of contributory negligence or comparative fault as Sally manifested no signs of her own negligence in taking the medication.

Assumption of Risk

Doc's claim of Sally's assumption of risk will fail for the same reasons stated above with respect to Mfr.

Duty to Mitigate

The analysis with respect to Doc's liability for damages and any claim based upon Sally's failure to mitigate will proceed in the same manner as discussed above with respect to Mfr.

Q6 Community Property

In 1997, Hank and Wanda, both domiciled in Illinois, a non-community property state, began dating regularly. Hank, an attorney, told Wanda that Illinois permits common-law marriage. Hank knew this statement was false, but Wanda reasonably believed him. In 1998, Wanda moved in with Hank and thought she was validly married to him. They used Hank=s earnings to cover living expenses. Wanda deposited all her earnings in a savings account she opened and maintained in her name alone.

In February 2000, Hank and Wanda moved to California and became domiciled here. By that time Wanda=s account contained $40,000. She used the $40,000 to buy a parcel of land in Illinois and took title in her name alone.

Shortly after their arrival in California, Wanda inherited an expensive sculpture. Hank bought a marble pedestal for their apartment and told Wanda it was Aso we can display our sculpture.@ They both frequently referred to the sculpture as Aour collector=s prize.@

In March 2000, a woman who claimed Hank was the father of her 6 year-old child filed a paternity suit against Hank in California. In September 2000, the court determined Hank was the child=s father and ordered him to pay $800 per month as child support.

In January 2002, Wanda discovered that she never has been validly married to Hank. Hank moved out of the apartment he shared with Wanda.

Hank has not paid the attorney who defended him in the paternity case. Hank paid the ordered child support for three months from his earnings but has paid nothing since.

1. What are Hank=s and Wanda=s respective rights in the parcel of land and the sculpture? Discuss.

2. Which of the property set forth in the facts can be reached to satisfy the obligations to pay child support and the attorney-s fees? Discuss.

Answer according to California law.

Answer A

1. Hank (H) and Wanda's (W) Rights to the Parcel of Land and the Sculpture

Hank and Wanda's rights to the parcel of land and the sculpture will be determined according to their status as married couples.

Putative Spouse

A putative spouse is one who reasonably believes they are married to another but for some reason their marriage is invalid. Here W believed she was married to H because she believed a common-law marriage was permitted in Illinois. Because H lied to W only he knows they were not really married and thus W's status as a putative spouse should be established.

The courts have yet to determ ine whether H would be considered a putative spouse under these circumstances because he knew no common-law marriage was established, ho wever in this case the court should find that H and W are in a Putative Marriage because of W's reasonable belief that she was married in Illinois via a common-law marriage due to H's (an attorney) representation that they were marrie d. Califo rnia recognized Putative Marriages as an alternative to common-law marriages, and because H and W are currently domiciled in California a punitive marriage is established.

Quasi-Marital Property (Q-MP)

In California all property acquired during the putative marriage is deemed marital property and treated the same as community property. Such property acquired by gift or inheritance during the marriage is the spouse's separate property (SP) as well as any property acquired before the putative marriage and after permanent separation is the SP of the acquiring spouse.

In determining the character of any property the court will consider the abo ve general presumptions as well as the source of funds used to acquire any property, any actions taken by the parties, and any special presumptions that may apply to the property. Property acquired outside California is treated as quasi-marital property and the court will treat it as community property or marital property I[f] such property were to be community property if acquired in California.

With these general principles in mind we can now examine the properties at issue.

Illinois Parcel of Land

The source of the Illinois parcel of land was the $40,000 W had earned from her earnings during marriage to buy the land. Thus, since the earning[s] were earned during the marriage it is Q-MP earnings and so the parcel is Q-MP in which both H and W have a ½ interest in.

Wanda took title in her name alone which could be deemed as a valid transmutation, which after 1985 requires a writing expressly stating that such property is the spouse's SP. If H knew and consented to W taking title in her name alone this could be SP, however, absent such consent the land would still be Q-MP.

Married Women's special presumption gives W a presumption of SP if title is taken in her name alone, however, such a presumption would not apply here because it is only applicable to property acquired before 1975 by W. Here the general presumption would apply and since the source was Q-MP and it was acquired during marriage the land should also be Q-MP.

Sculpture

The source of the sculpture was W's inheritance and so it should be deemed her SP under the general presumptions. W's statement to H that the sculpture was "our sculpture" could suffice as a valid transmutation. However, this was not in writing and a transmutation to be valid after 1985 requires that there be a writing clearly expressing a transmutation. Since there was no writing the general presumption will control and the sculpture is entirely W's SP.

2) Which Property Set Forth in the Facts Can Be Reached to Satisfy the Obligations to Pay Child Support and the Attorney's Fees?

Child Support Claim

Generally creditors' claims against either spouse are determined to be SP or Q-MP of the liable spouse depending on when such claim arose.

If the debt is SP debt then the creditor must satisfy his claim from the spouse's SP first before seeking satisfaction from the CP (here Q-MP). If the debt is a MP debt then the creditor will seek satisfaction from any MP (or Q-MP) first before seeking satisfaction of the claim from the SP of the debtor spouse.

Singe Hank's obligation to pay child support of $800 per month was a debt of H's personally and was not acquired for any benefit to the marital community such obligation is H's separate obligation. The child support claim must be satisfied from H's SP before seeking the MP.

If H is unable to pay from his SP, woman can seek satisfaction from the land as MP. However, an exception to reaching the MP earnings of the nondebtor spouse (W) arises if she has kept her earning separate with no accessibility to H.

Here W's earnings uses to buy land were deposited in an account in her own name of which presumably H had no access to, then such earnings were used to buy the land which was titled in W's name alone. Thus under this exception the claim of child support could not be reached by woman.

However still another exception arises when the debtor spouse's debt[s] are for "necessaries" which the court could deem child support payments to be. Spouses are liable to each other for necessary debts because of their duty to support each other.

Thus under this exception the child support could be satisfied from the land even if the court determined the land was entirely W's SP. She could still be liable if the child support claim were a necessary debt obligation of H.

Otherwise, if the debt is not necessary it could not be satisfied from the land because of the action's taken by W to separate her MP earning or if it was deemed entirely W's SP.

Attorney's Fees

The court provides that attorneys' fee's can if not paid give the attorney a right to a real property lien and any of the SP of the debtor spouse of the MP of the spouses. This is known as the family lawyer's real property lien.

Further if such debt were deemed necessary the fee could be satisfied from either the sculpture or the land.

If should be noted, however, that generally creditors' claims cannot reach the SP of the nondebtor spouse unless such was a necessary debt, thus as to the child support claim the sculpture which is W's SP should not be subject to the child support claim unless it is deemed necessary. The same rule would apply to any Attorney's fees owed by H.

Answer B

CA is a community property state. All property acquired while domiciled in CA is presumed to be community property. All property acquired before marriage and when the economic community has come to an end and all property acquired by gift and inheritance is separate property.

Property acquired while a married couple is domiciled in a non-community property state, becomes quasi-community property when the couple moves to California so long as it would have been community property if acquired while domiciled in California.

Before discussing Hank and Wanda's respective rights, it is important to determine the status of their relationship.

In 1997, Hank and Wanda, both domiciled in Illinois, a non-community property state, began dating. Hank told Wanda that Illinois permits common-law marriages. Hank knew the statement was false, but Wanda reasonably believed him. In 1998, Wanda moved in with Hank, thinking they were validly married. As a result of Wanda's mistaken belief that she was validly married to Hank, Wanda is a putative spouse.

Because Wanda is a putative spouse, quasi-marital property law will apply. Quasi-marital property law will apply. Quasi-marital property law is the same as community property law. As a result, the moment Wanda and Hank moved to California, all the property acquired by either of them while living in Illinois will be quasi-community property (so long as if it would've been community property if acquired while domiciled in California).

1. Hank's and Wanda's Respective Rights In The Parcel of Land and the Sculpture

Parcel of Land

Wanda used $40,000 from a savings account to purchase the parcel of land. The source of the money in the account was all of Wan da's earnings acquired while domiciled in Illinois. Because the $40,000 would have been community property if it was acquired while the couple was domiciled in California, it is considered quasi-community property.

The $40,000 of quasi-community property was used to purchase the parcel of land. In order to determine the character of a piece of property, a party must trace to the source. The land was purchased with quasi-community property and is the refore qu asi-comm unity prop erty.

Wanda, however, took title in her name alone. Because this took place post-1974, Wanda will not be entitled to the Married Women's Special Presumption (applies pre-1975 and presumes that property is the woman's separate property so long as title is in her name alone). Wanda will try to argue that it was a gift of quasi-community property to her as separate property. The gift argument will fail, however, because she made the "gift" to herself.

Moreover, all property acquired during marriage is presumed to be community property. Unless Wanda can rebut the presumption, the parcel of land is quasi-community property. At separation, Wanda and Hank will each take ½ of the land (or proceeds from the sale of the land).

The Sculpture

Wanda inherited the sculpture. As a result, the sculpture was Wanda's separate property in the beginning. However, Hank bought a marble pedestal and told Wanda it was "so we can display our sculpture." Moreover, both Hank and Wanda referred to the sculpture as "our collector's prize."

Hank will argue that the parties' actions transformed the character of the sculpture from separate property into community property. By referring to the sculpture as "ours," Wanda intended that the sculpture be a gift to the community.

If the court finds that Wanda intended the sculpture to be a gift to the community, then Wanda and Hank will each take ½ of the value of the proceeds.

However, any transmutation that takes place post–1984 must be in writing. There is an exception, however, for interspousal occasions, etc. Because this alleged transmutation took place in 2000, a writing is required. Because there is no writing and the sculpture was not given as a birthday or

anniversary gift (and is likely to be very valuable), then transmutation was not valid. As a result, Wanda will take the entire sculpture.

2. Which Property Can Be Reached to Satisfy the Obligations to Pay Child Support and The Attorney's Fees?

Child Support

Quasi-Community Property can be reached to satisfy the obligations to pay a creditor even when the obligation arose prior to the marriage. However, if the nondebtor spouse placed his/her earnings into a separate account in his/her name alone, creditors cannot reach the money in the account so long as the account is not accessible by the debtor spouse.

Hank's child support obligations arose 6 years ago when his child was born. Wanda and Hank were not together at the time the obligation arose. However, because the parcel of land is quasi-community property, it can be reached to satisfy the child support obligations. Wanda's sculpture, however, is her separate property. Then nondebtor spouse's separate property can't be reached to pay an obligation that arose prior to marriage.

Attorney's Fees

The attorney's fees were incurred in 2000, (during the period of time Hank and Wanda were "married"). All debts incurred during marriage may be satisfied by quasi-community property (and of course community property), the debtor spouse's separate property, and the nondebtor spouse's separate property, so long as the debt was incurred for necessaries.

Because the parcel of land is quasi-community property, it can be reached to satisfy the attorney's fees. The sculpture, however, is Wanda's separate property. The issue is whether the attorney's fees were incurred for "necessaries." Hank will argue that defending himself if in a child paternity suit should be considered a "necessary". A necessary of life, however, is [sic] food, clothing and shelter. As a result, the sculpture cannot be reached to satisfy the attorney's fees.

Feb 2002

California Bar Examination

Essay Questions and Selected Answers

February 2002

FEBRUARY 2002 CALIFORNIA BAR EXAMINATION EXAMINATION ESSAY QUESTIONS AND SELECTED ANSWERS

Published by the Committee of Bar Examiners of the State Bar of California

This document contains the six Essay Questions from the February 2002 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by the applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here the consent of their authors and may not be reprinted.

ESSAY EXAMINATION INSTRUCTIONS

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

Q1 Civil Procedures

Pam, a resident of State X, brought suit in state court in State X against Danco, a corporation with its principal place of business in State Y. The suit was for damages of $90,000 alleging that Danco breached a contract to supply Pam with paper goods for which she paid $90,000 in advance. In her complaint, Pam requested a jury trial. State X law provides that contract disputes for less than $200,000 must be tried to a judge.

Danco removed the case to federal court in State X. Danco moved to strike the request for a jury trial. The federal court denied the motion.

A few days before trial, Pam learned for the first time that Danco was incorporated in State X. She moved to have the case remanded to state court on this ground. The federal court denied the motion.

At trial, Pam testified that she paid for the goods but never received them. Danco admitted receiving Pam's payment and then presented evidence from its dispatcher that it had sent a truck to Pam's office with the paper goods. Danco also called as a witness Rafe, who works in a building next to Pam's office. Rafe testified he saw a truck stop at Pam's office on the day Danco claimed it delivered the goods. Rafe also testified he saw the truck driver take boxes marked "paper goods" into Pam's office that same day.

At the close of all the evidence, Pam moved for judgment as a matter of law. Danco opposed the motion, and the court denied the motion. The jury returned a verdict in favor of Pam.

Danco then moved for judgment as a matter of law, which Pam opposed. The court denied Danco's motion.

Did the court rule correctly on:

1. Danco's motion to strike the request for a jury trial? Discuss.

2. Pam's motion to have the case remanded to state court? Discuss.

3. Pam's and Danco's motions for judgment as a matter of law? Discuss.

Answer A

I. Danco's motion to strike request for jury trial

Because this is a diversity case *(see below) and involves common law questions, Erie comes into play. Under Erie, in such a case, the federal court must use federal procedural law and state substantive law.

The question is whether a jury trial (versus a bench trial) is a procedural or substantive question. The state and federal laws on the subject conflict -- the law of State X provides for only a bench (or court) trial when the contract dispute is over an amount less than $200,000, and Pam is claiming only $90,000 in damages. The federal constitution, in the Seventh Amendment, provides for a jury trial in civil cases "for suits at common law" when damages exceed a mere $20.

Therefore, in state court, Pam would have a trial in front of a judge, while if following federal law, she would have a trial in front of a jury. The Seventh Amendment is not incorporated to the states through the Fourteenth Amendment, so that does not control.

Some issues that at first may not seem substantive -- such as statutes of limitations -- are in fact considered such because of the effect they may have on suits. Because a jury trial is handled somewhat differently than a bench trial, it

would probably be considered a substantive issue, so the federal judge should have applied the law of State X and denied the motion.

Diversity jurisdiction

This has to be a diversity case in federal court. Federal courts have two types of subject matter jurisdiction -- the power to hear cases regarding certain issues. The first is federal question jurisdiction, where federal courts may hear cases "arising under" a federal statute or the constitution. This is a contracts case, arising under state contracts law (or possibly the common law). Therefore it is not a federal question case.

Federal courts also have jurisdiction over diversity cases, where there is complete diversity among the parties -- all plaintiffs have different citizenship from all defendants, and where claimed damages exceed $75,000. Citizenship of a corporation for these purposes is its principal place of business and the (or all) place(s) of its incorporation. When Pam brought the suit and when Danco removed, there seemed to be diversity jurisdiction because P is a resident of State X, and D has its principal place of business in State Y, and damages exceed $75,000.

3. Pam's motion to have the case remanded to state court

Removal

Even if a plaintiff properly brings suit in state court, the defendant may remove it to federal court. However, the defendant may not do so if it is a resident of the state in which the case was brought. Therefore, because Danco (D) is a resident of State X -- since it is incorporated there -- it cannot properly remove to federal court.

(If removal were proper, it would be proper to remove to the federal court in the same state and district in which the case was brought.)

For analysis of citizenship of corporations, please see #1 above.

The federal court may have discretion to keep the case because Pam's motion was brought just a few days before trial, but in the end it cannot do so, as it lacks subject matter jurisdiction.

Lack of subject matter jurisdiction is not a waivable defense -- that is, even though Pam didn't raise this defense in her first pre-answer motions, she did not forfeit the defense. It may be brought at any time, even throughout trial.

The court simply lacks subject matter jurisdiction over this case, so it may not hear it. Therefore the court should have granted P's motion to remand.

4. (A) Pam's motion for judgment as a matter of law

Timing

A motion for judgment as a matter of law may be brought after the close of plaintiff's evidence or at the close of all evidence. Therefore Pam's (P's) timing was fine, as she brought the motion at the close of all evidence.

Substance of motion

A motion for judgment as a matter of law is granted if no reasonable person could differ as to the outcome of the trial. That is, it asks the judge to take the case out of the jury's hands and decide it as a matter of law.

Evidence

Dispatcher's evidence

The issue is whether the dispatcher's evidence was admissible and whether it makes a difference to Pam's motion.

We do not have enough information to decode this issue for sure, and we do not know how this evidence was offered at trial -- by the dispatcher orally, through notes or from someone else. It could be subject to the hearsay rule, if it is an out-of-court statement offered for the truth of the matter asserted -- particularly if D offered a written document or someone else to testify as to what the dispatcher said. If written, it could possibly come in under the business record exception to the hearsay rule -- if it was made in the normal course of business, known to the dispatcher at the time he made it, and timely made.

In any event, it wouldn't help the jury all that much because it doesn't show (alone) that the truck ever showed up at Pam's place of business.

Rafe's evidence

This is not an out-of-court statement, and it is relevant because it might show (especially when put together with the dispatcher's evidence) that the delivery from D was in fact made to P. This is Rafe testifying to his own personal knowledge.

The written statement "paper goods" could, however, be hearsay -- it is an out-of-court statement and D is offering it for the truth of the matter asserted -- that the boxes did in fact contain paper goods. That written statement would not fall into any exception or exclusion to the hearsay rule, so it should not be admitted.

With or without the "paper goods" statement, Rafe's evidence does not make clear whether the truck belonged to D. Together with the dispatcher's evidence, however, it does seem enough that reasonable people could differ as to the outcome.

Therefore the judge was correct in denying P's motion.

(B) Danco's motion for judgment as a matter of law

The issue is whether D's motion should have been granted.

In order to be able to make a renewed motion for judgment as a matter of law -- which is what it is called when made after the jury has returned its verdict -- the party must have made a motion for judgment as a matter of law at the close of all evidence.

Danco failed to make that motion, so its renewed motion is barred.

(If D had made the proper motion, its renewed motion would be subject to the same standard as discussed above.)

Therefore, the court was correct in denying D's motion.

Answer B

1. Danco's motion to strike request for jury trial

According to the US Constitution, any plaintiff who is suing in federal court for damages has a right to a trial by jury. If the suit involved is one of equity, there is no right to a jury trial.

Here, at the time that Danco made its motion, the case was in federal court. The state law that provides that contract disputes for less than $200,000 be tried by a judge does not therefore apply. Federal courts generally follow federal rules of procedure and are bound by the US Constitution. Therefore, the plaintiff does have a right to have a trial by jury and the federal court properly denied Danco's motion.

2. Pam's motion to have the case remanded to state court

If a plaintiff sues a defendant in state court and the case at hand is one in which a federal court would have subject matter jurisdiction over it, a defendant may properly remove the case to federal court. Therefore, if this case either posed a federal question or there was diversity between the claimants, the court could properly be heard in federal court.

In order to have diversity jurisdiction, the case at hand must involve an amount of at least $75,000 and there must be complete diversity between the plaintiff and defendant. For a person, his or her place of residence is the state to which he or she belongs. For a corporation, it is the principal place of business or place of incorporation where it is a resident.

At the time of removal, the federal court appeared to have diversity jurisdiction over this case. Pam was suing for $90,000, an amount over the required $75,000. Furthermore, Pam was a resident of State X and all that was known was that Danco had its place of business in State Y. Therefore, it appeared that there was complete diversity.

After a case is removed to federal court, it can be remanded back down to state court if the federal court does not in fact have proper jurisdiction. Here, before the trial took place, Pam learned that Danco was incorporated in State X. This would ruin the complete diversity requirement and would be grounds for the federal court to remand back down to state court because it would not be proper for the federal court to hear the case since it did not have jurisdiction. If a federal question was involved it would be different, but that is not the case here. This is a simple contract claim. Danco would argue that Pam could have easily found out where it was incorporated by simply asking. However, that does not have anything to do with the federal court's actual power to hear a case.

Therefore, the Federal Court was mistaken in denying the motion to have the case remanded.

3. Pam's and Danco's motions for judgement as a matter of law.

A motion for judgement as a matter of law can be made after the other side to a lawsuit has presented its case. That is, the Defendant can make the motion after the plaintiff has presented its side and after the defense has presented its side (or after all evidence has been presented). Furthermore, a renewed motion for a judgement as a matter of can be asked for after a jury has rendered its verdict. However, in order for the defendant to be able to make such a motion, he or she must have first made the motion at the end of all of the evidence being presented.

Pam's motion

When determining whether to grant a motion for a judgement as a matter of law, the court must consider the evidence and be able to determine that reasonable minds could not differ as to the outcome. This is an extremely difficult standard to meet. The judge in essence would be ruling that this would be the only reasonable verdict that could be reached if he or she granted the motion.

Here, Pam claimed that Danco breached the contract by not supplying the paper goods to her. Her only evidence was her testimony that she paid for the goods, but never received them. Danco on the other hand, admitted to receiving payment, but

claimed to have delivered the goods. He presented several pieces of evidence, including evidence from his own dispatcher that it did deliver the product and testimony of a neutral witness that claimed he saw a truck parked at Pam's office that day and a box marked "paper goods" on the front being delivered to her.

However, the witness did not mention whether the truck belonged to Danco and Pam could have received different paper products from another company. Therefore, it could be reasonable to believe Pam's story over Danco's. The other evidence offered was simply that from their own records or own recollection. At the same time, it could be reasonable to believe Danco's story because he offered credible testimony from two different sources. Therefore, it would be reasonable to believe either side and a motion for judgement as a matter of law should not have been granted.

Therefore, the court properly denied Pam's motion.

Danco's motion

Danco first moved for a judgement as a matter of law after the jury verdict. Again, this would normally be a renewed judgement as a matter of law and could only have been brought after Danco made a motion for a judgement as a matter of law after the close of all evidence or at the time Pam made the motion. Instead of simply denying Pam's motion, Danco should have brought its own motion at that point.

Furthermore, as mentioned before, reasonable minds could have come to different conclusions in this case and such a motion would not have been warranted anyway.

Therefore, court properly denied Danco's motion.

Q2 Remedies

Berelli Co., the largest single buyer of tomatoes in the area, manufactures several varieties of tomato-based pasta sauces. Berelli entered into a written contract with Grower to supply Berelli its requirements of the Tabor, the only type of tomato Berelli uses in its pasta sauces. The Tabor tomato is known for its distinctive flavor and color, and it is particularly desirable for making sauces. The parties agreed to a price of $100 per ton.

The contract, which was on Berelli's standard form, specified that Grower was to deliver to Berelli at the end of the growing season in August all Tabor tomatoes that Berelli might require. The contract also prohibited Grower from selling any excess Tabor tomatoes to a third party without Berelli's consent. At the time the contract was executed, Grower objected to that provision. A Berelli representative assured him that although the provision was standard in Berelli's contracts with its growers, Berelli had never attempted to enforce the provision. In fact, however, Berelli routinely sought to prevent growers from selling their surplus crop to third parties. The contract also stated that Berelli could reject Grower's tomatoes for any reason, even if they conformed to the contract.

On August 1, Berelli told Grower that it would need 40 tons of Tabor tomatoes at the end of August. Grower anticipated that he would harvest 65 tons of Tabor tomatoes commencing on August 30. Because of the generally poor growing season, Tabor tomatoes were in short supply. Another manufacturer, Tosca Co., offered Grower $250 per ton for his entire crop of Tabor tomatoes. On August 15, Grower accepted the Tosca offer and informed Berelli that he was repudiating the Berelli/Grower contract.

After Grower's repudiation, Berelli was able to contract for only 10 tons of Tabor tomatoes on the spot market at $200 per ton, but has been unable to procure any more. Other varieties of tomatoes are readily available at prices of $100 per ton or less on the open market, but Berelli is reluctant to switch to these other varieties. Berelli believes that Tabor tomatoes give its sauces a unique color, texture, and flavor. It is now August 20. Berelli demands that Grower fulfill their contract in all respects.

1. What remedies are available to Berelli to enforce the terms of its contract with Grower, what defenses might Grower reasonably assert, and what is the likely outcome on each remedy sought by Berelli? Discuss.

2. If Berelli elects to forgo enforcement of the contract and elects instead to sue for damages, what defenses might Grower reasonably assert, and what damages, if any, is Berelli likely to recover? Discuss.

Answer A

1. The contract between Berelli and Grower is a contract for the sale of goods, tomatoes. Accordingly, it is governed by Article 2 of the UCC. Because Berelli is a pasta sauce manufacturer and Grower is a commercial farmer, both parties are merchants and the UCC's special rules for merchants will apply. Additionally, because the contract calls for Grower to provide Berelli with all of the tomatoes it requires, the agreement is a requirements contract and the rules applicable to those particular types of agreements will also apply.

The parties appear to have made a valid contract, as it was in writing and reflected both the type of goods specified (Tabor tomatoes) and the price ($100/ton). Although the UCC ordinarily requires contracts to specify the quantity of goods to be provided, in a requirements contract it is sufficient that the buyer (Berelli) agrees to buy all its requirements from the Seller (Grower), to the limit of Seller's ability to provide goods of that type. That renders the contract sufficiently definite to be enforced under the UCC, as the Buyer's good faith in using Seller as its sole supplier, and its actual after-the-fact use of the goods contracted for, define the quantity of goods to be delivered. Here, Berelli's actual need for 40 tons of Tabor tomatoes supplies the requisite quantity under the contract.

While in this case Grower may have defenses to contract formation based on the doctrines of failure of consideration, unconscionability, misrepresentation and fraud, these will be discussed later.

If Berelli seeks to enforce the terms of the agreement with Grower, it may do so under the doctrines of replevin and specific performance, or seek an injunction prohibiting Grower from selling the tomatoes to Tosca.

Anticipatory Repudiation. The time for performance under the contract has not yet arisen, and won't arise for 10 more days. A party can ordinarily not sue under a contract until the time for performance has arisen. Where, however, a party unambiguously states to the other, before the time for performance has arisen, that it will not perform, the other party is entitled to treat that as an anticipatory repudiation that gives rise to an immediate right to sue for total breach of the contract, including the right to seek to cover its losses by purchasing replacement goods. Because Grower informed Berelli that it was repudiating the contract, Berelli is entitled to sue immediately and seek replevin or specific performance, or damages.

Replevin

Replevin. Replevin provides a remedy for a plaintiff to recover its goods prior to determination of a dispute, upon a judicial hearing to determine whether the plaintiff has title to the goods, and upon plaintiff's posting of a bond to secure any damages that may be owed to the defendant if the replevin is wrongful. Under the common law, to obtain

replevin a plaintiff must show that the defendant has possession of personal property that is owned by the plaintiff. Under the UCC, however, where goods have been "specifically identified" under a contract and the buyer is unable to cover by purchasing other goods, it has a right to replevy the goods in seller's possession, even though title to those goods has not yet passed. Here, the requirements for replevy are met. Because Berelli agreed to buy all of Grower's Tabor tomatoes, all the tomatoes actually grown by Grower have been specifically identified under the contract. And because Berelli has only been able to cover 10 of the 40 tons it needs, the second requirement is met. Accordingly, Berelli is entitled to replevy 30 tons of the Tabor tomatoes in Grower's possession, as well as recover damages for the excess price it paid for the 10 tons it was able to cover (as discussed in the next section).

While Grower does not have any defenses to Berelli's claim for replevin (because all elements of that claim are met), Grower will defend on grounds that the contract is invalid for failure of consideration and lack of mutuality, or voidable for fraud and unconscionability.

Failure of Consideration/Mutuality: A contract must be supported by consideration, which is a bargained for exchange of something of value. In addition, the promises must be mutual, with both parties required to perform a detriment in exchange for receiving a benefit. Here, Grower will contend that because Berelli had the right to reject conforming goods under the contract, it was not bound to purchase anything from Grower and, as a result, there is a failure of consideration under the contract.

Consideration is found in a requirements contract from the fact that the buyer is required to meet all its requirements from seller, despite the fact that, as stated above, the contract itself does not expressly require the buyer to buy any fixed quantity of goods. While a requirements contract will not fail for lack of consideration if the buyer in good faith has no requirement for the goods and therefore orders none on that basis, it will fail if the buyer has no real obligation to buy goods it needs, and can accept or reject without regard to its actual requirements for the goods. Here, that is precisely the case. As a result, there is no mutuality of obligation under the contract -- Berelli can buy if it pleases, whereas Grower is required to sell all its Tabor tomatoes only to Berelli. Accordingly, the contract is void for failure of consideration and Grower should succeed in defending against all of Berelli's claims on this basis.

Fraud/Misrepresentation. Where a party is induced to enter into a contract based upon the fraud or misrepresentation of another party, the contract may be voidable in whole or in part at the election of the defrauded party. Here, Berelli's standard form provided that Grower could not sell Tabor tomatoes to third parties without Berelli's consent. When Grower objected, Berelli's representative falsely stated that Berelli never enforced this provision, when in fact it regularly did. In reliance thereon, Grower went forward and signed the agreement. While Grower might argue that this provided it grounds for voiding the entire contract, this argument will likely be rejected because the term was not material to the bargain (as evidenced by the fact that it was just a clause in Berelli's standard form), and because Berelli had made no attempt to enforce it. Rather (as we shall see in the discussion of Berelli's right to injunctive relief), the

remedy will be to void the term, rather than the entire contract. This is also the result under the doctrine of estoppel and under the UCC battle of the forms rules. Having induced Grower not to formally object to the term based on the representation that it will not be enforced, Berelli will be estopped to do so. Moreover, under the UCC battle of forms rules pertaining to contracts between merchants, additional terms do not become part of the bargain when the other party objects within 10 days of receipt of the form, as Grower did here. Hence, the contract is not void for fraud.

Unconscionability. Grower will also argue that the contract is unconscionable because (i) Berelli is not bound to purchase anything, as explained above, while (ii) Berelli is prohibited from selling to third parties.

Changed Circumstances. Grower may also seek to challenge the validity of the contract under the doctrine of changed circumstances, contending that the poor growing season coupled with the unprecedented demand for scarce Tabor tomatoes was not foreseen by the parties such that performance should be excused on grounds of commercial impracticability. This defense will be rejected, however, because uncertain weather is always foreseeable at the time of contracting, and unanticipated market conditions will never support a challenge to the validity of a contract based upon commercial impracticability.

Specific Performance

Berelli will also seek to enforce the contract through a decree of specific performance. Specific performance is an equitable remedy that will be granted where: (1) the contract is valid, definite and certain; (2) mutuality is present; (3) the legal remedy is inadequate; and (4) the plaintiff has fully performed all of its obligations under the contract. A request for specific performance is subject to equitable defenses, including the defense of unclean hands.

Here, the contract is sufficiently definite and certain, as stated above, but could be found invalid for lack of consideration or mutuality, also as explained above. If these defenses are accepted, specific performance will not be granted. If the promises are found to be mutual and the consideration sufficient, however, then Berelli would be able to meet the elements required for specific performance. The legal remedy is inadequate because the subject matter of the contract is unique. Here, we are told that Tabor tomatoes are in short supply, they have a distinctive flavor that is critical to the Berelli sauce recipe, and the use of other types of tomatoes is inadequate. Hence, this would provide sufficient uniqueness to support a request for specific performance. In addition, Berelli performed all of its current obligations under the contract when it placed the order with Grower for all of its requirements, and stands ready and willing to perform its remaining obligation to pay for the goods when received. Hence, assuming the mutuality/consideration issues could be overcome, the other requirements necessary for specific performance would be met.

However, Grower could defend against such a decree on the doctrine of unclean hands. Equity will deny relief to a party with unclean hands, that is, one that has engaged in wrongful conduct with respect to the case at hand. Here, Berelli's fraud in inducing Grower to sign the contract based on its false assertion that the prohibition on third party sales was never enforced by Berelli, coupled with its insistence on terms that allowed it to reject Grower's goods without reason, could support such a defense.

Injunction

Berelli could also seek the Court's immediate assistance through the issuance of a Temporary Restraining Order, followed by a preliminary injunction and a permanent injunction. This relief will likely be denied, however, unless Berelli can show a right to replevin.

A TRO may be granted ex parte based on a showing of immediate and substantial hardship. Here, the fact that Tabor tomatoes are scarce and Grower is about to sell them to Tosca would be sufficient to support entry of a TRO. Berelli would have to make a good faith effort to provide Grower with notice of the hearing, but if it could not the TRO could be entered on an ex parte basis. The TRO would last for only 10 days, however, and then be automatically dissolved.

Berelli would thus have to seek a preliminary injunction before the 10 days expired. A preliminary injunction will be granted in order to preserve the status quo pending trial or otherwise avoid extreme hardship to a party, where the plaintiff can

demonstrate the likelihood of success on the merits and the balance of hardships favors entry of injunctive relief. Here, Berelli can meet the hardship test but will have difficulty establishing the likelihood that it will succeed on the merits, due to the failure of consideration/mutuality argument described above. Additionally, the fact that the tomatoes are perishable goods will make it impossible for the Court to preserve the status quo -- the tomatoes simply cannot be preserved in any useable form pending the outcome of a trial on the merits. If Berelli can overcome the problems described above and establish its immediate right to replevy the goods, this hardship could be avoided because the tomatoes would be immediately sent to Berelli. Hence, a preliminary injunction could be entered. If it cannot do so, an injunction would be denied on grounds that Berelli has not demonstrated it is likely to succeed on the merits, or the balance of hardships (spoiled rotten worthless tomatoes) favors Grower, or both.

While a permanent injunction is theoretically possible, it would be of no practical use because the tomatoes would spoil long before the injunction would be entered. However, to obtain such an injunction, Berelli would have to show that its legal remedy is inadequate, it has a property interest to protect, the injunction would be feasible to enforce, and the balance of hardships favors entry of the injunction. Here, the remedy is inadequate for the reasons explained above; Berelli has property interest in both the contract and, if specifically identified, the tomatoes; the injunction would be simple to enforce because it countenances just a single act, delivery of the goods; and (assuming, arguendo, the contract was enforceable) the balance of hardships would favor Berelli because it has an immediate need for and contractual right to the

tomatoes, whereas the hardship to Grower -- a lower contract price -- was entirely of its own making.

2. If Berelli elects to sue for damages, it can seek to recover compensatory damages, nominal damages, and restitutionary damages. Punitive damages would not be allowed because this is a breach of contract action. The defenses to contract enforcement described above would pertain to these claims as well. However, Berelli might be able to recover these damages under a theory of promissory estoppel, which provides that a party is estopped to deny the existence of an agreement where their promise can reasonably be expected to induce reliance in the other party, and the other party so relies to their detriment. Here, Berelli elected not to enter into a contract with other growers of Tabor tomatoes in reliance on Grower's promise to meet all its requirements. Hence, if the contract is invalid, Berelli may be able to claim damages under this alternate theory of relief.

To be recoverable, contract damages must be foreseeable at the time the contract was entered into, they must have been caused by the other parties (sic) breach, and the amount must be provable with certainty.

Compensatory damages aim to give each party the benefit of their bargain. The amount is the amount necessary to put them in the place they would have been in had the contract been performed. Here, Berelli can claim the right to recover the difference between the $200/ton it paid for the 10 tons of tomatoes it purchased on the open market, and the $100/ton contract price, or $1,000. Berelli will also be entitled to recover any incidental expenses it incurred in purchasing these goods, that it would not have incurred had the contract been performed. These damages were all foreseeable,

the amount is certain, and they were caused by the breach. Hence, Grower would have no defense (other than the defenses to contract validity described above).

With respect to the other 30 tons, Berelli could seek to recover the lost profits it would have realized on the pasta sauce made from these tomatoes, or may seek to recover restitutionary damages in the amount by which Grower was enriched by refusing to perform its contract with Berelli. Lost profits would be defended by Grower on grounds that they are speculative and uncertain. However, here, Berelli's past sales and manufacturing records could be adequate to demonstrate how much sauce could be made from 30 tons of tomatoes, how much would be sold, and what the anticipated profit would have been. On the restitutionary side, Berelli would simply argue that Grower has been unjustly enriched by being allowed to sell the tomatoes to Tosca for $250/ton, and therefore should be liable to return the excess $150/ton to Berelli.

Both claims would be subject to Berelli's duty to mitigate; and Grower could successfully argue that Berelli must try to make sauce with other tomatoes to mitigate its damages, and then be limited to recovering the amount by which its sales were lowered due to using worse types of tomatoes.

Answer B

I. VALIDITY OF THE CONTRACT

This is a requirements contract for a sale of goods of over $500. The UCC applies, and the writing requirement appears to be satisfied.

CONSIDERATION: Grower will argue that there was no consideration for its promise to supply Berelli's tomato requirements because Berelli could reject the tomatoes for any reason, even if they conformed to the contract. Thus, Grower would argue, Berelli's promise is illusory. This is probably not a good argument because Berelli still has an obligation to try in good faith to be satisfied with the shipment. Although the terms are harsh, there probably is consideration here.

II. CONTRACT TERMS

Grower would argue that the contract terms should reflect the oral "agreement" from the Berelli's representative that the prohibition on sales to third parties would not be enforced. Berelli would successfully raise the PAROLE EVIDENCE RULE which states that where the parties have reduced their agreement to final written for form (sic), evidence of prior or contemporaneous agreements varying the contract are inadmissible. Here, the supposed promise by Berelli that a part of the contract would not be enforced clearly varies the agreement, so this evidence would not be admitted. The terms of the writing will be applied.

Grower might argue that the parole evidence rule does not ban evidence that the agreement was induced by FRAUD. Grower would argue that Berelli committed fraud by knowingly misrepresenting Berelli's practices regarding enforcement of the clause forbidding sales to 3rd parties.

III. GROWER'S BREACH

Anticipatory Breach: When Grower informed Berelli on August 15 that it would not perform, this was a breach of the contract. Berelli could either sue for damages immediately or choose to treat the contract as still in force.

Frustration of Purpose: Grower would argue (unsuccessfully) that its duty to perform was excused by frustration of purpose because of the unexpected rise in tomato prices. This is not a valid argument because a change in market price is generally a foreseeable risk allocated by the parties under the terms of the contract.

1. BERELLI'S REMEDIES IF HE CHOOSES TO ENFORCE THE CONTRACT.

A. SPECIFIC PERFORMANCE: Specific performance is an equitable remedy which will be allowed only if money damages are inadequate (typically because the goods are unique), if the terms of the contract are clear and definite and if no equitable defenses apply.

Here, Berelli will argue that money damages are inadequate because the Tabor tomatoes are very distinctive and that using inferior tomatoes would cause irreparable harm to Berelli's high reputation. The facts also state that Berelli is unable to get Tabor tomatoes elsewhere, and this indicates that money damages would be inadequate because there is no opportunity to cover. The written terms of the contract terms are also clear and definite, so the court would likely grant specific performance if no defenses apply.

B. BERELLI WOULD ALSO SEEK A PRELIMINARY INJUNCTION TO STOP GROWER FROM SELLING THE CROP TO TOSCA.

The purpose of the preliminary injunction is to maintain the status quo between the parties pending outcome of the merits of the suit. Berelli must show irreparable harm, likelihood of success on the merits, and that a balancing of interests favors Berelli.

Here, Berelli appears to have a valid claim on the merits or the breach of contract. Moreover, Berelli would suffer irreparable harm if Grower were to sell the Tabor tomatoes elsewhere because these are the only tomatoes Berelli uses and they are not available elsewhere. The balancing of interests is a fairly close case here. A court of equity might be influenced by the very harsh terms of the contract and look to the hardship suffered by Grower in being unable to sell his tomatoes elsewhere. On the other hand the hardship to Berelli would be very great because there are no other tomatoes available and use of inferior tomatoes would damage Berelli's trade reputation. Moreover, if the court grants specific performance, clearly the sale of the entire tomato crop to Tosca must be halted, or performance of the contract will no longer be possible.

C. GROWER'S DEFENSES

Specific Performance and Preliminary Injunction are both equitable remedies. Thus Grower would raise several equitable defenses.

UNCLEAN HANDS: Grower would assert that Berelli acted wrongfully in relation to the very contract which Berelli seeks to enforce because Berelli's representative made misrepresentation to Grower during contract negotiations. Also, the generally harsh terms of the contract indicate possible overreaching by Berelli. This argument probably will not prevail because there is nothing wrong with hard bargaining. There appears to be no outright wrongdoing here, hence, the defense of unclean hands does not apply.

ESTOPPEL: Grower will argue that he relied to his detriment on Berelli's oral promise that Grower would be allowed to sell his excess tomatoes elsewhere. The reliance was Grower's act of entering into the contract. This is probably a good argument, so Berelli

would be estopped from preventing Grower from selling the excess tomatoes to Tosca. Thus, if this defense applies, Grower will still have to sell 40 tons to Berelli but may sell the excess 15,000 tons to another buyer.

UNCONSCIONABILITY: Grower would argue that the terms of the contract are unconscionable: the writing was Berelli's standard form contract. The terms themselves are oppressive (preventing Grower from selling elsewhere) and Berelli is the largest single buyer of tomatoes, so there may be a great difference in bargaining power. This is probably a convincing argument, given all these factors.

Under the UCC the court may refuse to enforce the contract or limit the effect of the unconscionable terms. Thus the prohibition on selling elsewhere probably would not be enforced.

2. Berelli's Legal Damages.

As the aggrieved buyer, Berelli may seek either the difference between the contract price and the market price at the time he learned of the breach, or he may make a reasonable "cover" of substitute goods and sue for the difference between the cover price and the contract price plus incidental and consequential damages.

Here, Berelli can partially cover on the spot market per ton. The difference in price is ten tons times 100, so $1,000. Berelli is entitled to damages for the remaining 30 tons which it is entitled to under the contract. The damages there would be the difference in market price and contract price at the time of the breach. Berelli will argue that the market price is 250, since that is what Tosca was willing to pay. Grower would argue that the cover price is only 200 per ton because that is the price on the "spot market."

Berelli would also seek incidental and consequential damages such as damage to its reputation and customer goodwill because of being forced to use inferior tomatoes. Any possible delay might also result in consequential damages to Berelli.

B. BERELLI'S DEFENSES

UNFORESEEABILITY: Contract Damages will only be awarded if they were foreseeable at the time the parties entered into the contract, (Hadley v. Baxendale). Here, the money damages are clearly foreseeable, but Grower would argue that damage to reputation was not foreseeable, and thus should not be awarded. However, damage to trade reputation is probably foreseeable here because both parties appear to be aware of the uniquely excellent qualities of the Tabor tomatoes.

FAILURE TO MITIGATE: Grower will also argue that Berelli cannot collect damage it failed to mitigate. Here, Berelli could have mitigated its damages by buying inferior tomatoes, and this would at least allow Berelli to continue production. This argument is probably not convincing because Berelli has no obligation to "cover" with inferior tomatoes.

Berelli probably can obtain money damages for Grower's breach.

Q3 Business Associations

Acme Corporation was a publicly traded corporation that operated shopping malls. Because of an economic slowdown, many of Acme's malls contained unrented commercial space. Additionally, the existence of surplus retail space located near many of Acme's malls prevented Acme from raising rents despite increasing costs incurred by Acme.

In June 2001, Sally, president and sole owner of Bigco, approached Paul, Acme's president. She proposed a cash-out merger, in which Bigco would purchase for cash all shares of Acme, and Acme would merge into Bigco. Sally offered $100 for each outstanding share of Acme's stock even though Acme's stock was then currently trading at $50 per share and historically had never traded higher than $60 per share.

Paul, concerned about Acme's future, decided in good faith to pursue the merger. In July 2001, before discussing the deal with anyone, Paul telephoned his broker and purchased 5000 shares of Acme at $50 per share. Paul then presented the proposed merger to Acme's board of directors and urged them to approve it. The board met, discussed the difference between the current market share price and the offered price, and, without commissioning a corporate valuation study, voted to submit the proposed deal to a shareholder vote. The shareholders overwhelmingly approved the deal because of the immediate profit they would realize on their shares. Based solely on shareholder approval, the board unanimously approved the merger, and all shareholders received cash for their shares.

In December 2001, shortly after completing the merger, Bigco closed most of the Acme malls and sold the properties at a substantial profit to a developer who intended to develop it for light industrial use.

1. Did Paul violate any federal securities laws? Discuss.

2. Did Paul breach any duties to Acme and/or its shareholders? Discuss.

3. Did the board breach any duties to Acme and/or its shareholders? Discuss.

Answer A

PAUL'S VIOLATION OF FEDERAL SECURITIES LAW

The issue here is whether Paul violated any federal securities laws by purchasing 5000 shares of Acme stock prior to the merger with Bigco. The two main federal securities laws that Paul could be liable under are Rule 10b-5, which prohibits insider trading, and Section 16(b), which imposes strict liability on officers, directors, and 10% shareholders for trading the stock of their company within 6 months of each other. Each will be discussed below:

Rule 10b-5

The issue is whether Paul violated rule 10b-5 of the SEC. Rule 10b-5 prevents insider trading by making it illegal for one who owes a fiduciary duty to a corporation and possesses "inside information" to use an instrumentality of interstate commerce to buy or sell the corporation's stock. Additionally, the rule contains a scienter requirement. The "insider" must either disclose the information or abstain from trading.

A person who owes a fiduciary duty is one who is an officer, director, attorney, employee, etc. who owes some duty (duty of care, loyalty, confidentiality, etc.) to the corporation. As the president of Acme, Paul is an officer and is clearly within the class of persons owing Acme a fiduciary duty.

Inside information is that information that a reasonable trader would want to know before buying or selling the corporation's stock. Here, the information was that Bigco had proposed a merger and buyout of Acme's stock at twice its current selling price and $40 higher than it had ever traded before. This information would be crucial to any person who was trading Acme's stock.

Using an instrumentality of interstate commerce is easily satisfied. Here, Paul used the telephone to place the order to his broker. The telephone lines cross state lines and are used to conduct business across state lines. Therefore, this requirement is satisfied as well.

Paul did purchase 5000 shares of Acme's stock. And, he did so with improper intentions. This is what is required in "scienter" -- it is knowledge that what one is doing is wrong. In short, Rule 10b-5 requires that the insider to something "slimy" and repugnant to an ordinary person. Purchasing 5000 shares of his company's stock on the basis of inside information is just what Rule 10b-5 was enacted to prevent.

The "abstain or disclose" rule is also part of 10b-5. Here Paul did eventually disclose the Bigco offer to the Board of Directors, and then to the shareholders, he traded on the information prior to disclosing. The announcement could have increased the current trading price of Acme, and Paul took advantage of the low price of Acme stock by purchasing before the disclosure.

In short, Paul has violated Rule 10b-5 and will be forced to disgorge his profits to the corporation.

Section 16(b)

The issue here is whether Paul violated Section 16(b). Section 16(b) imposes strict liability on any officer, director, or shareholder owning 10% or more of the outstanding stock from buying and selling or selling and buying stock of the company within 6 months of each transaction. There is no "guilty mind" requirement as in 10b-5 because the idea is that it is simply bad policy and bad for the market to have these persons trading. In order for Section 16(b) to apply, the corporation has to either be publicly traded or be of sufficient size to meet the guidelines. Here, Acme is a publicly traded corporation, and Paul, as president is an officer; therefore, the rule applies.

Here, Paul bought 5000 shares in July of 2001. If he sold those shares within 6 months, he is strictly liable to the corporation. The facts do not indicate when Bigco purchased the shares, but it had to be prior to December of 2001, when Bigco closed the malls. This is 6 months or less from the purchase. Paul therefore is strictly liable for profits.

Profits under 16(b) are tricky -- the calculation is the difference between the lowest price in the six month period and the highest price in the six month period. Paul's profits were at least the same as they would be under 10b-5. However, if the price fluctuated under $50 or sold for more than $100, P would be liable for that additional amount as well.

Conclusion

Paul has violated both Rule 10b-5 and Section 16(b).

PAUL'S BREACHES OF DUTY TO ACME/SHAREHOLDERS

The issue is whether Paul breached any duty to Acme or the shareholders. Paul owes two overarching duties to the corporation and hence the shareholders: the duty of care and the duty of loyalty. Each are discussed below.

Duty of Care

As an officer, Paul owes a duty of care to Acme. Paul must act as a reasonably prudent person would in this situation. He must act in good faith and in what he honestly believes is the corporation's best interest.

Paul, in good faith, decided to pursue the Bigco merger. A reasonably prudent person would most likely do the same thing. A merger would be good for the shareholders because the company was suffering from financial hard times. However, Paul apparently did not do any checking on Bigco's intentions after the merger. Had Paul done some investigating, he might have been able to discover that the reason Bigco was offering so much for the Acme stock was because it had a developer waiting to purchase the property and make a substantial profit.

Business Judgment Rule

Paul will assert that his actions did not violate the duty of care he owes the corporation because he acted under the protection of the business judgment rule. The

business judgment rule provides that when an officer or director acts in a way motivated by a good faith belief that he is acting on behalf of the corporation's best interests and that judgment turns out in hindsight to be wrong, the court will not step in [and] hold the officer or director liable.

However, the corporation or the shareholders will be able to argue that a reasonable person would have made the further inquiries, that the high asking price should have tipped Paul off that something else was happening here. This was a substantially high price for stock here -- Acme had never traded higher than $60/share, and Sally offered $100/share while the market was depressed and Acme was suffering financial hardship. This would have tipped off any reasonable person that something was motivating her.

Therefore, the business judgment rule will probably not protect Paul's decision in the end. While pursuing the merger might have been a wise choice, the failure to inquire into the basis of the merger was a violation of the duty of care.

Duty of Loyalty

As an officer, Paul owes a duty of loyalty to the corporation as well. This means that Paul must put the corporate interest ahead of his own, or those close to him, at all times. There are many ways to violate the duty of loyalty; of particular relevance here is the duty not to engage in interested transactions.

Normally, an interested transaction is one where the officer has an interest such as an ownership in another corporation that this corporation is considering doing business with. Here, however, the interest came in the $250,000 Paul spent on Acme's stock before he went to the Board with the merger proposal. A quarter of a million dollars -- there was no way that Paul would be able to act in an impartial manner in this transaction. By purchasing the stock before he even went to the meeting and informed the board of the merger proposal, he had indicated that he had decided it was going to happen. Otherwise, he risked losing that money.

As such, Paul violated his duty of loyalty to the corporation.

Conclusion

Paul has violated both the duty of loyalty and the duty of care he owed to the corporation.

THE BOARD'S BREACHES OF DUTY TO ACME/SHAREHOLDERS

The issue is whether the Board breached any duty to Acme or the Shareholders. Directors owe two overarching duties to the corporation and hence the shareholders: the duty of care and the duty of loyalty. Each are discussed below.

Duty of Care

The board of directors owes the same duty of care that Paul, as an officer, owes. The Board will, like Paul, argue that the Business Judgment Rule protects their decision to take the merger to the shareholders. However, like Paul, the argument will fail.

One of the fundamentals of the duty of care is that the directors need to investigate. Here, all the directors saw was dollar signs. They did not take the time to get a corporate valuation study, which in all likelihood would have revealed the developer that Bigco was dealing with, or some other similar venture. Directors are allowed to base decisions on the recommendations of employees or other people who have relevant information. However, there has to be some basis for this reliance. Here, the directors only relied on Paul's recommendation. Paul had done nothing to indicate that he had substantially investigated the deal. All the board based its decision on was the price. While price is important, it is not the only concern of the board. The board should have investigated further.

Therefore, the board breached its duty of care to the corporation and is not protected by the business judgment rule.

Duty of Loyalty

The board owes the same duty of loyalty that Paul, as an officer, owes. There is no evidence here of any interest on the part of the directors. If the directors were also large shareholders in Acme, that might provide the basis for the breach of the duty of loyalty, but absent such or similar evidence, there is no indication that the board breached any duty of loyalty to the corporation.

Conclusion

The board has violated its duty of care owed to Acme, but no facts indicate that a suit for violation of the duty of loyalty could be maintained.

POSSIBLE DEFENSES BY PAUL AND THE BOARD

Shareholder Approval

Paul and the board both could attempt to defend any liability based on the fact that the shareholders approved the merger. The merger constituted a fundamental corporate change, and as such, required shareholder approval. Therefore, the board acted properly in submitting it to them. However, the shareholders are permitted to rely on the board's recommendation, as they did here.

Therefore, the shareholder approval will not protect either Paul or the Board.

Answer B

1. Did Paul violate any federal securities laws?

Rule 10b-5

Rule 10b-5 is a federal law that makes it illegal for any person to use any means or instrumentality of interstate commerce to engage in a scheme to defraud, make an untrue statement of material fact (or omit a material fact) or engage in any practice that operates a fraud, in connection with the purchase or sale of a security. The elements of a violation of Rule 10b-5 therefore include an instrumentality of interstate commerce, scienter, an act or misstatement and the purchase or sale of a security.

Here, Paul telephoned his broker, which satisfies the element of interstate commerce. The "means or instrumentality" requirement is broadly defined to include anything that affects interstate commerce, and the use of the telephone is included. (Also, the facts state that Acme Corporation is publicly traded. If it is traded on a national exchange, Paul would satisfy this element even without using the telephone.)

Paul purchased 5000 shares of Acme while in possession of insider information, which is insider trading. Paul is an insider of Acme Corporation because, as its president, he is in a position of trust and confidence to the corporation. He knew about the merger proposal when he purchased the shares, even though not even the Board, much less

the public, knew about it. Inside information is material nonpublic information, which includes any information about which there is a substantial likelihood a person would be interested (or that a person would find persuasive) in deciding whether to buy or sell the security. A potential $50 per share profit in a month or two is certainly material.
Because Paul is an insider and he possessed inside information, he had an obligation to either disclose the information or abstain from trading on it. He violated this duty when he purchased the shares without disclosing the offer.

Paul's knowing disregard of his duty to disclose or abstain fulfills the scienter element of a Rule 10b-5 violation. His purchase of the shares is the requisite act and also satisfies the purchase or sale requirement.

Paul has violated Rule 10b-5.

Section 16b

Section 16b makes it illegal for any director, officer or 10% shareholder of a company to profit from the purchase and sale, or sale and purchase of shares of that company's equity securities within a time frame of 6 months; if the company has 500 shareholders and $10,000,000 in assets or is traded on a national exchange.

Here, Paul purchased 5000 shares of Acme stock at $50 per share in June of 2001. Because he was a shareholder of Acme when the merger was approved, he received $100 per share. The merger was completed prior to 2001, so Paul's profit was

sustained within 6 months. Acme Corporation is publicly traded. If it has 500 shareholders and $10M in assets or is traded on a national exchange, Paul has violated Section 16b. His profit of $50 per share times 5000 shares must be disgorged to the company. Therefore, Paul owes Acme (now Bigco) $250,000, assuming someone pursues this claim against him. He will have to defend a claim by any shareholder who held shares of Acme in June 2001 when Paul purchased the 5000 shares, and remained a shareholder through the merger and the suit.

2. Has Paul breached any duties to Acme and/or its shareholders?

As Acme Corporation's President, Paul owes Acme and its shareholders the duties of care and loyalty. He is therefore required to act in good faith as a reasonably prudent person would and in the best interests of Acme and its shareholders.

Paul's decision to pursue the merger was in good faith and supported by his concern about Acme's future. Therefore, this decision did not breach his duties.

However, Paul's purchase of 5000 shares of Acme stock based upon material inside information breached his duty of loyalty. An officer or director may not profit at the expense of the company or its shareholders. Paul purchased his shares from either Acme or another shareholder, so he profited at their expense when he reaped the $50 profit per share associated with the merger.

Paul may also have breached his duty of care when he submitted the merger proposal to the Board and urged them to approve it. Other than Paul's good faith concern about Acme's future, there is nothing in the facts to suggest that Paul did any research regarding the offer or the other possible ways Acme could make a profit. Since the facts indicate that Bigco sold Acme's properties at a substantial profit shortly after the merger, it appears that there were options Paul failed to look into or convey to the Board.

3. Did the Board breach any duties to Acme and/or its shareholders?

As with Paul, the Board as directors have duties of care and loyalty they owe to the corporation. This means that they must act as reasonably prudent persons would, and in good faith, in the best interests of the corporation and its shareholders.

The business judgment rule prevents the directors from being liable for any action taken in good faith that they reasonably believed to be prudent in their business judgment. The directors are also allowed to rely on the recommendations of officers in good faith.

Here, the Board was unaware of Paul's breach of duty when it relied on his recommendation, so the reliance was probably justified. However, a closer question arises regarding the Board's decision to submit the merger proposal to shareholders without commissioning a corporate valuation study or, as with Paul (above), considering alternative sources of profit. If a reasonably prudent person in conducting his or her

own business affairs would have taken such actions then the Board's failure to do so breached their duty of care owed to both the corporation and its shareholders.

As with Paul, the Board likely should have considered other possibilities or commissioning a valuation study. A reasonably prudent person, when offered double what that person previously believed to be the fair value of his or her property, would probably look into whether there was value to the property of which he or she was unaware.

On the other hand, the fact that the shareholders overwhelmingly approved the deal undermines this argument and could be used as evidence that the Board acted prudently.

The Board also breached its duties by failing to vote on the merger proposal until after the shareholders had already approved it. The Board may not shirk its responsibility to make decisions for the corporation and leave the decisions to the shareholders. The shareholders must see the Board's decision in the proposal.

Q4 Trust

Richard, a resident of California, created a revocable, inter vivos trust in 1998 at the urging of his wife, Alicia, who was also his attorney. Alicia drafted the trust instrument.

Richard conveyed all of his separate property to the trust. The trust instrument named Alicia as trustee with full authority to manage the trust and invest its assets. By the terms of the trust, Richard was to receive all of the income during his life. Upon his death, his child by a former marriage, Brian, and Alicia's daughter by a former marriage, Celia, would receive for their lives whatever amounts the trustee in her discretion thought appropriate, whether from income or principal. Whatever remained of the principal on the death of the last income beneficiary was to be divided equally among the then-living heirs of Brian and Celia. Celia was included as a trust beneficiary only after Alicia convinced Richard that this was necessary to avoid a possible legal action by Celia, although Alicia knew there was no legal basis for any claim by Celia.

Celia had lived with Alicia and Richard from her 10th birthday until she graduated from college at age 21 in 1990. Although Richard had once expressed an interest in adopting her, he was unable to do so because her natural father refused to consent. After Celia's college graduation, however, she rarely communicated with either Richard or Alicia.

After creation of the trust, and while Richard was still alive, Alicia invested one-half of the trust assets in a newly-formed genetic engineering company, Genco. She lent the other one-half of the trust's assets at the prevailing market rate of interest to the law firm of which she was a partner.

Richard died in 2000, survived by Alicia, Brian and Celia. Brian, upset with the way Alicia has handled the trust assets, seeks to have the trust declared invalid or, in the alternative, to have Alicia removed as trustee and require her to indemnify the trust for any losses.

1. What grounds, if any, under California law can Brian assert for invalidating the trust, and what is the likelihood Brian will succeed? Discuss.

2. What grounds, if any, under California law can Brian assert for removing Alicia as trustee and requiring her to indemnify the trust, and what is the likelihood Brian will succeed? Discuss.

3. As an attorney, independent of her capacity as trustee, has Alicia violated any rules of professional responsibility? Discuss.

Answer A

Part 1.Grounds Under California Law Which Brian ("B") Can Assert for Invalidating the Trust and Likelihood of Success

The issue is whether B can assert that the trust created by Richard ("R") pursuant to California law suffered legal defects in its creation so as to invalidate the trust. In order for a trust to be validly created, the settlor must deliver trust assets (res) to a Trustee for the benefit of certain beneficiaries for a valid legal purpose. According to the facts a trust instrument was executed, which satisfies any statue of fraud issues, whereby R, the Settlor, conveyed its separate property to the trust. Thus, the res requirement has been met. A California court will not invalidate a trust for lack of a trustee, but where there is only one trustee and such trustee is also the only beneficiary. Here, R named Alicia ("A") as Trustee, and the beneficiaries are initially, R, then B and Cecilia ("C"), and then others. The last legal hurdle is that the trust must have a valid legal purpose. In the instant case, the purpose is valid, since it does not restrict actions frowned upon by the law, such as prohibition of marriage.

According to the facts, R's trust was validly created. B's best argument for invalidating the trust is that R lacked the testamentary capacity and intent to create the trust because of (1) undue influence and (2) fraud. B is likely to succeed on this basis. With respect to undue influence, B will point to extrinsic evidence that A, an attorney, drafted the trust instrument and urged R to create the trust. Pursuant to common law, beneficiaries of a trust or will is (sic) prohibited from drafting the trust, unless they are related and live in the same house. This exception is met, since A is R's wife and lives with R, though A should have sought outside counsel to review the instrument. For B to succeed on a claim of undue influence, B would have to show that but for a strong influence, R would not have entered into a trust and made the specific distributions outlined therein. Given the facts, it would be difficult for B to succeed in proving undue influence.

B's other cause of action, which is much stronger, is fraud in creation of the trust. For a claim of fraud, B would have to prove that A intentionally made a misrepresentation of fact to induce R to enter into the trust, and that R relied on such representations. These requirements are met in this case. The facts show that C was included as a trust beneficiary only after A convinced R that this was necessary to avoid a possible legal action by C, although A knew there was no legal basis for such a claim. A clearly misrepresented law and had the necessary scienter to induce R to include C, a stepdaughter that (sic) was not formally adopted or acknowledged as a daughter by R, as a beneficiary to the trust. Because the requirements for fraud are met, B would likely succeed in invalidating the trust or at least the provision in the trust benefiting C.

Part 2.Grounds under California Law B can assert for removing Alicia ("A") as Trustee and Requiring A to indemnify the Trust; and Its Likelihood of Success

A's powers as a trustee can be expressly granted in the trust instrument or implied. In addition, A as the trustee has fiduciary duties, mainly a duty of care and a duty of loyalty. Because the trust does not specifically discuss A's powers, we must look to A's duties of care and loyalty. A's duty of care, which has been described as the prudent investor rule, requires that A exercise the degree of care, skill and prudence of a reasonable investor investing his or her own property. The prudent investor rule requires the trustee to, among other things, diversify trust assets and avoid risky investments while keeping the income production potential of the trust.

In the present case, A violated her duty of care to R and the other beneficiaries, including R. A invested 50% of trust assets in a newly-formed genetic engineering company, Genco, and the other 50% in the form of debt at the prevailing market rate of interest to the law firm of which she was partner. Both of these investment decisions are not decisions that prudent investor would decide upon. First, A did not diversify the trust's assets as exemplified by the 50% and 50% investments. Second, the investment in a (sic) Genco a newly-formed company without publicly disclosed operating results for a period of time is a very risky investment. Most financial institutions and prudent investors would advise investors to avoid shares of new companies because they lack operating results and many years of public reporting of financial results. A violated this

basic rule in investing 50% of the corpus into a newly-formed genetic engineering company. The facts do not indicate that Genco is a public company, which compounds the riskiness of this investment since private companies are not subject to many of the accounting and financial restrictions and disclosures that are intended to protect investors. Lastly, A invested the remaining 50% of the funds as debt to a law firm at prevailing interest rates. All things equal, this investment is more risky than placing the funds at a bank which is generating the same amount of interest. If the latter option is available, A also breached A's duty of care by not investing R's separate property into a less risky investment.

B can also claim that A violated her duty of loyalty. The duty of loyalty requires that the Trustee has undivided loyalty to the trust and may not enter into transactions with the trust that will detriment the beneficiaries. In the instant case, A made a loan of trust assets to the law firm where A is a partner. As discussed in the previous paragraph, this is to the detriment of the beneficiaries since safer investments and possible more profitable investments existed.

Because A violated her duties of care and loyalty, B has a strong claim for removing A as trustee and requiring her to indemnify the trust. Where a trustee has violated these duties, not only may the trustee be removed, the beneficiaries can see (1) to ratify the transactions made by the trustee, (2) impose a surcharge on the trustee (i.e, indemnify the beneficiaries for losses) or (3) trace trust assets and recover such asset. Because we do not know the results of A's investments in Genco and in the loan

to her law firm, we cannot recommend a specific course of action to B; however, since B seeks to have A indemnify the trust for losses, B will clearly have such option at his disposal, In addition, the court will not hesitate to remove A as trustee for lack of another trustee specified in the trust instrument, since the Court has power to appoint another trustee.

Part 3.Possible Violations by A of the Rules of Professional Responsibility

As an attorney, independent of her capacity as trustee, A has violated many rules of professional responsibility. First, A has a duty of loyalty to R, which means that A should act in the best interest of R, her client, and her own personal interests should not adversely affect her representation. If such personal or other interest affects her representation, A can only represent R if she reasonably believes that her personal and possible conflicts of interest will not adversely affect her representation of R and R is advised of the situation with consultation and consents. Pursuant to California Law, such consent should be written. According to the facts of this case, A had a potential conflict, since A was named a trustee and A's daughter was a beneficiary. This was not a potential conflict, but an actual conflict. In addition, A did not seek R's consent or advise him of the conflict. In fact, A was well aware of the conflict and intentionally lied to R so that R would include C as a beneficiary and continued to draft the trust instrument. When apprised of such a conflict, A should have withdrawn or asked R to seek another attorney for representation (or at least an outside attorney's opinion on the

trust instrument). Because of this conflict of interest, A has violated her duty of loyalty to R.

A also violated her duty of competence. A lawyer should have the legal knowledge, skill, preparedness and thoroughness necessary to protect his or her client's interest. In this case, A did not possess such knowledge as reflected by her advice to R. A should have withdrawn as R's attorney given the conflict of interest and not have advised R as to the legal consequences of not including C.

Lastly, A committed misconduct since A has duty not to lie and defraud clients. As an officer of the court, A should not have intentionally abused her role [as] a lawyer to R by telling him that it was necessary to include C in the trust. This intentional misrepresentation of the law is misconduct that is violative of the rules of professional responsibility.

Because of these violations of the rules of professional responsibility, A should be censured for her actions.

Answer B

1. Brian's Grounds to Invalidate the Trust

At his wife's urging, Richard created an express inter vivos trust of his separate property, which allowed him the income from the property for the remainder of his life, and at his death to go to his children. Brian can argue (1) that the trust was not validly formed, (2) that Alicia exerted undue influence over Richard and overcame his will in his disposing of his separate property in the trust at his death, (3) that the trust is voidable because of Alicia's misrepresentation to Richard regarding Celia.

Trust Requirements

Brian could first attempt to argue that the inter vivos trust was not validly created.

Under California law, a valid inter vivos trust requires (1) intent to create a trust, (2) delivery of the res (including constructive delivery), (3) a res (property to be placed in the trust Btrust assets), (4) named ascertainable beneficiaries, (5) a trustee, and (6) a valid lawful purpose.

In the present case, it appears that the requirements for a valid trust have been met. Although Richard created the trust at the urging of his wife, it appears that he did in fact intend to create the trust. Additionally, his separate property was transferred to the trust as the res, Brian and Celia and their heirs were named ascertainable beneficiaries,

Alicia was named as the trustee, and the trust purpose (providing for Richard's children) is a lawful one. Therefore, the trust appears to have facially met the requirements for a valid trust.

Undue Influence

However, Brian will assert that the trust is void because Alicia exerted undue influence (1) by urging Richard to create the trust of his separate property, and (2) by convincing him against his will to leave trust property to his stepdaughter Celia.

Under California law, a testamentary disposition is void if it was the result of undue influence. In order to prove undue influence, Brian has the burden of showing (1) that Alicia exerted influence over Richard, (2) that Richard's will was Aoverborne@ by Alicia's influence, and (3) that but for the influence, the disposition would have been different. However, proof that a party had the ability to influence the testator, as well as the motive, is not sufficient in an[d] of itself to demonstrate undue influence.

In the present case, Alicia urged Richard to create the trust of his separate property. This fact demonstrates that she did attempt to exert influence over him, but there are no facts indicting that Richard's will was overborne by this urging, or that he did not already desire to create the trust of his own will.

Additionally, Richard did not want to include Celia in the trust, but Alicia convinced him to do so because he might be sued if he did not. This is a much closer call, because in

this case, Alicia exerted influence by giving faulty legal advice to Richard, he changed his mind based solely on the influence, and but for Alicia's self-serving advice, he would not have included Celia in the trust. If the Court or finder of fact believes that Alicia exerted undue influence, then the inclusion of Celia in the trust would be void, and the trust may potentially be declared invalid.

Misrepresentation

Brian will also argue that Alicia's misrepresentation regarding Celia was fraud in inducing Richard to crate the trust and include Celia in it.

In order to demonstrate that the trust was based on misrepresentation, Brian must show (1) that Alicia made a material misrepresentation to Richard, (2) that Alicia knew the information was false, (3) Richard in fact relied on the misrepresentation, (4) that Richard's reliance was justifiable, and (5) damages.

In the present case, Alicia knew that Celia did not have grounds for a legal action against Richard, and yet she still told Richard that he should include her in the trust to avoid a lawsuit. Richard relied on this advice because he did in fact include Celia in the trust, and his reliance was justifiable given that his wife was an attorney and he was not, so he reasonably trusted her legal advice. The damages in this case result from the fact that Celia was wrongfully added to the trust.

Based on this misrepresentation, it will be a close call whether the entire trust will be found void, or whether the provision regarding Celia will be declared invalid. It appears that Richard intended to crate a trust for the benefit of Brian and his heirs, and that he originally intended to crate a trust before the misrepresentation. Therefore, the gift to Celia would likely be declared void based on the misrepresentation, but the trust itself would likely not be revoked.

2. Removal of Alicia as Trustee and Indemnification

Alicia invested half the trust assets in a new biotech company and loaned the other half of the trust assets to her law firm. Based on her actions as trustee, Brian has several arguments that she should be removed and that she should be forced to indemnify the trust.

Powers of Trustee

Under the common law, a trustee was entitled to buy or sell trust assets, but was not entitled to borrow for the trust or loan funds from the trust. However, under the modern trend, the trustee is entitled to loan or borrow funds for the benefit of the trust under certain circumstances.

Brian could argue that Alicia exceeded her duties as trustee because she was not empowered to loan trust assets, but nonetheless loaned funds to her own law firm. However, because under the modern trend a trustee is entitled to loan trust assets,

Brian will likely lose this argument. (However, see discussion below regarding self-dealing/duty of loyalty regarding loan to Alicia's law firm.)

Duty to Diversity Trust Assets

Brian would also argue that Alicia violated her duty as trustee to diversify the trust assets. A trustee has an obligation to diversify the trust assets to keep them from being depleted.

In the present case, Alicia invested half of the trust assets in one risky company, and loaned the other half to her own law firm. In doing so, she failed to properly diversify the trust assets, and rant the risk that if one of the two investments lost money, the trust assets would be depleted. Therefore, Alicia violated this duty.

Duty to Avoid Speculation

Brian will also argue Alicia violated her duty to avoid speculation and risky investments of the trust assets. A trustee has an obligation to avoid speculating the trust assets or placing the assets in risky investments that might jeopardize losing the trust assets. Under the prudent investor rule, a trustee must act as a reasonably prudent person would do in managing their own business assets.

In the present case, Alicia invested half the trust assets in a speculative new biotech company. Regardless of whether Alicia actually believed that this was a good company, new and untested biotech companies are inherently risk investments. In

investing half the trust funds in this company, Alicia did not act as a reasonably prudent investor would do, and she violated her duty to avoid speculation.

Duty to Keep Trust Assets Productive

A trustee also has a duty to keep trust assets productive. In this case, Alicia loaned half the trust assets to her own law firm. There is no indication what kind of rate of return this loan will receive, but if it is not substantial, or if it is below what it would otherwise receive from being properly invested, Alicia has violated her duty to keep the trust assets productive.

Duty of Fairness

A trustee also has a duty of fairness not to favor one beneficiary over the other. In the present case, Celia is Alicia's daughter, and Brian is Richard's soon from a previous marriage.

Therefore, Alicia cannot favor Celia over Brian. Additionally, Alicia cannot attempt to invest in risky investments in order to benefit the trust assets during the lifetime of Celia (who has a lifetime interest in trust income), at the risk of jeopardizing the trust assets for future beneficiaries. By investing in risky investments for quick-profit (the biotech firm) it appears that Alicia is violating this duty.

Duty of Loyalty of Trustee

The main duty that Alicia violated is the duty of loyalty. A trustee has a duty not to self-deal trust assets or commingle trust assets with her own. In the present case, Alicia loaned half the trust assets to her own law firm, where she is a partner. Therefore, because she loaned money to an entity which she is an equity owner, she violated her duty to avoid commingling or self-dealing.

Damages

Brian has several options in receiving damages for Alicia's breaches of her duties as trustee. First, for any investment that Alicia made that benefitted the trust and were profitable, he can ratify those actions, and keep the proceeds. For any deals that Alicia made that lost money, Brian can surcharge the trustee, and she will be required to indemnify the trust for the losses. Finally, for any self-dealing, such as the loan to her law firm, Brian can trace the funds, and have them given back to the trust.

3. Alicia's Violation of the Rules of Professional Responsibility

Alicia violated several rules of professional responsibility.

Duty of Loyalty

First, an attorney has a duty of loyalty to the client to avoid conflicts of interest. A conflict of interest arises where an obligation or interest of the attorney, to a third party, or to another client is materially adverse or directly adverse to the client. If there is a

potential conflict of interest, the attorney can represent the client in that matter only (1) if the lawyer reasonably believes she can give the client effective representation, (2) the attorney informs the client of the nature of the conflict, (3) the client consents, and (4) the consent is reasonable.

In the present case, Alicia had a conflict of interest in serving as the trustee and in drafting the trust document for Richard because her own interest in providing for her daughter may affect her representation. (This was in fact demonstrated by the fact that she misinformed Richard of the law to include Celia in the will). Although there was a conflict, Alicia did not inform Richard of the conflict, Richard did not consent, and on the facts given, any consent he gave would have been unreasonable.

An attorney can also not create an instrument for the client that gives the attorney or close relative of the attorney a gift or devise. Alicia may have violated this duty by writing the testamentary trust that gave Celia, Alicia's daughter, an interest in the trust. Although there is an exception where the attorney is a relative of the client, this exception may not apply given Alicia's fraud and the devise to her daughter.

Duty of Competence

An attorney also has a duty of competence to the client to act vigorously and competently to advance that client's interests. Under this duty the attorney has an obligation to give competent legal advice, vigorously advance the client's interests, and not take a case if they will violate an ethical rule. Alicia did not advance Richard's

interests, and should have refused to draft the instrument because of her conflict of interest (discussed above).

Duty of Dignity and Decorum

Under the duty of dignity and decorum, an attorney has an obligation not to present false or misleading legal advice. Alicia violated this duty when she told Richard falsely that Celia would have a legal claim if she were not included in the will. This may also constitute tortious misrepresentation (see above).

Q5 Constitution

The growth of City has recently accelerated, putting stress on municipal infrastructure. City's water supply, roads, sewers, and schools are all operating in excess of designed capacity.

The Assembly of Future Life was organized in City not long ago. Its members adhere to certain unpopular religious beliefs. City gave the Assembly preliminary zoning approval for plans to build a worship center on a one-acre parcel of real property the Assembly owned within City's borders. The Assembly's plans incorporated a dwelling for its minister. Soon after the preliminary zoning approval, newspapers in City featured articles about the Assembly and its members' beliefs.

After these newspaper articles appeared, City adopted a "slow growth" ordinance providing for an annual lottery to allocate up to 50 building permits, with applicants for certain "priority status" dwellings entitled to participate first. Priority status dwellings were defined as: (1) affordable housing; (2) housing on five-acre lots with available sewer and water connections; or (3) housing with final zoning approval as of the date the ordinance was adopted. Only after all applicants for priority status dwellings had received permits in the lottery could other applicants participate.

Over 500 applicants for priority status dwellings participated in the first annual lottery. Realizing that its opportunity to participate in a lottery could be years away, the Assembly submitted an application for retroactive final zoning approval and a building permit. City denied the application.

The Assembly brought suit in federal district court against City, alleging that: (1) City's ordinance was invalid under the due process, equal protection, and takings clauses of the U.S. Constitution; and (2) City's denial of the Assembly's application was invalid under the due process clause of the U.S. Constitution.

What arguments can the Assembly reasonably make in support of its allegations and is each argument likely to succeed? Discuss.

Answer A

1. Assembly of Life's (AAssembly@) Challenge of the City Ordinance

The Assembly, an unpopular religious organization in the City, is attempting to obtain building approval for its worship center on a one acre parcel of land. However, in response to the growth of the City and the strain on the City's infrastructure, the City enacted an ordinance that strictly limits growth, and affords priority largely on the basis of increasing affordable housing with preexisting facilities. Assembly challenges the ordinance based on (1) Due Process, (2) Equal Protection, and (3) the Takings Clause of the United States Constitution.

Standing

Because Assembly is suing in Federal Court for violation of its constitutional rights, it must first demonstrate that it has proper standing to bring its claim. A plaintiff has standing to

sue (1) where it has suffered an actual injury, (2) where that injury has been caused by the defendant's actions, and (3) where the harm or injury is redressable by a court order.

In the present case, Assembly has standing to challenge the ordinance. Assembly has suffered an actual injury because it cannot build its worship center because of the change in the law, preventing it and its members from more fully exercising their religious beliefs. This injury was caused by the change in the law when the city enacted the ordinance, and it could be redressed if the court struck down the ordinance.

However, the city could argue that even if the court struck down the ordinance, Assembly's injury would not be redressed because [it] may not receive final zoning approval regardless. In light of the fact that Assembly received preliminary approval without difficulty, this argument would likely fail.

It is also important to note that the assembly has organizational standing, because its members are injured by the city's action, and it relates to the purpose of the organization (exercise of religious beliefs).

Ripeness

In a related matter, Assembly's claim must also be ripe in order for the court to hear its claim. A suit is not ripe where the injury has not yet occurred or where the harm is speculative in nature or where the issues for the record are not fully developed or fit for adjudication.

The City may argue that Assembly has not yet been turned down for its permit, and that it could conceivably receive its permit after the lottery takes place. However, this argument would likely fail, given the limited nature of available permits, and given the fact that the available permits will be given on a basis of priority which excludes Assembly. Additionally, the issues in the case are fit for adjudication, and there is no further factual development necessary before the court can properly decide the merits.

State Action

The protections of the Constitution prevent the government from infringing the Constitutional rights of its citizens, and therefore, for Assembly to succeed it must prove state action. However, because the City's ordinance is at issue, and the City is a government actor, there is sufficient basis for state action.

Substantive Due Process

Assembly will argue that the city enacted the ordinance in order to prevent it from exercising its unpopular religious beliefs, violating its fundamental right to exercise its religion, as well as it members' right to free assembly.

In cases where a statute denies a plaintiff the exercise of a fundamental right, the statute should receive strict scrutiny. However, if the law does not prevent the plaintiff from exercising a fundamental right, the law should only receive rational basis review.

This law would likely receive rational basis review because it does not expressly prevent the Assembly or its members from exercising their fundamental right to their religion, their right to privacy, or right to free assembly. The members are still free to assemble where they please, and exercise their religion if they so desire. Despite the fact that the prevention of building a religious center may make these activities more difficult, it does not prevent them from exercising these activities and they are still entitled to do so. Therefore, the court should apply rational basis review.

Under rational basis review, the law will be upheld if it is rationally related to achieve a legitimate governmental interest. In the present case, the city has a legitimate interest in preserving the city infrastructure for necessary housing purposes, and delaying approval for development that may otherwise tax the city's resources until they can be improved. This ordinance is rationally related to achieve this purpose because it gives a priority to housing development and development with pre-existing infrastructure, thereby limiting growth to necessary housing, and housing that will not sufficiently burden the resources of the city. Thus, under rational basis review the ordinance will be valid.

However, if the law is analyzed under strict scrutiny, the law will only be upheld if the City can show that (1) it is narrowly tailored to (2) achieve a compelling governmental interest. Additionally, there must be no less restrictive means available to achieve the city's goal. Under this analysis, the City would assert that it has a compelling interest in

increasing housing and limiting development. However, the Assembly will likely argue that it is not narrowly tailored to achieve this goal because it includes housing that had final zoning approval at the time the ordinance was passed, which could potentially include land that did not include housing. Additionally, because the religious center was only going to have one person (the minister) live on the property, they could argue that the law could have been less restrictive by allowing development of property which would not tax the water supply, sewers or schools by the mere addition of one person. Therefore, in the unlikely event that the court applies strict scrutiny, the ordinance would be struck down.

Equal Protection

The Assembly would argue that the ordinance is discriminating against it because of its unpopular religious beliefs, and that the law is therefore invalid under the Equal Protection clause because it discriminates against them based on their exercise of their fundamental right to exercise their religion.

Classification

If the statute does not discriminate on its face or expressly in its terms, the plaintiff must prove (1) discriminatory effect, and (2) discriminatory intent.

The ordinance in this case does not discriminate on its face between religious or nonreligious development. The classification in the ordinance is between affordable

housing and nonaffordable housing. Because this classification does not implicate a fundamental interest, the statute would receive rational basis review.

However, the Assembly would argue that the ordinance has a discriminatory effect, because other development would be permitted under the new law, but the religious development is now prevented. Additionally, it would argue that the timing of the ordinance leads to a conclusion that the law was passed because of discriminatory intent. Assembly would argue that it received preliminary approval of its zoning, but that immediately after the unfavorable newspaper articles were printed, the city enacted the ordinance that prevented their development. The city would argue that there is no discriminatory intent because it was not acting to prevent the Assembly from its religious beliefs, but was instead motivated by the dire crisis for city resources.

This is a close call, but the city would likely prevail. Absent additional evidence, the City's ordinance appears to be related primarily to its concern regarding limited resources, rather than an aversion to Assembly's religion.

Level of Review

If the court believes that the ordinance was not motivated by discriminatory intent, it should apply rational basis review. As discussed above, the statute would pass this level of review.

However, if the court believes that this law was motivated by religious animosity to Assembly and discriminated against it for issuing permits based on its unpopular religious beliefs, then it should apply strict scrutiny. As discussed above for due process, the law would likely fail strict scrutiny.

Takings Clause

The Assembly would argue that the retroactive change in the permit approval process after it has already received preliminary approval constitutes a taking of its property right in violation of the Takings Clause.

Under the Takings Clause of the Fifth Amendment, where the government takes or condemns private property, due process requires that it provide just compensation. Any permanent physical occupation of private property by the government is a per se taking of the property. However, a statute which limits the productive uses of the property is considered a regulatory taking. In order for a regulatory taking to occur, the government's action must take away all reasonable use or value of the property. Otherwise, the government's action that impacts, but does not take away, the value or use of the property need not be compensated.

The assembly wants to use its parcel of land in the city to develop a worship center and give its minister a place to live. It will argue that because it is a religious organization, its only purpose in owning the property is to conduct religious

activities. Because the ordinance prevents them from building a worship center to conduct their activities, it prevents them from beneficial use of the property and should be compensated.

However, the city would argue that the ordinance may have prevented (or more likely, merely delayed) the building of the center, but did not deprive the Assembly of every beneficial use or value of the property itself. The assembly is free to use it for other purposes that do not require the building permit, and are still free to use it for religious worship. Because the Assembly is still free to use the property for other purposes than building the center, the ordinance likely does not constitute a taking, and need not be compensated.

2. Assembly's Challenge of the Denial of its Retroactive Zoning Approval and Building
Permit

The Assembly will argue that the city's denial of its retroactive zoning application violated it right to procedural due process and substantive due process.

Procedural Due Process

The Assembly will argue that it did not receive procedural due process when its application was denied. Under procedural due process, before a plaintiff is deprived

property or liberty right, it must receive reasonable due process (including a hear, right to present its side and argue its case). For property, a taking of property without due process only occurs if there was a property right, i.e., an entitlement to the benefit or property interest.

In the present case, although Assembly will argue that it was already approved for preliminary zoning and that it would have been approved for final building if not for the newspaper, it will likely lose because it cannot demonstrate that it was deprived of a property right. Zoning approval was not yet complete, and preliminary approval did not create an entitlement to final approval. Therefore, because Assembly was not deprived of a property right or interest entitlement, no procedural due process is required, and the City's denial of the application was likely valid.

Substantive Due Process

As discussed above, in cases where a statute denies a plaintiff the exercise of a fundamental right, the state action should receive strict scrutiny. However, if the state action does not prevent the plaintiff from exercising a fundamental right, the law should only receive rational basis review.

The city's denial of Assembly's permit application would likely receive rational basis review because it does not expressly prevent the Assembly or its members from exercising their fundamental right to their religion, their right to privacy, or right to free assembly. As discussed above, the members are still free to assemble where

they please, and exercise their religion if they so desire. Despite the fact that the prevention of building a religious center may make these activities more difficult, it does not prevent them from exercising these activities and they are still entitled to do so. Therefore, the court should apply rational basis review.

The denial of Assembly's retroactive application survives rational basis review because it is rationally related to the legitimate city interest of preserving development and city resources for necessary housing.

Answer B

1. Validity of Ordinance?

Standing

First, Assembly will have constitutional standing whether as [an] organization or by individual members to sue in federal district court. In order to have standing, a party must have (1) an injury in fact; (2) caused by alleged unconstitutional conduct; (4) capable of redressibility. Here, the Assembly and its members have injury in fact, as they have been denied a permit to build, caused by the new ordinance;; and if the court rules in favor of Assembly, their grievance will be capable of redressibility. The ordinance caused them not to get their permit, and if the ordinance is invalidated, they will be able to participate in the lottery.

(a) Due Process argument. (Procedural and Substantive)

Procedural Due Process

The Assembly could first argue that the ordinance is invalid under procedural due process. The Fifth Amendment due process clause, as applied to the states via the Fourteenth Amendment, is applicable in this case to City (a State Actor). The due process clause guarantees that no person shall be denied life, liberty, or property without due process of law. Assembly will argue it was denied procedural due process in the denial of its permit under the ordinance. It will argue it had a right to be heard on the issue, particularly after it had already been granted a preliminary

zoning permit. It will argue the ordinance does not leave open any procedures to be heard.

In determining the need for procedural due process, courts look at (1) whether a fundamental life or liberty interest or property entitlement has been denied, (2) the importance of that interest; (3) whether the procedures claimed by Assembly would make the hearing more fair and accurate; and (4) balance those interests against the interests of governmental efficiency.

Assembly could argue that (1) their land and zoning permit is a property entitlement. Although they did not have a final permit, the preliminary permit gave them reason to claim an entitlement and believe they would receive a final permit. Also, they will argue they have a right to build on their land and the ordinance is denying them this.

(2) the Assembly will argue that their interest is important. They have invested money in the land, and they are a church that needs a place to worship.

(3) The assembly will argue that to have a hearing or at least a chance to repetition will greatly increase the fairness and accuracy of the permit procedure. As of now, City determines on its own, without hearing, who fits Aaffordable housing,@ and sets an arbitrary 5-acre minimum land size, and doesn't leave open for hearings for those with preliminary permits. The hearings, rather than an arbitrary lottery, will better determine who needs the permits more, who should be entitled to them, etc.

(4) The City will counter that its interests in efficiency outweigh the interests in procedure, particularly because no one truly has an Aentitlement@ to a building permit. The City will argue that it is facing a crisis in its municipal infrastructure, and that the only way to relieve it is to substantially slow down growth. If it were to having (sic) a hearing on every permit, this would drastically slow down the process with so many parties competing for limited spots. Plus, a lottery is fair and objective.

City, could, however, have a lottery for some, and leave open a few spots/permits to be reviewed by application.

Given City's interests, they could keep the lottery, but they should have allowed reasonable procedures and hearings in place for others who want to develop their land. Assembly could win here.

Substantive Due Process

In order to succeed on a claim of substantive due process, Assembly must show (1) that the ordinance denies applicants a fundamental liberty interest and did so deny them; and (2) is not necessary to achieve a compelling government interest.

Assembly will argue that the ordinance denies individuals the right to build on their property, [and] to decide how to develop their land. Assembly, unfortunately, will not be able to show this is a fundamental right. The Supreme Court has not recognized a fundamental economic right (but see below as applied to them).

Therefore, the Rational Basis test will apply. Assembly must prove that the ordinance is not reasonably related to a legitimate government interest. Assembly will fail here. Government will be able to assert that the extreme stress on the City's infrastructure is a legitimate government interest in the welfare of its people. City will also show that the ordinance was a rational way of solving the City's growth and infrastructure problem. By limiting building, it can stabilize and improve infrastructure to keep up with the growth.

Assembly will not succeed here.

Equal Protection

Assembly can argue that the ordinance, on its face, denies equal protection of the laws based on an applicant's housing to be built, those with final zoning approval, and the infrastructure of the land. In order to sustain an equal protection claim, Assembly must show that people are treated differently with regard to fundamental rights, or that Assembly is part of a suspect (or quasi) class.

Assembly will again try to argue that people are treated differently depending on the nature of their land, what they choose to build, etc. Again, this is not a fundamental right recognized by the supreme court, and rational basis will apply. (See before.)

Also, Assembly won't be able to make a reasonable argument as to suspect classification. The law in its intent, effect, or in its face, does not discriminate based on

race, national origin, alienage, gender, or illegitimacy (recognized protected classes by the supreme court). Therefore, rational basis applies and City again will succeed (see before).

(c) Takings Clause.

Assembly will argue that the ordinance acts as a taking of their real property for public use without just compensation. Under the Takings Clause, when a government entity (State Actor B as City is here) (1) takes property of another for (2) public use, it must provide just compensation.

Taking?

Assembly will argue that the regulation, in effect, is a taking because by denying building permits, the regulation leaves no viable use for the property (other than farming). Assembly will argue that those who want to build something other than housing and who do not meet the other requirements are left with no viable use for their property. The City is essentially taking their property because City is leaving them without use.

City will counter that there are other viable uses like parking, or farming, that there are some viable uses left, although severely limited. And that the limitations are outweighed by the benefits to the City in reducing the stress on its infrastructure and slowing growth.

Assembly may succeed on this issue if they can show that where their property is situated, it can not be made useful in any other way B that will stay a vacant property without earning potential.

If Assembly meets this prong it will also be able to show it was taken for public use as the City admits that it's being used for the City's purposes in slowing growth.

Assembly will receive just compensation if it succeeds.

2. City's denial of Assembly's Application

Assembly will argue again that it should have had a hearing, etc. (see above) and may succeed there.

However, Assembly may have an argument that it was denied substantive due process because the City used the ordinance to violate Assembly's right to worship/free exercise of religion.

Assembly will try to show that although the ordinance seems to be a law of general applicability on its face, it is really an attempt to interfere with its practice of religion under the First Amendment as applied to the states under the Fourteenth Amendment.

Assembly will argue that (1) City's intent in passing the ordinance was to prevent them from building a place of worship; and (2) the law had the effect of preventing them from building.

Obviously, they were denied the building permit, so they will be able to show prong #2.

In order to meet Prong #1, however, they will have to show that they were granted the preliminary permit and that only after the newspaper article, the lottery came into effect. They will have to prove that the City never had this ordinance in mind before learning of Assembly, the City passed the ordinance with the intent to prohibit Assembly's plans. Assembly could try to find witnesses or City council members, or minutes of meetings to help them.

If they succeed here, City will have to show that their discrimination vs. religion was necessary to achieve a compelling government interest. This will be nearly impossible to show, and Assembly will succeed. City would have to show Assembly was a cult, or illegal institution.

Q6 Evidence

Phil sued Dirk, a barber, seeking damages for personal injuries resulting from a hair treatment Dirk performed on Phil. The complaint alleged that most of Phil's hair fell out as a result of the treatment. At a jury trial, the following occurred:

A. Phil's attorney called Wit to testify that the type of hair loss suffered by Phil was abnormal. Before Wit could testify, the judge stated that he had been a trained barber prior to going to law school. He took judicial notice that this type of hair loss was not normal and instructed the jury accordingly.

B. Phil testified that, right after he discovered his hair loss, he called Dirk and told Dirk what had happened. Phil testified that Dirk then said: (1) "I knew I put too many chemicals in the solution I used on you, so won't you take $1,000 in settlement?" (2) "I fixed the solution and now have it corrected." (3) "Don't worry because Insco, my insurance company, told me that it will take care of everything."

C. Phil produced a letter at trial addressed to him bearing the signature "Dirk." The letter states that Dirk used an improper solution containing too many chemicals on Phil for his hair treatment. Phil testified that he received this letter through the mail about a week after the incident at the barbershop. The court admitted the letter into evidence.

D. In his defense, Dirk called Chemist, who testified as an expert witness that he applied to his own hair the same solution that had been used on Phil and that he suffered no loss of hair.

Assume that, in each instance, all appropriate objections were made. Did the court err in:

1. Taking judicial notice and instructing the jury on hair loss? Discuss.

2. Admitting Phil's testimony regarding Dirk's statements? Discuss.

3. Admitting the letter produced by Phil? Discuss.

4. Admitting Chemist's testimony? Discuss.

Answer A

Phil v. Dirk

This question raises issues under the Federal Rules of Evidence. (FRE)

1. Judicial Notice.

Under the FRE, judges may take Ajudicial notice@ of certain types of facts. To take judicial notice, the fact must be of the type that (sic) well-established and commonly known , including certain scientific facts B for example, that water freezes at 32°. In a civil case, if a fact is judicially notice (sic) and the judge so instructs the jury that fact is conclusively established.

Here, the judicial notice was improper. It is not commonly known or well-established that the type of hair loss suffered by Phil (P) was abnormal. Proving that P's hair loss was abnormal was part of P's case-in-chief to establish negligence. The judge cannot use his personal experience to judicially notice a material fact. The instruction was error.

The court erred in taking judicial notice.

2. Phil's Testimony Regarding Dirk's Statements.

Presentation. Witnesses are Acompetent@ to testify only if they have personal knowledge of the subject matter of their testimony. Here, Phil called Dirk and heard Dirk's statements himself, so Phil has personal knowledge.

Relevance. Only relevant evidence is admissible. Evidence is relevant if it has a tendency to prove a fact in issue. Here, Dirk's testimony tends to prove his negligence, so it is relevant.

Exceptions to Relevance: Substantial Risk of Prejudice

However, not all relevant evidence is admissible. A court may exclude relevant evidence if Aits probative value is substantially outweighed by the risk of prejudice.@ This rule is within the court's discretion. It would not apply here though because several Public Policy Exceptions apply: (1) Offers of settlement. Offers to settle claims will be excluded due to the public policy of encouraging settlements. The rule only applies if there is an actual claim however: that is there is a dispute as to (1) liability or (2) amount.

Here, D will argue that his statement regarding paying $1000 was clearly an offer of settlement and should have been excluded. Although D admitted he Aknew he put too many chemicals in@ the amount was still in dispute. Also, Phil had called him to complain about the hair loss, suggesting that Phil was threatening suit. This testimony should have been excluded.

(2) Remedial Measures. Evidence of remedial measures taken after the incident are not admissible for public policy reasons of encouraging remedial actions. Here, D's statement clearly shows the taking of remedial action and may be excluded. Evidence of remedial measures may be, however, admissible to prove ownership and control, or to rebut proof that greater care could not be taken. If D presented evidence that the chemicals he used were proper and could not be changed, then D's statement that he Afixed the solution@ could be admitted to rebut, for that purpose only. The courts should have allowed the testimony but given a limiting instruction in purpose.

(3) Liability Insurance.

Evidence of liability insurance is also excluded for the public policy to encourage the purchase of insurance. It generally is inadmissible, except to show ownership and control. D's statement is only about liability insurance, and ownership and control is not at issue.

The court should have excluded this testimony.

Hearsay. Hearsay is an out of court statement offered to prove the truth of the matter amended. D may argue that the testimony should have been excluded as hearsay.

However, all three of D's statements are admissible because they are non-hearsay as an admission of a party opponent. The court erred in allowing the testimony only on the public policy grounds discussed above.

3. Admitting Phil's Letter.

Form: P's testimony about the letter is proper since he has personal knowledge. He did not testify about whether the handwriting and signature were actually D's. He could only do this if he had personal knowledge of D's writing, or if the letter was a response letter to something he had written.

Presentation: Foundation, Authentication, Best Evidence Rule .

Foundation: P's testimony about receiving the letter a week after the incident at D's barbershop laid a proper foundation for the document.

Authentication: Documents must be authenticated before they can be admitted into evidence. They can be authenticated by testimony of a witness with personal knowledge about the document. P's testimony is sufficient.

Best Evidence Rule: This Rule requires that where the party is trying to prove the contents of the document, the Aoriginal@ document must be submitted, or if it is not the original document, an explanation that is satisfactory must be given as to why the original document is not submitted. Here, P is trying to prove the contents of the letter. P is not testifying about what the letter

said, but is actually introducing the letter into evidence. Since he is submitting the original, the rule is satisfied.

Relevance: The letter is relevant because it tends to prove that D was negligent, the issue in the case.

Hearsay: D may object that the letter is hearsay. However the statement in the letter is an admission by a party - opponent and is non-hearsay. The court did not err in admitting the letter.

4. Chemist's Testimony.

Form: D can produce Aexpert witnesses@ to testify in aid of his case.

Presentation: Expert witnesses must meet several requirements before they can testify. The testimony must be helpful to the factfinder and based on scientific evidence. The expert himself must be qualified, may rely on treatises or other scientific, well-established bases of information, and must have personal knowledge of the facts of the case being discussed (must make himself or herself aware of the facts).

Here, Chemist does not meet these requirements.

Chemist's testimony is not based on sufficiently scientific evidence. Conducting one experiment upon himself does not qualify as scientific and is not helpful to the fact-finder.

It is unclear whether Chemist is qualified to testify to this matter, whether he knows about chemical effects on hair loss for example. He did not mention relying on scientific evidence or treatises to conduct his experiment. He seems to have personal knowledge of the facts of the case if he knows the chemical solution used on Phil, but this is insufficient to qualify as an expert witness.

The court erred in admitting Chemist's testimony.

Answer B

I. Judicial Notice and Jury Instruction

A. Judicial Notice

A judge may take judicial notice on his own initiative. However, a judge may only take judicial notice of things of common knowledge, or that may be ascertained by reference to sources of undisputed accuracy.

Here, the judge took notice of the fact that the type of hair loss was not normal. He based this, not on common knowledge, or on reference to a source of undisputed accuracy, but on his own personal knowledge. This was not a proper basis for judicial notice. Therefore the court erred.

B. Jury Instruction.

The instruction itself, other than the error in the judicial notice, would not have been in error. The judge may instruct the jury that something has been judicially noticed. In a civil case such as this one, it would be conclusive. However, because the judicial notice was in error, so was the instruction.

C. Misconduct

A judge may not offer expert testimony in a trial over which he presides. His actions should subject him to discipline.

II. Phil's Testimony re: Dirk's Statements

A. Statement One

1. Logical relevance

The statement is relevant because it has Aany tendency@ to show that D was negligent and liable.

2. Legal relevance

Offers of settlement and negotiations are inadmissible to prove negligence or liability, due to a public policy of encouraging such measures. Here, D's first statement was a negotiation and an offer. However, spontaneous offers made when no case is pending are admissible. Here, all we know is that P called D to tell him what had happened. It appears no claim was pending, so admissible.

D may also argue it was an offer to pay medical expenses, inadmissible because of a policy encouraging such measures. However, it is doubtful that P was going to seek medical care B there is no mention of physical injury. Further, the exception only applies to the offer, and not surrounding statements, so the statement about too many chemicals would come in.

3. Hearsay

D's statement was made out of court, and is offered for its truth, so it may be hearsay.

However, under the FRE, admissions of a party opponent are admissible. Here, D is a party, and the statement is offered by P, his opponent. It is an admission because it is an acknowledgment of a fact in issue, namely D's liability. Thus, it is not hearsay.

If D testifies that he didn't use too much, the statement will also come in to impeach him as a prior inconsistent statement, so long as D's given a chance to explain or deny it.

Finally, it might also be a state of mind statement of D's intent to pay P $1000, which is an exception to hearsay.

Thus, the statement was admissible and in error.

B. Statement Two

1. Logical relevance

If he Afixed@ it, it must have been Abroken@ B negligence.

2. Legal relevance

Evidence of subsequent remedial measures are inadmissible to show liability or negligence due to a policy of encouraging such measures. Here, D said he fixed the solution after P's harm. Thus, it was a subsequent remedial measure.

However, if D denies the solution was his, or that a fix was possible, it will be admissible. Further, if there are no longer any samples of the solution used on P, the statement can come in to explain why D's new solution isn't defective, or that D destroyed evidence.

3. Hearsay

See above.

Party admission, so not hearsay. May be inconsistent, depending on D's testimony, Also could be present sense impression, if D made it while fixing the solution.

Therefore, the statement was admissible only if an exception to the bar on subsequent remedial measures applies. Probably an error to admit.

C. Statement Three

1. Logical relevance

Saying that the insurance company would cover it shows that D was liable.

2. Legal Relevance

Evidence of liability insurance is inadmissible to show liability or liability to pay, due to a policy encouraging insurance.

Here, D said his insurers would cover it. Therefore it is inadmissible unless used to prove ownership and control, which appears to be undisputed.

3. Hearsay.

Even if not barred by public policy, there are two levels of hearsay. The statement from D to P is an admission, as discussed above. However, the statement from the insurance company to D (they told me@) is also an out of court statement offered for its truth, and not under any exception, unless there are circumstantial guarantees of trustworthiness, necessity, and notice, none of which are present here. Thus, the court erred in admitting the statement.

III. The letter

A. Logical Relevance

It goes to show D was negligent.

B. Legal relevance

It may be more prejudicial than probative, if D's statement, above, came in. It might be unnecessary cumulative evidence that would not add much and would waste the jury's time.

C. Authentication

A document must be properly authentic. Here, it is a letter allegedly from D. P needed to authenticate.

P could have authenticated by having someone familiar with D's handwriting or signature testify it was his, or by having an expert or the jury compare it to a sample of D's handwriting or signature.

Or, if P had written a letter to D, and received this one in response, it could be authenticated. A response to their phone call was not sufficient. Since P did none of this, not authenticated, and error to admit.

D. Hearsay

Party admission B see above.

IV. Expert

An expert may give testimony on any subject beyond common experience that is helpful to the trier of fact.

The expert must be qualified, express reasonable certainty about their opinion, and have a proper factual basis, such as hypotheticals , things generally relied on by such experts, or personal knowledge. An expert may testify to ultimate issues.

The hair chemicals and effects appear to be beyond common experience. It would be helpful to the trier of fact to see if the expert found the chemicals to make him lose hair (that's why it's relevant).

However, it's unclear that Chemist was qualified as an expert in the subject of chemicals and hair loss. If he was, an opinion based on his experiment would be admissible. However, here, the expert gave no opinion as to any issue in this case, but merely testified about what he did to himself. The jury may not know enough to tell whether the experiment shows that P's claim has no merit. They needed an expert opinion to show them the two were comparable. Because he gave no opinion, he did not express any certainty.

Finally, if the Aexperiment@ is not let in as expert testimony, it must be authenticated. To have proper foundation for an experiment, there must be evidence that the experiment was conducted with the same materials, under the same conditions as the events at issue. No foundation was laid here.

Thus, admission as expert opinion or as evidence in its own right was in error.

Jul 2001

THE COMMITTEE OF BAR EXAMINERS
OF
THE STATE BAR OF CALIFORNIA

California Bar Examination Essay Questions

and

Selected Answers

ESSAY QUESTIONS AND SELECTED ANSWERS
JULY 2001 CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2001 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

ESSAY EXAMINATION INSTRUCTIONS

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

Q1 Civil Procedure

Pam took an indefinite leave of absence from her job, sublet her apartment in State A, and went to care for her elderly mother in State B. Approximately six months later, while Pam was walking to her car in the parking lot of Don's Market in State B, Rita, a resident of State C, struck Pam with her car. In Rita's car were three friends from State C who were traveling through State B with Rita. The friends told the police officer called to the scene of the accident that Pam was reading a magazine as she walked across the parking lot and was therefore not watching where she was going. Pam told the police officer that she had just walked out from behind a large concrete column in the parking lot when Rita's car struck her.

Pam sued Rita and Don's Market in federal court in State B. Pam's complaint sought $60,000 in damages against each defendant. It also asked the court for an injunction ordering Don's Market to tear down the concrete column in the parking lot.

Don's Market moved to dismiss Pam's complaint on the ground that the court lacked subject matter jurisdiction. The court denied the motion.

Rita then moved for a change of venue of the action to federal court in State C on the grounds that she is a citizen of State C and that it would be a hardship for her and her witnesses to travel to State B for trial. The court denied Rita's motion for change of venue.

Rita then filed a notice of appeal of the court's denial of her venue motion. The appellate court dismissed Rita's appeal.

1. Was the trial court correct in denying the motion of Don's Market to dismiss the complaint on the ground that the court lacked subject matter jurisdiction? Discuss.
2. Was the trial court correct in denying Rita's motion for change of venue? Discuss.
3. Was the appellate court correct in dismissing Rita's appeal? Discuss.

Answer A

I. Trial Court's Denial of Don's Market's Motion to Dismiss for Lack of Subject Matter Jurisdiction

Federal courts are courts of limited subject matter jurisdiction (SMJ). Generally, a plaintiff's cause of action must be based on a federal question or on diversity of citizenship for a federal court to have SMJ.

A. Federal Question Jurisdiction

A federal question exists when plaintiff sues to vindicate a federal right, often under a federal statute or the Constitution. Here, it is not clear what Pam's lawsuit is specifically about. However, since the incident was a car accident in a private parking lot, it is probably a negligence action. Accordingly, this is not a federal question since no federal issue is raised, and so the court does not have federal question SMJ.

B. Diversity of Citizenship SMJ

For a federal court to have SMJ based on diversity, each plaintiff must be diverse from each defendant and the amount in controversy must exceed $75,000.

a. Diversity of Citizenship

Rita (R) is a resident of State C. An individual's citizenship is that of their domicile; since R appears to be domiciled in C, where she resides, R is a citizen of C.

Don's Market is probably a corporation. A corporation's citizenship includes its state of incorporation and the state in which it has its principal place of business. We are not told in which state Don's Market (DM) is incorporated. The market itself is in State B. If this is the only store DM operates, then its principal place of business is in State B and so it is a citizen of State B. Accordingly, DM is probably a citizen of B.

Pam, as an individual, is a citizen of the state of her domicile. Pam originally lived in State A, but left her job there indefinitely, subletting her apartment, to come to care for her mother in State B. Domicile is determined by physical residence combined with intent to make the state a permanent home. Pam (P) is physically residing in B. Her indefinite leave of absence from her job in State A may indicate she intends to eventually move back to A. If she intended to make B her permanent home, she probably would have quit her job in A and terminated her lease rather than subletting it. Accordingly, P probably does not have the intent to make B her permanent home. She is therefore still domiciled in State A and is a citizen of A.

Because P is a citizen of A, and R is a citizen of C, and DM is a citizen of B, complete diversity exists.

b. Amount in Controversy

For diversity SMJ, the amount in controversy must exceed $75,000. Here, P is claiming

$60,000 from each defendant. A plaintiff's good faith claim in excess of the required amount is sufficient.

P may aggregate her claims for $60,000 against each defendant. A plaintiff may only aggregate claims against multiple defendants if they are joint tortfeasors. Here, P appears to be claiming that R and DM jointly caused her injury through their individual negligence: R's negligence in driving and DM's negligence in placing the concrete column. Since these acts of negligence combined to cause P's injury, DM and R are joint tortfeasors. Accordingly, P may aggregate her separate $60,000 claims together, making $120,000, in excess of $75,000.

Additionally, P is seeking an injunction. An injunction may be valued by either the value of the benefit to plaintiff or the cost of compliance for defendant. The value of removing the column to P is probably not great. However, if the cost to DM of removing the column is over $15,000, then the injunction against DM plus the damages claim would exceed $75,000. Note P may then argue she has supplemental jurisdiction over the claim against R. However, as a plaintiff in a diversity case, she may not join additional claims under the supplemental jurisdiction statute.

Accordingly, since the parties are all diverse, and the amount in controversyexceeds $75,000 either through aggregation or the injunction, subject matter jurisdiction was proper.

The motion was therefore properly denied.

II. Denial of Motion for Change in Venue

A. Proper Venue in State B

To determine if R's motion should have been granted, we must see if venue was originally proper.

In a diversity case, venue is proper in any district where all defendants reside; or where a substantial part of the claim arose; or, if neither is possible, any district where any defendant is subject to personal jurisdiction.

1. Residence

A corporation resides where it is subject to personal jurisdiction. Jurisdiction is proper under traditional bases, such as presence or citizenship in a state, or under minimum contacts analysis, in which the exercise of jurisdiction would not offend traditional notions of fair play and substantial justice. Here, DM is a citizen of B since it has its principal place of business there. Personal jurisdiction will be proper under traditional grounds over a corporation present as a citizen in a state. Accordingly, DM is subject to personal jurisdiction in B as a citizen. Additionally, DM certainly has minimum contacts with State B. It does substantial business there, purposefully availing itself of State B's laws, since its market is in State B. Also, the accident arose directly out of DM's contacts with B, since its market parking lot is in State B and it was certainly foreseeable that DM could be sued in State B arising out of incidents involving its market in State B. Accordingly, DM is subject to personal jurisdiction in State B, and so, for venue purposes, it resides in State B as well.

R, as a citizen and domiciliary of State C, resides in State C.

Accordingly, since DM resides in B and R resides in C, there is no district in which all defendants reside.

2. Substantial Part of the Claim

The accident occurred entirely in State B, in the DM parking lot. Accordingly, a substantial (indeed, all) part of the claim arose in the district in which DM's store is located.

We are not told whether P's suit was filed in the district encompassing DM's market (sic). If State B only has one district, then venue is proper since the accident necessarily occurred within that district. If the accident and lawsuit are in different districts, then venue may not be proper where filed. More information is needed.

3. Any District Where Any Defendant is Subject to Personal Jurisdiction

Here, R, as a citizen of C, is subject to personal jurisdiction in C; as noted above, DM is subject to personal jurisdiction in B. Accordingly, if no district fulfilling either of the first two requirements exists, then venue would be proper in R's home district or in B. However, as explained above, venue is proper in the district encompassing DM's market (sic), where the accident occurred.

Accordingly, assuming the lawsuit was filed in the same district encompassing DM's market (sic), venue was proper. Thus R's motion was properly denied on this basis.

B. Transfer of Venue

Even if venue is originally proper, a court may still transfer venue to another court where the suit could originally have been brought, if the interests of justice so require.

R will argue that the interests of justice require transfer to C because her three witnesses

reside in C, and travel to B would be highly inconvenient. Certainly R's witnesses are very important, since their testimony presumably will state that P, in reading a magazine while walking,was at least contributorily negligent. The convenience of witnesses is normally a valid reason to transfer venue.

However, the action must have been bringable in the transferee district. Here this means all defendants must be subject to personal jurisdiction in C, the C court must have had SMJ, and venue must be proper in C.

1. SMJ in C

Diversity of citizenship would provide valid SMJ in C.

2. Personal Jurisdiction

R, a citizen and domiciliary of State C, is subject to personal jurisdiction in C under traditional bases.

DM may not be subject to personal jurisdiction in State C. We are not told State C's long-arm statute, but it does not appear that DM is a citizen of C, or even that it does any business there. Without any contacts with State C, DM cannot be said to have purposefully availed itself of C's laws, nor is it foreseeable that DM would be sued in C if it has no contacts there. Finally, the accident occurred in State B, so not only does State C have little interest in exercising jurisdiction over DM, but there is no relationship between DM and State C and the cause of action. Accordingly, it is highly unlikely that State C could exercise personal jurisdiction over DM, since no traditional bases exist, and there are apparently no contacts between DM and C, much less the constitutionally required minimum contacts.

Since DM is not subject to personaljurisdictionin State C, then the action could not have been brought originally in State C. Therefore, venue cannot be transferred to State C.

3. Venue

As explained previously, a district exists where a substantial part of the claim arose: the district encompassing DM's market (sic), in State B. Therefore, since such a district exists, venue would not be proper in State C, since the only means of proper venue in State C would be under the "last resort" option of any district where any defendant is subject to personal jurisdiction. This option is unavailable where, as here, a district exists where a substantial part of the claim arose.

Accordingly, since transfer of venue to State C could not have been proper since neither venue nor personaljurisdictionover DM existed in C, the trial court properly denied R's motion to transfer venue.

III. Did the Appellate Court Correctly Dismiss Rita's Appeal?

Appellate courts generally review final judgments. Here, the denial of R's motion to transfer

venue was not a final judgment. An appellate court may consider interlocutory appeals on certain matters, particularly if the matter is of great importance and, if not settled immediately by the appellate court, will substantially affect subsequent litigation.

Here, the denial of the motion to transfer venue was not a final judgment. In addition, since venue was proper in State B, since the accident occurred there and so the claim arose there (see previous analysis), the denial of transfer of venue did not confer improper jurisdiction on the trial court. Accordingly, there was no compelling need to consider the denial of the motion on immediate appeal.

Even had the appellate court heard the appeal, it would have reviewed the denial onan abuse of discretion basis. While the requirements of personal jurisdiction must be properly met, and cannot be waived, the determination of whether transfer would be in the interests of justice is for the discretion of the trial court. The court could have found that, while R and her witnesses would be inconvenienced in State B, that P and DM would be more inconvenienced in State C, especially since P cares for her elderly mother in State B. Since this decision would be one of the trial court's discretion, the appellate court would have been unlikely to overturn it.

Therefore, the dismissal of R's appeal was proper.

Answer B

(1) Subject Matter Jurisdiction

Pam brought suit in federal court in State B. For a federal court to have subject matter jurisdiction, there must be a federal question or complete diversity of citizenship between the parties. Because no federal statute or constitutional claim is involved, jurisdiction can only be based on diversity.

Diversity Jurisdiction

Federal court jurisdiction based on diversity requires complete diversity of citizenship between the parties and an amount in controversy over $75,000.

A. Complete Diversity of Citizenship

For Pam to sue Don's Market and Rita in federal court, she must be a citizen of a different state than each of them.

1. Pam's Citizenship

An individual's citizenship is based on their domicile, or where they intend to make their permanent home. For Pam to be diverse from Don's Market, her domicile cannot be in State B. Pam will argue that she is domiciled in State A, because that is where she was living until 6 months ago. Pam will argue that she left only for a temporary period to care for her elderly mother in State B, and that her intent to return is evidenced by the fact that she did not give up her apartment, only subletted it. Also, she did not quit her job, but only took a leave of absence from it.

Don's Market will argue that Pam is a citizen of State B because she is living there presently. He will argue that Pam's subletting her apartment was giving up her residence there, and that it was subletted just so Pam could avoid breaking her lease. Don will argue that she did not merely take a vacation from her job in State A, but has left it indefinitely.

Although it is a close question, the fact that Pam has retained both her apartment and her job in State A shows her intent to keep her permanent home there. The court should find that she is domiciled in State A.

2. Don's Market's Citizenship

The citizenship of a business is its principal place of business and, if it is incorporated, where it is incorporated. The facts do not state whether Don's Market is a corporation, but its principal place of business is in State B, so it is a citizen of State B. Therefore Don is diverse from Pam.

3. Rita's Citizenship

Since Rita is an individual, her citizenship, like Pam's, is based on her domicile. Since the facts state that she is from State C and was just driving through State B, her domicile can be

assumed to be in State C, where she lives. Therefore, Rita is diverse from.

Since both the defendants, Don's Market and Rita, are diverse from the plaintiff, Pam, complete diversity of citizenship exists.

B. Amount in Controversy

Diversityjurisdictionrequires an amount in controversy of over $75,000. The amount is based upon the plaintiff's good faith allegation and can only be challenged if it is clear to a legal certainty that she cannot recover thatamount.

1. $60,000

Here, Pam claims $60,000 in damages against each defendant. Presuming that is her total claim against each one, including punitives and attorneys' fees if available, it does not satisfy the jurisdictional amount.

However, a plaintiff can aggregate her claims to meet the $75,000 requirement in certain circumstances. A plaintiff can aggregate her claims against the same defendant, but cannot aggregate her claims against different defendants unless theyare joint tortfeasors against any of which she could recover the full amount. Here, there are facts to indicate that Don's Market and Rita are jointly liable, since they each caused the accident (Don's Market by placing a column improperly and Rita by driving carelessly). If they are jointly liable, Pam has met the jurisdictional amount because her claim is $120,000. If they are not, she cannot meet the requirement solely through her claimed damages.

2. Injunction

However, Pam is also asking for an injunction to make Don's Market tear down the offending column. In a majority of states, injunctions are valued at their value to the plaintiff. Here, the injunction has little value for Pam, as she has already been injured and is unlikely to be injured by the column again. In the majority of states, then, this would not help Pam reach the jurisdictional amount against Don.

A minority of states allow injunctions to be measured by their cost to the defendant. Here, the cost to Don of tearing down the column may be high enough to raise her $60,000 claim to the required $75,000. If it does, the injunction will give the court diversity jurisdiction over Pam's claim against Don, but not over her claim against Rita. Nor is supplemental jurisdiction available over the claim against Rita based on the claim against Don, because this is not a federal question claim, and it is being brought by the plaintiff.

In conclusion, if Don's Market and Rita are jointly liable, the court's denial of Don's motion to dismiss for lack of jurisdiction was proper because there is complete diversity of parties and the amount in controversy exceeds $75,000 when the claims are aggregated. If they are not jointly liable, jurisdiction over Don may still be proper due to the injunction, but not as to Rita.

(2) Change of Venue

A. Venue in State B Federal Court

Venue is proper where any defendant resides if all reside in the same state, or where a substantial part of the events forming the basis for the claim arose.

Here, Don's Market resides in State B, where it is located and does business, but Rita resides in State C. However, since the accident that is the basis for the claim took place in State B, venue is proper there even though not all defendants reside there.

B. Transfer to State C

Where venue is proper to begin with, a court may transfer to any other venue where the case could originally have been brought for the convenience of the parties or witnesses or in the interests of justice.

1. Convenience

Here, Rita argues for transfer to State C on convenience grounds because that is where she resides, and it would be a hardship for her and her witnesses to defend in State B.

It is true that Rita and the three primary eyewitnesses, who also reside in State C (her friends who were in the car at the time of the accident and allege they saw Pam reading a magazine and not watching her step), would incur hardship in coming to State B to defend.

However, this hardship will be balanced against the hardship Pam and Don's Market will face in having to defend in State C, a foreign state for them. Pam is caring for her elderly mother and will find it hard to leave, and it will be hard for Don's Market to leave its business, especially as it is likely a sole proprietorship. Also, witnesses regarding the construction of the column, police who were called to the scene afterwards, and doctors who treated Pam are all located in State B. These factors weigh in favor of denying the motion to transfer.

2. Venue Proper in State C

Moreover, venue may not be proper in State C because the case could not have originally been brought there, nor did the claim arise there. Although Rita resides there, Don's Market resides in State B, so venue cannot be supported on this basis. Also, the only event involved in the claim, the accident, occurred in State B, so venue is not proper on that basis either.

In conclusion, because the convenience to the parties and witnesses weighs in favor of State B and because venue would not be proper in State C, the court was correct to deny Rita's motion.

(3) Dismissal of Appeal

A. Final Judgment

A case can only be appealed from a final judgment on the merits in the lower court. If there are issues remaining for the lower court to decide, appeal will not be taken.

Here, the lower court has dismissed Rita's motion for change of venue, but that is not a final judgment. The court has not dismissed the underlying case, which still must be tried and decided.

B. Interlocutory Appeal

A party may appeal before a final judgment on certain matters by right, such as a granting of an injunction, or if the lower court certifies that the issue is a close one and the appellate court agrees.

Because there is no right to an interlocutory appeal for a denial of a change of venue motion and the lower court did not certify, the dismissal of the appeal was proper.

Q2 Real Property

Artist owns a workshop in a condominium building consisting of the workshops and sales counters of sculptors, painters, potters, weavers, and other craftspeople. The covenants, conditions and regulations (CC&Rs) of the building provide for a board of managers (Board), which has authority to make "necessary and appropriate rules." Board long ago established a rule against the sale within the building of items not created within the sellers' workshops.

Artist accepted a three-year fellowship in Europe and leased the workshop to Weaver for that period. The lease prohibited an assignment of Weaver's rights. Weaver used the workshop to produce custom textiles.

A year into the term, Weaver transferred her right of occupancy to Sculptor for one year. Sculptor moved into the workshop with his cot, electric hotplate, and clothes. He also brought several works of art that he had created during a stay in South America and offered them for sale along with his current works. Sculptor mailed his rent checks every month to Artist, who accepted them. Both Weaver and Sculptor knew the terms of the CC&Rs and Board's rules when they acquired their interests in the workshop.

Three months after Sculptor moved in, Board told Sculptor to stop selling his South American pieces. He refused to do so and thereafter withheld his rent and complained that the regulation was unreasonable and that the building's heating was erratic.

1. What action, if any, may Board take against Artist to enforce the rule against the sale of Sculptor's South American pieces? Discuss.
2. Can Artist recover from Weaver the rent that Sculptor has refused to pay? Discuss.
3. Can Artist evict Sculptor from his occupancy? Discuss.

Answer A

1. Action Board may take to enforce rule against sale of South American pieces

Whether the Board may enforce the rule against the sale of Sculptor's South American pieces depends on whether the covenant contained in Artist's lease runs to Sculptor. First, it must be determined if Sculptor ("S") is properly occupying the workshop. If S is not allowed to be in the workshop because of A's lease with the Board, the Board may be able to evict S.

Assignment/Sublease of A's workshop to S

An assignment occurs when a tenant transfers the complete tenancy in a lease to another party. The original tenant has no right to reoccupy the leased premises under an assignment. A sublease occurs when a tenant leases the premises to another tenant for a period of time less than the complete lease that the original tenant has with the Board. Artist had a three-year lease from Weaver in the workshop. Because A only transferred a right of occupancy for one year to S, this is a sublease, and not an assignment. The Board will argue that the lease expressly prohibits these types of transfers. However, the lease only prohibits assignments and does not mention subleases. When the lease is silent as to one or the other, the courts will strictly construe the lease as only prohibiting that which is named in the lease. Therefore only assignments are leased since that is all that is named in the lease. Furthermore, the fact that A accepted rent checks may prohibit the Board from taking any action.

Enforcement of Covenant -- Equitable Servitude

The Board will argue that the covenant agreed to by A when he purchased the workshop should also govern any interests between those that are using the workshop in place of A. Because this covenant is being enforced as an injunction (to stop S from selling South American art), it will be easier for the Board to enforce than if they were trying to recover damages. Because the covenant will stop A from selling South American art, it is being enforced as a burden against A. For the burden to be enforced against A, there must be intent between the original parties, there must be a writing satisfying the Statute of Frauds, notice between the parties, and the covenant must touch and concern the land.

Intent between original parties

The Board and Artist intended that the covenant be binding. The Board has the authority to make "necessary and appropriate" rules that are binding on those occupying the building. Since the Board established the rule "long ago" the original parties, A and the Board, intended the covenant to be followed.

Statute of Frauds

As long as there is a written agreement signed by S, the Statute of Frauds is satisfied. This appears to be satisfied since there are no facts suggesting a written agreement was not entered into. Also, since the transfer between A and W is for more than one year, it had to be in writing. Because a tenancy is an interest in land, the Statue of Frauds must be met.

Notice between the Parties
Both Weaver and S knew about the terms of the CC&Rs when they acquired their interests in the workshop. Therefore, all parties were on notice of the restriction.

Touch and Concern
The most challenging requirement for a burden to run with the land between occupiers the Board must meet is that the covenant touches and concerns the land. Here, a promise not to sell items not created within the sellers' workshops does not seem to touch and concern the land. In order for a covenant to touch and concern the land, the land must be benefitted in some way. The only people that are benefitted from such a covenant are those that own workshops in the building. They may argue that such a covenant does touch and concern the land because it makes their workshops more valuable. If this is the case, then the Board may have satisfied all the requirements to enforce this restrictive covenant. By not selling artwork not created in their workshops, the artists that own workshops there may have a protective interest. If selling only local work increases the value of their units, the covenant touches and concerns the land. It seems likely that purchasers of artwork would like (sic) to be able to buy a variety of work, so it is unlikely (sic) that this covenant actually increases the value of the workshops. Therefore, this covenant does not touch and concern the land and therefore does not run with the land.

Breach of Covenant -- Damages
The Board may also attempt to recover damages against A for failing to abide by the covenant. In addition to the elements discussed above, in order to enforce a covenant and recover damages there must also be vertical privity between the parties. This means that the parties must share an interest in land. The Board is just responsible for managing the complex, and does not appear to own the building. Therefore, no interest in land is shared, and there is no vertical privity.

Estoppel
S will argue that the Board is estopped from enforcing the covenant since they have waited three months after he moved in before requesting S to stop selling his South American pieces. S will argue that because they did not do anything, he assumed it was okay to sell that art.

Laches
S will also argue that too much time has elapsed for the Board to enforce the covenant. They waited three months before asking him to stop, and therefore should be barred from enforcement because of laches (defense that occurs when [sic] passage of time).

2. Ability of Artist to recover rent
Artist will be able to recover rent from Weaver if Weaver remains liable under the lease between A and W. As discussed above, the lease between A and W only prohibited assignments. Courts strictly interpret such provisions, and therefore will allow a sublease. S's

interest in the workshop is a sublease since he did not take the full term of the original lease, but only took a one-month occupancy. Although W may not be in privity of estate with A during the time that S is in possession of the workshop, he is in privity of contract. A will argue that W is in privity of estate as well as contract. Privity of estate is present when two parties share an interest in land. Because this is only a sublease, A will argue that W still shares an interest in the workshop with A and that there is privity of estate. Privity of contract between A and W exists because A and W signed the original lease. W remains liable for any defaults of his subleasees since he is still in privity of contract with A. S has a duty to pay rent, and W has a duty to pay rent to A. Therefore A should be able to recover from W the rent S has refused to pay.

There is a duty to pay rent imposed on all tenants, unless this duty has been excused. S will argue that A breached an implied warranty of habitability by providing better heating to the condo. However, because this condo is being used for commercial purposes, A does not owe a duty of habitability. While A must maintain basic utilities, such as heat, it is understandable that the heating [will] be erratic in a commercial building. Heat is often turned down at night and during the weekend in order to save energy. Therefore, it is not a breach of habitability, and S must still pay rent.

3. Ability of Artist to evict Sculptor

Artist may evict S if S was not in rightful possession of the workshop, or if S has breached any duty owed to A. As discussed above, S is in rightful possession of the workshop, as a subleasee. Therefore W owes a duty to pay rent unless A has breached any of his duties owed to tenants.

Implied Warranty of Habitability

The implied warranty of habitability only applies to premises that are leased for residential purposes. It appears that this workshop was not leased for a residential purpose, and therefore no duty of habitability is owed. Although the workshop is located in a condominium, which is traditionally regarded as a residential property, the fact that all the other units in the condominium are used as workshops and sales counters of sculptors, painters, potters, weavers, and other craftspeople suggests that the condominium was not rented for residential purposes. Furthermore, the fact that S moved into the workshop, bringing with him his cot and electric hotplate, suggests that the condo did not contain a stove and therefore was not intended to be used as a residence.

Unreasonableness of Regulation

The covenant was agreed to by the owners of the building and the Board has the authority to enforce it. If the covenant was properly instituted by the Board it is not unreasonable. Although the authority that gives the Board the power to pass such covenants, "necessary and appropriate rules," seems vague, the covenant is clear. Only items created in the building are offered for sale. This is probably an appropriate rule considering the interests of the other artists that work in the building. The fact that W and S knew of the terms before accepting the

lease implies that they consented to the covenant.

Erratic Heating
When a property is to be used as a residence, the landlord is under an implied warranty of habitability. One of the warranties is that heat be provided to a building so that it is liveable. However, as discussed above,it does notappear that this workshop was intended to be used as a residence. It would make sense that the heat would be erratic in a commercial office space. In normal office space, heating is often turned off at night and weekends, times when workers are not usually there. This would be appropriate in this case. Even [if] A is found to owe a duty of habitability, the fact that there is erratic heat does not excuse the tenant from withholding rent. If anything, the tenant will be allowed to abate the rental price by the amount it costs to repair the heater. The landlord should repair the heater first, but if the landlord has been notified and fails to repair, the tenant is allowed to repair and abate the purchase price. Therefore, S was still owed a duty to pay rent.

Breach of Quiet Enjoyment
S will also argue that there was a breach of quiet enjoyment when A did not provide constant heat to the building. As discussed above, this was probably not breached since erratic heat can be expected in commercial buildings. It would also be helpful, though, to know if erratic means the heat is not working during the day (times when it is expected that people would be using the building). Even so, S should only be allowed to abate rent, not discontinue payment of rent.

Privity of Contract
S will argue that he only owes rent to W, and not A, because he is a subleasee and therefore not in privity of contract with A. However, he is in privity of estate, and therefore owes the owner of the property rent. If W is also not paying rent (assuming this is the case, since S is not paying rent), then A can evict W, which would also have the effect of evicting S. If W continues to pay the rent to A, despite the fact that S is not paying rent to W, then A will not be able to evict S on the grounds that he is not paying rent.

Breach of Covenant
As discussed in part one, the covenant not to sell art not created in the workshop probably does not extend to S, since it does not touch and concern the land. If the court does find the covenant to extend to S, such that he is bound bythe covenant, A will have grounds for eviction based on the fact that S is violating the covenant.

Answer B

1. What actions, if any, may Board (B) take against Artist (A) to enforce the rule against the sale of Sculptor's (S) South American pieces?

B, as a representative body of the condominium, has been granted the authority to make necessary and appropriate rules. B also presumably has the authority to enforce the CCRs of the condominium on behalf of the individual owners. The rules regarding sale of items not created in Seller's workshops are long established. Where the board of a condominium has established rules under proper authority for a condominium (i.e. under authority in the CCRs, which are generally recorded), the board may enforce these rules as either a restrictive covenant or an equitable servitude if the proper requirements are met.

Artist's liability for Sculptor's (S) acts

A, as the owner of S's workshop may be liable for S's violation of the CCRs. The B may seek to enforce the CCRs as either a restrictive covenant or equitable servitude if proper conditions are met.

Real Covenant

In order to enforce a restrictive covenant against a party (enforce the burden), the burdened party must have notice, the parties creating the restrictive covenant must have intended the restrictive covenant to continue indefinitely and against successor parties, the restrictive covenant must touch and concern the land, and both horizontal privity and vertical privity must exist.

Where these conditions are met, the party seeking to enforce may seek a money judgment.

Intent

When the B created the rule, they likely intended it to continue and to bind successor parties. The condominium has established an identity and enforcement of this rule is an important part of maintaining that identity.

Notice

Where the party creating a condominium has established CCRs, the parties purchasing units in the condominium may be determined to have constructive knowledge if the CCRs are recorded or included or provided as part of the purchase transaction.

Here, A had notice of the terms of the CCRs when he acquired his interest in the condo. So, he had constructive notice.

Touch and Concern

Real covenants that touch and concern the land are those thatgenerally relate physically to the property in a way that increases its value. Here, the rule relates to what may or may not be sold on the property. While this is not necessarily physically related to the property, it is part of the overall function of the condo as a location for artisans. While A may argue that this does not touch and concern the land, a court would likely view it as being closely related to the purpose and function and therefore find that the rule touches and concerns the land.

Vertical Privity
Vertical privity exists where the party is a recipient of the same possessory interest as the person who agreed to the restriction. A owns the workshop and is therefore in vertical privity with whatever party originally agreed to the rule.

Horizontal Privity
For horizontal privity to apply, the party agreeing to the restriction must have had a common property interest with the other party. Here, the original purchaser would have received property from the owner of the condominium. Also, all owners of workshops possess an interest in property that was once a single ownership interest.

Therefore horizontal privity is present.

The B may enforce the rule as a restrictive covenant and sue A for money damages.

Equitable Servitude
A party mayenforce a restriction as an equitable servitude against a burdened party when the restriction touches and concerns the land, the parties creating the restriction had intent that it run against subsequent parties, and the burdened party had notice.

As discussed above, the rule touches and concerns the land, was intended to burden subsequent parties, and A had notice.

The B may enforce the rule against A as an equitable servitude and seek to enjoin the sale of South American goods on the premises.

2. Can Artist (A) collect from Weaver (W) the rent that Sculptor has refused to pay?
As the landlord, A may collect rent from a party with whom he is in privity of estate or privity of contract.

The duty to pay rent runs with the land and is an independent covenant of the tenant.

Here, although W has sublet his property, he is still in privity of contract with A and has a duty to pay rent. W would only be able to avoid this obligation if A agreed to a novation, which has not occurred.

W may try to argue that he is not obligated to pay rent because he has been constructively evicted (he would argue this based on the assertions of his sublessee) from the workshop due to the unreasonableness of the regulation and the erratic heating. However, in order for a tenant to assert constructive eviction under the landlord's covenant of quiet enjoyment, the tenant must move out of the premises within a reasonable time. Both W and S would also likely fail on the basis of the reasonableness of the regulation since it is being enforced by a third party. Finally, both W and S may be estopped from asserting the unreasonableness of

the rule because they had notice when they accepted their interests.

In sum, A will be able to recover from W because they are in privity of contract, the tenant has a duty to pay rent, and W's defenses would not likely succeed.

3. Can Artist evict Sculptor from his occupancy?

A will likely attempt to evict S based on the prohibition against assignment and the violation of the rule on sale of outside goods. Both of these are likely to fail and so A will have to attempt to terminate his lease with Weaver or evict Weaver in order to retake possession.

Prohibition Against Assignment

Prohibitions against assignment are enforceable. However, courts construe these prohibitions narrowly and will not interpret a prohibition against assignment to prohibit a sublease. A court will also be quick to find a waiver of a prohibition against assignment.

Here, the lease with W prohibited assignments, not subleases. W has subleased his property to S since W will retake possession for the last year of his own lease. In addition, A accepted rent checks from S and thereby likely waived any right he might have had. A will not be able to evict S due to the prohibition against assignment.

As a sublessee, S is not subject to restrictive covenants and so A may not evict S on this basis either. A sublessee is not viewed as being in either privity of estate or privity of contract.

If A attempts to evict S based on nonpayment of rent, he will also likely lose for the same reason that a landlord is not viewed as being in privity of estate with a sublessee.

A will likely have to sue W for damages and attempt to evict W. An eviction of W would also evict S since all rights of a sublessee are derivative of the sublessor.

Q3 Evidence

Walker sued Truck Co. for personal injuries. Walker alleged that Dan, Truck Co.'s driver, negligently ran a red light and struck him as he was crossing the street in the crosswalk with the "Walk" signal. Truck Co. claimed that Dan had the green light and that Walker was outside the crosswalk. At trial, Walker called George Clerk and the following questions were asked and answers given:

17. Would you tell the jury your name and spell your last name for the record, please?
A. George Clerk. C-l-e-r-k.
[1] Q: Where were you when you saw the truck hit Walker?
A: I was standing behind the counter in the pharmacy where I work.
[2] Q: What were the weather conditions just before the accident?
[3] A: Well, some people had their umbrellas up, so I'm pretty sure it must have been raining.
[4] Q: Tell me everything that happened.
[5] A: This guy rushed into my store and shouted, "Call an ambulance! A truck just ran a red light and hit someone."
Q: What happened next?
[6] A: I walked over to the window and looked out. I said, "That truck must have been going way over the speed limit." Then I called an ambulance.
Q: Then what happened?
[7] A: I walked out to where this guy was lying in the street. Dan, the driver for Truck Co., was kneeling over him. A woman was kneeling there too. She spoke calmly to Dan and said, "It's all your fault," and Dan said nothing in response.

At each of the seven indicated points, what objection or objections, if any, should have been made, and how should the court have ruled on each objection? Discuss.

Answer A

For ease of reference, D will be Truck Co., C will be Clerk, and W will be Walker.

"Where were you when you saw the truck hit Walker?"
The objections that can be raised to the question include: Argumentative, assumes facts not in evidence, and lack of foundation.

Assumes facts not in evidence.
A lawyer may not use his/her questions on direct examination to argue the facts or issues of a case. The lawyer must ask questions and allow the witness to testify. Although we have no background evidence, we know Clerk (C) has not yet testified that he saw the truck hit Walker. Thus, the question assumes facts not in evidence, and an objection should be sustained.

Lack of personal knowledge/foundation
A witness may only testify based upon his/her personal knowledge, and the lawyer must present the basis for the witness's knowledge before a witness may testify as to facts in the trial relating thereto. Here, all we know is the name of this witness. We do not know where he was, who he was, or even whether he observed any accident. This assumes not only that he saw the accident, but that the truck hit Walker -- which has not yet been established. Thus an objection for lack of personal knowledge is sustainable.

Argumentative
A lawyer may not use his/her questions on direct examination to argue the facts or issues in a case. The lawyer must ask questions and allow the witness to testify. An argumentative question is one which argues the facts or issues of the case rather than just eliciting a direct response. This question is argumentative in that it assumes as the truck "hit" Walker rather than Walker "walking out in front of" the truck. Any objection should be sustained.

"What were the weather conditions like just before the accident?"
The statement could be objected to based on lack of personal knowledge. The attorney has not laid a foundation that C had an opportunity to observe the weather conditions on that day. However, it could also be argued that it is within a witness's personal knowledge to remember what the weather conditions were like that day, so it is arguable that the statement did not need a foundation to be laid. Thus, an objection may be proper here, but it is not likely to be sustained unless the witness actually does not have personal knowledge (see below).

The statement could also be objected to on the basis of relevance. A statement is relevant if it makes some fact more or less likely. Although the weather conditions do not appear to make a difference in the accident claims (red light/green light issue), it could be relevant to show the ability of each party to see one another. Thus, the weather conditions are probably relevant, and the objection should be overruled.

"Well, some people had their umbrellas up . . ."
Here, a motion to strike should be made because the answer is speculation. A motion to strike must be made immediately after a witness's response, and can only be made when the original question did not obviously contemplate an objectionable response. If granted, the jury will be instructed not to consider that portion of the witness's answer. A witness must base his testimony on personal knowledge, and cannot speculate as to the conditions surrounding his/her answer. As discussed above, the weather conditions may be within C's personal knowledge. However, upon his answer, it becomes obvious that the questions actually led him to speculate and base his answer on something other than personal knowledge -- he made an inference that it was raining because of the umbrellas. W's attorney may argue that this is not speculation but rather based on personal knowledge because he remembers the umbrellas, and as such if anything only the portion about the "must have been raining" must be stricken. The court will probably agree, and only strike the parts based solely on speculation. Thus, the failure to object in the first place is excusable, the motion to strike is proper, and it should be sustained in part.

"Tell me everything that happened."
An objection should be made thatthe questioncalls for the witness to give a narrative account. The lawyer interrogating the witness on direct examination must ask specific questions and lead the witness through his or her testimony. This question calls for a narrative by the witness, and as such it is an improper question. The objection should be sustained.

The "call an ambulance" statement
An objectionshould be made based on hearsay. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. A statement can be words or conduct. If a statement is found to be hearsay and does not fit into a hearsay exception, it must be excluded from evidence. Here, the statement is hearsay because it was made out of court by a "guy" -- a declarant who is not testifying at trial and it is being offered for its truth -- that a truck ran a red light and hit someone. It could be argued that the statement is being offered for the nonhearsay purpose of showing its effect on the listener, C, in which case it would not be hearsay, because it would not be offered to show the truth that the truck ran the light but to show the effect the statement had on C. However, this argument will fail because what C did is not relevant in thiscase.

Likely, W's counsel will argue that the statement is a present sense impression or an excited utterance. A present sense impression is a statement that is made contemporaneous with an observation or a physical condition that is so trustworthy because there is not much time for contemplation to lie. It must be very contemporaneous, and very little time can lapse. Here, this statement would be admissible if it were made while the accident was happening, but the lapse of time between the declarant's coming in and the accident is not established as short and we do not know what he was doing at that time. Thus, it may not be contemporaneous enough to come in a present sense impression.

However, it will likely come in as an excited utterance. An excited utterance is a statement made under the stress of excitement of some event. Here, the time period can be longer than in a present sense impression so long as the stress of excitement remains. It seems apparent that the declarant was still under the stress of excitement when he made the statement, as he was exclamatory in doing so. Also, a short period of time passed -- as no ambulance had yet been called, so this makes it more likely that he was under the stress of excitement. Watching a car accident is definitely stressful and exciting. Thus, it is likely that the statement is trustworthy enough to come in under the excited utterance exception, and the objection should be overruled.

"That truck must have been going way over the speed limit."
Hearsay. D's counsel will object based on hearsay. This is an out-of-court statement made to prove the truth of the matter asserted. Even though the statement was made by the witness, the statement was made out of court, and as such it still is classified as hearsay. C can testify on the stand as to what he or she recalls of the events, but C cannot testify as to what he/she said about them then unless they fall into a valid hearsay exception. This statement could probably not be classified as an excited utterance because C did not observe the events and there is no indication that he was particularly excited about what occurred. Further, it cannot be classified as a present sense impression unless there would be some foundation laid as to why he thought that (e.g., what did you observe, etc.) and then it could be argued that the statement was made as a present sense impression of what it was that he saw. (However, this may still be an impermissible opinion; see below.) It could not be argued that it is an effect of hearsay scenario (see above) because it does not demonstrate why he called the ambulance, his action, but rather is being offered to show that the truck was speeding -- the truth. Thus, the objection should be sustained based on hearsay grounds.

Calls for an opinion.
The statement itself is an opinion statement, and lay witnesses may not testify as to their opinions unless they have personal knowledge, the information in the opinion cannot be derived from a better source and will be helpful to the trier of fact, and it is not scientific or technical in nature. Here, the statement is not based upon personal knowledge (at least not from the foundation we have here), and as such it is an impermissible opinion. Not only could the hearsay statement not come in, but the statement made by the witness on the stand himself [sic] could not come in either. C did not observe the events; rather, C only observed the aftermath. Thus, he did not know that the truck was speeding and was basing this information on evidence not offered forth as a foundation. Thus, although his statement would be permissible if he actually saw the truck speeding, because he did not he has no basis for knowledge of this fact and his opinion is inadmissible. The objection should be sustained.

Woman's statement to Dan: "It's all your fault."
Hearsay!
D's counsel is likely to claim that this is a hearsay statement. Woman's statement is an out-of-court statement offered to prove the truth of the matter asserted. As such, her statement itself

is hearsay unless it can fall into one of the exceptions. Here, the statement is not offered for a non-hearsay purpose, so it must fall into an exception. Because of the time lapse, present sense impressions and existed utterance exceptions are probably not viable. However, C's counsel can argue that D's response to the statement, his failure to respond, is an adoptive admission. An admission is deemed to be "not hearsay" by the Federal Rules of Evidence, and as such they are not subject to hearsay objections even though they go to the truth of the matter asserted. An admission is a statement made by a party offered by his/her opponent in a case. Here, it must first be determined whether Dan is a party opponent in the case against Truck Co. Dan may be a party due to the doctrine of vicarious admissions. If an employee is acting within the scope and course of his or her employment, then all admissions made by that employee are imputed to the employer. Here, we do not have definite facts as to the activity that D was engaged in at the time of the accident; however, if it is found that D was acting in the scope and course of his employment then any statement he made concerning the accident can be considered an admission and be vicariously imputed to his employer, Truck Co.

However, it must also be shown that D's failure to respond was an adoptive admission. An adoptive admission is an admission by silence, and it is only allowed when relating to an accusatory type statement that is made that would likely invoke a denial or response by the party, when the party does not deny it, and when the party is physically and mentally capable of denying it. D's counsel will argue that it is not necessarily true that a person would deny liability in this case. D will claim that Dan was stunned and was unable to mentally grasp what was going on. Thus, he would lack the mental capacity to deny the statement. Further, D's counsel will argue that many people know that it is not in their best interest to deny or admit liability at the scene of the accident, and that they should just keep quiet. Thus, the average person would not be expected to deny the statement, but silence would in fact be appropriate. Thus, although D is probably liable for anything he did say as a vicarious admission, this statement does not qualify as an adoptive admission and the objection should be sustained.

Improper Opinion
Counsel may claim that this is an improper opinion because no foundation was laid as to whether W saw the accident or not. This would be sustainable.

Answer B

1) Where were you . . .
Assumes facts not in evidence.
The question asks where George was when he saw the truck. This assumes that George did in fact see the truck. There is no foundation for this assertion in the testimony at this point.

A judge would find that the question was improper and would probably ask to rephrase the question. Such question would be relevant because it would indicate facts about George's ability to perceive the action.

2) What were the weather conditions . . .
Relevance
In order to be admitted, the testimony must be relevant. Relevant testimony is usually admitted. Relevant evidence is evidence that tends to make a fact more or less likely.

Truck would say that the statement was irrelevant because the issue is not loss of control of the vehicle but running the red light or not. Therefore, driving conditions were irrelevant. W would respond that the information was relevant to determining if Dan could see the red light and whether George could see the incident. It seems that George did not see the incident.

A court would find that the question would be relevant because it would shed light on Dan and W's ability to see the signals.

3) Umbrellas up
Speculation
Truck would say that George was speculating whether it was raining or not. He lacked personal knowledge of whether it was raining but speculated that it was raining from open umbrellas. W would say that George may have had personal knowledge about the umbrellas and that would be sufficient.

A court would find that the fact was not established by his personal knowledge and hence the raining part would not be allowed.

Relevance
There would be the same objection as for Q2.

4) Tell me everything
Calls for a narrative.
Truck would say that the question was too open-ended. The point of direct exam is to ask specific questions and not allow ramblings that may lead to inadmissible evidence. Here, there are no bounds to the way that George could answer.

A court would find that there was a call for a narrative and would ask for a more specific question.

5) Guy's shouted statements

Hearsay

Hearsay is an out-of-court statement that is being offered to establish the truth of the matter asserted. Here, Truck would say the statement of the guy would be an out-of-court statement offered to prove that indeed the truck ran the red light. In fact, it was being offered for the truth, so if there is no exception, then it would be struck as hearsay.

Excited utterance

W would say that it was an excited utterance. An excited utterance is a statement made about a startling event that was made under the excitement of that event. W would say that seeing the accident would be sufficient excitement and that it was indeed made under the influence of that excitement. Here, there is an urgent call for an ambulance -- this would indicate that the statement about the red light was also made under the excitement.

A court would find that there was an excited utterance.

Present sense impression

W would say that there was a PSI. There must be a statement about what someone currently is sensing. Here, the guy is making a statement about a past sensation -- seeing the accident.

A court would not find PSI.

A court would allow the testimony as an excited utterance.

6) Truck over the speed limit

Personal Knowledge --speculation

Truck would say that George lacks personal knowledge. He did not see the accident and therefore cannot make an assessment of its speed.

Here, a court would say that he did not have personal knowledge and would disallow the statement.

Lay opinion.

Truck would say that it was an improper opinion. Lay opinions are allowed if they are helpful, do not require expertise, and can be made on the facts.

Here, it would be helpful to know the speed. However, he did not have the fact because of lack of personal knowledge. Generally, there is lay opinion allowed for estimations of speed.

Here a court would find that it was an inappropriate opinion because there was no personal knowledge.

Hearsay
Truck would say that it is hearsay because it was offered to prove that it was speeding. This was an out-of-court statement even by the guy testifying.

A court would find that it was offered to prove the truth and not admit it because there was no exception.

7) Woman's statement; Dan's silence
Hearsay.
Truck would say that it was offered to prove that it was Dan's fault.

There would be no exception because it was not under excitement (she said it calmly) and it was an opinion based on a recollection that would not allow a PSI.

A court would not allow it to be admitted.

Admission by silence and vicarious liability
W would say that it is not hearsay at all because it is an admission by a party opponent. Dan's silence would be a hearsay statement as an admission of his guilt. He would be subject to the rule about admissions of party opponents because he was working for Truck and the comment was in the scope of his employment.

It would be an admission if: 1) a reasonable person would respond and 2) he had an opportunity to respond. Here, he could say something but did not. Also, with an accusation like that, he should have denied it. He would say he did not have to.

A court would allow the admission by silence because it was not hearsay -- as an omission by a party opponent. His statement would be inadmissible because he was in the scope of employment.

Q4 Constitution

To prepare herself for a spiritual calling to serve as a pastor at City's jail, Ada enrolled in a nondenominational bible school. After graduating, Ada advised the pastor of her own church that she was ready to commence a ministry and asked that her church ordain her. While sympathetic to her ambition, Ada's pastor accurately advised her that their church did not ordain women.

Ada began going to City's jail during visiting hours and developed an effective ministry with prisoners, particularly women inmates who increasingly sought her counsel. Ada noticed that ordained ministers who visited the jail received special privileges denied to her.

Dan, the jail supervisor, told Ada that ministers who were ordained and endorsed by a recognized religious group were designated "jail chaplains" and, as such, were permitted access to the jail during nonvisiting hours. He told Ada that she too could be designated a jail chaplain if she obtained a letter from a recognized religious group stating that it had ordained her as a minister and had endorsed her for such work.

Ada replied that her church was not part of any recognized religious group and would not ordain her anyway because she was a woman. She asked Dan nonetheless to designate her a jail chaplain because of the effectiveness of her work.

Dan refused to designate Ada a jail chaplain or to allow her the access enjoyed by jail chaplains. He acted pursuant to jail regulations adopted to avoid security risks and staff involvement in making determinations as to who was really a "minister."

Ada has brought suit in federal court to obtain an injunction requiring that she be designated a jail chaplain or be granted access to City's jail equivalent to those who have been designated jail chaplains. Ada's complaint is based on the grounds that the refusal to designate her a jail chaplain violates rights guaranteed to her and the prisoners by the First Amendment to the U.S. Constitution and also violates rights guaranteed to her by the equal protection clause of the Fourteenth Amendment to the U.S. Constitution.

How should Ada's suit be decided? Discuss.

Answer A

Standing -- Federal courts are only empowered to hear cases involving real controversies, and a plaintiff has standing to bring a case only if he or she suffers, or will imminently suffer, an injury in fact that may be remedied by the court's action.

Here, Ada (A) alleges that she is being denied privileges that are afforded to others because of her particular religion, which is not "recognized," and because she is not ordained by her religion. Both, she argues, violate her constitutional rights under the first and fourteenth amendments to the U.S. Constitution. Thus, she has alleged an injury in fact sufficient to give the federal court the power to hear the case. Further, an injunction, if granted, directing the jail to grant her the additional privileges would remedy the injury. Thus, A has standing to bring the case.

Ada also appears to be raising the rights of prisoners in her action. A plaintiff may only raise her own constitutional rights, unless the persons she is seeking to represent are unable to vindicate their own rights, the proposed plaintiff has the same motivation to pursue the litigation as the rightholder, and the proposed plaintiff is capable of doing so. Prisoners are capable of raising their own rights, and A's motivations are not necessarily the same as the prisoners. Therefore, she will be precluded from raising the prisoners' rights in her lawsuit.

Eleventh Amendment -- In general, the eleventh amendment prevents a private individual from bringing suit in federal court against a state government. However, this prohibition does not apply to local governments, nor to individual state officers. A is bringing her suit both against "City" jail and, apparently, against Dan, the jail supervisor. She is also seeking injunctive relief. For these reasons, the eleventh amendment is not a bar to this suit.

State Action -- Generally where a plaintiff alleges violation of personal rights under the constitution, the violation must have been committed by a state or federal actor in order to be actionable. Here, A is primarily arguing that City Jail's actions violate her rights. City Jail is a political subdivision of state, and is therefore a state actor. However, Jail may argue that it is only implementing a classification (ordained vs. unordained) that is established by a private church, and therefore A's real injury is caused by a private, not state actor. However, the fact that Jail adopts the private entity's classification is enough to establish state action.

The fourteenth amendment clearly applies to the state. The first amendment only applies to the federal government, but the rights under the first amendment have been incorporated into the fourteenth amendment and are therefore applicable to the state as well.

First Amendment
A may argue that the jail's policy of granting special privileges only to ordained pastors of established religions violates both the free exercise of religion clause and the establishment clause of the first amendment.

Free Exercise Clause -- The state may not impose restrictions on the free exercise of religion unless the restriction serves a compelling state interest and is narrowly tailored to serve that interest. A law of general applicability, however, which merely incidentally burdens religious practices will not be subject to invalidation. A will argue that the jail regulation is not generally applicable, since it focuses directly on "established" religions, and singles out these religions for special privileges. She will also argue that the regulation inhibits her ability to preach to inmates who are interested in receiving her ministry, and therefore impairs her free exercise of religion. Therefore, the burden will be on the state to demonstrate the necessity of the regulation to serve a compelling interest.

The jail will argue that the regulation serves important security interests, and that if all self-proclaimed ministers were given security clearances, it would raise the risk that some ministers are falsely representing themselves. However, the jail has alternative means of determining the security risk of a person claiming to be a minister other than classifying them as "ordained" and from "established" religions. Since the regulation is not narrowly tailored, the regulation does not pass the strict scrutiny test.

No Inquiry into Legitimacy -- Further, the regulation differentiates between established and non-established religions. This in effect amounts to an inquiry into the legitimacy of [sic]. The supreme court has held that the government may not inquire into the legitimacy of a religious belief. The regulation is invalid for this additional reason.

Establishment Clause -- The first amendment also prohibits the government from establishing a religion. A will argue that by giving preference to established religions, the Jail is giving support to those religions, and in effect establishing them. The establishment clause is not violated, however, if the regulation or statute at issue serves a secular purpose, has primarily a secular effect and does not entangle the government in religious matters.

Here, the jail will argue the regulation has the secular purpose of increasing security at the jail by limiting the number and types of outside visitors allowed in. However, the regulation clearly does not have a secular effect -- it impacts religious practice directly, by limiting the right of non-established religions to send their ministers, and it prevents unordained ministers from receiving privileges. Therefore, the second prong is not met.

The third prong is also not met. A will argue successfully that by allowing only established religions to send ministers to the jail, the state must get involved in determining what is an established religion. Although the jail has argued that it is limiting its entanglement with religious affairs by allowing the particular religion to determine who can be ordained, the mere acceptance of these decisions necessarily entangles the public entity in the religious organization's decisions.

The regulation will be found to be a violation of the establishment clause because, although it may serve a secular purpose, it has a non-secular effect and entangles the state in religious

affairs.

In addition, as discussed above, the regulation is a violation of the free exercise clause.

Equal Protection -- State and local governments may not discriminate against individuals on the basis of a suspect class unless the discrimination serves a compelling state interest and is necessary and narrowly tailored to serve that purpose. A classification based on a quasi-suspect class is subject to intermediate scrutiny -- the state must show an important interest being served, and the regulation must be necessary for the purpose. Further, if the disparate treatment is in relation to the exercise of a fundamental right, the state must also meet the stricter scrutiny standard of review.

A will argue that the disparate treatment is based on her affiliation with a non-established [sic] religion, her status as a non-ordained [sic] minister, and, indirectly, on her status as a woman (since her church won't ordain her because she is female). Further she will argue that the disparate treatment relates to the exercise of a fundamental right (the free exercise of religion).

Non-ordained [sic] and Non-Established [sic] -- Classifications based on religious titles or on membership in a particular religion are not suspect classes for purposes of the equal protection clause. Therefore, A must prove that the regulation serves no legitimate purpose and is not rationally related to this purpose.

The stated purpose is to increase security at the jail. This is a legitimate purpose. Further, limiting the ministers who are allowed to serve as chaplains to those who are endorsed by established religions tends rationally to limit these outside influences in a jail to those who are legitimately there for religious, and not ulterior, motives. Therefore, the regulation passes this low level of scrutiny.

Gender-Based Class -- Gender discrimination is a quasi-suspect class (see above for standard of review). The jail's regulation itself does not on its face differentiate between male and female chaplains, but A will argue that since some religious organizations, such as her own church, refuse to ordain females, the regulation has a discriminatory effect on women. However, A will have to show that the discrimination by the state was intentional, and there is no indication of this here, unless the jail knew when it passed the regulation that no, or almost no, religions ordain female ministers. The regulation also allows "endorsed" ministers to be considered chaplains, and arguably even those religions that don't ordain womenmayat least "endorse" them.

A will also argue that the private church's discrimination, though not directly actionable under the equal protection clause, has been endorsed by the jail through the use of the religion's classification system. This argument will succeed, and the jail will therefore have to meet the midlevel scrutiny.

Although security is an important issue, as discussed above, the regulation limiting chaplains to those who are ordained or endorsed does not appear to be necessary to ensure security. Therefore, if the church's discrimination against women will be applied to the jail, the regulation will be struck down for this additional reason.

Exercise of a Fundamental Right -- Because the classification involves the exercise of a fundamental right, the regulation is subject to strict scrutiny under the equal protection clause. However, the standard of review is identical to that provided under the first amendment, and therefore the discussion above is applicable here as well.

Thus, the regulation should be found invalid, and A should be given access to the jail as a chaplain (access during non-visiting hours) as requested in her injunction.

Answer B

Justiciable
For Ada's (S) suit to be heard in federal court, it must involve a case or controversy. The justiciable requirements ensure that the case or controversy requirement of Article III are met.

Ripeness
A plaintiff's suit must represent a case ripe for review by federal courts. A suit for a declaratory judgment or a pre-enforcement injunction against a regulation or law may present an issue as to whether a case is ripe for review.

Here, A has already sought to be named a jail chaplain or receive jail chaplain privileges. Thus, her suit is ripe for review, because A is not seeking either a declaratory judgment or pre-enforcement review. A's injury by being denied the privileges as a jail chaplain is ongoing and occurring now.

Mootness
Mootness doctrine prevents a federal court from continuing to hear a case when the case is no longer a live controversy, because the real world injury to the plaintiff has already ended. Here, A's case is not moot -- she is still being denied the rights of a jail minister.

Political Question
Federal courts may not hear non-justiciable political questions. This case does not involve a political question.

Abstention
Federal courts will in general abstain from enjoining an ongoing state criminal prosecution. There is no criminal prosecution in this case -- abstention does not apply.

Standing
To be able to sue in federal court, a plaintiff must have standing, which includes injury in fact, causation and redressability.

Injury in fact
A plaintiff must have suffered (or be about to suffer with a significant likelihood) an injury in fact. The injury may be the denial of constitutional or statutory rights, economic injury, or even environmental or aesthetic harm.

Here, A is suffering an alleged denial of her first and fourteenth amendment rights. Her first amendment rights to freely exercise her religion and to not have state action force an established religion on her have been allegedly denied -- her fourteenth amendment right to equal protection has also been denied. Moreover, A's desire to serve as a jail chaplain, and the denial of that by the jail, would alone probably qualify as enough of an injury in fact.

Causation
The plaintiff's injury must have been caused by the defendant's action. Here, the denial of A's rights was caused by the City's refusal to allow her to be a jail chaplain. Thus, City's action caused A's injury.

Redressability
The plaintiff's injury must be redressable by a court order. Here, an injunction from the court to require City to admit A as a jail chaplain would redress A's injury. Thus, there is redressability.

Third Party Standing
Generally, plaintiffs may not assert the rights of third parties in filing suit. However, there is an exception when either the relationship between the plaintiff and third party is close (e.g.) doctor -- patient; buyer -- seller) or where the third party would be unlikely to assert their rights on their own.

Here, A is attempting to also assert a violation of the prisoner's first amendment rights. A court might hold that this is not appropriate because it is third party standing.

However, a court might also hold that the exceptions apply. Here, A does have a close relationship with the prisoners, as she is effectively serving as a minister to them. Also, the prisoners might be unlikely to assert their rights to have A serve as a jail chaplain, since they may not even know this is an issue. Thus, a court might allow A to assert the prisoners' rights in this case.

State Action
The first amendment applies to states because it has been incorporated through the fourteenth amendment. The fourteenth amendment only applies to state action -- action by state governments.

This includes branches of state governments. Here, City is the party allegedly denying A's rights by not allowing her to be a jail chaplain. City is a municipality, and so is a branch of state government. Thus, there is state action.

First Amendment
Free exercise clause: Ada
The first amendment prohibits state action that interferes with the free exercise of religion. However, neutral laws of general applicability with no intent to infringe on free exercise, but which happen to prohibit religious activity, are allowed under the first amendment.

Here, A would argue that the City rule prohibiting her from being a jail chaplain violates her free exercise of religion, because it keeps her from expressing her religion by ministering to inmates after visiting hours.

The City might respond that the law is of general applicability because it restricts access to visiting hours to everyone who is not a jail chaplain.

However, A would respond that the law is not a neutral law, because only members of "recognized religions" canbecome jail chaplains. Thus, the law explicitly distinguishes among religions and is not neutral.

Strict Scrutiny

Since the law is not a neutral law of general applicability, and infringes on A's free exercise rights, it will be only upheld if it meets strict scrutiny. This requires the government to show that the law is necessary to fulfill a compelling state interest, and is narrowly drawn to meet that interest.

Here, the state has two possible interests: avoiding security risks and not having staff determinations as to who is really a minister. Avoiding security interests in a jail is clearly a compelling interest. However, avoiding staff determinations as to who is a minister does not appear to be compelling, because there is no clear reason why it matters if someone is a minister -- a non-religious psychiatrist, for example, might be just as helpful to the inmates. Thus, the security risk interest is the only compelling interest.

It also does not appear that the rule is narrowly drawn (and thus necessary) to serve the compelling interest of jail security. It is unclear that ministers from recognized religious groups would pose any less of a security threat than other ministers. Instead, background checks or the monitoring of visits would seem to serve the security interest much better.

Thus, the City policy would not meet strict security and should be struck down as violating free exercise.

Free Exercise Rights of Prisoners

The prisoners have a free exercise right to receive A's ministry services, and to participate in those services after visiting hours.

On the other hand, prisoners' rights in jail may be curtailed more than other individuals' rights for valid penological reasons -- such as security.

However, again, the City policy is not neutral on its face, and thus strict security would apply. This is because inmates who share A's faith are denied A's help outside visiting hours, while others can receive chaplains at that time. The same analysis would be undertaken as above -- security would be a compelling interest, but the policy is not necessary to that interest, and so it would also violate the prisoners' free exercise rights.

Establishment Clause

The first amendment also prohibits states from establishing any form of religion. The test as

to whether a state action establishes a religion is whether it (1) has a valid secular purpose, (2) has a primary effect that neither inhibits nor advances religion, and (3) does not result in excessive entanglement ofthe state with religion.

Secular Purpose
Here, City's policy has a secular purpose of reducing security risks and of avoiding staff determinations as to who is a minister. Thus, there is a valid secular purpose for the "recognized religion" requirement.

Primary Effect
However, City's policy does have the primary effect of advancing some religions, and inhibiting others. Here, "recognized religion" chaplains may enter the jail after visiting hours, while non-recognized chaplains may not. Thus, some religions have considerably greater access to prisoners, which they might use to proselytize, etc. Thus, the state action advances some religions and inhibits others.

City might argue that City's effect is not "primary" because non-recognized chaplains may still visit during visiting hours, so the impact is minimal. This would depend on how large a difference in time there is between visiting and non-visiting hours -- unless the difference is minimal (e.g., visiting hours last 20 hours/day), then this argument would probably fail and the effect would be primary.

Excessive Entanglement
The jail officers must determine what religions are "recognized." This is an excessive entanglement of the City with religion.

Thus, the City policy also is an unconstitutional establishment of religion.

Fourteenth Amendment
Equal Protection
Religion
A might argue that the City policy classifies and discriminates based on religion, and this either involves a suspect class or fundamental right. If the court argues with this, the analysis would be the same as for the free exercise clause of the first amendment, above.

Gender
The equal protection clause requires states to grant equalprotectionof the laws to all citizens. If one state denies a fundamental right to some citizens, or distinguishes based on a suspect classification, then the state action will undergo a heightened level of scrutiny. Otherwise, the rational basis test applies.

If a state law improperly classifies on the basis of gender, then intermediate scrutiny applies. The state must show that the classification is substantially related to an important government

interest (and also must provide an exceedingly persuasive justification).

Gender is only a classification for equal protection analysis if the law facially discriminates based on gender, or there is a discriminatory impact and a discriminatory intent to the law.

Here, the City policy does not facially discriminate against women, but only based on the type of religion.

A might argue that the city policy has a discriminatory impact -- most organized religions (including A's) do not ordain women. Thus, it is much more difficult, if not impossible, for women to qualify as jail ministers. Thus, there is a discriminatory impact.

However, there does not appear to be any discriminatory intent to City's action -- City's policy is instead based on staff and security concerns.

Rational Basis

Thus, no suspect class is involved, and only a rational basis test would apply. The burden is on the plaintiff to show that there is no conceivable legitimate state interest that could rationally be served by the policy.

Here, the City clearly has a legitimate interest in security. While City's policy may not be narrowly tailored to that policy (see above), it is certainly rationally related. Thus, any gender discrimination claims by it would fail.

Fundamental Rights

Strict security applies to any discriminatory denial of a fundamental right under the equal protection clause. Here, A's freedom of religion is allegedly denied because she is not part of an organized religion. Thus, strict scrutiny would apply under this claim -- the same analysis as for free exercise (above) would apply and the policy would be struck down.

Q5 Torts

Ann, an attorney, represented Harry in his dissolution of marriage proceedings, which involved an acrimonious dispute over custody of Harry and Wilma's minor children.

Ann advised Harry that a favorable custody ruling would be more likely if he could show that Wilma had engaged in improper behavior. Two days after receiving this advice Harry came to Ann's office with his wrist heavily bandaged. Harry told Ann that, when he went by the family home the prior evening to get some of his things, Wilma had tried to run over him with her car, actually hitting him. This was the first suggestion of any violence between Harry and Wilma. After listening to Harry's story, Ann urged Harry to sue Wilma for assault and battery. Ann said: "Filing this suit will improve our bargaining position on custody." Ann did nothing to investigate the truth of Harry's story.

Just before the hearing on custody, Ann filed a tort action on Harry's behalf alleging Wilma had committed an assault and battery on Harry. Ann referred to the tort action at the custody hearing, and Wilma denied that the incident ever occurred. The judge, however, believed Harry's version and awarded sole custody to Harry.

Three months later, Ann learned that Harry had fabricated the story about how he injured his wrist. Ann did not report Harry's lie to anyone and merely failed to prosecute the tort action, which, as a result, was dismissed with prejudice. Wilma then sued Ann for malicious prosecution, abuse of process, and defamation. Wilma also filed a complaint against Ann with the State's office of lawyer discipline.

A: What is the likelihood that Wilma can succeed on each of the claims she has asserted in her civil suit against Ann? Discuss.

B: Did Ann's conduct violate any rules of professional ethics? Discuss.

Answer A

I. **What is the likelihood that Wilma (W) can succeed on the following claims against Ann (A)?**-

A. Malicious Prosecution-

Malicious prosecution requires (1) filing of a claim against a party for a purpose other than seeking justice, (2) the claim being dismissed in the defendant's favor (3) that there was a not sufficient probable cause to bring the claim, and (4) damages.

On the first element, W will likely argue that A should have known that the claim was frivolous, or at least suspected that the claim might not be valid because H was suddenly injured two days after A advised H that he needed to obtain evidence of improper behavior by W. Further, W may assert that the fact A filed the claim right before the custody hearing suggests that A's intent was to use the claim against W in the custody hearing. Because A did use the information of the claim in the custody hearing, W will likely meet the requirements of this element (additionally, that A stated to H her intent to file to improve the likelihood of success is evidence of filing for an improper purpose. However, this is confidential communication and W would likely not ever be aware of it).

On the Second Element, the claim was dismissed with prejudice in favor of W because A failed to prosecute the claim prior to filing. Therefore, this element is satisfied.

On the Third Element, W will argue that because the event did not occur, that it was impossible for A to have sufficient probable cause that the event occurred. W will further argue that A failed to make a reasonable investigation to determine whether there was any substance to H's claims (such as inspecting the car, arranging to depose W to determine if W was the driver . . . etc . . . . .). While A may assert that she had probable cause due to H's injuries, such a line of argument may be undermined by A's failure to investigate the extent of H's injuries by requesting H to seek a doctor. Because there was insufficient probable cause to bring the claim for either battery or assault, W will win on this element.

On the Fourth Element, W must establish some form of pecuniary loss. Because W was required to undergo the expense of preparing to defend the claim against her, W has suffered loss.

Because W has met her burden on all of the elements, she will likely win here.

B. **Intentional Infliction of Emotional Distress**-

Further, W may seek damages for emotional distress under IIED. Because A's conduct was beyond the scope of social tolerance, and A had demonstrated recklessness by not pursuing an investigation, if W has suffered severe emotional distress, W may recover here.

C. **Abuse of Process**-

To establish abuse of process, a party must show (1) that a claim was brought to further an improper purpose, (2) that there was a sufficient act or threat used to accomplish that purpose, and (3) damages.

With regard to the first element, W may argue that the claim was not brought to adjudicate H's injuries, but rather to create false evidence to use against W in the child custody hearing. W may demonstrate that there was no proper purpose by showing that the claim was brought immediately before the child custody hearing even though the claim was not ready to file due to an insufficient investigation. Further, W may assert that the claim was raised as evidence in the hearing,and that after its usefulness had been served, A left the claim to wither by failing to even try and prosecute it. (Additionally, A stated to H her intent to file to improve the likelihood of success is evidence of filing for an improper purpose. However, this is confidential communication and W would likely not ever be aware of it.) While A may assert that she had a justification to file the claim due to H's injuries, such an argument may be undermined by A's failure to investigate the extent of H's injuries by requesting H to seek a doctor. Because there is sufficient evidence that the claim was brought to further H's interests in the custody hearing and not to adjudicate the alleged battery or assault, W will win on this element.

On the second element, W may assert that the act of filing the claim was intended to place pressure on the judge to award H custody by discrediting W's character. Because A filed a frivolous tort claim against W to achieve those purposes, A has engaged in a sufficient act under this element.

Because W has undergone damages, both emotionally (from the claim itself, and its effect in causing W to lose custody of her children) and economically (expenses in fighting the claim), there is sufficient damage here. Therefore, because W has satisfied all of the elements of the claim, she will likely win here.

D. **Defamation**- To establish a claim for defamation, the plaintiff must prove the following elements:

1. Defamatory Statement-

A statement satisfies the defamatory element if the statement causes harm to a person's reputation. W will argue that a charge of assault and battery ruined her reputation (as evidenced by the judge's decision not to grant W custody of the children). Unless A can show evidence that W had a reputation for being violent, W will win this element.

2. Of or Concerning the Plaintiff-

A statement can be said to be "of or concerning the plaintiff" if a reasonable person would know that the statement was about the plaintiff. Here, the claim was filed in W's name. Therefore, a reasonable person would be able to determine that the statement was concerning W.

3. Publication-
The publication element requires that the statement be memorialized in some medium, or communicated to a 3rd party. Here, the statement that W had assaulted H was not only written in a claim that is public record, the claim was raised in the presence of several persons in the courtroom. Therefore, this element is satisfied.

4. Damages-
As a general rule, a plaintiff does not need to establish damages if the statement was either libel or slander per se. Because the statement was recorded in writing and became public information, the statement is libel. However, W may assert that the statement was slander per se as well. A statement that reflects a crime of moral turpitude will fall under slander per se. W may argue that the battery against a spouse carries a high stigma in our society (and may use the judge's reaction as evidence). Because there is libel and slander per se, W will win on this element.

5. Are there any defenses?-
a **Absolute Privilege**-
A may assert that absolute privilege applies here. Although A is not a state actor, she is an officer of the court and the statements made against W were in furtherance of her duty to her client as an officer of the court. However, A may assert that A's intention in bringing the claim was not to further H's interests with regard to the assault and battery and that A failed her duty to the court by bringing frivolous claim and should not be entitled to immunity. Because A did not know that H was fabricating his story at the time A filed the claim (even if filed for improper purposes), A should be entitled to privilege here and should not be held liable for defamation.

b. **Qualified Privilege**-
Does not apply.

II. **Did Ann's conduct violate any rules of professional ethics?**-

A. Duties to the Court-

1. Filing Frivolous Claims (Rule 11 FRCP)-
Under Rule 11, an attorney, by signing the pleading, agrees that: (1) attorney has brought an action for a proper purpose, (2) the attorney has not brought a frivolous claim, (3) the claim is supported by admissible evidence, and (4) a reasonable investigation have [sic] been conducted to ensure the above.

Here, A should have known that the claim was frivolous, or at least suspected that the claim might not be valid because H was suddenly injured two days after A advised H thathe needed to obtain evidence of improper behavior by W. Further, prior to filing the claim A was required to ensure that the claim was supported by admissible evidence. Because A failed to conduct a reasonable investigation to determine whether the evidence was valid, and the claim was meritorious prior to filing the claim, A has violated the rules of ethics.

2. Duty to not allow client to commit perjury-

Under the model rules, if a client admits that he/she has committed perjury, the attorney must advise the client to inform the court. If the client refuses, the attorney must attempt to withdraw from representation, and if withdrawal is not possible, the attorney must disclose the perjury to the court. However, under the CA rules, once an attorney has advised the client to disclose the perjury to the court, and the client refuses, the attorney cannot disclose the perjury.

Here, A discovered that H had lied about W trying to hit H with the car, and that H had feigned his injury. Under either of the above stated rules, A had a duty to advise her client to disclose the perjury to the court. However, A did not advise H to disclose the fabrication, but instead chose to allow the case to die without prosecution. Because A failed to take the critical step of advising H to disclose the lie, A has violated the rules of ethics under both the model rules and the CA rules.

3. Duty to Withdraw-

Under the model rules, an attorney cannot assist her client to commit fraud or a crime and must withdraw if the client insists that the attorney pursue these ends. In CA, an attorney's duty to withdraw is permissive, but not required. Here, although H did not ask A to commit fraud, A's failure to withdraw from representing H after learning that H had created his claim against W is questionable. That A failed to at least request H to drop the claim she knew was frivolous may rise to the level of participating in H's fraud.

B. Duties to Client-

1. Breach of Client's Authority-

While an attorney has the right to control the arguments and claims put forth, the client (in civil cases) has the right to determine the objectives of the case. Here, A has asked Harry (H) to file a claim against W for assault and battery. However, H did not consent to filing the claim prior to A's filing. However, because H did not challenge A's filing, H will likely be held to have implicitly ratified A's filing of the claim.

Answer B

1. Wilma v. Ann

a. Malicious Prosecution

Malicious prosecution in a civil setting is usually referred to as malicious institution of civil proceedings. It occurs when: 1) a plaintiff institutes civil proceedings against a defendant; 2) the proceedings are instituted for an improper purpose; 3) the proceedings are resolved in favor of the defendant; 4) the proceedings were instituted without probable cause or a reasonable basis for believing their merit; 5)harm.

First, Ann instituted the tort action against Wilma for assault and battery of Harry.

Second, the facts suggest that the sole reason for instituting the proceedings was to gain an advantage in the acrimonious custody battle of the children of Wilma and Harry. The most damaging fact is that Ann "urged" Harry to sue Wilma and said: "Filing this suit will improve our bargaining position on custody." The fact that Ann mentioned the tort action in the custody hearings suggests that her purpose in bringing the actionwas for the advantage in the custody battle. Additionally, Ann failed to investigate the facts involved in this situation before bringing the case. When a lawyer brings an action for any reason other than to vindicate the rights of the plaintiff, the purpose is improper. Therefore, Ann acted improperly when she instituted the proceedings against Wilma.

Third, the tort action was dismissed with prejudice when Ann failed to litigate it. Dismissal with prejudice means that Harry is precluded from bringing the action in the future. Therefore, this designation suggests that Wilma is "off the hook" for this tort action and the proceedings were, in fact, resolved in her favor.

Fourth, the facts suggest that Ann brought the action without a reasonable factual basis for believing in its merit. Ann suggested that Harry would have an advantage if he could show that Wilma had engaged in improper behavior. The fact that Harry came into Ann's office just 2 days after hearing this, claiming that Wilma had attempted to run him over with the car, creates a suspicious causal connection between the advice and the claim. Additionally, the facts indicate that this was "the first suggestion of any violence between Harry and Wilma" and should have put Ann on notice that the claim needed more investigation before bringing suit.

Ann will argue that she is entitled to believe in Harry's account, and the fact that he had a noticeably bandaged hand gave her a reasonable basis for bringing the suit. Since the judge in the custody hearing believed Harry, he must have been quite convincing. However, as discussed above, this probably is not enough basis to bring the suit, given the circumstances between Harry and Wilma's acrimonious custodybattle.

Fifth, Wilma will certainly be able to show harm because the judge awarded full custody to Harry and she has no custody of her children.

Therefore, because all of these requirements indicate that Ann acted improperly, Wilma will likely be successful on her claim of malicious institution of civil proceedings.

b. Abuse of Process

Abuse of process occurs when a legal process or proceeding is used to gain an improper advantage and such advantage results in harm to the plaintiff. Here, Ann used the legal process of a civil claim in tort against Wilma for allegedly assaulting and battering Ann's client, Harry.

As discussed above, Ann used this process to gain an improper advantage in the custody hearing between Harry and Wilma. Her advantage was improper because the facts suggest that the sole reason for instituting the proceedings was to gain an advantage in the acrimonious custody battle of the childrenof Wilma and Harry. The most damaging fact is that Ann "urged" Harry to sue Wilma and said: "Filing this suit will improve our bargaining position on custody." The fact that Ann mentioned the tort action in the custody hearings suggests that her purpose in bringing the action was for the advantage in the custody battle.

Wilma was also likely disadvantaged by Ann's use of the tort action against her. The facts indicate that the judge believed Harry's version of the story over Wilma's and awarded him sole custody of their children. Therefore, Wilma suffered harm and will be successful in showing that Ann abused process by bringing the tort action against her.

c. Defamation

Defamation is the: 1) publication 2) to a third party 3) of a statement about the plaintiff 4) that tends to adversely affect the reputation of the plaintiff. Here, Ann instituted a tort action for assault and battery against Wilma. By filing this complaint, she published in writing the accusations that Wilma acted violently with her husband. This publication is a form of libel. The publication was to a third party because it was filed with the court. Ann published the statements a second time by arguing about them before the judge in the custody hearing. This oral publication is a form ofslander.

Because Wilma is not a public figure and the matter is not one of public concern, Wilma does not need to prove that the statement was false.

The statements were clearly about Wilma as the complaint had to name her as defendant and the statements in court must have expressly indicated Wilma as the tortious batterer. These accusations probably tend to adversely affect Wilma's reputation. The accusations suggest that Wilma has violent tendencies against her ex-husband. While some listeners might readily forgive suchtendencies, a judge considering whether Wilma is a proper parent certainly would not. Therefore, the accusations not only tend to adversely affect Wilma's reputation but, in fact, hurt her reputation with the judge presiding over the custody hearing.

Defenses

No adequate defenses exist for the malicious prosecution or abuse of process actions.

Common Interest

Ann will try to argue that she had a defense to the defamation action because she made the statements to parties with a common interest. However, this privilege is only a qualified privilege that can be extinguished with abuse. Even though Ann's publication to the judge and the court were to interested parties, Ann did not make any efforts to investigate the truth of the accusation and therefore she abused her privilege of spreading the accusations about Wilma.

Absolute Litigation Privilege

Ann will argue that her comments to the court were privileged because comments in a courtroom have an absolute privilege. Because Ann's publications were to a judge and were in a tort complaint, they do qualify as protected under the absolute privilege for statements made in a courtroom. Therefore, Wilma's defamation action against Ann will fail.

2. Professional Conduct

Duty of Candor to the Court

As an officer of the court, lawyers owe the court a duty of candor. This requires that lawyers do nothing to promote fraud on the court. Ann may have violated this duty by instituting a tort action against Ann without fully investigating the facts first and for the improper purpose of gaining an advantage in the custody battle. Furthermore, she planted the idea in Harry's mind to fabricate conduct about Wilma, thus aiding a client to defraud the court.

When a client seeks representation that would require the attorney to engage in conduct that violates a law or ethical standard, the attorney must withdraw from the representation. Ann should not have represented Harry in this action and should not have counseled her client to improperly gain an advantage by claiming a tort injury. Therefore, Ann will be subject to discipline for this conduct.

Additionally, Ann may have violated her duty of candor to the court when she learned that Harry's story about Wilma was fabricated and merely failed to prosecute the tort action against Wilma.

The ABA Model Rules require that lawyers may not assist their clients in lying to the court. The ABA and California rules say that lawyers may withdraw if they learn that a client has used the lawyer to assist them in a past crime or fraud. California rules of conduct say that lawyers must do nothing to further the deception.

Here, when Ann found out about Harry's lies, she merely failed to prosecute the action against Wilma rather than withdrawing the action. This may have violated her duty of candor to the court because she allowed the case to remain on the docket even after finding out about the lie. Therefore, Ann may be subject to discipline for this action.

Duty Not to Suborn Perjury

Lawyers must not aid clients in suborning perjury. Here, Harry lied to the judge during the custody hearing by claiming that Wilma had engaged in tortious conduct. The ABA would allow Ann to withdraw. California does not allow Ann to do so but she must do nothing to further the deception. In either case, Ann should have counseled Harry to retract his lies to the judge so that the judge would be able to properly rule on the custody matter with truthful facts.

Duty of Fairness to the Adversary

Lawyers owe a duty of fairness to their adversaries. This duty precludes lawyers from engaging in conduct that obstructs the truth-seeking process. By filing a suit to gain an advantage in the custody battle, Ann violated her duty of fairness to Wilma as the adversary. Therefore, Ann is subject to discipline for this violation as well.

Duty of Competence

The rules of professional conduct require that lawyers competently serve their clients. The duty of competence requires lawyers to possess all of the knowledge, skill, thoroughness and preparation necessary for the representation.

Here, Ann may have violated her duty of competence by suggesting that Harry find some improper behavior in Wilma and by urging Harry to file a tort claim for assault and battery without first investigating all of the facts. When Harry came to Ann just two days after Ann's suggesting that Wilma's improper behavior would advantage [sic] Harry in the custody battle, Ann failed to prepare for tort litigation by investigating the facts of the incident. She merely accepted Harry's word.

Additionally, because this was the first suggestion of violence between Harry and Wilma, Ann should have been on notice that investigation was necessary. Therefore, Ann is also probably subject to discipline for violating her duty of competence in failing to adequately prepare for the tort claim against Wilma.

Q6 Wills / Trusts

Ted, a widower, had a child, Deb. He had three brothers, Abe, Bob, and Carl.

In 1998, Abe died, survived by a child, Ann. Ted then received a letter from a woman with whom he had once had a relationship. The letter stated that Sam, a child she had borne in 1997, was Ted's son. Ted, until then unaware of Sam's existence, wrote back in 1998 stating he doubted he was Sam'sfather.

In 1999, Ted executed a will. With the exception of the signature of a witness at the bottom, the will was entirely in Ted's own handwriting and signed by Ted. The will provided that half of Ted's estate was to be held in trust by Trustee, Inc. for ten years with the income to be paid annually "to my brothers," with the principal at the end of ten years to go "to my child, Deb." The other half of the estate was to go to Deb outright. One month after Ted signed the will, Ted's second brother, Bob, died, survived by a child, Beth.

In 2000, Ted died. After Ted's death, DNA testing confirmed Ted was Sam's father.

Whatinterests, if any, do Deb, Sam, Ann, Beth, and Carl have in Ted's estate and/or the trust? Discuss. Answer according to California law.

Answer A

In re: Estate of Ted (T)

I will first discuss the validity of the will, and then discuss the terms of the will, which includes the trust. Then I will discuss how the estate should be distributed, according to those terms, and then how that distribution would be altered by Sam's claims.

I. Validity of Will

Under California law, a valid will must be signed by the testator, signed or attested before two witnesses at the same time, who know the items in a will, and who then sign the will. Further, the testator must have the intent that this document be his will.

Here, while the will was signed by T, it was not properly witnessed -- it appears only one witness signed, and the law requires that two sign. Therefore, this will does not comply with will formalities.

However, this will is valid as a holographic will. Holographic wills are valid in California. A holographic will is one in which all of the material terms of the will -- testamentary intent, property to be distributed, and intended beneficiaries -- are all in the testator's handwriting (intent can be found as a commercially prepared will form, but that is not applicable here). Next, the holographic will must be signed by the testator.

Here, those requirements are met. The entire will was written by T (under the witness' signature), so the material portions are in T's handwriting (he expressed his intent, disposed of his property, and named his beneficiaries) and he signed the will.

II. Terms of the Will

Half of the estate goes to Deb (D). The other half goes to the trust.

A trust is a disposition of property which separates equitable title, held by the beneficiaries, from the legal title, held by the trustee. The trustee must manage the trust for the benefit of the beneficiaries.

A. Validity of Trust

For a trust to be valid, there must be: 1) a trustee; 2) funding of the trust; 3) ascertainable beneficiaries; and 4) no violation of public policy.

Here, a trustee has been named -- Trustee, Inc. Even if Trustee, Inc. is not actually still in existence, the trust will not fail. Trusts do not fail for want of a trustee -- the court will just name one.

Next, the trust has ascertainable beneficiaries. The trustee must be able to identify the

recipients of the trust. Here, Deb may argue that the beneficiaries are not ascertainable because none are listed by name. However, here there is a class gift. T left the income of the trust for 10 years "to his brothers." A trustee can identify his brothers.

D may argue this class gift violates the Rule against Perpetuities. Under the rule, an interest must vest if at all with 21 years of a life in being at execution. Here, D would argue that T could still have more brothers. However, at T's death, the class closes due to the Rule of Convenience, so the interest vests.

Next, the trust is funded by the transfer from the will to the trust at death. This is called a testamentary trust and is valid.

Finally, there is no improper purpose for this trust. Therefore, the trust is valid.

III. Distribution

Here, I will discuss the distribution as if Sam's claims are denied. I will discuss the impact of his claims on this distribution later.

A. Deb's ½ of Estate in the will

Deb takes this share outright.

B. Distribution of trust.

As discussed above, the income of the trust is distributed to T's brother for ten years. The issue is which brothers or their issue share in this class gift.

When T died, Carl was still alive, and Abe and Bob had already died. Carl will argue that he is the only surviving member of this class, so he takes the ½ interest outright. He would argue that Abe and Bob's interests had lapsed, and so failed.

However, California has an anti-lapse statute. Under the statute, if: 1) the dead beneficiary was related to the testator, 2) the dead beneficiary was survived by issue, and 3) there is no contrary intent, then the dead beneficiary's issue represent him and take his share. In California anti-lapse also applies to member of a class gift, unless a member of that class died before execution and the testator knew that.

Here, Bob died one month after T executed the will, so he qualifies for anti-lapse application under the statute. Further, Bob satisfies the statute -- he is related to T (his brother), he is survived by issue (Beth) and there is no contrary intentions in the will, like a survivorship clause. Therefore, Beth joins Carl in the class.

However, Abe died before execution of the will, and provided T knew this, which he probably did because people usually know when their siblings die, Abe does not qualify for protection under the statute because he fails the class gift requirements. Therefore, even though Abe

satisfied the statute, Ann cannot avail herself of the statute and so will not join the class.

Therefore, Carl and Beth are entitled to the income from the trust for 10 years. Once the ten years are up, Deb gets the principal and therefore, the entire estate.

IV. Sam's Claims

Sam, if he can prove he is T's son, has several claims.

First, Sam must prove he is T's son. During life, Sam could prove paternity by admission of T, being listed on a birth certificate with T as father, or by being born in marriage between his mom and T. Here, during T's life paternity was never established. T wrote back to Sam's mom saying he doubted he was Sam's father, and T was unaware Sam existed, so they never held out a relationship.

After death, paternity can be proven, but it must be by clear and convincing existence. Here, DNA confirmed T was S's father, which is convincing and clear evidence, so Sam can pursue the following claims.

1. Pretermitted Child

By statute, a child born after execution of a will can take an intestate share if he was not taken care of in the will, outside of the will, there is no contrary interest, and the parent did not leave most of the estate to the surviving spouse.

Here, S was born in 1997. T learned of this in 1998. T executed his will in 1999. Therefore, because T executed his will after S was born, S cannot avail himself of this statute.

2. Unknown Child

By statute, a child born before the will was executed, who was not provided for in the will or outside the will in other instruments, is entitled to an intestate share if the testator did not know of the child's existence, and did not provide for the child because of that belief, either by mistakenly believing the child was dead or never born.

Deb will argue that T knew of Sam's existence when he executed the will. T received a letter in 1998 telling him he was Sam's dad. Therefore, Sam cannot qualify under the statute.

Sam will argue that, although T knew Sam existed, he did not know Sam was his child. This proof did not come out until after T died, with the DNA testing. Sam will argue that had T known S was his child, T would not have omitted him.

However, that belief must be the but/for cause of the omission. Here, it appears that T was not interested in Sam -- he made no attempt to determine paternity, or to establish a relationship with Sam, so Sam cannot qualify under this statute.

If he did, he would get an apportioned share of the entire estate.

Answer B

Validity of Will: CA recognizes the validity of wills that are valid under CA law or the law of other states where a person executed the will. I will assume Ted died and executed his will in CA.

CA recognizes attested, statutory and holographic wills. A holographic will must be signed by the testator and the material provisions in the handwriting of the testator. Here, Ted signed the will and the entire will, which would include material provisions, was in his handwriting. Therefore, the will is valid.

Validity of Trust: A will may create a trust. Ted's will created a trust. A trust must have: (1) settlor with capacity. Ted is a settlor and has capacity. (2) Present intent to create: Ted intended [that] his will create the trust. (3) Trust property existing and ascertained. Ted's estate meets this requirement. (4) Beneficiaries existing within the rule of perpetuities. All Ted's provisions require that beneficiaries take within 10 years. Therefore, all beneficiaries will be existing within the Rule Against Perpetuities, and (5) Valid Purpose: A trust for relatives is a valid purpose. Further, Ted already has a trustee. The trust is valid.

Ann, Beth and Carl:
Carl: Carl definitely takes a share of the trust income because he is a surviving member of a named class: "Ted's Brothers." The share he takes, however, depends on the claims of everyone else.

Beth: Any rights Beth have come from her father, Bob. Bob predeceased Ted. Therefore, Bob and his issue do not take under the instrument. However, Beth may take under CA Anti-lapse, which states: if a beneficiary predeceases the Testator (Note: Anti-lapse applies to all testamentary instruments including trusts), that person's issue takes his share unless a contrary intent. Class gifts are included in Anti-lapse. Therefore, Beth will take her father Bob's share. (See Ann for more Anti-lapse)

Ann: Same analysis except as Abe's daughter as Beth until Anti-lapse. Another exception to anti-lapse is that if a class gift is made and one member of the class is dead when made, anti-lapse does not apply to that person if testator knew he was dead.

Here, Ted likely knew his brother Abe was dead (Abe died in 1998) when he made his will in 1999. Plus, Abe is a member of a class gift. Therefore, Ann will not take unless Ted did not know of Abe's death; then she will take his share of anti-lapse.

Deb: Deb will take the shares described in the instrument because the trust and will are valid. However, her share may be altered by Sam's claims.

Sam: Sam will not take under the instruments. Sam may take under CA's Omitted Child

Provisions. Since Ted died in 2000, the omitted child provisions apply to all testamentary documents.

An omitted child is a child: born after execution of the instrument(s), thought dead, or not known by testator to be born.

Here, Ted knew of Sam, but did not know Sam was his child. However, after execution of the instrument(s) and in fact after Ted's death, DNA proved Sam was the child of Ted. Therefore, Sam may qualify as constructively being born after execution or that he was not known to be born. One of these arguments should work because as to Ted Sam was not known to be born.

Therefore, the omitted child provision should apply unless Ted provided for Sam outside the instrument, intended to exclude or gave most property to the surviving parent.

Deb will argue that Ted intended to exclude Sam because Ted knew of Sam and doubted that he was Sam's father. Deb's argument likely fails because Ted never knew Sam was his child and neither of the other exceptions even remotely qualifies.

Therefore, Sam will very likely take his omitted child's share, which is his intestate share.

Sam's Intestate Share: Since Ted had no surviving spouse, his issue are his intestate successors. Ted had two issue, Deb and Sam. The intestate share is ½ of Ted's estate each. However, since Deb takes under the will, she does not take under intestacy.

Sam's Share: ½ the estate prior to it going into the trust or to Deb if he is an omitted child. If not, he gets nothing.

Summary:
1. Beth and Carl likely split the trust income for 10 years unless Ted did not know of Abe's death. In that case, Ann, Beth and Carl split the income.

2. Deb takes the principal of the trust after 10 years and ½ the estate outright subject to Sam's interests.

3. Sam likely takes ½ the estate before any other dispositions are made. Or he takes nothing.