



California
Bar
Examination

Essay Questions
and
Selected Answers

February 2004

ESSAY QUESTIONS AND SELECTED ANSWERS
FEBRUARY 2004 CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2004 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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TUESDAY MORNING
FEBRUARY 24, 2004

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

Bank was robbed at 1 p.m. by a man who brandished a shotgun and spoke with a distinctive accent. The teller gave the robber packets of marked currency, which the robber put into a briefcase. At 3:30 p.m., the police received a telephone call from an anonymous caller who described a man standing at a particular corner in the downtown business district and said the man was carrying a sawed-off shotgun in a briefcase. Within minutes, a police officer who had been informed about the robbery and the telephone call observed Dave holding a briefcase at that location. Dave fit the description given by the anonymous caller.

The officer approached Dave with his service revolver drawn but pointed at the ground. He explained the reason for his approach, handcuffed Dave, and opened the briefcase. The briefcase contained only the marked currency taken in the bank robbery. The officer said to Dave: "I know you're the one who robbed the bank. Where's the shotgun?" Dave then pointed to a nearby trash container in which he had concealed the shotgun, saying: "I knew all along that I'd be caught."

Dave was charged with robbery. He has chosen not to testify at trial. He has, however, moved to be allowed to read aloud a newspaper article, to be selected by the judge, without being sworn as a witness or subjected to cross-examination, in order to demonstrate that he has no accent. He has also moved to exclude from evidence the money found in the briefcase, his statement to the officer, and the shotgun.

How should the court rule on Dave's motions regarding the following items, and on what theory or theories should it rest:

1. Dave's reading aloud of a newspaper article? Discuss.
2. The currency? Discuss.
3. Dave's statement to the officer? Discuss.
4. The shotgun? Discuss.

Answer A to Question 1

1)

This question raises issues involving Dave's rights under the 4th Amendment and 5th Amendment.

Dave's Reading Aloud of a Newspaper Article

A criminal defendant may be required to give a voice sample. This does not violate a defendant's right against self-incrimination.

A criminal defendant is allowed to submit evidence that will prove that he could not or did not commit the crime. Here, the alleged robber spoke with a distinctive accent. Dave seeks to read a newspaper article to the jury in order to show that he was not the robber because he does not have an accent. The key issue, however, is whether Dave may do this given that he does not want to be sworn in as a witness or subjected to cross-examination. By doing so, Dave is denying the prosecution the right to cross-examine him and to test whether he is being truthful. It is possible for Dave to fake an accent or to have taken voice lessons to change this previous accent. All of these are factors that the prosecution should be permitted to test on cross-examination. Because the prosecution will not be given the right to cross-examine Dave, Dave's request to read to the jury should be denied.

THE CURRENCY

The 4th Amendment prohibits warrantless searches and seizures by a police officer in an area where a person has a reasonable expectation of privacy. The 4th Amendment applies to the states via incorporation into the 14th Amendment. Warrantless searches are permitted under certain circumstances.

State Action:

The 4th Amendment prohibits warrantless searches and seizures by a state actor. Here, the officer was conducting the search and seizure as a police officer and therefore state action is involved. In addition, the officer was searching Dave's briefcase - - an area where Dave had a reasonable expectation of privacy.

Search Incident to a Lawful Arrest

An officer does not need a search warrant if the search is done pursuant to a lawful arrest. Under this exception to the warrant requirement, an officer may search the person arrested and search the area within the person's immediate control if the officer suspects that the area would contain contraband or a weapon. In order for this exception to apply, the arrest

must have been lawful.

The officer arrested Dave after receiving a phone call from an anonymous caller stating that a man fitting Dave's description was carrying a sawed-off shotgun in a briefcase. An officer may arrest a person in public without a warrant if the officer has probable cause to believe that the person has committed a crime. A tip from an anonymous informant can be used as a basis for establishing probable cause if the officer reasonably believes that the tip is reliable. Here, the officer knew that a Bank was robbed at 1 p.m. by a man who had a shotgun. The officer received a tip at 3:30 saying that a man was standing at a corner with a sawed-off shotgun in a briefcase. The combination of the call, with the circumstances surrounding the Bank robbery are sufficient to give the officer probable cause to arrest Dave in public without a warrant.

Because the arrest was lawful, the officer could search Dave and the area within his immediate control if the officer suspects that the area would contain contraband or [a] weapon. Here, the officer suspected that the briefcase would have a sawed-off shotgun and it was within Dave's immediate control. Thus, the officer could search the briefcase. Any evidence found during this valid search could be admitted.

Plain View

Any evidence seen by an officer when the officer has a lawful right to search the area may be admitted. Here, the officer had a right to search Dave's briefcase under the exception to the warrant requirement for searches incident to a lawful arrest. Because the marked currency was in the officer's plain view during this search, the currency can be admitted as evidence against Dave.

Stop & Frisk

An officer who has reasonable suspicion to believe that a person is engaged in criminal activity may stop the suspect and conduct a warrantless frisk for weapons. An officer may not look inside containers during a stop & frisk. Thus, this exception to the warrant requirement will not be a basis for admitting the currency.

DAVE'S STATEMENT TO THE OFFICER

The 5th Amendment privilege against self-incrimination applies when there is state action and a custodial interrogation of a person. It gives a defendant a right to refuse to give testimonial evidence that would result in self-incrimination.

State Action

As discussed above, the action of the police officer involves state action.

Custodial Interrogation

Under the 5th Amendment, an officer must read a suspect his Miranda rights before conducting a custodial interrogation. A person is in custody if he believes that he is not free to leave the officer's control. Here, the officer approached Dave with his service revolver drawn and handcuffed Dave. Under these circumstances, Dave was in custody because he was not free to leave the officer's control.

An interrogation is any communication by the police to the suspect that is likely to elicit a response. Before engaging in a custodial interrogation, the officer must read the suspect his Miranda rights, which involves the suspect's right to remain silent and the right to ask for counsel.

Here, the officer would argue that his statement to Dave "I know you're the one who robbed the bank. Where's the shotgun?" was not an interrogation and that Dave's response to this statement was a voluntary statement. A statement by a suspect that is blurted out is admissible. Dave, however, would argue that the officer's statement "I know you're the one who robbed the bank" is a statement likely to elicit a response and that Dave would not have said anything had he not been prompted by the officer's accusation. Dave would probably win on this argument because accusing a suspect who is in handcuffs of committing a crime is the type of statement likely to elicit a response.

As a result, Dave's statement to the officer cannot be admitted because Dave was not read his Miranda warnings prior to the interrogation. Dave's statement could be admitted for impeachment purposes if Dave takes the stand and could be admitted in a grand jury proceeding.

THE SHOTGUN

The admissibility of the shotgun also depends on an analysis of whether Dave's 5th Amendment privilege against self-incrimination was violated when the officer asked Dave where the shotgun was without reading Dave his Miranda rights.

As discussed above, state action was involved and Dave was in custody when the officer asked him where the shotgun was. If the question to Dave was improper, the shotgun cannot be admitted because it is the fruit of a poisonous tree.

Dave will argue that he pointed to the trash container as a result of the officer's interrogation and that he wouldn't have done so but for the officer's interrogation. The officer will argue that Dave's "pointing" to the trash is not testimonial and therefore the 5th Amendment does not apply. The 5th Amendment does not typically apply to conduct but it may apply if the conduct is testimonial in nature. Here, Dave's pointing to the shotgun could be considered testimonial in nature because Dave was telling the police the location of his weapon.

Courts, however, allow an officer to question a suspect about the location of the weapon without giving Miranda warnings if it is necessary because of exigent circumstances. In other words, if the officer thinks that there might be a weapon laying around that might pose an immediate danger to the public the officer can question the suspect immediately following the arrest and pre-Miranda as a means of securing the premises and protecting the public.

Here, the shotgun is probably admissible under this exception because the officer knew that there was a shotgun used in connection with the robbery and has reason to believe that Dave was connected with this robbery given the discovery of the marked bills. Thus, the officer could ask about the location of the gun to secure the premises.

Answer B to Question 1

1)

Dave's Reading Aloud the Newspaper Article

The Fifth Amendment protects against self-incrimination. Therefore, the prosecution cannot compel D to testify against his will. Furthermore, the Sixth Amendment allows an accused to confront his accusers. Here, D wants to read aloud a newspaper article of the judge's cho[o]sing to demonstrate that he does not have a distinctive accent, which is something that was described by the bank teller. D would like to do this without being sworn in or subject to cross-examination by the prosecution. The issues hinges [sic] on whether reading the statement aloud is testimonial in nature. If it is testimonial in nature than [sic] the judge will not allow Defendant to do this without being sworn in because he will be a witness.

Non-Testimonial

Here, Defendant wishes to demonstrate that he does not have an accent. The content of his speech is not testimonial in nature because he is not asserting his own thoughts, opinions, observations, or knowledge, which are things that a witness would do. Here, D is not making any statements of fact. The evidence is relevant to demonstrate that D doesn't have an accent, but it is only the sounds of his speech that matters [sic] and not the content. It is akin to showing tattoos, needle marks, or hair color. Therefore, reading a newspaper is sufficiently nontestimonial and D will be allowed to do this.

The prosecution may argue that this is testimonial because D can alter the way that he is speaking and if they were allowed to cross-examine him this would come to light in front of a jury that he was faking. This argument would fail because there is no content for the prosecution to cross-examine him on and they can sufficiently argue in closing that he may be faking or offer a witness to counter his assertion that he does not have an accent.

Dave will succeed because his reading the newspaper aloud is sufficiently nontestimonial and will[,] therefore, be admitted at trial.

The Currency

The Fourth Amendment, incorporated to the states via the Fourteenth Amendment, protects against unreasonable searches and seizures. In order to bring an action under the Fourth Amendment, the defendant must have standing and the action must be done by a government actor.

Standing

In order to have standing one must have a reasonable expectation of privacy in the items seized or search[ed]. Here, Defendant was seized and his briefcase searched. Therefore, since D had a reasonable expectation of privacy in himself and his briefcase he has standing.

Government Actor

A police officer is [a] government actor for the purposes of the Fourth Amendment.

Seizure of D

In order to arrest a person an officer must have a warrant based on probable cause signed by a neutral magistrate. Absent a warrant a search or seizure is per se invalid absent an exception. Here, there was no warrant for D's arrest.

Dave would argue that this was an illegal arrest and that the officer did not have probable cause based on this information first and foremost because of the amount of time passed between the robbery of the bank and the time that the officer contacted defendant two and half hours later. D would argue that it is unreasonable to think that a bank robber is going to just stand out in the middle of public [sic] with a gun two and a half hours later. Furthermore, D will argue that he was a man with a briefcase downtown, which is hardly a novel notion. Moreover, D will argue that the anonymous caller lacked any indicia of reliability and was not corroborated by anything other than the fact that D just happened to match the description of a man with a briefcase, but with no sawed-off shotgun. D will also point out that the bank teller described a shotgun whereas the anonymous calle[r] described a sawed-off shotgun, which are noticeably different. Therefore, D will argue that the officer had no probable cause to arrest D based on this information and therefore, the arrest was illegal.

The prosecution would like[ly] respond that the initial contact with D by the police officer was a detention based on reasonable articulable facts or if it rose to the level of an arrest that there was probable cause.

Detention based on Reasonable suspicion

The prosecution may argue that D was not arrested by [sic] merely stopped in order to investigate whether criminal activity was afoot. During a detention, an officer must have reasonable suspicion that criminal activity is afoot. Here, the officer had two basis [sic] as will be described in more detail below. The officer had the matching description of the bank robber with the briefcase and he had an anonymous caller who described D with a gun at the corner. Therefore, the officer had sufficient probable cause to contact D. The officer may detain a suspect long enough to investigate and determine if there is criminal

behavior or not. Here, the officer drew his weapon and handcuffed D because he believed that D had a gun based on the anonymous tip and the bank robbery information.

D will argue that this was an arrest and not merely a stop. D will argue that the officer approached him with a weapon drawn and handcuffed him and[,] therefore, it was an arrest because D was not free to leave.

The court will hold that this was a detention based on reasonable suspicion and was, therefore, not in violation of the Fourth Amendment.

Probable Cause

Moreover, the officer had probable cause to arrest D based on the information that he had. If an officer has probable cause to believe that someone has committed a felony they may arrest that person without a warrant as long as within 48 hours a magistrate makes a determination that there was probable cause for the arrest. If a person commits a misdemeanor it must be committed in the officer's presence for an arrest.

Here, the officer had reason to believe that D robbed a bank. Robbery is a felony under the law. The information that the officer had at the time that he contacted the defendant was that a bank was robbed at 1 pm, by a man with a shotgun who spoke with a distinctive accent. The robber had in his possession marked currency given to him by the teller which he put into a briefcase. The officer received a tip from an anonymous caller who described a man standing at a corner with a sawed-off shotgun in a briefcase. The officer arrived to [sic] the corner within minutes of the call, saw Dave there holding a briefcase and matching the description given by the anonymous caller.

The prosecution will argue that under the "totality of the circumstances" the officer's arrest was based on probable cause. Not only did the officer have reasonably articulable facts to contact D and investigate him to see if he had a weapon but also to arrest him in connection with the bank robbery. As the facts described above detail the officer had description of Defendant and just because minutes after the phone call he no longer had the weapon does not mean that the officer should just walk away without any investigation. The officer has a duty to investigate and determine if there is a safety issue and what is going on.

Therefore, based on the totality of the circumstances the officer has probable cause to arrest Dave and the seizure of D was not unlawful.

Search of Briefcase

Here, the search of the briefcase also requires and [sic] warrant exception because there was no additional warrant to search the briefcase. D had a reasonable expectation of privacy in his briefcase because it was something that was closed and not open to public

view or scrutiny.

Probable Cause

As stated above the officer had probable cause to believe that Defendant was armed with a shotgun and therefore had sufficient probable cause to search the bag to ensure for his own safety and the safety of others where the gun was. During a detention an officer may “pat down” an individual if they believe the person may have a weapon. Here, the officer did believe that D had a weapon which was something that could have easily fit in the briefcase. Therefore, the search of the briefcase was lawful.

Search incident to Arrest

Furthermore, as stated earlier there was sufficient probable cause for a lawful arrest. In a search incident to a lawful arrest, the arrest must be lawful, and the officer can search the Defendant and anything within the “wingspan” of the suspect under Chimel. Here, D was holding the briefcase which was sufficiently in his wingspan. Therefore, the search of the briefcase was a lawful search incident to arrest.

Finding the Currency

Although the officer had probable cause to search the briefcase for a weapon, he saw the currency in plain view when he opened the briefcase. Something is in plain view in a place the officer may lawfully be and without the officer touching or moving it around.

Conclusion: The currency found in the briefcase will not be suppressed.

Dave’s Statements to the Officer

Miranda

Miranda protects against coerced confessions. It is a prophylactic [sic] measure designed to provide additional protection for the 5th Amendment, incorporated to the states through the 14th Amendment, against self-incrimination. According to Miranda, if a suspect is interrogated and in custody, he is to be warned of his right to remain silent, that anything that he says can be used against him, that he has a right to an attorney and if he can’t afford an attorney one will be appointed for him.

Here, Dave made two statements to the police officer and each needs to be analyzed separately to determine the admissibility. The first statement was when Dave pointed to the nearby trash can and the second is when he said “I knew all along that I’d be caught.”

Pointing to the trash can

Statements can be express or implied. An express statement is an oral statement. An

implied statement is one made with assertive conduct or by silence. Here, Dave pointed to the trash can in response to the Officer's question "Where's the shotgun?"

In custody

Custody occurs where the suspect is not free to leave. At this point Dave was handcuffed standing on a street corner. This is sufficiently in custody for Miranda.

Interrogation

Interrogation occurs where the officer asks questions in order to elicit a response. Here, the officer asked where the gun was and D pointed to the trash can. Therefore, this was interrogation.

Dave's argument will succeed because the conduct of pointing to the gun should be suppressed and inadmissible at trial.

"I knew all along that I'd be caught"

This was an express statement made by Dave after he pointed to the gun. As stated above Dave was in custody, but the difference with this statement is that it was a spontaneous statement. The officer did not ask D if he knew that he would be caught. He asked him where the gun was. The prosecution would argue that the [sic] D's statement was spontaneous and therefore, not a violation of Miranda and should be admissible. D would argue that this was a result of a custodial interrogation and the statement should not come in.

Dave's argument will fail because this was a spontaneous statement and is, therefore, admissible.

Shotgun

The shotgun was found as a result of D's pointing to where it was located and therefore D will argue that it is inadmissible as the result of a Miranda violation.

Fruit of the poisonous Tree

When there are violations of the Fourth Amendment the exclusionary rule helps to protect against unreasonable officer conduct by excluding the evidence. D would likely argue that as a result of his unmirandized statement the gun should be suppressed. This argument would likely fail because courts have not readily applied the fruits of the poisonous tree doctrine to evidence resulting from Miranda violations. Furthermore, under the doctrine of inevitable discovery the officers would have likely found the shotgun independent of D's pointing to it. Generally, when officers find the suspect of a crime who had only minutes before been seen with a weapon and now has no weapon to [sic] search the area around

where the defendant was found to see if he dumped the weapon.

Furthermore, D abandoned the gun before the officer even approached him so he had no expectation of privacy in the trash can.

Dave's argument will fail and the gun will be admissible.

Question 2

In 1989, Herb and Wendy married while domiciled in Montana, a non-community property state. Prior to the marriage, Wendy had borrowed \$25,000 from a Montana bank and had executed a promissory note in that amount in favor of the bank. Herb and Wendy, using savings from their salaries during their marriage, bought a residence, and took title to the residence as tenants in common.

In 1998, Herb and Wendy moved to California and became domiciled here. They did not sell their Montana house.

In 1999, Herb began having an affair with Ann. Herb told Ann that he intended to divorce Wendy and marry her (Ann), and suggested that they live together until dissolution proceedings were concluded. Ann agreed, and Herb moved in with her. Herb told Wendy that he was going to move into his own apartment because he “needed some space.” Ann assumed Herb’s last name, and Herb introduced her to his friends as his wife. Herb and Ann bought an automobile with a loan. They listed themselves as husband and wife on the loan application, and took title as husband and wife. Herb paid off the automobile loan out of his earnings.

In the meantime, Herb continued to spend occasional weekends with Wendy, who was unaware of Herb’s relationship with Ann. Wendy urged Herb to consult a marriage counselor with her, which he did, but Herb did not disclose his relationship with Ann.

In 2003, Wendy and Ann learned the facts set forth in the preceding paragraphs. Wendy promptly filed a petition for dissolution of marriage, asserting a 50% interest in the Montana house and in the automobile. At the time of filing, the Montana bank was demanding payment of \$8,000 as the past-due balance on Wendy’s promissory note which has been reduced to a judgment. Also at the time of filing, Ann had a \$15,000 bank account in her name alone, comprised solely of her earnings while she was living with Herb.

1. What rights do Herb, Wendy, and Ann each have in:
 - a. The residence in Montana? Discuss.
 - b. The automobile? Discuss.
 - c. The \$15,000 bank account? Discuss.
2. What property may the Montana bank reach to satisfy the past-due balance on Wendy’s promissory note? Discuss.

Answer according to California law.

Answer A to Question 2

2)

1. Rights of Herb, Wendy and Ann

Herb married Wendy in 1989 while both were domiciled in Montana. In 1998 they moved to California, and California law applies here. One year later, in 1999, Herb began having an affair with Ann and moved out, telling his wife he “needed more space” but saw a marriage counselor with Wendy. When she discovered the relationship in 2003, she filed for dis[s]olution.

Community Property

Except as otherwise provided by statute, all property, real or personal, whenever situated, acquired by a married person, during the marriage, while domiciled in California, is community property.

Quasi-Community Property

California law holds that real or personal property acquired before the couple was domiciled in California, or real property held outside of California is quasi-community property.

In California, quasi-community property is treated as follows: 1) For purposes of management and control, quasi-community property is treated as separate property; 2) In cases of death or divorce, or the rights of creditors[,] it is treated as community property.

Putative Spouse

Under the putative spouse doctrine, an otherwise valid marriage that is voidable for some reason (here, bigamy) may allow the putative spouse--who reasonably and objectively believes there is a valid marriage--to have rights similar to community property.

Herb moved out in 1999 and began having an affair with Ann, who knew that Herb was married to Wendy, but was told he intended to divorce her. She took Herb’s last name, was known as his wife, and took title to a car as his wife. However, Ann knew Herb was still married to Wendy and that the “marriage” was not valid.

The putative spouse doctrine does not apply.

Marvin Relationship

Under the Marvin case, courts may enforce contracts between couples who are not

married, so long as they are not expressly based on performance of illicit sexual acts.

There is no mention of an express contract between Herb and Ann. The only possible “implied” contract is that Ann allowed Herb to move in with her in her apartment because he promised to divorce Wendy and marry her. Such an agreement was explicitly based on a meretricious relationship (committing adultery and divorcing his wife). Public policy requires that this contract not be enforced since it is a contract in derogation of marriage.

There is a small chance courts will enforce the promise as one merely for “housing” since Ann said Herb could live in her apartment. But this is highly unlikely.

The courts will not enforce any promise.

A. Residence in Montana

General Presumption

Under the general presumption, property acquired during the marriage is community or quasi-community property. The Montana residence was acquired during the marriage, with community funds (savings from salaries earned during the marriage). It was acquired in Montana, however, before they moved to California. Therefore, it will be presumed quasi-community.

Titled as Tenants in Common - Presumption (pre-1985)

Prior to 1985, it was presumed that when title was given to a husband and wife as “joint tenants” that they held property as joint tenants. To find community property, the couple had to 1) intend that it be taken as community, and 2) have a writing stating such. Since Herb and Wendy were not married until 1989, this presumption cannot apply.

Post-1985

After 1985, jointly titled property was considered community absent a desire to hold it jointly. No writing was required.

Here, there is nothing to indicate that Herb and Wendy desired the residence to be community. They were not even domiciled in a community property state. However, in such cases where they moved to California afterwards, California law will apply. The courts will probably consider the residence to be community. But this conclusion is not certain.

No Transmutation of Property

After the marriage, the property may be transmuted by a writing. There is no evidence of

such here.

Disposition

Depending on which way the court decides, the residence in Montana may be considered as owned by the community or by Husband and wife as tenants in common. Either way, at dissolution, it will be divided equally between Herb and Wendy.

B. Automobile

While married to Wendy, but during his relationship with Anne, Herb bought an automobile, with a loan, acquiring title with Ann as “husband and wife.” Both Herb and Ann signed the loan application. Herb paid off the automobile out of his earnings.

General Presumption

Since the automobile was acquired during his marriage to Wendy, it will be presumed community property.

Possible Exception - Living Separate and Apart

Earnings while living separate and apart are not considered community property.

In 1999, Herb moved out of the dwelling he shared with Wendy and began living with Ann. He told Ann he intended to divorce Wendy, but never took affirmative steps to complete the divorce. During this time, he told Wendy he merely “needed some space” and let her believe he would return at some point. He spent occasional weekends with Wendy, attended marriage counseling with her, and never informed her of his relationship with Ann.

Herb will attempt to show he is living “separate and apart” because he intended the separation to be permanent and was going to divorce Wendy and marry Ann.

Wendy will contend, however, that it was not separate and apart. She will cite Herb’s failure to tell her about Ann, his occasional weekends with Wendy, his attendance at marriage counseling, and his act of living this way for 4 years without ever filing for divorce.

The court will probably hold that the spouses were not living separate and apart, and that the earnings of Herb during this time were community property.

Herb and Anne’s Title and Husband and Wife - Presumption

Herb and Ann will argue that they took title to car as husband and wife, and that this should control.

Wendy will argue several reasons the car should be community property.

Management and Control - Husband may not make a gift without written consent

As discussed supra, the courts should hold that Herb and Wendy were not living separate and apart, and that his income was community property. While husband and wife generally have equal management and control neither may give property away without the written consent of the other.

Herb attempted to give community funds to Ann by paying for a car and naming her as a joint tenant. This will not be allowed and the car will be considered community property.

Disposition at Divorce.

The car is community and will be divi[d]ed between Herb and Wendy. Ann will get nothing.

C. \$15,000 Bank Account

Ann had a \$15,000 bank account in her name alone comprised of her earnings while living with Herb. If they were husband and wife, or Herb was a putative spouse, this is presumed community. However, since they are living in a meretricious relationship, the funds were in an account in Ann's name, and were not commingled, they are separate property.

2. What property may the Montana bank reach to satisfy the past-due balance of Wendy's promis[s]ory note?

Prior to marriage, Wendy borrowed \$25,000 from Montana Bank and executed a promis[s]ory note for that amount in the bank's favor. At the time Wendy filed for divorce, Montana Bank was demanding payment of \$8,000 as the past-due balance on Wendy's promis[s]ory note which has been reduced to a judgment. This is a separate debt.

Time Judgment Was Entered

If the judgment was entered before Wendy and Herb were living separate and apart, i.e., before she filed for divorce, the bank may reach Wendy's separate property or the community.

Herb's Separate Property

Generally, the separate property of one spouse may not be reached to satisfy the separate debt of the other.

Community

If the judgment was reached before legal separation, then community is liable on the debt. However, the bank must first attempt to recover the judgment from Wendy's separate property.

Answer B to Question 2

2)

California is a community property state. All property acquired during marriage is presumed to be community property (CP). All property acquired before marriage or after permanent separation, or by gift, bequest, or devise during marriage, is separate property (SP). All property acquired while parties were domiciled in a non-CP state, that would have been CP if the couple had been domiciled in CA, is quasi-community property (QCP). The source of the funds for a purchase can be traced in determining whether an asset is CP or SP.

At divorce, each CP and quasi-CP asset is split 50-50 between each spouse, and each keeps their own SP.

State of Marriages

This is a complicated situation involving two supposed marriages. Two issues that will determine rights in the property are when H & W's marriage ended, and whether Ann & H have [sic].

The Residence in Montana

Hank (H) & Wendy (W) purchased the Montana home with savings from salaries during their marriage. Salaries acquired during marriage are all considered community property, and thus the home was entirely acquired with CP. In addition, H & W took title as tenants in common, a joint form of title. Under CA law, taking title in a joint form, such as tenants in common, creates a presumption that property is CO [sic]. Since H & W were domiciled outside CA in a non-CP state at the time of the acquisition, the home would be considered quasi-CP because it would have been CP if they had been domiciled in CA.

There is no information indicating the source of payments for principal & improvements, but presumably that has been the earnings of the couple & thus CP. Thus under CA law, the home would be classified entirely as quasi-CP.

Effect of Separation

However, any earnings from either spouse after "permanent separation" are considered to be SP. Here, the issue is whether there was a permanent separation when H moved in with Ann in 1999, or if it occurred in 2003, when W filed for dissolution. If the couple permanently separated before 1999, then any of H's or W's earnings used for principal payments or improvements on the house might be considered to be a SP contribution to a CP asset. Under CA law, such contributions are entitled to reimbursement at divorce.

Permanent separation occurs when the spouses are living permanently apart and when one spouse intends to permanently end the marriage. Here, W will argue that permanent separation did not occur until 2003. Prior to that, although H moved in with Ann, he continued to spend occasional weekends with W, and thus did not permanently live apart from her. Also, the fact that he continued to spend weekends with her is evidence that he did not intend to end the marriage; he was keeping his options open. H, however, will argue that he intended to permanently separate when he moved in with Ann in 2003. He told Ann that he was divorcing his wife, bought a car with Ann, listed themselves as husband & wife, & took title as husband as [sic] wife. He also refused to see a counselor with W [sic]. Hence, he intended to move out permanently.

On balance, because H never filed for divorce & continued to visit W, his intent to end the marriage is not clear; it appears that he was keeping his options open. Hence, permanent separation did not occur until 2003.

In that case, all of the contributions to the house are CP, and the house is classified as quasi-CP to H & W. Ann has no rights to the house on any theory (see discussion below).

The Automobile

The Automobile was purchased with a loan obtained by H & Ann. Thus the source of the loan was one-half H's credit, & one-half Ann's. However, H paid off the loan entirely with his own earnings, however [sic]. Since H was still married to W at the time (see discussion above), H's earnings were CP, because all earnings are considered CP. Thus the car was paid for entirely with CP.

All property purchased during marriage by either spouse is presumed CP. W will argue that since H purchased the car with CP, it remains CP, and thus she is entitled to a 50% interest in it. H may respond, however, that by putting title in his & Ann's name, he considered the car to be a gift from CP to his SP & Ann.

W will respond, however, that, under CA law, a spouse cannot make a gift of community property outside the marriage without the written consent of the other spouse. Here, W certainly did not give her consent. A gift of personal property made without the other party's consent may be reclaimed at any time, with any statute of limitations. Here, since H made the gift to A without W's consent, W may reclaim her share of the community property even after 4 years. In addition, since 1985, no gift changing the character of property has been presumed unless the adversely affected spouse consents in writing. If H asserts that he changed the character of the CP by putting it in his & Ann's name, the transmutation will be unsuccessful because W did not consent in writing.

Here, W will prevail, and the car will be considered as H & W's CP. The issue is A's interest in the car.

Putative Spouse Theory

Although A & H were living together, California does not recognize common law marriage. Thus, any rights Ann may have must be asserted under either a putative spouse theory or contract theory.

A may assert that she is a putative spouse. A putative spouse is one who reasonably believed in good faith that she was married. If the court concluded that one was a putative spouse, all property acquired during the putative marriage is entitled quasi-marital property (QMP) & treated like CP at separation or divorce. Although there has not been a definite decision, if one spouse believed in good faith there was a marriage even the bad faith spouse may be able to treat the property like QMP.

Here, H clearly did not reasonably believe that he was married to A because he knew that he had not divorced W & continued to see her. It would not be reasonable for him to believe that he was married to A.

A, however, may argue that she believed in good faith that she & H were married because [t]hey lived together, she assumed H's last name, they bought a car together, and H introduced her to his friends as his wife. She was unaware of his continued relationship with W. Nonetheless, H had told A when they moved in together only that he "intended" to divorce W & that he had not concluded dissolution proceedings. However, putative spouse status also requires that the belief be reasonable. While any belief of A in the marriage may have been in good faith, a reasonable person would verify that the dissolution proceedings had been concluded. In addition, A & H did not take out a marriage licence or have a wedding ceremony, nor did H tell her that they had a valid common law marriage; he simply suggested they move in together. Consequently, A had a good faith but unreasonable belief in the marriage, and is not a putative spouse. Consequently, none of the property she & Hal acquired while they lived together can be considered quasi-marital property.

Contract Theory

A may be entitled to reimbursement from H on a fraud or breach of contract theory for a share of the car. She may argue that the loan application and title constitute a contract between them [and] that she would have a one-half interest in the car. Although the car appears to be a gift, and none of her money went into the car, she may be able to recover from H on a contract theory.

The \$15,000 Bank Account

The \$15,000 bank account is in Ann's name alone and consists entirely of her earnings while she was living with H. If they were considered to be putative spouses, then the account would be quasi-marital property, and H & A would each be [e]ntitled to a one-half

share. Since they were not putative spouses, the account is Ann's separate property, and neither H nor W have any rights to it.

Property to Satisfy the Note

W's note is a debt that she entered into before marriage. Debts entered into before marriage are CP. The creditor may attach all CP and the debtor spouse's SP. Quasi-CP is treated like CP for the purpose of satisfying debts.

Here, neither H nor W have any rights to Ann's \$15,000 bank account. Thus it may not be attached by any debtor. The car is CP, and thus the debtor may repossess the car to satisfy the judgment. The house is quasi-CP, and thus may be also be entirely attached by the debtor.

However, because the house is in Montana, a California court cannot directly order judgement on the house. W, however is subject to the jurisdiction of the CA court, and the court can therefore order her to transfer title to the house if needed to satisfy the judgment. Thus the debtor can reach the house.

Question 3

Two years ago, Lawyer represented Sis in her divorce. Last week, Sis made an appointment with Lawyer to assist her father, Dad, with an estate plan.

Sis brought Dad to Lawyer's office. Dad was 80 years old, a widower, and competent. In Sis's presence, Dad told Lawyer he wanted to create a will leaving everything he owned to his three adult children, Sis, Bob, and Chuck, in equal shares. Dad's assets consisted of several bank accounts, which he held in joint tenancy with Sis, and his home, which he held in his name alone. Sis then asked Dad whether he wanted to do something special about his house. Dad thanked Sis for asking, and told Lawyer that he wanted Lawyer to draft a deed that would place his house in joint tenancy with Sis.

At the conclusion of the meeting, Lawyer told Sis and Dad that his customary fee was \$750 for drafting such a will and deed. Sis gave Lawyer a check for \$750 in payment drawn on her personal account. Lawyer then drafted the will and deed as directed.

What ethical violations has Lawyer committed, and what should Lawyer have done to avoid those violations? Discuss.

Answer A to Question 3

The lawyer here has violated a number of ethical rules, as follows:

A. Duty to Identify & Disclose Conflicts Before Undertaking the Representation & Obtain Consent

Here, a potential conflict is presented at the very initiation of L's representation, when Sis (not Dad) first made the appointment and brought her father to see L.

The ethical rules (RPC) provide that a potential conflict arises when the lawyer's representation of one client may be materially impacted or limited either by his own interests, the interests of a former client, or other factors. In this situation, the lawyer may proceed only if he reasonably believes the representation won't be affected, and the client (or potential client) consents after full disclosure.

Relatedly, a lawyer can't take on representation that is or may be mat[erial]ly adverse to a former client in the same or a substantially related matter, absent full disclose [sic] and consent of the former client.

Thus, here both provisions are triggered:

(1) The representation of Dad to make a will is potentially adverse to Sis, L's former client. There is a risk to Dad that L's former relationship with Sis could affect his independent judgment. If L reasonably thought it would not, he still needed to fully disclose this conflict to D and obtain his written consent. Logically, to do that, L would have needed to exclude Sis from the discussions (see discussion later conc[ernin]g allowing Sis to be present, which raises other ethical issues).

Whether L also had to get Sis's consent, as a former client, depends on whether the prior represent of Sis is viewed as related to L's current representation of Dad. This test looks at whether there is a potential that the lawyer may have gained confidential information from Sis that could impact his representation of Dad, and also whether Sis and Dad are "adverse" in the current represent.

To be prudent, L should have also obtained Sis's consent to the representation of Dad.

B. Duty of Confidentiality & Preservation of Attny-Client Privilege

L also violated ethical obligations in proceeding to discuss the representation with Dad, while Sue [sic] (a third party) was present. This had the potential effect of disclosing client confidences to Sue [sic], and waiving the privilege. (Note that the attorney-client privilege attaches to initial consultations).

The facts suggest that there was some ambiguity concerning Sis's role. If Dad in fact desired to have Sis present during the discussions, to assist him, that would be permissible (assuming L disclosed ramifications) and there may have been a way to allow that without effecting a waiver. On the other hand, it appears Dad was competent, so there arguably was no need to have Sis present. Regardless, L needed to raise these issues with Dad at the outset, including a discussion of who was the client (Dad) and of the attorney-client privilege, and the possible impact of allowing Sis to "sit in" on the consultation on waiving any privilege. L also would have needed to discuss the fact that because Sis was an interested person in his estate distribution, the potential conflict of interest between Dad & Sis weighed in favor of excluding Sis from the consultation.

Initially, it appeared that Dad wanted Sis to share = with other siblings, so the conflict may have been less apparent. However, once she attempted to influence a disposition to herself, L was obligated (even if not before) not to continue with the consultation in Sis's presence (because at that point her interest conflicted with the client's objective of = distribution).

C. Duty as Advisor and General Duty of Competence

L also violated his ethical obligation to ①be competent in his representation, ②to fully advise the client, ③to act consistent with the client's objectives; and ④to exercise indep. judgment and not let a third pty improperly influence his judgment.

Here, L knew that the client's objective was, as stated, to leave everything to his children in = shares. The final result, contrary to that objective, was that he drafted a will and deed that did no such thing, but in fact conformed to the instructions of a third party, Sis.

L also acted incompetently in failing to explain to Dad what would need to be done to achieve Dad's objective. L would have needed to discuss how the bank accounts were titled (in jt. T w/ Sis) and determine whether that was consistent with Dad's objective of = division, and if not, to discuss options for those accounts that would ensure their distribution on Dad's death =, rather than all to Sis as a Jt. tenant. [This assumes Dad was true owner of funds]. Similarly, L failed to adequately explain the implications to Dad of placing a deed in Jt. T w/Sis on the house (that she would take sole ownership on Dad's death), to make sure that Dad fully understood and appreciated the consequences of holding title in that form, and that this form of title was consistent w/Dad's (not Sis's) objectives.

Finally, in simply acting as a scrivener for Sis's instructions, L failed to exercise independent judgment and improperly allowed his judgment to be influenced by a third party (and one with objectives contrary to the client's stated objective).

D. Duty of Loyalty; Acceptance of Pymt from 3d.

L also violated his duty of loyalty to the client, acted acted [sic] improperly in accepting payment from Sis. The RPC state that a lawyer should not accept payment from a third party for services to a client, unless the third party does not influence the lawyer's indep. judgment, and the client consents after full disclosure.

Here, there was no "informed" consent. Although Dad was present when Sis paid, L did not explain to either of them that he was working solely for Dad, even though Sis was paying. Furthermore, here it appears that there was an actual conflict, prejudicial to the client, in that L acted according to Sis' objectives and did not properly counsel Dad on his options.

E. Fee

A lawyer's fee must be reasonable in light of the services performed. Here, lawyer charged a flat fee of \$750. Assuming this amount was reasonably related to the services performed, including their complexity, the lawyers' experience, & fees charged by others in the community for similar work, it would be proper even though in the nature of a "flat" rather than hourly based fee. California does not require fee agreements to be in writing unless amt is greater than \$1000.

Summary of Options and What L Should Have Done

In summary, L violated ethical duties by undertaking representation when there was a conflict of interest, without disclosure and consent; by allowing Sis to "participate" when her interests conflicted with Dad's; by failure to adequately advise Dad and to act competently in achieving Dad's objectives. (And other viols. as stated above.) He should have:

- ① Made full discl. to Dad of past relat. with Sis, & got written consent assuming L reasonably believed he would not be influenced by Sis.
- ② L should not have conducted the initial consultation in Sis's presence, and at the least needed to fully advise & disclose to Dad the implications re: the attorney-client privilege, & Sis's conflicting & potentially conflicting interests w/Dad.
- ③ L should have fully explained to Dad the options and acts needed to achieve his objectives, including the consequences of jtly titled accounts/property.
- ④ L should not have accepted Sue's check without full discussion & disclosure.
- ④a L should not have let his judgement (apparently) be influenced by Sis.

- ⑤ Arguably, L should also have obt. Sis' written consent to repres. of Dad b/c both representations related to "property."

Answer B to Question 3

3)

I. Duty of Loyalty to Client

Lawyer had a possible and actual conflict of interest with Sis and Dad. Sis had worked with Lawyer in the past and she arranged the meeting. However the purpose for the meeting is for Dad to create a will. As such, the current client is Dad. Lawyer should have clearly indicated upfront that Dad was the client and that he would zealously advocate for him. Also since Sis paid the bill, [sic].

A lawyer has a duty of loyalty to his clients. He must not act if there is a conflict of interest - either potential or actual - unless he reasonably believes he can effectively represent the client. He must also inform the client of the potential conflicts and the client must consent in writing. A reasonable lawyer standard will also be applied to determine that he could fairly represent the client.

Here there are a few potential conflicts. Sis was an old client. She has an interest in the dealings with Lawyer and Dad. Lawyer must disclose the previous relationship without revealing any confidential information of the dealings with either Sis or Dad. A lawyer can represent an old and a new client as long as the matter is different. Since Sis brought Dad, consent would have been confirmed by Sis but Lawyer should have got the consent in writing. He also should have clearly indicated to her that Lawyer was representing Dad and not her for this matter even though she was paying the bill.

Dad, however, should have been informed of the potential conflict and given consent in writing. The potential of conflict is apparent in drafting a will where one of the takers under the will is present. Here Sis was involved in the meeting to discuss how the assets would be distributed. As such, Dad should have been informed upfront of the potential conflict with Sis and given his written consent. As the meeting progressed, it became apparent that there was an actual conflict and Lawyer should have again informed and received consent from both Sis and Dad. The assets that were being distributed involved several accounts that Sis held in joint tenancy with Dad. Dad indicated that he wanted to leave everything to his children. That would mean that something may have to be done with the accounts in joint tenancy which would affect Sis's interest.

Sis also prodded Dad about the house. This may be considered undue influence on her behalf and Lawyer should have been aware of that. He should have informed Dad have [sic] the various actions who could take with the house rather than just let Sis make the suggestions.

At this point he should have recognized that he could not adequately represent Dad with Sis present.

II. Duty of Confidentiality

Lawyer has a duty of confidentiality to both Dad and Sis. Any discussions that occurred during the meeting would be held in confidence. Since Sis was present, Dad did not have the opportunity to talk freely with his lawyer. Although he was not likely going to have to disclose any confidential material, it would have been in his client's (Dad's) best interest to have a confidential meeting without Sis present to disclose how he wanted the estate distributed.

III. Fiduciary Duty

Fee discussion upfront

Any discussion of fees should be held upfront. Lawyer did not tell Dad and Sis the fee for his services until the end of the meeting. This should be okay if there was no fee charged for the preliminary discussion. The fee must be reasonable. In California, the fee must not be unconscionable. He also must be clear of any extraordinary costs that he may be aware of that mean a higher fee.

Payment by Sis

Lawyer had a duty to inform Sis that although she was paying the bill, she was not the client and that Dad was. Lawyer should have also told Dad that Sis was paying the bill but that he was the client. He should have gotten this consent and understanding in writing.

IV. Competency

Lawyer has a duty of competency to zealously represent his client's desires. In dealing with Sis and Dad together he could not competently represent Dad. Drafting a will for distribution among three children is difficult. Dad specifically stated that he wanted to distribute his estate to all three children equally. In allowing Sis to have the house put in her name as joint tenant, Lawyer was violating the duty to adequately and competently represent his client Dad and his best interests. He should have had a separate meeting with Dad to ensure that all assets were accounted for and distributed according to his wishes.

V. Duty of Fairness to Third parties - Sis, Bob, Chuck

In addition to his client, Lawyer owes a duty of fairness to third parties. Here specifically those who would take under the will - Sis, Bob, and Chuck. During the course of conversations with Dad and Sis, it should have become clear to Lawyer that Sis was going to get all the property and Bob and Chuck would receive the short end of the stick. He owed this duty of fairness to ensure that Dad's will did reflect his desires and his estate went to all three equally.

Question 4

Lori owns a small shopping center. In April 1999, Lori leased a store to Tony. Under the lease Tony agreed to pay Lori a monthly fixed rent of \$500, plus a percentage of the gross revenue from the store. The lease term was five years. In part the lease provides:

Landlord and Tenant agree for themselves and their successors and assigns:

* * *

4. Tenant has the right to renew this lease for an additional term of five years, on the same terms, by giving Landlord written notice during the last year of the lease.
5. Tenant will operate a gift and greeting-card store only. Landlord will not allow any other gift or greeting-card store in the center.

* * *

In July 2000, Tony transferred his interest in the lease in writing to Ann. Ann continued to operate the store and pay rent.

In February 2003, a drugstore in the shopping center put in a small rack of greeting cards. Ann promptly complained, but Lori did nothing.

Beginning in March 2003, Ann stopped paying the percentage rent, but continued to pay the fixed rent alone. Lori took no action except to send a letter in April 2003 requesting payment of the percentage rent that was due.

In January 2004, Ann sent a letter to Lori requesting that Lori renew the lease according to its terms. Lori denied that she had any obligation to renew.

1. Is Ann entitled to a renewal of the lease? Discuss.
2. Is Lori entitled to the past-due percentage rent from:
 - a. Ann? Discuss.
 - b. Tony? Discuss.

Answer A to Question 4

Ann's Right to Renew the Lease

Statute of Frauds

The statute of frauds requires that a lease for possession of property for longer than one year must be evidenced by a writing, signed by the party to be charged. Here, the lease was for a period of 5 years. So to be enforceable it must comply with the statute of frauds. The facts imply that a written lease was drawn and the lease stated the amount of rent[,] the lease term, a right to renew, and a restriction on landlord[']s lease to a competitor and tenant[']s type of use. The Statute of Frauds has been met.

Sublease vs. Assignment

When a lessee purports to transfer less than its entire term, or entire rights and remedies under a lease, the resultant transferee shall be considered a sublessee and the transfer shall be considered a sublease. In this case, the sublessee would not be considered a successor or assignee of the original lessee and would not be in privity of contract with the landlord. Thus, a sublessee may not enforce lessee's rights under the original lease, against the landlord. Conversely, a landlord may not enforce its right to collect rent from a sublessee.

The facts indicate simply that "Tony transferred his interest in the lease in writing to Ann". Because this transfer was in writing, the Statute of Frauds is satisfied. Because it appears that Tony's entire interest in the lease was transferred to Ann, Ann's is an assignee and the transfer shall be considered as assignment.

Does the covenant for tenant's right to renew the lease for an additional five years, on the same terms, by giving landlord written notice during the last year of the lease run with the land?

In order for Ann to be able to enforce her right to renew the lease, she will need to establish that the covenant runs with the land. A covenant is said to run with the land when four criteria are met:

1. The original parties intended that future takers be bound.

Here, the express terms of the lease state "landlord and tenant agree for themselves and their successors and assigns". This language clearly indicates that landlord and tenant intended their successors to be bound.

2. The successor must have knowledge of the covenant.

Ann has actual knowledge of the covenant as it is expressly stated in the original lease and she is seeking to enforce the covenant.

3. There must be horizontal and vertical privity between the parties.

Ann is in horizontal and vertical privity of estate with landlord by virtue of the assignment from Tony, thus, this criterion is met.

4. The covenant must “touch and concern” the land.

A covenant will be held to touch and concern the land if it burdens the land. Here, a 5 year possessory interest in the demised premises, touches and concerns the land.

Because the covenant to renew the lease “runs with the land,” unless Ann is in material breach of the lease, she will be entitled to enforce the covenant upon her satisfaction of the “notice during the last year of the lease” requirement. Ann gave written notice to Landlord (Lori), in January of 2004, the last year of the lease. She has met this requirement & is entitled to renew the lease. (She may have waived the non-competition covenant and the renewed lease may not include this covenant - see below.)

[2a.] Did Ann’s failure to pay the percentage rent constitute a material breach of the lease, discharging Lori’s duties under the lease and permit Lori to collect the percentage rent from Ann?

The facts indicate that begin[n]ing in March 2003, Ann stopped paying the percentage rent. Lori took no action except to send a letter requesting payment of the percentage rent. The covenant to pay percentage rent is enforceable against Ann by Lori since this covenant “runs with the land” (supra). Ann will argue that Lori’s breach of the restriction on leasing space to a competitor discharged her duty to pay percentage rent. At common law, the duty to pay rent was held to be an “independent covenant” and was not discharged by a breach of the landlord in regard to improvements on real property. The modern trend is to find that the covenants under a lease for real property are mutually dependant. If Ann can prove that the landlord’s (Lori[’s]) breach of the covenant “not to rent to a competitor” gave rise to a claim that the amounts of rent she withheld comprised a reasonable “set off” of damages from Lori’s breach, her failure to pay the percentage rent may be discharged.

_____ Waiver:

Ann will also argue that Lori’s failure to enforce the percentage rent constituted a “waiver” which Ann then reasonably relied upon to continue her tenancy without paying percentage rent. The facts indicate that Lori’s only response to Ann’s failure to pay

percentage rent was to write one letter requesting rent in April 2003. On these facts, Lori may have waived the covenant to collect percentage rent.

Conversely, Lori may argue that Ann waived the covenant to not to [sic] lease to a competitor greeting card store by merely complaining in February 2003 and then taking no further action under the lease. If Ann would have claimed that Lori's breach of the covenant caused her business to be economically impacted to the point where she had to close shop, she might be able to present an argument for "constructive eviction". Since this did not occur, Ann may have waived her right to enforce the covenant.

Therefore, while the right in Lori to collect percentage rent from Ann may have arisen under the lease, as this covenant "ran with the land", a court might not enforce this covenant against Ann based upon the "mutually dependent" nature of this covenant with Lori's duty not to lease to a competitor, which Lori breached. In the alternative, a court may find that both parties waived their rights to enforce the respective covenants. It should be noted that as Tony's assignee, under the lease, Ann could raise any of Tony's rights and defenses against Lori - provided the covenants run with the land, as they do here.

[2b.] Lori vs. Tony:

Lori's right to collect past due percentage rent.

The assignment of Tony's interest in the lease to Ann did not discharge Tony's duties under the lease. In the facts presented Tony will remain in "privity of contract" with Lori and will therefore be bound by the contractual duties imposed by the lease. The proper method for Tony to have discharged his liability under this contract would have been for Tony & Lori to effect a novation of the contract. A novation occurs when the two parties agree to substitute in a stranger, in this case Ann, and discharge the original party to the contract. No novation occurred in the facts presented. Tony remains liable for the past due percentage rent owed to Lori, subject to the defenses which Ann could have raised, waiver, breach of mutually dependent covenant. For the reasons stated above, Tony will be subject to a claim for unpaid percentage rent based on his contractual liability to Lori, but he will likely be able to successfully defend this claim as set forth above.

Answer B to Question 4

4)

1. Lori's obligation to renew the lease

Validity of the Assignment

The first issue in this case is whether a valid contract exists between Lori and Ann. A lessee may assign his interest in a rental property to a third party unless the lease expressly forbids it. In this case, the lease between Lori and Tony did not forbid an assignment. Therefore, Tony had the right under the contract to assign his interest in the lease to Ann, and a valid contract existed between Lori and Ann. Furthermore, Lori accepted rent from Ann, which further indicates that the assignment was valid.

Terms of the Lease

The second issue is whether Ann has a right under the contract to enforce the provision in the lease that Tenant has the right to renew the lease for an additional term of five years on the same terms by giving the landlord notice. Under the terms of the contract, Ann will argue that Tony agreed for himself and his assigns (Ann) to the term of the lease allowing Ann to renew. Therefore, Ann would have the right to renew the lease, as long as she was not in breach of contract.

Lori would argue that there is no privity of contract between herself and Ann. The contract that Tony made with Ann was not expressly assumed by Lori. Therefore, any covenants that do not run with the land are not binding between Ann and Lori, because there is no privity of contract between them. Lori will further argue that the term of the lease requiring Lori to allow the tenant to renew does not run with the land: there is nothing about the agreement to allow the renewal that touches and concerns the property. Therefore, Lori will argue that her promise to Tony is not binding. However, because the terms of the contract are specifically binding on Tony's successors and assigns, Lori will lose this argument. Under the terms of the original contract, Ann is entitled to renew the lease.

Lori will further argue that Ann breached her covenant to pay rent. The duty to pay rent is an obligation that runs with the land: Ann is in privity of estate with Lori, and her failure to pay rent constitutes a material breach of the contract. Though Lori chose not to evict Ann for her failure to pay rent, she could evict her any time and may refuse to renew the lease at the end of the term.

Ann will will [sic] argue that the duty to pay rent in the form of the percentage check has been excused by Lori's breach of contract. The contract contained a provision that Lori would not allow any other gift or greeting card store in the center. Ann can correctly argue that that [sic] a restriction of this type is a covenant that runs with the land: The restriction

touches and concerns the leased property, because it has the effect of making Ann's gift store more valuable. Furthermore, as mentioned above, the contract expressly states that the covenants in the lease would be binding upon each party's assignees, and Ann as Tony's assignee, can sue under the terms of the contract.

The next issue is whether Lori's decision to allow the drug store to put up a small rack of greeting cards constituted a breach sufficient to allow Ann to stop paying the rent. If Lori's decision constituted a material breach, Ann would be excused from her duty to pay rent. Because Lori would be in breach, Ann could suspend her performance of her rent obligations. Furthermore, as the non-breaching party, she would be entitled to renew the lease under the terms of the agreement between the parties. However, Lori did not breach the terms of the contract. The facts indicate that the contract required Lori not to allow "any other gift or greeting-card store in the center." The facts indicate that the store that sold the cards was a drug store, and that the cards it sold were contained on one small rack. Therefore, under the terms of the contract, Lori will be successfully be [sic] able to show that she was not in breach of the contract. Because Lori did not breach the contract with Ann, Ann was not relieved of her obligation to pay the percentage rent. Ann's material breach of contract, her failure to pay the percentage rent, excused Lori from her obligation under the contract to renew the terms of the lease according to Ann's request.

In the alternative, Lori will argue that even if her decision not to stop the drug store from selling greeting cards did constitute a breach of contract, the breach was minor. A material breach occurs when one party fails to pe[r]form in such a way that the value of the contract is substantially destroyed. Ann may argue that allowing even one card rack in one other store expressly breached the lease and should therefore be considered material. However, Ann will lose this argument: the facts indicate that the drug store primarily sold other things, and that it carried one small rack of card[s]. Allowing the drug store to sell card[s] did not substantially impair the value of the contract for Ann. Therefore, if a breach occurred at all, it was a minor breach. A minor breach does not excuse the other party from performing its obligations under the contract. In this case, Ann had no right to cease paying the percentage rent, because the breach was minor. On the other hand, the failure to pay the full amount of rent owed constituted a material breach, and Lori would have been entitled to evict Ann or sue for damages. Lori's rights concerning the rent itself are more fully discussed below: with regards to the obligation to renew the contract, Lori was excused because of Ann's material breach.

2. The Past Rent

Ann's Obligations

The next issue is whether Lori is entitled to recover for the percentage rent from Ann. As mentioned above, because the covenant to pay rent runs with the land, and because the contract expressly states that the obligations of the lease would be bi[n]ding on assignees such as Ann, Ann was obligated to pay rent. For the reasons discussed above, she will

lose her argument that Lori breached the contract.

Ann's duty to pay rent is a covenant that runs with the land. Since Ann is the tenant in possession of the property, she is in privity of estate with the [sic] Lori. Lori may sue Ann to recover for the value of the rent that she is owed.

Ann may try to argue that Lori is estopped from suing her for the rent. She will argue that, although Lori requested the rent, she allowed Ann to continue occupying the premises for 8 months after requesting the percentage rent. She will argue that Lori's acceptance of the rent constituted a waiver of her right to collect the percentage rent. However, Ann will lose this argument as well. Although Lori had the option of evicting Ann and suing for the rent, she also had the option of letting Ann stay and suing for damages. Ann's obligation to pay rent has therefore not been discharged. Lori clearly did not waive this right, because she sent Ann a letter requesting the percentage rent to be paid.

Tony's Obligation

The next issue is whether Lori may sue Tony to recover the percentage rent that Ann has not paid. The rule is that when two parties sign a contract, and one party assigns its interests in the contract to a third party, the assignor remains liable to the obligee on the original contract. The landlord may collect rent from any party with whom she is in privity of contract or privity of estate.

In this case, Tony and Lori signed the original contract. Tony assigned his interests to Ann. As an assignor, Tony is not relieved of his duty to ensure that the contract is fully performed. Lori may sue Tony for his obligation to pay rent and to pay the percentage of revenues that the store [sic] earned. Tony will have the same defenses available to him that Ann had: he can argue that Lori was in breach and that this breach relieved Ann of her duties to pay. However, for the reasons discussed above, these defenses will not be successful. Because Ann remains liable for the percentage rent, Tony is also liable.

Question 5

The National Highway Transportation and Safety Administration (NHTSA), a federal agency, after appropriate hearings and investigation, made the following finding of fact: “The NHTSA finds that, while motor vehicle radar detectors have some beneficial purpose in keeping drivers alert to the speed of their vehicles, most are used to avoid highway speed-control traps and lawful apprehension by law enforcement officials for violations of speed-control laws.” On the basis of this finding, the NHTSA promulgated regulations banning the use of radar detectors in trucks with a gross weight of five tons or more on all roads and highways within the United States.

State X subsequently enacted a statute prohibiting the use of radar detectors in any motor vehicle on any road or highway within State X. The State X Highway Department (Department) enforces the statute.

The American Car Association (ACA) is an association comprised of automobile motorists residing throughout the United States. One of ACA’s purposes is to promote free and unimpeded automobile travel. ACA has received numerous complaints about the State X statute from its members who drive vehicles there.

In response to such complaints, ACA has filed suit against the Department in federal district court in State X, seeking a declaration that the State X statute is invalid under the Commerce Clause and the Supremacy Clause of the United States Constitution. The Department has moved to dismiss ACA’s complaint on the ground that ACA lacks standing.

1. How should the court rule on the Department’s motion to dismiss on the ground of ACA’s lack of standing? Discuss.
2. On the assumption that ACA has standing, how should the court decide ACA’s claim that the State X statute is invalid under the Commerce Clause and the Supremacy Clause of the United States Constitution? Discuss.

Answer A to Question 5

5)

1. ACA's Standing

Organizational Standing

An organization may bring suit on behalf of its members if it can establish the following:

1. It's [sic] members have suffered an injury in fact;
2. The injury is related to the organization's purposes; and
3. The court can grant relief without the presence of the individual members who have suffered the injury.

Injury in Fact

The requirement that the members have suffered an injury in fact ensures that the federal courts are only hearing real and live claims and controversies. In order to establish an injury where a statute is challenged based on its unconstitutionality, either the statute must have been enforced against someone or the failure to rule the statute invalid before enforcement must work an extreme hardship to the complaining individual.

Here, there is no evidence that the statute has been enforced against any of the ACA members. Though the State X Highway Department enforces the statute, the facts do not indicate that the department has enforced the statute against any of the ACA members. The facts do state that ACA has received numerous complaints about the statute from State X members who drive in State X where the statute is being enacted. Because there has been no actual enforcement of the statute, in order to obtain pre-enforcement review, the ACA must show that its members are going to be put to an extreme hardship if they are not granted a judgment on the constitutionality of the statute.

The hardship faced by the members if they are forced to continue acting under this statute until it is enforced is relatively light.

It is likely that the court will find that this case is not ripe for review because there is no evidence that the statute has been enforced against the ACA members. Furthermore, the hardship the members will suffer if they are not given pre-enforcement review does not rise to the level of extreme hardship to justify a premature ruling by the federal court.

Injury Related to Organization's Purposes

If the court does find the members of ACA have suffered an injury, ACA must next establish that this injury is related to the purpose of the organization. Here, the injury would be that the drivers are forced to drive without radar detectors. The stated purpose of the ACA is to promote free and unimpeded automobile travel. ACA will have no problem showing that the statute prohibiting drivers from utilizing radar detectors is related to free and unimpeded automobile travel. Not having a radar detector can rationally be viewed as being an impediment to free driving. Thus, the injury is related to the association's purpose.

Presence of Individuals is Unnecessary to Grant Effective Relief

ACA must show that it can bring suit challenging the statute and that the court can grant relief to remedy the injury suffered by its members without the individual presence of the members in the lawsuit. Here, the relief ACA is seeking is a declaration that the statute is invalid. If they are seeking injunctive relief, to keep the Department from enforcing the statute, then the presence of the members would not be necessary to fashion this relief. If the ACA is seeking an injunction this relief would be an effective means to remedy the injury suffered by the drivers. If, however, the association is seeking money damages because of the infringement of some free driving right, then they would need the presence of the drivers in the suit to grant this relief.

11th Amendment

State may also challenge the suit brought by ACA on grounds of the 11th Amendment. The 11th Amendment prohibits cases in federal courts against the states. Here, ACA is bringing an action against State X Department in the federal court. The ACA's suit might not be barred because they are seeking to have the statute ruled unconstitutional and are most likely seeking an injunction prohibiting further enforcement of it. It is unlikely that the 11th Amendment will bar this suit against the Department for a declaration of unconstitutionality.

Conclusion

The court will most likely find that ACA lacks organizational standing because its members have not suffered an injury in fact. There is no evidence the statute has been enforced against the members and the "hardship" suffered by the members is not sufficient to warrant pre-enforcement review. The case should be dismissed for lack of standing.

2.

Validity of State X Statute under Commerce Clause

Preemption

Where the federal government preempts a field, the state may not regulate it. Preemption can take place either expressly by the Legislature stating so in a statute, by the pervasive presence of the federal government in the certain field, or by a federal statute conflicts [sic] with a state statute directly or indirectly.

There is no evidence that the NHTSA intended to preempt the field of radar detector legislation. In the statute, they stated that its purpose was to allow apprehension of speeders by law enforcement officials and assumedly, for the protection of drivers. There is no express preemption of the field. The regulation by the federal government in this area does not seem to be so pervasive so as to imply that the federal government has preempted the field (as is the case with the FCC). This statute appears from the facts to be the only statute related to speed control devices.

The federal statute is limited to large trucks. It prohibits radar control devices in trucks over a certain weight. The state statute is more regulatory than the federal statute- it prohibits such devices in all vehicles. More extensive regulation granting more protection serves the purpose of the federal statute, it does not conflict with it.

Dormant Commerce Clause/Negative Implications of the Commerce Clause

A state may not regulate interstate commerce in a way that is discriminatory against interstate commerce or in a way that unduly burdens interstate commerce. Here, the statute does not discriminate against interstate commerce. The statute prohibits all drivers from using these radar control devices- it does not just prohibit out-of-state drivers from using these devices. Because the law does not discriminate against interstate commerce, to be invalid, ACA must show that the regulation places an undue burden on interstate commerce.

In order for state law that regulates either the channels, instrumentalities or those things that, in their aggregate, have a substantial affect [sic] on interstate commerce, the state must show that the non-economic state interest outweighs any burden on interstate commerce. Here, the interest is not economic. The interest of the state is presumably for the safety of drivers on the State X roads and highways. Speed devices like radar detectors arguably aid drivers in evading the laws that the state will argue were designed to protect drivers.

The safety of drivers on State X roads and highways is a legitimate, important state interest. This interest must outweigh the burden on interstate commerce by the prohibition

on speed control devices. The only burden suffered by interstate commerce is that interstate drivers will be subject to different rules. In other states, they might be permitted to use radar detectors, but in State X, they will not be able to. This might potentially create a substantial likelihood that drivers traveling on interstate highways, traveling between states, will be more likely to unknowingly violate this rule. In order to remedy this problem, the State could post signs at or near its borders that radar detectors are prohibited in State X. Once a driver knows of this prohibition, the driver can put the radar detector away or turn it off. The statute does not prohibit the possession of one within the state, but only the use of one.

Conclusion.

The prohibition of radar detectors in State X in any vehicle traveling on a road or highway within the state serves an important, non-economic state interest. This interest outweighs any burden placed on interstate commerce. The statute will not violate the Dormant Commerce Clause.

Supremacy Clause

The statutes, treaties, and Constitution of the United States are supreme. Where a state law conflicts with either federal statutes, regulations, or the federal Constitution, the state law is invalid.

In order for ACA to prove that the state law violates the Supremacy clause, it must show that the State X law either directly conflicts with the federal law, or frustrates or impedes the objectives and purposes of the federal law. Here, the State X law only regulates more vehicles than does the federal statute which is limited to trucks over a certain weight.

A state may regulate more extensively than a federal statute so long as this does not frustrate the objective of the federal statute. A state may not, however, pass a law that excludes conduct that is included in a federal law. Thus, for example, the State X statute could not read that trucks with a gross weight of five tons or more are exempt from the radar detector ban. This would expressly contradict the federal statute. Here, the State X law does not expressly conflict with the federal statute nor does it impede or frustrate the objective of the federal statute. The federal statute objective and the state statute objective are the same- both statutes aim to prevent drivers from evading law enforcement officials for violations of speed-control laws. The State X statute only prohibits more vehicles from using such devices--- it extends the protections the federal statute desired even further.

Conclusion

This law will not be invalid under the Supremacy Clause. It neither expressly contradicts nor frustrates or impedes the purposes of the federal statute.

Answer B to Question 5

5)

I. The Court should Deny the Department's Motion to Dismiss for ACA's lack of standing

A. Preliminary Jurisdictional and Venue Issues

Personal jurisdiction in State X is appropriate here, given that the subject action is to challenge the validity of a statute of State X. The Federal District Court for State X has jurisdiction because the ACA is raising a federal question: namely, whether or not the State X statute violates the United States Constitution as to either or both of [sic] the Commerce Clause and the Supremacy Clause. Venue in the Federal District Court for State X presumes that State X is a single-district state, and thus there is not a multiplicity of federal district courts from which to choose.

B. ACA has standing

The Federal courts have jurisdiction to hear cases and controversies. This means that there must be an actual dispute, not a hypothetical or moot question, and that the parties to the action are, respectively, the injured party and the party liable for the injuries.

Although the ACA itself has not suffered an actual injury, the Courts have, since the Sierra Club case, set forth a clear standard by which unincorporated associations can sue on behalf of their members and be found to have standing. There are three components that must be met: first, the purpose of the lawsuit must be directly related to the purpose of the association; second, individual members of the association would have the standing to bring the action on their own individuals['] behalves; third, the participation of individual members of the association is not required to prosecute the action. Each of these will be explored in turn.

i. The Purpose of the ACA

As noted in the facts, the ACA is an association comprised of automobile motorists residing throughout the United States. Among ACA's organizational purposes is the promotion of free and unimpeded automobile travel. Such an organization is clearly one that is concerned with a State that has adopted and enforced a statute that imposes different rules on drivers as they cross from state to state.

ii. The Standing of Individual Members

Also, as noted, members of the ACA have complained to the ACA about the relevant statute. We cannot determine, from the facts provided, whether any member of

the ACA has actually been cited for use of a radar detector in violation of the statute, nor can we determine whether ACA members have been cited for speeding based on being “clocked” by police-operated radar that would have been detected with the lawful use of radar detectors. However, a person with a reasonable basis for challenging a criminal statute is not required to first commit the crime and be convicted thereof before challenging the validity of the statute. On this basis, individual members of the ACA who own radar detectors and would use them when driving in State X would clearly have standing to sue; assuming that such persons exist, the next element of the standing analysis is satisfied.

iii. The participation of individual members

The final element of associational standing analysis is whether the individual members themselves are required to participate in the action. Here, the ACA is mounting a broad-based challenge to the statute; their claim is not tied to the enforceability of the statute against a particular person or in a particular set of circumstances. In these conditions, the ACA is fully capable of proceeding with its case absent the active involvement of any particular person or representative plaintiff.

Thus, the requirements of associational standing have been met, and the Court should deny the Department’s motion to dismiss for lack of standing.

II. The Court should Uphold the validity of the Statute.

The ACA has identified two bases for its challenge of the constitutionality of the relevant State X statute: the Commerce Clause and the Supremacy Clause. Each will be discussed in turn.

A. The Commerce Clause.

Under the United States Constitution, Congress has the power to regulate interstate commerce. However, individual states, as separate sovereigns, have their own individual police powers to regulate conduct within the boundary of the state. The interplay between these two provisions - often conflicting provisions - requires in part of a fact-based analysis.

The ACA would argue that the subject statute clearly imposes significant restrictions on interstate commerce. They would argue that motorists driving through State X on their way from one state to another should not be expected to know the requirements of State X law, and thus face risk of [a] ticket or possible arrest.

State X will counter by noting that any impact on interstate commerce is, at best, minimal and tangential, and does not constitute an undue burden. The State will note that they do not ban the ownership or possession of radar detectors, only the use of radar detectors.

Additionally, State X will argue that its regulation is required to enable State X to use its

police power to provide for safe roads and highways. State X will cite to laws in other states, such as Virginia, prohibiting the use of radar detectors. State X will similarly note that other states validly impose regulations that are far more burdensome, such as laws regarding child safety seats.

State X will also note that no discriminatory impact exists against out-of-state residents. All motorists - both from outside State X and residents of State X - are subject to the ban. Presumably, State X will post appropriate signage at or near public roads that cross into State X advising motorists of the existence of the ban on radar detectors. This will further minimize the impact on out-of-state motorists.

On these bases, the Court is likely to agree with State X's contention that State X's regulation does not violate the Commerce Clause.

B. The Supremacy Clause.

In arguing that the relevant statute is in violation of the Supremacy Clause, the ACA is really arguing that by reason of the applicable NHTSA regulations on radar detectors, the Federal government has preempted any state legislation impacting this area. For the reasons noted below, this argument too will fail.

Federal laws and regulations can preempt state laws either expressly or through implication. Express preemption is readily apparent when it occurs; here, no evidence exists to indicate that the NHTSA's regulations promulgated on this topic state that they are exclusive, and thus no express preemption exists.

The federal government can also preempt by implication. If the scope of the federal action is such that it leaves no room for any additional state regulation, then state action is prohibited. Here, the NHTSA regulations only apply to trucks with a gross weight of five tons or more. The ACA will argue that by defining certain classes of vehicles which are not allowed to use radar detectors, the NHTSA also implicitly ruled that other motor vehicles are not prohibited from doing so.

This argument is likely to fail, however. Nothing implicit in the text of the regulation, as provided, implies any intent at reserving the arena for the federal regulatory action. Rather, the NHTSA's findings of fact are in no way limited to certain classes of vehicles, certain sizes, weights, etc. This would suggest, the State will argue, that NHTSA simply was not willing or able to extend its regulations further, but not that the individual states were prohibited from doing so.

Again, as noted above, many other states have similar or comparable statutes, regulating radar detectors or other areas. As such, the requisite intent to preempt is not likely to be found, and the Court will agree with State X that the regulation is not in violation of the Supremacy Clause.

* * *

Since the regulation is not invalid on any basis challenged by the plaintiff, assuming no facts inconsistent with those given, the statute will be upheld.

Question 6

Paul and Tom, both State X residents, were involved in an auto accident in State X. At the time of the accident, Tom, who was working as a delivery truck driver for Danco, was driving through State X to make a delivery to a customer located in State Y. Danco is incorporated in State Y and has its principal place of business in State Z. State Z is located adjacent to State X. Danco does no business in State X.

Paul filed a complaint against Danco in federal district court in State X on the basis of diversity jurisdiction, alleging \$70,000 in property and personal injury damages. Danco was properly served with the complaint at its principal place of business.

Appearing specially in the State X federal district court, Danco filed a motion to dismiss the complaint on the grounds that the district court lacked both subject matter and personal jurisdiction and that Paul's action could not proceed without joining Tom. The district court denied Danco's motion.

Danco then filed a counterclaim against Paul to recover \$20,000 in property damage to the truck Tom was driving at the time of the accident. Paul moved to dismiss Danco's counterclaim on the ground that the district court lacked supplemental jurisdiction to hear the counterclaim. The district court granted Paul's motion.

State X law provides that its courts may exercise jurisdiction over nonresidents "on any basis not inconsistent with the Constitution of the United States."

1. Did the district court rule correctly on Danco's motion to dismiss Paul's complaint? Discuss.
2. Did the district court rule correctly on Paul's motion to dismiss Danco's counterclaim? Discuss.

Answer A to Question 6

6)

Question 6

(1) Motion to Dismiss Paul's Complaint

Personal Jurisdiction (PJ):

Personal jurisdiction refers to the court's power to bind the person of the defendant. The traditional basis [sic] of personal jurisdiction are (1) domicile; (2) personal service in state; and (3) consent - either expressly through a forum clause or impliedly by failing to raise lack of PJ in your first response to the court. Paul filed a complaint against Danco in federal district court in State X. Danco denies that State X has personal jurisdiction over it. Danco is a corporation which is incorporated in State Y and has its principal place of business in State Z. Therefore, Danco's residence would be considered State Y and Z.

Due Process:

To have personal jurisdiction over a defendant who is not a resident of the forum, the forum state must have a long arm statute and meet the requirements of International Shoe to meet due process requirements. To have personal jurisdiction, due process also requires that defendant be given notice and have the opportunity to be heard. Defendant must be served with the summons and complaint within 120 days of filing of the complaint. In this case, Danco was properly served with the complaint at its principal place of business.

Long Arm Statute:

A long arm statute is a statute that allows the state to assert jurisdiction. States may have specific or nonspecific long arm statutes. State X has a long arm statute that provides that its courts may exercise jurisdiction over nonresidents "on any basis not inconsistent with the Constitution of the United States." This is a nonspecific long arm statute because it does not specific[y] the circumstances under which the forum may exercise personal jurisdiction. Therefore the court may exercise jurisdiction to the limits allowed by due process.

International Shoe:

To meet the test in International Shoe, the forum must show that defendant has such minimum contacts with the forum that assertion of personal jurisdiction would not offend traditional notions of fair play and substantial justice.

Minimum Contacts:

To have minimum contacts, the courts will analyze the (1) D's purposeful availment of the forum; and (2) D's foreseeability of a lawsuit.

Purposeful Availment:

In analyzing purposeful availment, the court will consider (1) the nature and quality of D's actions; (2) voluntary acts of D directed at the forum; (3) whether D intentionally placed a good in the stream of commerce; and (4) where injury is shown, jurisdiction is established. Here, Danco does no business in State X. However, at the time of the accident Danco's driver was driving through State X to make a delivery to a customer located in State Y. Danco is incorporated in State Y and has its principal place of business in State Z. State Z is located adjacent to State X. Although Danco does not do any business directly in State X, it appears that Danco must make regular use of State X's roads to conduct its business. Also, Paul was injured by a Danco driver in an accident in State X. Therefore, it appears that Danco did purposefully avail itself of State X.

Foreseeability of Lawsuit:

The court must also determine whether Danco could reasonably foresee that its actions could lead to a lawsuit, i.e., it being hauled into court in State X. It appears that Danco drivers regularly traveled State X's roads to conduct business. Therefore, it would be reasonable for Danco to foresee that one of its drivers may get into an accident while in State X and cause damage.

Traditional Notions:

The court must balance the minimum contacts of defendant against traditional notions of fair play and substantial justice. This means that the court will look at (1) the relatedness between the claim and D's conduct; (2) P's interest in obtaining relief; (3) D's burden v. benefit; and (3) the state interest. Here, Danco's driver drove through State X and this conduct led [sic] to the car accident, P has a high interest in seeking relief for his injuries and property damage, D benefits from being able to drive on State X roads and it would not be a heavy burden to require D to be responsible for any accidents which this may cause, and finally State X has a strong interest in holding drivers who cause accidents on its roads, especially to State X citizens, responsible.

Conclusion: The district court was correct in its decision to deny D's motion because State X may assert PJ over D.

Subject Matter Jurisdiction:

Subject matter jurisdiction refers to the court's power to hear the kind of claim being

brought. P filed a suit against D on the basis of diversity jurisdiction, alleging \$70K in property and personal injury damage. For diversity jurisdiction, plaintiff must show that (1) amount in controversy (AIC); and (2) complete diversity.

AIC:

To meet the AIC requirement, plaintiff must have a good faith claim exceeding \$75K. Here, P is only seeking \$70K. Therefore, he has not satisfied the AIC requirement. If P were seeking some sort of injunction, the value of the injunction could be added to the AIC requirement. However, it does not appear that P is seeking an injunction. Therefore, P has failed to satisfy the AIC requirement.

Complete Diversity:

Complete diversity requires that no plaintiff and defendant be from the same state. This will depend on where the parties were domiciled at the commencement of the lawsuit. P was domiciled in X. As discussed above, D was domiciled in Y and Z. Therefore, there appears to be complete diversity.

Conclusion: The court erred in denying D's motion as to lack of SMJ. State X does not have SMJ to hear this claim because P has not satisfied the AIC requirement. Also, the federal court does not have any other SMJ over this case because it does not involve a federal question (it is a personal injury action) and it is not a matter within the federal court's exclusive jurisdiction.

Joinder:

P claims that the matter cannot proceed without joining Tom. Under compulsory joinder of parties, the court will first look to see if the party is a necessary party. A party is necessary where the court cannot afford complete relief without the party or there is a danger that the absentee will be harmed, there may be an inconsistent judgment or there may be a possibility of double liability. Here, it is arguable whether Tom is a necessary party because although he may be liable to Danco for the accident, P may get a judgment solely against D for the accident because Tom was an agent of D when the accident occurred and because the accident was within the scope of Tom's employment, D will be liable for Tom's negligence.

However, if Tom is a necessary party, the court will next determine whether he is an indispensable party. An indispensable party is one whose joinder will destroy diversity. Here, Tom's joinder will destroy diversity because Tom is also a State X resident and this would destroy complete diversity because P is also from State X. Where the party is indispensable, the court may dismiss the case or proceed without the party. The factors the court will use to determine that are the following: (1) alternative forum; (2) likelihood of prejudice; (3) chance of inconsistent judgment. Here, State X appears to be the best forum

for the case because the claim arose here and it would be highly inconvenient to require P to travel to State Y or Z. Also, there is not a high chance of prejudice because State X will likely fairly administer its laws. There is also not a chance of inconsistent judgment because as discussed, P can sue D alone for her damages. Therefore, the court may continue the case without joining Tom.

Conclusion: The court was correct in denying D's motion for failure to join. Had the court had SMJ, it could proceed with the case without joining Tom.

(2) Motion to Dismiss Danco's Counterclaim:

D filed a counterclaim against P to recover \$20K in property damage to the truck Tom was driving at the time of the accident. Paul moved to dismiss D's counterclaim on the ground that the district court lacked supplemental jurisdiction to hear the counterclaim.

Supplemental Jurisdiction:

Where the court has original jurisdiction over a matter, the court may also assert supplemental jurisdiction over other claims that are so related that they form the same case or controversy as the original claim. The same case or controversy means that the claims arose out of the same transaction or occurrence and arise out of a common nucleus of operative facts.

Same transaction/occurrence:

D is bringing a counterclaim to recover for property damage it suffered in the accident between P and Tom. The initial claim by P is for damages suffered as a result of the accident between P and Tom. Therefore, the counterclaim arises out of the same transaction or occurrence as the original claim.

Common Nucleus Operative Facts:

As discussed above, D's counterclaim relates to the accident between P and Tom and P's initial claim is for the same accident. Therefore, the counterclaim arises out of the same common nucleus of operative facts.

Counterclaim:

In cases where a counterclaim arises out of the same transaction or occurrence as the original claim, the counterclaim is considered compulsory and must be brought or it will be waived. Here, D had to assert the counterclaim or it would have been waived because the counterclaim arose out of the same transaction or occurrence. As discussed above, where a counterclaim is compulsory because it arises out of the same transaction or occurrence, the court will assert supplemental jurisdiction. The claim need not have an

independent basis for SMJ.

Conclusion: The court erred in granting P's motion because the district court had supplemental jurisdiction to hear the counterclaim.

Answer B to Question 6

6)

Personal Jurisdiction in Federal Courts

Personal jurisdiction is the court's power over the individuals in the case: the power to compel them to appear and to bind them to its judgment. The federal court's personal jurisdiction applies to state law (of the state it's in) regarding domicile of the defendant, where the defendant was served (whether in state or not), and whether the defendant consented, either expressly or impliedly, to the jurisdiction of the court.

A corporation is a resident of every state in which it is incorporated and the state of its principal place of business.

Here, Danco (D) was incorporated in Y and its principal place of business is in Z. Thus, it is not domiciled in X. D was served in Z.

D filed a motion challenging personal jurisdiction pursuant to rule 12b prior to filing an answer. A 12b motion can allege, inter alia, improper personal jurisdiction, subject matter jurisdiction, process, service of process, as well as failing to state a claim upon which relief can be granted. By filing a 12b motion challenging personal and subject matter jurisdiction, a party does not consent to that jurisdiction by the appearance. Thus D did not consent to personal juris in X by filing the 12b motion.

Minimum Contacts

Personal juris may also be had over a defendant if he had minimum contacts w/ the forum state. The minimum contacts test states that the exercise of personal jurisdiction cannot offend traditional notions of fair play and substantial justice and must be reasonable. In applying this test, the court will look to whether the defendant had systematic and continuous presence in or contact w/ the forum state; whether the cause of action arose in the forum state; whether the defendant could reasonably have foreseen being sued in and being subjected to personal jurisdiction in the forum state; and whether the defendant purposefully availed himself of the privilege of doing business in the forum state.

Here, D's delivery driver was driving through the forum state, X, in order to make a delivery in Y. However, D does no business in X. Furthermore, the facts do not indicate any contact by D w/ X except this driver driving through X to go to Y. While D is incorporated in Y, the facts do not indicate a large amount of business w/ Y requiring D's employees to regularly cross through X. On the facts given, D has had 1 contact w/ X. This is not systematic and continuous contact. However, the cause of action arose in X. If D's trucks were in X at all (which they were on at least 1 occasion), D could foresee an

accident requiring it to defend a lawsuit in X. D didn't purposefully avail itself of doing business in X, but it did purposefully avail itself of the use of the roads of X. And not just a little bit of roadway use, but D's driver was going all the way through X to get to Y. This is a close call, but given that the accident occurred in X and that D's truck was purposefully driving through X it would not offend traditional notions of fair play and substantial justice to subject D to personal jurisdiction in X.

State Z abuts X. Thus, it would be convenient for D to defend the suit in X. Also, X has a strong interest in protecting its citizens from injuries and negligent drivers. In addition, it would be easier for a corporation (with more assets and personnel) to defend in the neighboring state than it would be for an individual (P) to prosecute the claim in another state. Thus, it is reasonable to subject D to personal juris in X.

Because D meets the minimum contacts requirements, the court had proper personal jurisdiction over D and this part of D's motion should be denied.

Subject Matter Jurisdiction

Subject matter jurisdiction is the court's power of the subject matter of the lawsuit. In federal court, subject matter jurisdiction can be based on a federal question properly plead [sic] in the complaint or on diversity jurisdiction. For diversity jurisdiction to be proper, there must be complete diversity (all plaintiffs diverse from all defendants) and the plaintiff must in good faith (subject to Rule 11) plead damages of more than \$75,000. (Diversity is where 1 plaintiff resides in a different state from 1 defendant.)

Here, P resides in X. As stated above, D resides in Y and Z. Thus, there is complete diversity. However, P only alleged \$70,000 in damages in his complaint. This does not meet the \$75,000 minimum. The fact that D counterclaimed for \$20,000 doesn't matter; the 2 can't be added to cross the \$75,000 minimum. Thus, the court does not have subject matter jurisdiction over the case. That part of D's 12b motion should be granted.

Compulsory Joinder/Indispensable Parties

An indispensable party is one which a current party alleges must be included in the case 1) to grant complete relief; or 2) because the current party's interests would be prejudiced if it was forced to defend the case w/o the indispensable party. The current party can force the indispensable party to join the case through compulsory joinder. By doing so, the current party is alleging the indispensable party is the one responsible to the plaintiff (not the current party). First, the current party must meet 1 of the above 2 requirements. Second, the joinder of the indispensable party cannot destroy diversity in the case. The rationale for this requirement is that defendant should not be allowed to torpedo the plaintiff's proper diversity jurisdiction by bringing in a non-diverse party.

Here, D wants to join T. T is an employee of D. Through the doctrine of respondeat

superior, D can be held liable for T's actions that were in the scope of and during the course of T's employment. Thus, whether T is joined or not, P will be suing D and attempting to collect his judgment (should he win) against D, the party with the deep pockets. Complete relief can be granted to P w/o T's presence. D is not going to sue its own employee and obtain relief from him. D may need T as a witness in the case, but it will suffer no damage if T is not a party to the case. Furthermore, T is a state X resident. By joining T, D would destroy diversity because P is a state X resident. Thus, the court should deny D's motion regarding joinder of T.

Counterclaims

A counterclaim is when the defendant asserts a claim against the plaintiff that is suing him. Compulsory counterclaims are claims against the suing party that arise out of the same conduct, transaction, or occurrence. Compulsory counterclaims must be plead [sic] or the claim is lost. (The defendant cannot sue on that claim later as a plaintiff.)

Here, D alleges that P damaged its truck as a consequence of the same accident P is suing for. This is the same transaction and occurrence. Thus, D's counterclaim is compulsory.

Supplemental Jurisdiction

Supplemental jurisdiction is the federal court's power to hear cases associated with the main claim (the plaintiff's claim which must meet all jurisdictional requirements) even though the associated claims may not meet all jurisdictional requirements. For a plaintiff w/a valid federal case, the federal court can hear a plaintiff's state claim if it comes from the same common nucleus of operative facts and has a common question of law or fact. Supplemental jurisdiction also covers a state law claim by the defendant against the plaintiff if the defendant's claim arose out of the same conduct, transaction, or occurrence. In a diversity case, supplemental jurisdiction includes compulsory counterclaims. The rationale is that it would not make sense to make a defendant sue in state court on a claim that arose from the same conduct, transaction, or occurrence for which the plaintiff is suing in federal court. It would help the parties and serve judicial economy to hear both claims at one time.

Here, D's counterclaim is compulsory. Thus, the federal court has supplemental jurisdiction to hear that claim.

However, P's claim will be dismissed from federal court due to D's 12b motion, as above. Once that happens, the federal court will not hear D's counterclaim because it is no longer associated w/a plaintiff's valid complaint. D's counterclaim would have to meet its own jurisdictional requirements, which it does not. So the court will, after dismissing P's claim, dismiss the whole case.