



California  
Bar  
Examination

Essay Questions  
and  
Selected Answers

February 2003

**ESSAY QUESTIONS AND SELECTED ANSWERS**  
**FEBRUARY 2003 CALIFORNIA BAR EXAMINATION**

This publication contains the six essay questions from the February 2003 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors and may not be reprinted.

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# California Bar Examination

Answer all three questions.  
Time allotted: three hours

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

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

principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

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

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

## QUESTION 1

Petra, a State W resident, recently patented a new design for a tamper-free bottle cap for soft drinks. She contracted with Dave, who lives in State X, to design a manufacturing process to mass-produce the newly patented bottle caps. Under the contract, Dave was required to relocate to State W, where Petra had leased research and development facilities, and to keep confidential all design and production information concerning the bottle cap.

Dave promptly found someone to rent his home in State X. He moved all his belongings to State W. After working for six months in State W, Dave had perfected the manufacturing process, but when Petra denied Dave's request for additional compensation he quit his job and disclosed the bottle cap manufacturing process to Kola, Inc. ("Kola").

Kola is a regional soft drink bottler incorporated in State Y, with its principal place of business in State W. Kola flooded the market with bottled soft drinks capped with Kola's version of Petra's bottle cap months before Petra could begin production.

When Petra discovered what had happened, she filed suit against Dave and Kola in state court in State W for violation of State W's patent infringement law. Petra's complaint sought damages of \$50,000 from Dave and \$70,000 from Kola. Unknown to Petra's lawyer, a federal patent law enacted shortly before Petra filed suit encompasses the type of claim pleaded by Petra and expressly preempts all state laws on the subject.

Six weeks after being served with the complaint, Kola removed the entire action to the federal district court in State W. Petra immediately filed a motion to remand the case to state court in State W. The district court denied Petra's motion.

Petra immediately filed an appeal of the court's ruling denying Petra's motion to remand with the appropriate federal court of appeals.

1. Did the federal district court rule correctly on Petra's motion to remand the case to state court in State W? Discuss.
2. Should the federal court of appeals entertain Petra's appeal? Discuss.

## **Answer A to Question 1**

### I. Did Federal District Court Correctly Rule On Petra's Motion to Remand Case to State W?

Petra filed suit in State W Court against Dave (D) & Kola based on a State W cause of action. State courts are courts of general jurisdiction and thus if State Court had personal jurisdiction over D & Kola the claim was properly filed in State Court W.

A court has pers[onal] juris[diction] if the defendant is a resident, consents to juris, or is subject to the State's long arm statute and meets the constitutional minimum contacts test. Here Kola is a corporation and thus a resident of its state of incorp (Y) and its state of principal place of business (W).

Dave's residence is determined by his domicile and intent. He begins as a resident of State (X). Because of his contract with Petra he agrees to move to State W. It does not appear he intended to make W his domicile as he only rented his home rather than selling it. Also it was uncertain how long his job would take; thus Dave is likely still a resident of X.

State W may still have jurisdiction over Dave under the Const. minimum contacts analysis. Dave moved to State W to do business there and enjoyed the benefits of State W's laws. He received compensation and performed services there. Because of the close contact between the claim and his contacts with State W, personal jurisdiction is fair provided he receives notice.

### Removal of Case

A defendant may remove a case to the federal court in the state where the claim was filed provided the case could have initially been filed in federal court and the claim for removal is brought by all defendants within 30 days of filing of the complaint or the pleading which triggered the right of removal.

A Federal District Court is a court of limited jurisdiction, thus it may only hear claims based on federal questions (arising under the U.S. Constitution or statutes) or claims based on diversity of citizenship.

### Diversity Jurisdiction

For a federal court to have diversity juris the plaintiff must be of diverse residency from

all defendants and the amount in controversy must exceed \$75,000.

In the instant matter Petra is a resident of State W and so is Kola because of its principal place of business in W. Thus diversity does not exist and federal subject matter jurisdiction doesn't exist.

Additionally, the amount in controversy must exceed \$75,000 based on plaintiff's well-pleaded complaint (reasonable). A plaintiff may aggregate claims against multiple defendants provided the defendants are jointly and severally liable.

Petra's complaint lists damages of \$50,000 against Dave and \$70,000 against Kola. Because the total damages exceed \$75,000 and it is foreseeable that Dave or Kola could be liable for the full amount the \$75,000 jurisdictional amount is met.

Kola cannot remove the action based on diversity because it is not diverse from Petra. Kola may, however, remove based on federal question jurisdiction because of Petra's complaint, though pled under State W law, is really a claim under the new federal patent act. A plaintiff may not avoid federal question jurisdiction, knowingly or inadvertently, by failing to plead the federal statute.

In this case the claim is completely preempted by an express federal law and thus Petra has no claim based on the state statute.

Kola may therefore seek removal to federal court based on federal question jurisdiction.

The only remaining limitation is Kola's failure to remove within 30 days and Dave's failure to join in the removal action. Kola may be excused from the 30 day limitation because it was unknown initially that the case arose under a federal statute as opposed to the alleged state law basis.

Because federal juris is based on federal question and not diversity, not all the defendants must join in the removal. There Kola alone could remove.

A last limitation to removal is that a defendant may not seek removal if the case was initially filed in the state court of defendant's residence. Here, that rule doesn't apply because of federal question jurisdiction.

#### District Court's Refusal to Remand to State Court

The federal district court with proper jurisdiction may refuse to remand a case to state

court. In this instance, the federal court had federal question jurisdiction, thus properly retained jurisdiction.

## II. Should a Federal Court of Appeals Hear Petra's Appeal?

A federal court of appeals may only hear an appeal from a final judgment. A final judgment is one where all matters before the district court have been resolved by a final order. The only exception to this rule is for certain interlocutory appeals based on denial or granting of injunctive relief or failure to certify a class in a class action.

Here the denial of remand to state court was not a final judgment. The plaintiff still had ample opportunity to pursue his case in chief against Dave and Kola.

Upon final judgment, if Petra then loses [s]he may raise lack of subject matter jurisdiction of the federal court on appeal, because SMJ is never waived.

## Answer B to Question 1

### ISSUE I: Did the federal district court rule correctly on Petra's motion to remand?

In this case, plaintiff Petra ("Petra") sued defendants Dave ("Dave") and Kola ("Kola") in state court, alleging violation of state W's patent infringement law. Six weeks later, Kola removed the case to federal court, and Petra immediately moved to remand. The court denied Petra's motion. At issue is whether this ruling denying the motion was proper.

Federal courts are courts of limited jurisdiction, and only have subject matter over cases that either (i) involve a question of federal law (statutory, constitutional, etc), or (ii) diversity jurisdiction exists. Cases that were originally filed in state court (like this case), can only be removed to federal court if (i) they could have originally been filed in federal court, (ii) all defendants agree, (iii) defendant is not a resident of the forum state, and (iv) removal is sought within 30 days of learning of the grounds for removal. It appears that the court was wrong on all of these grounds.

#### A. Could Case Have been Originally Filed in Federal Court?

This case likely could not have been filed in federal court, because there is likely lack of subject matter jurisdiction. First, there is no federal question subject matter jurisdiction ("SMJ"). Petra's complaint is based on state patent infringement law. It is true that, as an affirmative defense, Dave and Kola will likely claim that Petra's claims are pre-empted by the federal patent law. However, for federal question SMJ, the court looks to plaintiff's well-pleaded complaint to determine whether a federal question is pled. Dave's and Kola's affirmative defenses - - even if they arise under federal law - - are irrelevant for federal question SMJ purposes. Because preemption by the federal patent law is an affirmative defense, it is irrelevant to federal question SMJ. Insofar as Petra's complaint raises no federal question, there is no federal question SMJ.

Second, there are potential problems with diversity. As a rule, diversity jurisdiction exists where: (i) plaintiffs have diverse citizenship from EVERY defendant, and (ii) the amount in controversy is \$75,000. It appears that Petra has met the second element: she has claimed damages of \$50,000 from Dave and \$70,000 from Petra. Amount in controversy is determined by (a) the amount pleaded in good faith in the complaint, and (b) plaintiff can aggregate her claims against multiple defendants to reach the amount in controversy threshold. Because Petra has claimed \$120,000 in damages against both D's combined, and we have no reason to suspect that this damages request was



not made in good faith, Petra has met the amount in controversy requirement.

However, Petra may not be diverse from BOTH Dave and Kola. Dave's residency: To be diverse from Dave, Petra and Dave must be residents of different states. Residency is determined by domicile - - where you live with intent to stay indefinitely. Although present living location is one factor, it may be offset by other factors that suggest that your current state is not your "domicile." In the facts, we are told that (i) Petra is a resident of state W, and (ii) Dave lived in state X (and had a home in state X), and because of the contract, was required to relocated [sic] to State W. The issue is, assuming that state X was Dave's domicile prior to the contract (and we have no facts to suggest otherwise, particularly because he owned a home in state X), did he change his domicile to state W?

Factors in favor of change of domicile: (i) he physically relocated to state W, and presumably got new living quarters; (ii) he moved all of his belongings to state W, suggesting that he was in it for the long haul; and (iii) this was not a short term project - - there are no facts to suggest that when Dave relocated to state W, he would only be there for a short time period. Although he quit his job after six months due to a contract dispute, this is not evidence that he had not intended to live in state W indefinitely. Factors against change of domicile: Dave retained his house in state X, and he only rented it out to someone else. This is strong evidence that Dave still considered state X his domicile, and even though he was moving out for a long period of time (as suggested by moving all of his belongings), there is no intent to change domicile. Conclusion: Dave is probably a resident of state X, because of lack of intent to change domicile. Factors that would help, but are not present, are: where is Dave registered to vote, driver's license, etc. In the absence of more facts suggesting that Dave intended to live in state W indefinitely and make it his domicile, he should still be considered a resident of state X.

Kola's residency: A corporation is a resident of two states: (i) its state of incorporation, and (ii) its state where its principal place of business is located. Moreover, principal place of business is defined differently by different courts, and can mean either (i) where its headquarters are located, or (ii) where its main manufacturing plants are located. In the facts, we are told that Kola is incorporated in state Y, and that its principal place of business is state W. Assuming that by "principal place of business" the facts mean that either Kola's HQ or manuf. plants (as the case may be, depending on the jurisdiction) are located in state W, then Kola is a resident of BOTH state Y and W.

**Mini-conclusion:** There is no federal SMJ. In addition, there is no diversity jurisdiction, because of a lack of complete diversity between plaintiff and defendants: Petra is

resident of state W and Kola is a resident of both states Y & W (and, Dave may be a resident of state W, but likely resident of state X). Because the case could not be originally brought in federal court, removal was improper, and the court should have granted the remand request.

#### B. All D's must agree

In addition, all defendants must agree to a removal. We have no facts to suggest that Dave consented to the removal. If he didn't, then removal was improper. If he did, this element is satisfied (but, still lose[s] because no jurisdiction). The case should have been remanded to state court as per Petra's timely motion.

#### C. D cannot be resident of forum state

An additional reason for remand is that the defendant cannot be a resident of the forum state. Removal is a process to protect defendants against "hostile" foreign state courts. Here, Kola, and possibly Dave (though less likely, see above) are residents of state W. As such, removal of this case to state W federal court, with state W defendant(s), was improper. The case should have been remanded to state court as per Petra's timely motion.

#### D. Motion must be brought within 30 days

A removal motion must be brought within 30 days of discovering the grounds for removal. In this case, Kola moved for removal 42 days after being served with the complaint. Assuming that Kola knew of the grounds for removal at the time it was served, its motion was untimely, and so the court should not have granted removal in the first place. (If Kola did not immediately know of the grounds, which is unlikely, then the original removal may have been timely, but case still should have been remanded because of lack of jurisdiction). The case should have been remanded to state court as per Petra's timely motion.

**CONCLUSION:** The court erred when it denied the remand motion, because (i) no subject matter jurisdiction, and (ii) proper procedure not followed (all D's didn't agree, untimely motion, D's resident of forum state).

#### **ISSUE II: Should the Federal Court of Appeals entertain Petra's appeal?**

Typically, the federal court of appeals can only entertain appeals from final judgments - i.e., from a judgment disposing of the matter, whether because of dismissal, grant of

summary judgment, trial verdict, and the like. There are certain exceptions, however: the federal appeals court can hear certain interlocutory (i.e. not final) appeals involving grants of TRO's and preliminary injunctions (and other pretrial remedies, e.g. attachment), collateral issues, as well as issues where the parties or court would be severely prejudiced - - or the right would no longer exist - - if they had to wait until final disposition to bring their appeal. In such an extraordinary case, where the parties or the court's resources would be wasted, the court can use its inherent writ power to force the trial court to act.

This is one such case. A party can attack subject matter jurisdiction at ANY point in the proceedings - - even on appeal for the first time. Likewise, the court can raise SMJ at any point. If, at any point, the court discovers that it lacks subject matter jurisdiction, the case MUST be dismissed. Moreover, this is a good cause to use the extraordinary writ power, because Petra's entitled to relief is [sic] clear.

In this case, it is conceivable that the parties could go through trial, never raising SMJ, and only on appeal the court discovers the issue and dismisses the case. This would result in a tremendous waste of judicial resources, a waste of the party's resources and time, and could severely prejudice Petra's ability to obtain relief, esp. if the proceedings are lengthy and there is a tremendous delay between now and when the SMJ problem is discovered. As such, the appellate court should entertain the appeal, either through its ability to award collateral relief, or more likely, through its inherent power to grant a writ of mandate in extraordinary circumstances.

## QUESTION 2

Olga, a widow, owned Blackacre, a lakeside lot and cottage. On her seventieth birthday she had a pleasant reunion with her niece, Nan, and decided to give Blackacre to Nan. Olga had a valid will leaving "to my three children in equal shares all the property I own at my death." She did not want her children to know of the gift to Nan while she was alive, nor did she want to change her will. Olga asked Bruce, a friend, for help in the matter.

Bruce furnished Olga with a deed form that by its terms would effect a present conveyance. Olga completed the form, naming herself as grantor and Nan as grantee, designating Blackacre as the property conveyed, and including an accurate description of Blackacre. Olga signed the deed and Bruce, a notary, acknowledged her signature. Olga then handed the deed to Bruce, and told him, "Hold this deed and record it if Nan survives me." Nan knew nothing of this transaction.

As time passed Olga saw little of Nan and lost interest in her. One day she called Bruce on the telephone and told him to destroy the deed. However, Bruce did not destroy the deed. A week later Olga died.

Nan learned of the transaction when Bruce sent her the deed, which he had by then recorded. Nan was delighted with the gift and is planning to move to Blackacre.

Olga never changed her will and it was in effect on the day of her death.

Who owns Blackacre? Discuss.

## **Answer A to Question 2**

Olga owned Blackacre and had a valid will leaving to her three children “in equal shares all the property I own at death.” If the terms of the will were to take effect while Olga owned Blackacre, her three children would share in Blackacre equally. However, she had a reunion with her niece Nan, and had decided to make a present conveyance of Blackacre. She drew up a deed with the help of her friend Bruce, gave the deed to Bruce, and, without Nan’s knowledge, instructed Bruce to “record it if Nan survives me.” Later, Olga attempted to revoke her alleged gift to Nan by destruction of the deed, however, Bruce did not destroy the deed. When Olga died, Bruce conveyed the deed to Nan. In order to determine who owns Blackacre, the central question to answer is whether Olga made a valid conveyance to Nan. A second question is whether Olga appropriately revoke[d] the conveyance to Nan. If Olga is found to have appropriately conveyed Blackacre [to] Nan, the three children would not take any share of Blackacre under the terms of the will. On the other hand, if Olga did not appropriately convey Blackacre to Nan, the three children would take Blackacre in equal shares, and Nan would not get anything. A final consideration is whether there was any reliance on Nan’s part that would allow Nan to take Blackacre.

### Did Olga make a valid conveyance of Blackacre to Nan?

In order to find that Olga validly conveyed Blackacre by deed to Nan, three elements must be present. First, there must be an intent by the grantor, Olga, to convey Blackacre to the grantee Nan. Secondly, there must be a valid delivery of the deed to Nan. And thirdly, Nan must validly accept the deed and Olga’s conveyance.

### Did Olga have an intent to convey Blackacre to Nan?

In order to possess valid intent, Olga must have intended to convey Blackacre to Nan at the moment she made delivery. It is not enough that Olga possess the requisite intent to convey Blackacre to Nan years before delivery is made. The intent must match the moment of delivery.

Here, the facts indicate that Olga intended to “effect a present conveyance.” This wording implies that her intent was to convey Blackacre at that precise moment. Olga therefore had Bruce draw up a deed which complied with deed formalities of description of property, names involved, and Olga’s signature. Olga then handed the deed to Bruce, stating, “Hold this deed and record it if Nan survives me.” When Olga handed the deed to Bruce, the facts state that she intended to transfer Blackacre to Nan at that precise moment. However, her conduct does not match the wording of “present

conveyance.” Instead, Olga wanted Bruce to “hold this deed, and record it if Nan survives me.” This language is indicative that Olga did not want to make a precisely present conveyance of Blackacre. Instead, Olga wanted Nan to receive Blackacre upon the happening of a condition, that Nan survive Olga. Olga manifested the intent that should Nan not survive Olga, Nan should not get Blackacre. Olga intended that at that moment, Nan was to receive a contingent remainder in Blackacre, and was not intended to be a present conveyance. Instead, Olga intended to remain holder of the deed to Blackacre, and leave open whether her children should take under her will.

This contingent remainder should be distinguished from a fee simple determinable. A fee simple determinable transfers an interest in land; however, should a condition occur, then the land will revert back to the grantor through possibility of reverter. Here, a court will most likely find that Olga did not intend to convey any type of defeasible fee, but instead wanted to convey a contingent remainder.

Nan would disagree with the characterization that Olga intended to convey a contingent remainder. Instead, Nan would argue that Olga intended to make a present possessory conveyance of Blackacre to Nan when she handed the deed to Bruce. However, the language which Olga used, indicating that there was a condition before the deed should be recorded, indicates that there was also a condition before the deed was to become possessory in Nan. This characterization will also depend on whether Bruce is an agent for Nan, or an agent for Olga as shall be discussed later.

Olga’s children will argue alternatively that the intent does not match the delivery at all, that Olga’s intent was to make a present possessory transfer of Blackacre, that her actions do not match, and therefore, the whole transaction should be invalidated. However, courts are unwilling to invalidate a transaction simply on technicalities. Instead, courts will try to look at the transferor’s intent in giving effect to a transaction, use that for guidance, but still rely on legal principles, justice, and fairness in coming to a decision. Therefore, most likely, a court will not invalidate Olga’s attempt to convey Blackacre to Nan, solely because her words do not match her actions. Instead, a court will construe her intent reasonably.

#### Did Olga make a valid delivery of the deed to Nan?

Conveyance of a deed also requires valid delivery of the deed from the grantor to the grantee. Such conveyance does not have to be a precise handing of the deed from the grantor to the grantee. Instead, there can be a constructive conveyance. The grantor could hand the deed to a third party, who could in turn hold the deed for the grantee. A finding of whether there was a valid delivery in such a situation rests upon which party

the third party is an agent for.

In the present case, Olga handed the deed to Bruce, with precise instructions to record the deed should Nan survive Olga. It is clear that there was a valid delivery from Olga to Bruce. But the question is whether Bruce is an agent for Nan, or Olga.

The facts support the conclusion that Bruce is an agent for Olga. The facts describe Bruce as a “friend” of Olga, and a person whom Olga could turn to for help in drafting a deed. Furthermore, Bruce helped Olga draft the deed with a form, and for all purposes, seems to be on Olga’s side. The facts also indicate that Bruce was to act on behalf of Olga. Bruce was to convey the deed to Nan, and record the deed, should Nan survive Olga. T[h]ese actions on behalf of Olga and other aid to Olga are indicative of an agency relationship. A court will most likely find that Bruce is an agent for Olga.

The facts do not support a finding that Bruce is an agent for Nan. The facts do not show that Nan even knew Bruce, and for all purposes, seems to have first heard from Bruce when Bruce sent her the deed. Because Bruce is not acting on behalf of Nan, but rather on behalf of Olga, a court w[il]l most likely find that Bruce is Olga’s agent, and not Nan’s.

A finding of this sort is significant. If Bruce is an agent for Olga, then when Olga gave the deed to Bruce, delivery was not yet made. Delivery would happen upon the occurrence of the specified condition, and Bruce would transfer the deed to Nan, using the power which Olga granted to Bruce to act on Olga’s behalf. On the other hand, if Bruce is an agent for Nan, then delivery was complete upon Olga’s delivery to Bruce. All that would remain is for the deed to be accepted.

Because a court will most likely find that Bruce is an agent for Olga, a court will also most likely not find that there was a valid delivery made to Nan at the moment Olga gave the deed to Bruce. Instead, a court may find that a valid delivery was made when Bruce, acting as agent for Olga, transferred the deed to Nan, because Olga empowered Bruce to act in her interest.

#### Was there a valid acceptance by Nan?

In addition to an intent to deliver by the grantor and a valid delivery by grantor to grantee, there must also be a valid acceptance by the grantee in order for a valid conveyance of a deed to take place. As indicated above, Bruce will most likely be found to be an agent for Olga. Thus Bruce cannot accept on behalf of Nan. If Bruce had been an agent for Nan, Bruce could accept the deed on behalf of Nan. Instead, the facts indicate that Nan did not even know of anything of the transaction. Nan could not accept until Bruce sent the letter to Nan.

When Bruce did send the letter to Nan, Nan accepted the transfer. This is indicative as Nan “was delighted” and intended to move to Blackacre. Thus, if there was not an effective revocation of Bruce’s power to transfer the deed to Nan, then the deed should be effective in favor of Nan.

#### Significance of Olga’s revocation

These findings are significant because of the revocation which Olga made. A revocation is valid anytime up to the moment of acceptance. In the present case, there was not even a valid delivery, let alone a valid acceptance at the moment Olga handed the deed to Bruce. A court MAY find that there was a valid delivery and acceptance when Bruce transferred the deed to Nan, but only if Bruce was st[il] empowered to transfer the deed to Nan. Nan would argue that Bruce remained empowered to transfer the deed because Bruce did not use substantially the same instrument and means to revoke her gift as she did to make it. Generally, such transfers are terminable by any reasonable means. Olga’s children would argue that even if there was not a valid delivery or acceptance, the revocation was effective upon the phone call, that is, was reasonable to revoke her offer by telephone rather than in writing because Olga and Bruce were friends.

A court will probably hold that the revocation was not effective. Although this is a scenario for the transfer of land thus subject to the statute of frauds, a finding that a person can revoke or reinstate a transfer simply on a whimsical phone call would invite the danger of too much fraud. If Olga could effectively terminate her transfer by a phone call, then she could just as easily reinstate her offer. Such ease in a transfer of something as substantial as a transfer of land would invite too much danger of abuse and fraud. Hence, a court will probably hold that Olga’s revocation was invalid.

#### Conclusion

A court will most likely hold that Olga had an intent to deliver land to Nan. Although her intent may not coincide precisely with her actions, a court will construe a reasonable intent to deliver. Olga conveyed the property to Bruce as her agent who in turn was empowered to deliver the deed to Nan. Olga’s revocation was ineffective because it did not comply with the statute of frauds. Hence, when Nan accepted the deed, a court will probably find an effective conveyance.

Should the court not find an effective conveyance, Nan could also pursue a theory of reliance. However, the facts do not support too much of a finding of reliance, as Nan did not take any substantial action, and instead, “planned” to move to Blackacre. A plan



is not sufficient to justify a finding of reliance. There must be also a significant manifestation of intent to possess.

## **Answer B to Question 2**

The issue is whether the deed form was sufficient to pass title to Nan and make her the owner of Blackacre, or whether the deed was invalid, which would mean that Olga was owner of Blackacre upon her death and the property would pass through her will to her three children in equal shares.

### **1. Deed**

In order for a deed to be valid there must be: (1) a writing that satisfies the statute of frauds; (2) delivery; and (3) acceptance.

#### **A. Statute of Frauds**

When conveying an interest in land, the conveyance must be contained in a writing that satisfies the statute of frauds. A deed is sufficient to satisfy the statute of frauds if it: (1) identifies the parties to the conveyance; (2) sufficiently describes the property to be conveyed; (3) and is signed by the grantor. In this case, Blackacre is a piece of real property that consists of a lakeside lot and cottage, and a sufficient writing must exist in order for the conveyance to be enforceable.

Here, the deed form is a written memorandum which identifies the parties to the conveyance. The deed names herself as grantor and Nan as grantee. The deed also sufficiently identifies the property to be conveyed. The deed designates that Blackacre is the property being conveyed and the deed includes "an accurate description" of Blackacre. Also, Olga, as grantor, signed the deed. In general, the signature of a deed does not have to be notarized; however, in this case the deed was notarized by Bruce after Olga acknowledged her signature. Therefore, it appears that the deed form was a written memorandum that is sufficient to satisfy the statute of frauds requirement for conveying an interest in land.

#### **B. Delivery**

To determine whether a grantor has sufficiently delivered a deed so as to affect a conveyance of real property, the focus of the inquiry turns on the grantor's intent. If the grantor intends to pass a present interest in the property, then delivery is complete. Actual physical delivery of the deed is not required, nor is knowledge of the delivery by the grantee, so long as the grantor possessed the requisite intent.

Here, Nan would argue that at the time Olga executed the deed form she had the

present intent to convey Blackacre to her. Olga and Nan were family members and had just had a “pleasant reunion” for Olga’s seventieth birthday. In addition, Olga did not want her children to know that she was leaving Nan Blackacre while she was alive. Thus, this shows that Olga has the present intent to pass title to Nan while she was alive. Moreover, the deed form by its terms would effect a present conveyance of the property.

On the other hand, Olga’s children may argue that Bruce merely provided Olga with the deed form, and Olga did not know that it would effect a present conveyance. Even though the terms were sufficient, Olga’s children would argue that she lacked the requisite present intent as evidenced by Olga handing the deed to Bruce and telling him to hold the deed and only record it if Nan sur[v]ived her. Olga’s children would argue that this demonstrates that Olga did not intend for the deed form to pass to present title and therefore Olga never ‘delivered the deed’ to Nan. Olga’s children would also note that Olga’s intent not to pass present title to Nan is shown by Olga’s telephone call to Bruce in which she instructed Bruce to “destroy the deed”.

On balance, because at the time of the conveyance Olga executed the deed sufficient to convey title and she wanted to make a gift of the property to Nan at that point, even though she didn’t want her children to know about it, a court would likely find the deed was sufficient to convey title to Nan at the point it was executed by Olga. Olga did not state that she only intended the deed to be effective upon the occurrence of an event, rather Olga merely stated that she wanted Bruce to record the deed if Nan survived her. A deed does not have to be recorded in order to be valid. Therefore, Olga likely delivered the deed.

### C. Acceptance

A grantee must accept the deed of conveyance. In general, acceptance is presumed unless the grantee has specifically indicated an intent not to accept the conveyance. Instead, it is immaterial whether Nan knew about the conveyance or not when Olga “delivered” the deed. Therefore, Nan’s lack of knowledge would not prohibit a finding that she “accepted” the deed. In fact, as further evidence of her acceptance, Nan “was delighted” with the gift and planned on moving to Blackacre. Thus, there was sufficient acceptance.

As a result, because there is a sufficient writing to satisfy the statute of frauds, and Olga intended to make a present transfer of the Blackacre when she executed the deed and Nan’s acceptance can be presumed, Nan owns Blackacre. Because the property is not part of Olga’s estate at the time of her death because she did not own it anymore, her three children would not receive Blackacre in “equal shares” pursuant to Olga’s will. A

testator may not devise property which she does not own at her death.

However, if the court found that Olga did not possess the requisite intent to deliver Blackacre to Nan, Nan could still argue that Olga's deed form constituted a valid disposition by will and therefore she would still take the property.

## **2. WILL - Is the Deed Form a Valid Will?**

In general, a will is valid if the testator is at least 18 years old and of sound mind, possesses the requisite testamentary intent, signs the will in the joint conscious presence of 2 witnesses that understand the document is the testator's will and who sign the will. Some jurisdictions recognize the validity of holographic wills. To be valid, a holographic will must be signed by the testator, the testator must possess testamentary intent, and the material provisions of the holographic will must be in the testator's handwriting. Material provisions of the will consist of identifying the beneficiaries and the property to be devised.

In this case, the deed form would not be a valid formal will because Olga executed the document in the presence of only 1 witness, Bruce. Thus, even though Olga was over 18 and appears to be of "sound mind", and she signed the deed, the deed form does not qualify as a valid formal will.

Nan could argue that the deed form constitutes a valid holographic will. The deed form was signed by Olga, and it appears that "Olga completed the form" by naming herself as grantor and Nan as grantee, and by including the property to be conveyed, Blackacre, and accurately described the property. Thus, the [the] "material terms" of the will appear to be in Olga's handwriting. It does not matter that the document was a "form" so long as the material terms were in Olga's handwriting. Therefore, the court may conclude that Olga executed a valid holographic will if it concludes that at the time Olga possessed the necessary testamentary intent.

Nan would argue that Olga's statement to Bruce instructing him to hold the deed and record it if "Nan survives me" evidences a testimony intent that Nan only take the property upon Olga's death. Thus, Nan would not have an interest in the property until Olga dies, which is consistent with disposing of one's property by will. A court would likely conclude that the deed form constitutes a valid holographic will.

### **3. Revocation of Holographic Will**

In general, wills are freely revocable during the testator's lifetime. A will may be revoked by a physical act or by execution of a subsequent instrument.

In order to revoke a will by physical act, the testator must (1) have the intent to revoke, and (2) do some physical act such as crossing out, destroying, obliterating which touches the language of the will. A testator may direct another person to destroy the will, however, the destruction must be at the testator's direction and in the testator's presence.

Here, Olga's children could argue that the deed form, which constitutes a holographic will, was revoked by Olga before her death. Olga intended to revoke the will when she called Bruce and told him to "destroy the deed". Olga's children may argue that even though Bruce did not actually destroy the deed, the court should still find that Olga possessed the intent to revoke. However, because Bruce was not in Olga's presence and did not do anything to the language of the holographic will, it is likely that Olga did not sufficiently revoke the holographic will before her death.

### **4. Revocation of Earlier Will**

If the court found that Olga did not revoke the holographic will, then the issue becomes whether the holographic will is sufficient to revoke the earlier valid will leaving all of Olga's property to her three children equally. A testator may revoke a prior will by executing a subsequent instrument. In general, a subsequent written instrument that qualified as a will must be construed, to the extent possible, as consistent with the prior instrument. However, to the extent that a subsequent instrument is inconsistent with prior will, the prior will is revoked.

Here, the holographic will leaves Blackacre, which was part of Olga's "property" to Nan. Olga's original will left "all the property that I own at my death" to her three children. If the court finds that the deed form was insufficient to pass title to Nan during life because Olga lacked the necessary intent, she would "own" Blackacre at her death. If the deed form constitutes a valid holographic will, it disposes of Blackacre. Thus, this disposition would work a revocation of the original will to the extent that it is inconsistent. Therefore, Nan would take Blackacre under the holographic will, and Olga's children would take the rest of Olga's property since that would not be inconsistent with the original terms of the will.

Olga's children may argue that Olga never dated the holographic will, and therefore, when a testator is found to have a formal will and a holographic will that is undated, a

presumption exists that the holograph was executed before the holograph [sic]. Thus, the formal will would be inconsistent with the undated holograph, and the formal will would, to the degree of inconsistency, revoke the undated holograph. In that case, Olga's children would own Blackacre equally, and Nan would take nothing.

In sum, Nan likely own[s] Blackacre because the deed form was sufficient to pass present title to her, and therefore Olga did not own Blackacre at her death. As such, her original will would not pass Blackacre to her children since she did not "own" it at her death. In addition, even if the court finds that Olga lacked the requisite intent for a valid delivery, the deed form likely qualifies as a valid holographic will which Olga did not revoke in her lifetime.

### QUESTION 3

Don was a passenger in Vic's car. While driving in a desolate mountain area, Vic stopped and offered Don an hallucinogenic drug. Don refused, but Vic said if Don wished to stay in the car, he would have to join Vic in using the drug. Fearing that he would be abandoned in freezing temperatures many miles from the nearest town, Don ingested the drug.

While under the influence of the drug, Don killed Vic, left the body beside the road, and drove Vic's car to town. Later he was arrested by police officers who had discovered Vic's body. Don has no recall of the events between the time he ingested the drug and his arrest.

After Don was arraigned on a charge of first degree murder, the police learned that Wes had witnessed the killing. Aware that Don had been arraigned and was scheduled for a preliminary hearing at the courthouse on that day, police officers took Wes to the courthouse for the express purpose of having him attempt to identify the killer from photographs of several suspects. As Wes walked into the courthouse with one of the officers, he encountered Don and his lawyer. Without any request by the officer, Wes told the officer he recognized Don as the killer. Don's attorney was advised of Wes's statement to the officer, of the circumstances in which it was made, and of the officer's expected testimony at trial that Wes had identified Don in this manner.

Don moved to exclude evidence of the courthouse identification by Wes on grounds that the identification procedure violated Don's federal constitutional rights to counsel and due process of law and that the officer's testimony about the identification would be inadmissible hearsay. The court denied the motion.

At trial, Don testified about the events preceding Vic's death and his total lack of recall of the killing.

1. Did the court err in denying Don's motion? Discuss.
2. If the jury believes Don's testimony, can it properly convict Don of:
  - (a) First degree murder? Discuss.
  - (b) Second degree murder? Discuss.

### Answer A to Question 3

1. Did the court err in denying Don's motion?

The issue here is whether the court properly denied Don's motion to exclude evidence of the courthouse identification.

**Right to Counsel:**

Don's first ground for having the identification evidence excluded is that the procedure violated his federal constitutional rights to counsel.

Sixth Amendment: The Sixth Amendment of the US Constitution, which is applicable to the states through the Due Process Clause of the Fourteenth Amendment, affords citizens the right to counsel during all post-charge proceedings. The Sixth Amendment right to counsel only applies after a Defendant has been formally charged. Here, Don was arraigned and therefore the Sixth Amendment right to counsel for his post-charge proceedings applies.

Don is arguing that the identification should be excluded on the grounds that it violated his federal constitutional grounds that the identification procedure violated Don's federal constitutional rights to counsel. However, Don's attorney was present with him during the identification. Don is going to argue that they were not made aware of the identification and given an opportunity to object to it. His lawyer was told of the identification and its methods, however, it is unclear as to when the attorney was advised of this information. It seems more likely that he was told after the identification had already been made.

However, the Sixth Amendment right to counsel does not apply to identifications of the suspect, since it's not a proceedings for purposes of the Sixth Amendment right to counsel.

Fifth Amendment: Miranda warning: Miranda warnings also afford the defendant of right to counsel. This right is to have an attorney present during all interrogation or questioning by the police. Miranda warnings are given to someone upon arrest. They include the right to remain silent and that everything said can be used in court against him, the right to have an attorney present and the right to have an attorney appointed by the court if the arrestee cannot afford one. [In] this case the right to counsel issue did not arise as a Miranda violation, since there was no questioning or interrogation of the police, and the Defendant has already been arraigned.



This case involves the Sixth Amendment right to counsel in all post charge proceedings. There are certain occasions where there is no right to counsel, for example, a photo identification of a suspect, taking of handwriting or voice samples, etc.

Because the identification of a suspect by a witness does not afford the Sixth Amendment right to counsel, and because Don's lawyer was actually present with him during the identification, the court was probably correct in denying Don's motion to exclude the evidence on this ground.

### **Due Process:**

Don's second ground for having the identification evidence excluded is violation of due process of law.

### **Identification**

The police may use different methods wherein witnesses can identify suspects as the crime doer. These methods include photo identification, lineups and in-court identifications. The identification process must be fair to the suspect and not involve prejudice and therefore not violate his due process rights. For example, the lineup must include others of similar build and appearance as the suspect.

The police in this case were going to have Wes [sic] identify Don (or the murderer) through photo identification. However, they took him to the courthouse knowing that Don was having his preliminary hearing that day. The photo lineup did not have to be at the courthouse, in fact it is usually at the police station. This questions the officers' conduct and intent. Don is going to argue that this was done with the express purpose of having Wes see him at the hearing and associate him to the crime. This is prejudicial to Don and a possible due process violation.

The police will argue that it was mere coincidence that they ran into Don in the courthouse and that their intent was to have Wes identify the murderer [sic] through a photo identification. They will further argue that Wes told the officer he recognized Don as the killer without any request by the officer. Therefore his identification was spontaneous and not prompted. Therefore it did not violate Don's due process rights.

However it is very suggestive to a witness to see a defendant charged with the crime and make the identification that way. If Wes had identified Don independent of that situation then the identification would have been valid and there would be no due

process violation. However, that was Wes' first and only identification of Don, and Don is going to argue that it was prejudicial and violated due process of law.

### **Officer's testimony**

Don is further claiming in his motion to exclude that the officer testifying to the identification would be inadmissible hearsay.

#### Relevance:

For any testimony or evidence to be admitted it must first be relevant. Here the officer's testimony will be established as relevant since it involves a witness' identification of the defendant as the murderer.

#### Hearsay:

Hearsay is an out-of-court statement made by a declarant that goes to the truth of the matter asserted. Hearsay is inadmissible generally because of the Defendant's right to confront and cross-examine witnesses. The officer is going to testify that he heard Wes tell him that he recognized Don as the killer. The statement was made out of court and goes directly to prove that Don is the killer. Therefore officer's testimony is hearsay. The question then is, is it admissible hearsay? There are exceptions to the hearsay rule depending on whether the declarant is available or unavailable to testify. There is no indication whether Wes is available or unavailable so we must look at the possible exceptions to the hearsay rule.

Present Sense Impression: Present sense impression is an exception to hearsay. This is when a declarant is expressing a present impression at that moment without an opportunity to reflect. The State will argue that Wes, upon seeing Don, merely expressed that he recognized him as the murderer. It was an impression at the present he was expressing. However this exception will probably not apply in this case since [sic].

State of Mind: The state of mind exception is a statement by the declarant that reflects the declarant's state of mind. For example, if the declarant said he was going to Las Vegas this weekend, that statement would be admissible to show that defendant intended on going to Las Vegas for the weekend. This is an exception to hearsay and would be admissible. The state of mind exception does not apply to this case.

Excited Utterance: A statement made when the declarant is an excited state caused by

an event and has not had a chance to cool down. Nothing in the facts here indicate that Wes' identification of Don was an excited utterance and therefore this exception does not apply.

Admission by Party Opponent: Statements made by the opposing party are usually admissible as an exception to hearsay. Here, since the statement the officer is going to testify to is not that of Don's but rather Wes, the exception does not apply here [sic].

Declaration Against Interest: When a declarant makes a statement that goes against his own interests, that statement is admissible as an exception to the hearsay rule. Again, Wes' statement was not against his own interest but against Don's interest and therefore this exception is not applicable here.

None of the other exceptions, including dying declaration, business record, are applicable here. It appears as though the officer's testimony is inadmissible hearsay. Therefore the court erred in denying Don's motion on this ground.

## 2. (a) First Degree Murder

Under common law, murder was homicide with malice aforethought. There were three types: murder, voluntary manslaughter and involuntary manslaughter. Statutes have categorized murder into de [sic].

The issue here is that if the jury believes Don's testimony, can Don be convicted of first degree murder[?]

Murder is the killing of another human being. It requires an actus reus (physical act) and a mens rea (state of mind). The defendant must have the requisite state of mind in conjunction with a physical act to be guilty of murder. The state of mind does not have to be the specific intent to kill; it could be a reckless disregard or an intent to seriously injure or harm.

First degree murder is murder with premeditation or murder during the commission of violent felony (felony murder).

Premeditation: Premeditation and thus first degree murder, is a specific intent crime. Premeditation involves the prior deliberation and planning to carry out the crime in a cold, methodical manner.

In this case there are no facts to indicate that Don planned or premeditated Vic's murder. In fact, according to the facts, Don was intoxicated and has no recollection of the killing.

**Intoxication:** There are two states of intoxication, voluntary and involuntary. Voluntary intoxication involves the voluntary ingestion of an intoxicating substance. It is not usually a defense to murder. Voluntary intoxication can be a defense to specific intent crimes, if it was not possible for the defendant to have the state of mind to form intent.

Involuntary intoxication is the involuntary ingestion of an intoxicating substance, such as with duress, without knowing of its nature, prescribed by a medical professional, etc.

In this case, Don was intoxicated since he ingested the hallucinogenic drug. Although Don was aware of what he was taking when he took it, he will argue that he was forced to take it under duress. Since Vic threatened Don that he would abandon him in freezing temperatures far from any town, Don was forced to take the drug. Although involuntary intoxication is not a defense to murder, it is a proper defense to the specific intent required for premeditation and thus first degree murder.

Since Don did not premeditate the murder nor have the specific intent for premeditated murder, he cannot be convicted of first degree murder.

Felony Murder: Felony murder is murder committed during the commission of an inherently dangerous felony. There are no facts to indicate that Don was committing an inherently dangerous felony, independent of the murder itself. Therefore felony murder probably does not apply in this case and Don cannot be convicted of First degree murder.

## 2. (b) Second Degree Murder

Second degree murder is all murder that is not first degree and is not made with adequate provocation to qualify for Voluntary Manslaughter. Second degree murder does not require specific intent.

The issue here is if the Jury believes Don's testimony, can Don be properly convicted of Second degree murder?

Don is going to use the defense of intoxication. Although intoxication is not a defense to murder, involuntary intoxication can negate a required state of mind. Since it will

probably be determined that Don's intoxication was involuntary due to duress (see discussion above), Don will argue that he did not have the state of mind required to commit second degree murder. He will be compared to a person who is unconscious. An unconscious person cannot be guilty of murder. Don will argue that he was so heavily intoxicated that he has no recollection of the occurrences and therefore could not have had even the general intent to kill or seriously injure.

Voluntary manslaughter: in order for a murder charge to be reduced to voluntary manslaughter there must be adequate provocation judged by a reasonable standard and no opportunity to cool down and the defendant did not in fact cool down. Nothing in these facts suggests that Don acted under the heat of passion or was provoked in any way. In fact Don does not remember the killing and therefore there is no evidence of provocation.

Since was [sic] involuntarily intoxicated, he could not have the requisite state of mind for murder. Therefore he cannot be convicted of either first degree or second degree murder.

### **Answer B to Question 3**

I. Court's Denial of Don's (D's) Motion

A. Violation of D's right to counsel

The Sixth Amendment guarantees defendants the presence of counsel at all critical stages of a criminal proceeding which results in imprisonment, as well as providing that the police may not elicit information from a defendant in the absence of counsel once criminal proceedings have been initiated against the defendant, usually in the form of an arraignment. Among those stages of a criminal proceeding which are considered critical are a preliminary hearing, at trial, when making a plea, at sentencing, and at any lineup or show-up conducted following the filing of charges against the defendant.

In this instance, the identification of D occurred after he was arraigned, and thus D did have a right to have counsel present during any lineup or show-up. However, this right to counsel does not extend to photographic identifications, which are not considered adversarial proceedings, but instead only to in-person lineups or show-ups. Thus, the police in this instance will claim that they simply took Wes (W) to the courthouse for the express purpose of having him attempt to identify the killer from photographs of several suspects, something for which D was not entitled to the presence of counsel, and the fact that W witnessed D emerging from the courthouse was not part of their plan, and something for which they should not be held responsible. Further, the police will refer to the fact that when D emerged from the courthouse they made no request that W identify D, but rather W made such an identification completely of his own volition.

D's counsel will most likely argue that the police were well aware that D would be at the courthouse at that particu[la]r time, and that bringing W to the courthouse ostensibly to view photographs was in reality simply a veiled effort to conduct a one-on-one show-up in which W could identify D, and that D thus had the right to counsel at such a proceeding.

In this instance, the court did not err in denying D's motion based on grounds that the identification procedure violated D's Sixth Amendment right to counsel. The Sixth Amendment guarantees the right to counsel at any post-charge lineup or show-up in part to ensure that the defendant's attorney will be aware of any potentially unfair methods utilized in the identification process, and can refer to these inequities in court. Because D's counsel was in fact present when W saw and identified D, D's attorney would be able to raise any objections he had to the identification, and thus D was not ultimately denied his right to counsel. Thus, even if the court were to find that the police bring[ing]

W to the courthouse amounted to a show-up in which D was entitled to the presence of counsel, D was with his attorney when the identification was made, and therefore his right to counsel was satisfied.

B. The identification as violative of due process of law

The Due Process Clause of the 14<sup>th</sup> Amendment, made applicable to the federal government by the Fifth Amendment, ensures that the prosecution bears the burden of proving each element of a criminal case against defendant beyond a reasonable doubt, and also guarantees that a defendant will be free from any identification which is unnecessarily suggestive or provides a substantial likelihood of misidentification.

In this instance, D's attorney would probably contend that the police bringing W to the courthouse on the date of D's prelimi[n]ary hearing to view photographs of suspects in fact raised a substantial probability that W would in fact observe D emerging from the courthouse, which is exactly what occurred. D's attorney would contend that any identification made in this context is extremely suggestive, as the fact that D is emerging from a court of law and was in the presence of an attorney places D in a situation in which he appears to be of a criminal nature, and is likely to lead an eyewitnesses to mistakenly identify D based solely on these circumstantial factors. Further, D's attorney would argue that the situation was unnecessarily suggestive because the witness could believe the fact that criminal proceedings had already been initiated against D, thus warranting his appearance in court, sufficient evidence, perhaps even in the form of testimony by other eyewitnesses, exists which incriminates D, and may make W more likely to believe that D was the man he had seen commit the killing.

The court probably did not err in denying D's motion based on the fac[t] that W's identification was violative of due process of law. The 14<sup>th</sup> Amendment guarantees against unnecessarily suggestive identifications, or identifications posing a substantial likelihood of misidentification, are intended primarily to remedy lineups in which a criminal defendant is placed in a lineup with other individuals to whom he bears no physical similarities whatsoever. It is unlikely that a court would find that a witness seeing an individual emerging from a courthouse would be so prejudicial as to lead to an unnecessarily suggestive identification.

C. Hearsay

Hearsay is an out-of-court statement being offered to prove the truth of the matter asserted. In this instance, the officer's planned testimony that W had identified D at the courthouse would qualify as hearsay, as the officer would be testifying to a statement made by W out of court in order to prove that W identified D.

However, instances in which a witness has previously identified a suspect are admissible as exceptions to the hearsay rule even if the defense is not attacking the identification. Such statements of prior identification are considered to possess sufficient guarantees of trustworthiness that the party against whom they are offered is not denied his Sixth Amendment right to confront witnesses against him. Therefore, the court did not err in denying D's motion to exclude the evidence of the courthouse identification because the officer's testimony would in fact not be inadmissible hearsay.

II. Crimes for which D may be properly convicted

A. First degree murder

In order to convict a defendant of first degree murder, the prosecution must prove beyond a reasonable doubt that the defendant unlawfully killed a human being with malice aforethought, and that the killing was either premeditated and deliberate or was committed during the commission or attempted commission of an inherently dangerous felony (felony murder). In order to prove malice aforethought, the prosecution must show that defendant acted with an intent to kill, an intent to inflict serious bodily harm, acted with a depraved and malignant heart, or was guilty of felony murder.

In this instance, D's acts appear to be both the actual and proximate cause of Vic's (V's) death, as the facts indicate that D killed V and dumped his body beside the road. However, D would probably be found not to possess the requisite intent to kill or to inflict serious bodily harm by way of his raising the excuse of involuntary intoxication. Intoxication, whether voluntary or involuntary, may be raised to negate the presence of an essential element of a crime, generally intent. In this instance, D's intoxication would be involuntary, as he did not wish to take the hallucinogenic drug V offered, but was forced to when he feared that if he did not, he would be abandoned in freezing temperatures and his life would be in jeopardy. Ingesting a drug under such circumstances is the virtual equivalent of being unknowingly slipped the drug, or being forced to ingest the drug upon threats of death. As such, D was involuntarily intoxicated, and his intoxication resulted in his having no recall of the events between the time he ingested the drug and his arrest. D thus will be found not to have possessed the requisite intent to kill or intent to inflict serious bodily harm necessary for a finding of first



degree murder. Further, even if D were not able to rely on the excuse of intoxication in order to negate a requisite mental state, there is no evidence that the killing was premeditated or deliberate, and because it did not occur during the commission or attempted commission of an inherently dangerous felony, there is no basis for finding D guilty of first degree murder.

## 2. Second degree murder

The jury most likely could not properly convict D of second degree murder, either. Second degree murder also requires the prosecution to prove beyond a reasonable doubt that the defendant intentionally killed a human being with malice aforethought, though it relieves the prosecution of proving the additional elements of premeditation and deliberation or felony murder.

In this instance, D's involuntary intoxication resulting from his unwillingly ingesting a[n] hallucinogenic drug should sufficiently relieve him from being found guilty of second degree murder, as it negates the requisite mental states of intent to kill or intent to inflict serious bodily harm as discussed above. Further, D should not be convicted under a theory of depraved or malignant heart, as such a finding requires proof of reckless conduct which created a substantial and unjustifiable risk of death or serious bodily harm. A defendant must be consciously aware of the risk he is creating to be guilty of a depraved heart killing, and D's involuntary intoxication would most likely relieve him of guilt, since he had no recall of the events between the time he ingested the drug and his arrest, and would most likely not be considered to have appreciated the risk of his conduct.

If D were found to have been intoxicated voluntarily, rather than involuntarily, he could be properly convicted of second degree murder for V's killing. However, if the jury believes D's testimony that he only ingested the hallucinogenic drug because he feared if he did not he would be left out in the cold and could potentially die, they must find that D was involuntarily intoxicated, which would relieve him of guilt for second degree murder.

## QUESTION 4

In 1995, Lawyer was hired by the City ("City") as a Deputy City Attorney to handle litigation, bond issues, and zoning matters. In 1998, she was assigned by the City Attorney to perform the preliminary research on the feasibility of a new land-use ordinance. Subsequently, the City Attorney retained outside counsel to draft the ordinance, which established new zoning districts and created a wetlands preservation zone restricting development in designated areas.

In 2000, Lawyer resigned from the City Attorney's office and became employed as an associate attorney in W & Z, a private law firm. In 2002, W & Z was retained by Developer to represent it in connection with a condominium project in City, and Lawyer was assigned to the matter. Developer's project was within the wetlands preservation zone, and City had denied Developer a permit for construction of the project on the basis that the newly enacted ordinance would not allow it to be built as planned. Developer requested that Lawyer file a lawsuit challenging the validity of the wetlands provision of the ordinance as applied to its project.

Association, an organization of City landowners, independently approached Lawyer and requested that she file a lawsuit on its behalf challenging the validity of the wetlands provision of the ordinance. Developer encouraged Lawyer to represent Association, since a lawsuit by Association would put pressure on City to reach a compromise concerning Developer's project. Developer told Lawyer it would pay half of Association's legal fees.

What ethical issues confront Lawyer and W & Z? Discuss.

## **Answer A to Question 4**

### **1. LAWYER'S DUTY OF LOYALTY/CONFIDENTIALITY TO FORMER CLIENTS**

Lawyer ("L") was retained by City as a Deputy City Attorney for 5 years. L thus owes a duty of confidentiality to City as his [sic] former client. The duty of confidentiality means that L may not use or disclose any confidential information obtained through the representation of City in any matter. The duty of confidentiality is broader than [sic] the attorney client privilege because it covers communications from any source, and it is imposed regardless of whether the attorney is being compelled to testify.

Here L has resigned his [sic] position with City, but he [sic] is now employed by W & Z. He [sic] may not represent clients for W & Z in a manner that uses information obtained through his [sic] representation of City. Therefore by being assigned to Developer's case L should consider whether his [sic] duty of confidentiality to City is implicated.

The duty of confidentiality is designed to foster the full, open and candid communication of clients with their attorneys. If L violates this duty owed to his [sic] former client City, he [sic] will be subject to discipline.

### **2. W & Z'S DUTY OF CONFIDENTIALITY TO L'S FORMER CLIENT -- IMPUTED DISQUALIFICATION**

Here the issue of confidentiality arises again because if one lawyer employed by a firm is unable to take on the representation because of a conflict of interest or confidentiality problem with a former client, the disqualification is imputed to the entire firm and no lawyer in the firm may take on the representation.

Here however, L's former client is a government employer. Because the government has a strong interest in employing qualified attorneys, special rules have been created to allow firms to represent clients against the government even if one of the attorneys in the private firm formerly represented the government.

If a lawyer is employed by a firm and has confidential information regarding a government matter obtained through previous representation of the government, the firm may properly represent another client against the government if:

1. The lawyer who previously represented the government is completely screened from handling any portion of the representation against the government;

2. The lawyer who previously represented the government shares in NO PART of the fees produced from the representation of a client against the former government client; and
3. The firm notifies the government of the possible conflict of interest so that the government can ensure that proper preventative measures are taken.

Therefore, if [sic] W & Z may properly represent developer if L is properly screened off of the case. Here, however, L has actually been assigned to the case of Developer against the City. Therefore the proper screening techniques have not been used. This will be improper for both L and W & Z if L formerly represented the City on a “matter” concerning Developer’s case.

Does Developer’s case involve a “matter” on which L formerly represented the City?

Although L formerly represented City, if L has no confidential information regarding the current pending representation against City, neither L nor W & Z would be disqualified. L will be deemed to have confidential information if L represented City on the same “matter” the current representation now involved.

Unlike the prosecution of a criminal, the drafting of regulations, ordinances or codes will not be considered a matter that would disqualify L from representing a private sector client against City. Part of L’s duties were litigation though, so it is possible he [sic] could be deemed disqualified. Moreover, the private sector client is directly asserting a direct claim attacking the validity of the rules, precisely the work that L was performing for City. However L performed only preliminary research on the feasibility of the proposed ordinance; the actual drafting was performed by outside counsel. Therefore, even if this was considered a matter for which L could be disqualified, a strong argument exists that L probably did not obtain any confidential information.

Therefore L probably is not disqualified, but L must encourage W & Z to notify the government regarding the proposed representation to see whether City has any objection to L’s participation in the case. If City does not object (L and W & Z should get consent in writing) then L may represent Developer so long as he [sic] does not use any confidential information obtained from City. If City does object, then L must be completely screened from the case, and take no part in the representation, and must receive no portion of the fees paid by Developer.

**3. L'S DUTY OF LOYALTY TO CURRENT CLIENTS - - MAY L REPRESENT ASSOCIATION?**

If it is proper for L to represent Developer ("D"), then L owes D a duty of zealous loyalty. This loyalty may not be compromised by an [sic] conflict of interest that L might have personally, economically or professionally. No lawyer may represent a client in any matter that is directly adverse to the interests of another current client.

Here Association ("A") has asked L to represent it in a suit challenging the validity of City's ordinance (all of the above discussion regarding loyalty and confidentiality to former clients applies to A). L is presumably already representing D in a suit regarding City's ordinance. Therefore A's proposed representation falls precisely within a matter that involves the subject matter of a current client.

Dual representation, or representation of two clients involving the same or similar subject matter may be permissible if:

- I. The lawyer subjectively reasonably believes that the representation of both clients may be undertaken without compromising his professional judgment or threatening his zealous representation of either client;
- II. Objectively, a reasonable uninvolved lawyer would agreed [sic] that the representation of both clients may be undertaken without compromising professional judgment or threatening zealous representation of either client; and
- III. Both the current and future client consent after full disclosure and consultation of the possible conflict of interest. In California the consent must be obtained in writing.

Here L may subjectively believe that it is reasonable to represent both clients. Both D and A are challenging the validity of City's ordinance. Therefore the goals appear to be the same. As noted by Developer, A's suit may actually pressure City into settling his claim early. However, L must be extremely careful, because it is very, very likely that a conflict that does not currently exist may arise later in the representation. If the City wants to grant a special use exception or a variance to D, in order to make his suit go away, but leaving the ordinance intact, then D and A's interests are materially adverse and dual representation is improper.

An objective uninterested lawyer may agree dual representation is proper, depending

on D and A's final goals. It is likely that a third party lawyer would disagree.

Therefore L must fully advise D and A of the possible conflict, especially the likelihood of a waiver, variance or special use exception for D. If both clients consent (in writing in CA) after full consultation, and both the objective and subjective tests are satisfied, then L may undertake the representation. However it appears in this case that such representation would be inappropriate.

#### **4. DUTY OF CONFIDENTIALITY TO CURRENT CLIENTS**

In addition to the duty of loyalty implication discussed above, dual representation presents a confidentiality issue because L will necessarily obtain confidential information from both D and A if he [sic] undertakes dual representation. Therefore in the event that an actual conflict of interest arises later in the representation, then it would be improper for L to continue representing either D or A, because he [sic] has obtained confidential information that could potentially be used against the former client. Therefore the only proper remedy would be to withdraw, and it could possibly present substantial prejudice to withdraw late in the representation.

W & X are also prevented from continuing the representation of either D or A if L would be, because of the imputed disqualification rules. There is no screening procedure available for representation of current private sector clients with actual conflicts of interest.

The fact that L was approached by A independent of his [sic] employment with W & X will not allow W & X to represent D. L's employment with W & X prevents either L or W & X from representing D and A if the interests are adverse.

#### **5. DUTY OF LOYALTY AND INDEPENDENT PROFESSIONAL JUDGMENT**

Payment of a client's legal fees by a third party is proper only where the payment is consented to by the client, where the lawyer reasonably believes that the payment by a third party will not affect his independent, professional judgment, and so long as no confidential information is disclosed to the third party paying the fee.

Here D has offered to pay half of A's legal fees. L may only allow this arrangement if A consents, and if L reasonably believes that his decisions will be completely unaffected by D's payment. L must zealously, competently and single mindedly represent A if he takes on the representation. L must not make decisions on A's behalf, while considering the fact that L is paying part of the fee. Moreover L must not disclose any of A's

confidential information to D even though D is paying part of the fee.

Here, because of the possibility of an actual conflict between D and A, D's payment of A's fees is probably inappropriate.

## **Answer B to Question 4**

### Ethical Issues Confronting Lawyer and W & Z

The ethical issues that confront both Lawyer and her firm W & Z arise as a result of Lawyer's past employment with City and a possible conflict between clients. Because Lawyer is a member of W & Z, any conflicts that she may have are imputed to the firm. The ethical issues that arise, and the steps that Lawyer and W&Z can take to avoid them, are discussed below.

#### A. Lawyer for the Government Now in Private Practice

The Model Rules provide that a lawyer who has worked personally and substantially on a matter while working for the government shall not represent that matter in private practice. The issue, therefore, is whether Lawyer worked personally and substantially on a matter involving City's ordinance respecting the wetlands preservation zone.

It does not appear that Lawyer worked personally and substantially on the wetlands preservation zone ordinance. The facts provide that the city attorney merely asked Lawyer to do the preliminary research for the project, and that outside counsel actually drafted the ordinance. Conducting this preliminary research would probably not qualify as "personal and substantial" involvement.

Furthermore, the drafting of the wetlands ordinance does not qualify as a "matter" under the Model Rules. A "matter" involves an actual dispute between parties. Drafting an ordinance is not a "matter" because it does not involve a dispute between ascertainable parties.

Thus, because Lawyer did not work personally or substantially on any "matter" and [sic] there is no conflict between her employment with the City and her representation of Developer or Association's matters challenging the ordinance.

#### Duties of W & Z if there is a Conflict

Even assuming there is a conflict under the Model Rules between Lawyer's representation of Developer & Association challenging the ordinance and her employment with City, W & Z may still take on the representation if Lawyer is not the individual representing the parties.

Conflicts of an attorney in a firm are imputed to the entire firm. However, if an attorney



in a firm worked personally and substantially on a matter while employed with the government, the firm may take steps to prevent the conflict from becoming imputed to all other attorney[s].

The Model Rules provide that a firm in this situation can prevent imputation by screening the ex-government attorney from the matter, not sharing any fees from the matter with that attorney and notifying the government employee. If W & Z thus screens Lawyer from its representation of Developer, did not share fees with lawyer and notified City, they could represent Developer even assuming there was a conflict. However, because Association approached Lawyer personally and not W & Z, Lawyer may not be able to represent Association if there is a conflict.

However, because as explained above there should be no conflict between Lawyer's representation of Developer & Association and her work on the zoning ordinance for City, W & Z should be able to keep lawyer on the case.

#### Conflict Between Developer & Association

If an attorney's representation of a client may interfere with her representation of a present or former client, a potential conflict of interest is presented and the attorney must take appropriate measures to avoid such conflict.

Association approached Lawyer and asked her to represent them in a matter that would involve similar issues as her representation of Developer. Although both Association and Developer are seeking the same result — a declaration that the ordinance is invalid — potential conflicts may still arise. For example, Lawyer may learn information during her representation of Developer that may be pertinent to her representation of Association. However, an attorney's duty of confidentiality to her client would prevent attorney from disclosing such information during her representation of Association. Because an attorney also has a duty of loyalty to her client to always represent her client's best interests, her inability to use this confidential information could create a potential conflict with her duty of loyalty to her other client.

Lawyer may still represent both Association and Developer if she obtains proper consent. Developer has already expressed its interest in having Lawyer represent both it and Association. However, Lawyer should still explain the potential conflicts to Developer and Association. If Lawyer reasonably believes that she can represent both Association and Developer adequately discloses all potential conflicts to both Developer and Association and obtains their consent, she should be able to represent both clients

under the Model Rules. The consent of the clients must also be reasonable, meaning that a reasonable attorney would advise the client of consent. Here, because Developer and Association's interests are not in conflict, consent should be reasonable. Furthermore, the California Rules require that consent be in writing.

Thus, if Lawyer obtains the written consent of both Association and Developer to represent them both on a similar matter, the Model Rules and California Rules would permit such representation.

### Payment of Fees By a Third Party

An attorney's duty is to her client and not any third party. If a client's fees are being paid by a third party, a potential conflict of interest is presented between the interests of the third party and the client.

Here, Developer has offered to pay half of the attorney's fees of Association because he believes that Association's case will advance his cause. However, accepting payment from Developer for Association's fees presents a conflict for Lawyer. Developer may attempt to direct the course of Lawyer's representation of Association in order to protect his own interests. However, taking direction from a client would violate Lawyer's duty of loyalty. Lawyer should probably not accept Developer's offer to pay Association's attorney's fees.

However, if Lawyer believes that accepting payment from Developer will not interfere with her representation of Association, she may be able to accept the payment after explaining the potential conflict to both parties. Lawyer should explain to Developer that she represents Association's interests in her representation of Association, and that Developer may not influence this representation. She must also explain the potential conflicts to Association. Under California Rules, she must obtain both parties' consent in writing. However, because she would be accepting payment from a current client in her representation of a second client, this consent may not be reasonable under the Model Rules.

Whether or not Lawyer accepts payment for her representation of Association from Developer, if an actual conflict arises during her representation of Developer and Association, she must withdraw from representing one or both of the clients in order to satisfy her ethical duties.

## QUESTION 5

Paul, a student at Rural State University (“Rural”), wishes to sue Rural, a public school, for violation of his rights under the U.S. Constitution because Rural refused to select him for its cheerleading squad solely on the basis that he is a male. Paul is indigent, however, and cannot afford to pay the costs of suit, including filing and service of process fees.

State law permits court commissioners to grant a prospective state court litigant permission to proceed *in forma pauperis*, which exempts the litigant from any requirement to pay filing and service of process fees. Paul applied for permission to proceed *in forma pauperis*. At a hearing, the state court commissioner conceded that Rural’s refusal to select Paul was constitutionally discriminatory, but nevertheless denied Paul’s application on the ground that Paul’s prospective lawsuit “involves merely cheerleading.”

What arguments could Paul reasonably make that the denial of his *in forma pauperis* application violated his rights under the U.S. Constitution, and what is the likely outcome? Discuss.

### **Answer A to Question 5**

Paul has a claim that the commissioner's decision violated his procedural due process rights and his First Amendment rights. An individual's procedural due process rights have been violated when he or she is denied a life, liberty, or property right in that due process of law. To succeed, Paul must demonstrate that his claim that his substantive due process rights were violated when he was the victim of gender discrimination was a life, liberty or property right which he was denied, and that the process by which that right was denied was inadequate when balanced with the state's interest in efficiency and fairness.

Paul's right to pursue his claim was not a right to life or liberty. Arguably, however, he has a property right to his claim. Typically, whether or not one has a property right depends on whether a property interest has vested (for instance, at will federal employees do not have a vested property interest in their jobs, but contractual employees do). Here, Paul's claim vested where his job due process rights were violated. At that time, his standing to indicate his rights became ripe. Arguably, his ability to indicate his claim is a vested property right, which was undeniably denied by the commissioner. The state may suspend process in denying rights only in emergency situations but no emergency existed here. Thus, in order to constitutionally deny Paul's property right, the state must exercise due process.

There is some question as to what process is due. An indigent individual may not be denied fundamental rights because of their indigent status, but because indigency itself is not a suspect class entitled to constitutional protection, the state may deny other privileges to the indigent so long as its means are rationally related to its purpose in doing so. For example, marriage and divorce are fundamental rights, and so an indigent individual may not be denied his or her right to marry or divorce based on an inability to pay a filing fee. However, this is not a fundamental right to declare bankruptcy, or another example, and as a person's bankruptcy petition may be denied on the basis of their inability to pay a filing fee. Here, Paul is unable to pay filing fees associated with filing his claim of gender discrimination, a substantive due process claim, in state court. The issue is whether his right to bring suit is a fundamental one. It is certainly outside the scope of the fundamental rights recognized by the courts in their interpretation of the Constitution, which typically involves privacy issues such as family rights (marriage, divorce) and bodily integrity (medical care, abortion). However, Paul's right to bring suit is undoubtedly very important, though not fundamental. So, the process in denying him his right must be balanced against his important rights.

State law permits commissioners to grant or deny prospective litigants the ability to

proceed in forma pauperis at their sole discretion, but in a hearing. A court-like hearing, in which the applicant is permitted to present evidence and argument, is typically sufficient to preserve procedural due process. What is troubling about this situation, however, is that the state commissioner is able to single-handedly, and arbitrarily, determine who may and who may not proceed to the courthouse door.

In a first amendment situation, where free speech is the issue, such sole discretion on the part of a state official, able to grant or deny permits to speak or gather in public, for example, is unconstitutional as an impermissible prior restraint on speech. The state may regulate speech in a public forum so long as the regulation is not based on the expression content or viewpoint, and in a non-public forum (which is open to some types of speech, but not others) so long as its regulation is not based on viewpoint. The courthouse, arguably, is a non-public forum, which is open to some types of speech, but not others. For example, it is appropriate to have arguments in an appropriately filed lawsuit, but not to hear a lawsuit in which the court has no jurisdiction, or to hear a poetry reading, or to hear a rock concert, or an anti-war demonstration. The state may regulate the types of speech that are heard in that forum, but not the viewpoint — it may not decide to hear one side as an appropriately filed suit and not the other, as an example. Here, the state commissioner is able, in the commissioner's sole discretion, to determine which litigants may be heard and may not be heard in a non-public forum. The commissioner even stated that Paul's case was valid — so it would otherwise be appropriate to be heard, but for the commissioner's sole opinion that "it involves merely cheerleading." This arbitrary decision violated Paul's first amendment rights, in denying him equal access to a non-public forum and the basis of his viewpoint, and it denied him his procedural due process in providing him with a forum inadequate to protect his very important right to see his substantive due process rights indicated.

Unfortunately, with the procedures in place, to bring suit against the state for these new violations of his procedural due process rights and his first amendment rights, Paul must go through the same procedure — in order to bring suit to indicate his rights, he must either pay the filing fee or present his case to the commissioner, but the very commissioner whose position violated his procedural due process and first amendment rights in the suit he is attempting to bring. He will be successful in indicating his rights, but he should bring suit in federal court, instead. (Though he can't sue the state in federal court for money damages, under the 11<sup>th</sup> Amendment, he must seek an injunction or sue the commissioner in his individual capacity, instead.)

The state's system at granting permission to litigants to file suit regardless of whether or not their underlying claims are valid and they have standing, also raises equal protection concerns. This system does not discriminate against indigent individuals per

se (they are not entirely prohibited from filing suit) and indigency is not a suspect class under substantive due process, so a substantive due process claim is not appropriate. However, the state system is denying a right to a certain class of individuals, raising an equal protection question. Filing a lawsuit is not a fundamentally protected right under equal protection, as are some privacy rights. However, participating in a non-public form is, arguably, a fundamental right, as recognized by the First Amendment. If so, the state must show that this screening process is necessary to protect a compelling state interest; a showing that is likely impossible under these circumstances. (Lightening the loads of the courts, preventing frivolous claims and requiring filing fees for all but the most essential of lawsuits might be admirable state interests, but none are compelling.) And, the discriminatory way in which this system operates, by permitting a single hearing officer in his sole discretion to determine what are important and what are unimportant rights, is not an appropriate method of seeing those interests, even under rational basis scrutiny simply because that system, in itself, is violative of the First Amendment and Procedural Due Process. Though Paul's right to sue is not fundamental under substantive due process, he may also have a valid equal protection claim.

## **Answer B to Question 5**

Under the Constitution, an indigent's inability to pay filing and service of process fees will not prevent him from being able to vindicate a fundamental right through the courts. In situations such [as] a termination of parental rights, for example, the indigent's costs will be borne by the state, because the right to raise one's child is considered a sufficiently important interest.

In determining whether the denial of the in forma pauperis application violated Paul's constitutional rights, the threshold question will be whether Paul's interest in freedom from gender discrimination is a sufficiently fundamental interest to allow him to proceed in forma pauperis. Paul will likely raise arguments based on the 14<sup>th</sup> Amendment - - specifically procedural due process, substantive due process, and equal protection. Because the principal actor here is the State of Rural (the State University [sic] in excluding him from the cheerleading squad, and state commissioner in denying his in forma pauperis petition), the state action requirement of the 14<sup>th</sup> Amendment has been met.

### Paul's Underlying Claim

Paul's underlying claim is most obviously supported by the Equal Protection clause of the 14<sup>th</sup> Amendment; indeed, the state commissioner has already acknowledged that Paul's constitutional rights have been violated. If Paul becomes able to proceed with his claim, the court will find that the state university's [sic] cheerleading program discriminates on the basis of a quasi-suspect classification-- gender. The government will be unable to show that the discrimination is substantially related to an important government interest, or supported by an exceedingly persuasive justification, as they are required to do. Keeping a state cheerleading squad all female is hardly and [sic] important government interest, and possibly not even supported by a rational basis.

It is therefore clear that Paul's constitutional rights have been violated. The question is whether the interest he seeks to vindicate is important enough to compel the government to pay his litigation costs.

### Procedural Due Process

Paul will first claim that the state accorded him insufficient process in denying his in forma pauperis petition. The denial of the petition will effectively preclude Paul from filing a lawsuit to enforce his constitutional rights, and this is sufficient to constitute a liberty interest. Paul is therefore entitled to some process before it is taken away. In

order to determine how much process is required, the three “Eldredge factors” are considered: the importance of the right being protected, the value of additional procedural safeguards, and the government’s interest in efficiency.

In terms of the right being protected: it is not, as the state commissioner described it, the right to engage in “merely cheerleading.” Rather, it is the right to be free from gender discrimination, and the right to enforce that guarantee in the courts. His interest is therefore considerably less trivial than the commissioner has intimated.

Paul’s problem arises from the second two factors: the value of additional safeguards, and the government’s interest in efficiency. Paul has already been given a hearing here, and that is likely to constitute sufficient process. It’s difficult to see what more process he could receive without seriously implicating the government efficiency prong. Therefore he will be found to have received sufficient process.

#### Equal Protection--14<sup>th</sup> Amendment

Paul will also assert that in denying his in forma pauperis petition, the state has denied him equal protection under the laws.

Paul may argue that the fact that the commissioner has seemingly wide discretion to grant in forma pauperis petitions constitutes an equal protection violation. However, as long as the commissioner acts consistently and operates within a set of specific guidelines this argument is likely to be unsuccessful.

#### Suspect Classification

The next question is whether there is a suspect or quasi-suspect classification at work here, which would trigger strict or intermediate scrutiny by the courts. Paul may argue that preventing indigents from filing a lawsuit to vindicate their constitutional rights discriminates on the basis of poverty. However, poverty is not a suspect classification, so the state will merely need to show that its actions are rationally related to a legitimate government interest. Here, the government interest would be in preserving its resources while still allowing access to the courts for those asserting the most fundamental of rights. Providing limitations on in forma pauperis petitions is rationally related to this interest.

#### Fundamental Rights – Possibly First Amendment

Paul may next argue that a fundamental right has been violated. Paul is actually



seeking to vindicate a right within a right here — he seeks access to the courts, to enforce the underlying constitutional right. So determining whether his right to access to the court has been violated depends on how the underlying right is characterized. Access to the courts in itself is not a fundamental right; however, if the underlying right is fundamental, the access becomes a protectable interest.

Paul's underlying interest might first be characterized as a right to be free from gender discrimination. But this in itself is not a fundamental right, and is more properly analyzed under a suspect classification analysis.

Paul may have more luck arguing that the exclusion from the cheerleading squad on the basis of gender (and then his inability to enforce the right in court) violates his First Amendment Rights of free expression and possibly even free association. First Amendment Rights are in fact considered fundamental rights for purposes of 14<sup>th</sup> Amendment equal protection analysis. The state appears to have no compelling justification for curtailing the rights of males to join the cheerleading squad, to thereby express their school spirit, and associate with others of like mind.

Because free expression and free association are fundamental rights for purposes of the 14<sup>th</sup> Amendment, Paul should be allowed to proceed in forma pauperis to attempt to vindicate those rights.

### Substantive Due Process

The substantive due process analysis turns on whether a fundamental right is implicated. The analysis mirrors the fundamental rights analysis under the Equal Protection clause. Again, we are required to consider Paul's "claim-within-a-claim": his seeking access to the courts to vindicate an underlying right. And again, if the underlying right is described as a First Amendment Right, the denial of his in forma pauperis petition was unconstitutional.

## QUESTION 6

Henry and Wanda married in 1980 when both were students at State X University. State X is a non-community property state. Shortly after the marriage, Henry graduated and obtained employment with a State X engineering firm. Wanda gave birth to the couple's only child, and Henry and Wanda agreed that Wanda would quit her job and remain home to care for the child. They bought a house in State X using their savings for the down payment and obtained a loan secured by a twenty-year mortgage for the balance of the purchase price. Mortgage payments were subsequently paid from Henry's earnings. The title to the State X house was in Henry's name alone.

In 1990, Henry accepted a job offer from a California engineering firm. The couple moved to California with their child and rented out the State X house.

In 1992, Wanda's uncle died and left her an oil painting with an appraised value of \$5,000 and a small cabin located on a lake in California. Wanda took the painting to the cabin and hung it over the fireplace.

In 1993, after reading a book entitled "How to Avoid Probate," Henry persuaded Wanda to execute and record a deed conveying the lake cabin to "Henry and Wanda, as joint tenants with right of survivorship." Wanda did so, believing that the only effect of the conveyance would be to avoid probate.

In 1995, after three years of study paid for out of Henry's earnings, Wanda obtained a degree in podiatry and opened her own podiatry practice. Her practice became quite successful because of her enthusiasm, skill, and willingness to work long hours. Henry continued to work for the engineering firm.

In 2002, Henry and Wanda separated and filed for dissolution of marriage. Wanda had the painting reappraised. The artist, now deceased, has become immensely popular, and the painting is now worth \$50,000.

Upon dissolution, what are Henry's and Wanda's respective rights in:

1. The lake cabin? Discuss.
2. The painting? Discuss.
3. The State X house? Discuss.
4. Wanda's professional education and podiatry practice? Discuss.

Answer according to California law.

## Answer A to Question 6

### HENRY & WANDA'S RIGHTS

#### 1. The Lake Cabin

California is a community property state. All assets acquired by earnings during the marriage are presumed to be community property. Assets acquired by gift, inheritance or devise or otherwise acquired before the marriage or after a permanent separation are separate property.

Property can change form and be transmuted from community or separate property and courts will consider the source of funds if they can be traced.

Here, the lake cabin was initially separate property because Wanda acquired the lake cabin from her inheritance. When Wanda transferred the lake cabin to Henry a transmutation occurred and the house was placed in joint names. This occurred in California.

Previously in California, a gift would be presumed to Henry based on the Lucas case. After 1987, however, any property in any joint title is presumed community property. Wanda can, however, receive the initial separate property value of the lake cabin back if she can trace the assets, such as through the title and probate documents and show it was hers. Then, if it is traced properly, any value over the separate property contribution would be divided equally. Henry would alternatively argue a gift and that each spouse receive  $\frac{1}{2}$  but Wanda could rebut this and rebut the community property presumption with her testimony that Henry told her it was just to avoid probate without donative intent.

#### 2. The Painting

Wanda inherited the oil painting so it is separate property. Wanda kept the painting at the cabin, so it could be argued that she intended to keep the painting as her separate property. No community earnings or funds were used to enhance the value of the painting and no skill or labor was used to enhance the value of the painting. Wanda should keep the painting as her separate property.

#### 3. The State X House

The community property laws of California create a presumption that all property acquired with earnings during the marriage is community property.

Quasi community property is property acquired in another state that would be considered community property if it were acquired in a community property state. Quasi community property is treated the same as community property in the event of a divorce.

Here the house was bought in another state — non-community property with earnings, a loan and savings that were all acquired during the marriage. Although the house was in Henry's name, all contributions to the house were community contributions. Henry's earnings were community earnings, the loan was acquired by both after the marriage, so the lender's intent was to rely on the community for repayment. Also the savings were their joint savings; it appeared they were acquired during the marriage. If the house would be community property in California, since it was acquired from all community sources, then it is quasi community property and would be treated as community property in a divorce. Each spouse received one-half of community property in a divorce unless there is some exception that applies (one spouse cares for a minor child in the house, one spouse misappropriates funds, one spouse is injured and should receive personal injury proceeds). No exceptions apply here, so each spouse receives one-half of the quasi community property State X house.

#### 4. Wanda's Education & Practice

Wanda's education is not community property. However, the community estate is entitled to repayment of her educational expenses if there is a time of 10 years or less. If less than ten years has passed there is a presumption the community has not yet received all the benefits of the enhanced earning capacity from the education.

If, however, Wanda can show the community has already received sufficient benefits, she would not have to repay the community. If she cannot prove this, then she would have to repay the education expenses ( $\frac{1}{2}$ ) to Henry.

The podiatry practice was acquired exclusively from community funds (Henry's earnings) and from Wanda's enthusiasm, skill, and labor during the marriage. These are all community sources so that the practice and the goodwill of the practice should be valued and divided one-half to each spouse.

Because all sources of labor and capital are community sources, the Pereira and Van Camp methods of accounting do not apply. Pereira would allow a spouse their initial investment back if it is separate property plus a reasonable rate of return (10%) on the initial investment. Because Henry's investment in Wanda's education was community earnings, there is no initial separate property to return and Pereira does not apply, for either Henry or Wanda, since Wanda's labor was all during the marriage and was all community labor.

Similarly Van Camp accounting does not apply because this principle allows a reasonable salary to be deducted from the business, multiplied by all years of the marriage, less any community expenses paid from the business and that would be considered community property with the balance of the value of the business returned as separate property. It is inapplicable because all community labor and earnings were used for the business, resulting in a community property podiatry business.

Van Camp is used where a unique separate property business has appreciated during

the marriage due to circumstances rather than community labor. It does not apply here because there was no separate property contribution to the podiatry practice, so each spouse receives one-half of Wanda's practice.

## **Answer B to Question 6**

### **1. Quasi Community Property**

The threshold issue is whether the laws of California community property govern property that Harry and Wanda acquired in State X, a non-community property state. Property acquired in another state that would be considered community property if acquired in California is treated as quasi community property and is treated as community property on the dissolution of marriage.

Here, at the dissolution of Harry and Wanda's marriage, the property they acquired in State X will be treated exactly under the same principles as the property they acquired in California. Both will be governed by California community property laws.

As mentioned, California is a community property state. All property acquired during the course of marriage is presumptively community property (CP). All property acquired prior to marriage or after separation is presumptively separate property. In addition, a gift, devisee, or bequest is presumptively separate property (SP).

In order to determine the character of a property, courts will trace back the source of funding used to acquire the property. A mere change in the form of a property will not change its characterization. At divorce, each item of community property is split equally, absent special circumstances.

With these principles in mind, we can turn to the specific assets involved.

### **2. The Lake Cabin**

The lake cabin was a gift to Wanda from her uncle and as such is SP.

Henry will argue that Wanda made a gift of the property to him in 1993 and therefore the property became CP.

Prior to 1985, gifts to a spouse did not have to be in writing. Post 1985, however, transmutations of property required writing. Henry will argue the execution and recording of the deed was a writing satisfying this requirement and, therefore, the gift should be treated as CP and he should have half of the she [sic].

Henry will also argue that, under Lucas, taking title in joint and equal form creates a presumption of community property and a relinquishment of the separate property rights. Moreover, the Anti-Lucas statutes provide that this presumption of CP holds true even for property taken as joint tenants on dissolution. While joint tenancy would not create a presumption of CP on death, it does on dissolution. Therefore, Henry will argue the fact that the property was in joint tenancy is further indication that it is community property.

Wanda, however, will counter that the only reason she put the property in her and

Henry's name was to avoid probate of the cabin. The courts have held under the Married Women's Presumption that a gift is not presumed when a party does so for improper purposes, such as shielding from creditors. By analogy, in this context the court may not presume a gift or title in joint and equal form because it was done for an improper purpose.

In sum, if Wanda had given Henry a share in the lake cabin for a proper purpose, the Lake Cabin would be CP. But since it was done for an improper purpose, a court will probably hold it is SP and that Wanda should keep it.

### **3. The Painting**

The painting was a gift to Wanda from her uncle, and as such was SP. Wanda is entitled to the appreciation of the painting that is now worth \$50,000. This appreciation was not in any way commingled because the painting was never sold. Moreover, Wanda committed no labor in the appreciation of the painting. Therefore, Wanda is entitled to the entire appreciation of \$50,000 which is simply a capital return on separate property.

### **4. The State X House**

The State X house was bought using savings (quasi CP) and paid off using Henry's earnings (quasi CP). Therefore, it is presumptively quasi CP which is treated as CP for the purpose of dissolution. There is no need to apply Marriage of Moore because the house was entirely purchased by CP, and there is no division of CP and SP in acquiring the interest.

Henry will argue, though, that the fact that he took title alone creates the presumption of a gift to him. Prior to 1975, when a woman took title alone in a property, that property was presumptively considered a gift to the woman. But, this presumption did not apply to men. It also does not apply post 1975. But, Henry will still argue that this property was a gift because he was the sole title owner.

This argument is unlikely to succeed because Wanda remained in the home and cared for the child in the home. Courts will look beyond the facade of sole title, and will not interpret the title as a gift to Henry. Instead, they will look at the property as jointly owned by Wanda and Henry who lived there together.

The question, then, becomes if the house is quasi CP how can it be split given that it is in a different state. California, after all, does not have jurisdiction over property that is in State X.

Courts, however, will either give Wanda and [sic] equivalent amount of resources from other assets to compensate for the State X house, or they will force Henry, given their personal jurisdiction over him, to sign over half of the property to Wanda.

In short, Wanda is entitled to her share of half the house despite the problems of jurisdiction given that California has personal jurisdiction over Henry.

## **5. Wanda's Professional Education**

The issue is whether Wanda's podiatry degree is community property.

The law is that an educational accreditation is not CP. However, the community is entitled to reimbursement for the education expenses unless: (1) 10 years have passed since the spouse acquired the degree creating a presumption that the community has reaped its benefits; (2) the other spouse also received a professional degree or (3) the education that the spouse receive[s] will lessen the need for spousal support[.]

Here, seven years passed after Wanda acquired the property, so the community is not presumed to have benefitted. Also, there is no indication that Henry received an education.

Wanda may argue that her education helped her open a successful practice and lessened her need for spousal support. Thus, the community should not receive any reimbursement. This will be persuasive only if Wanda can show that she would have been entitled to significant spousal support, absent the degree, which is a dubious proposition considering she had a job prior to giving birth. In other words, it is not clear that she would not have been capable of earning a good income, even without the degree.

A fair solution would probably be to reimburse the community 3/10 of the money it spent on Wanda's education. This would represent amount of benefit the community did not receive, under the 10 year presumption.

Henry then would be entitled to  $\frac{1}{2}$  of  $\frac{1}{3}$  or  $\frac{1}{6}$  of the expenses spent on Wanda's education degree.

## **6. Podiatry Practice: Accounting and Goodwill**

The issue is whether Wanda's podiatry practice is community property or separate property. Here, Wanda did not inherit a business, but rather opened the business during the marriage. Therefore, the earnings are presumptively all community property since the entire business was a result of her "enthusiasm, skill, and willingness to work long hours."

Pereira and Van Camp accounting principles **do not** seem to apply to this situation. Under Pereira, an independent business's rate of return at 10% is SP, and the rest is CP. This test applies when the growth of a business is primarily the result of a spouse's labor. Under Van Camp, CP is determined by subtracting a community's family expenses from the FMV of the spouse's labor, and the rest of the business value is SP. This test is appropriate when a large part of the business is a result of capital as



opposed to community labor.

Wanda may try to argue that the business is her separate property. She may concede that it grew as a result of her labor, but may argue that the Pereira principles must govern, entit[ing] her to a 10% per annum share as SP.

But, Henry will counter that Wanda started the practice while they were married, and as such, the entire business is a result of her labor. She did not inherit the business, Hen[r]y will argue, but rather opened it during the course of marriage. As such, all of the business earnings are presumptively CP.

Given that Wanda opened the practice after marriage and her labor is solely responsible for the practice, Henry is entitled to half of the practice.

If the court gives Wanda the practice, then it must compensate Henry for half the value. In such a scenario, Henry is also entitled to the value of the **goodwill** of the business. The goodwill is calculated by looking at the total revenue and subtracting the value of Wanda's services as well as cost. The remainder can be attributed to goodwill. In short, if the court decides to grant Wanda control of the business because she is responsible for managing it, it must grant Henry half the value of the business, including the value of goodwill for the foreseeable future discounted to present value.