



California  
Bar  
Examination

Essay Questions  
and  
Selected Answers

February 2006

**ESSAY QUESTIONS AND SELECTED ANSWERS**  
**FEBRUARY 2006 CALIFORNIA BAR EXAMINATION**

This web publication contains the six essay questions from the February 2006 California Bar Examination and two selected answers to each question.

The answers received high grades and were written by applicants who passed the examination. Minor corrections were made for ease in reading. The answers are reproduced here with the consent of their authors.

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TUESDAY MORNING  
FEBRUARY 21, 2006

# 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

Autos, Inc. manufactures a two-seater convertible, the Roadster. The Roadster has an airbag for each seat. Autos, Inc. was aware that airbags can be dangerous to children, so it considered installing either of two existing technologies: (1) a safety switch operated by a key that would allow the passenger airbag to be turned off manually, or (2) a sensor under the passenger seat that would turn off the airbag upon detection of a child's presence. Both technologies had drawbacks. The sensor technology was relatively new and untested, and the safety switch technology had the risk that people might forget to turn the airbag back on when an adult was in the seat. The safety switch would have increased the price per car by \$5, and the sensor would have increased the price per car by \$900. Research showed that most riders were adults and that the airbags rarely hurt children who were properly belted into the seat. No federal or state regulation required either a safety switch or a sensor. Autos, Inc. chose to install neither.

Oscar bought a Roadster. On his first day of ownership, he decided to take his 10-year-old daughter, Chloe, to a local ice cream shop. On the way home, Oscar accidentally ran the Roadster into a bridge abutment. The airbags inflated as designed and struck Chloe in the head, causing serious injury. Chloe was properly belted into the seat. She would not have been hurt if the airbag had not struck her.

What tort theories can reasonably be asserted on Chloe's behalf against Autos, Inc., what defenses can Autos, Inc. reasonably raise, and what is the likely outcome? Discuss.

## Answer A to Question 1

4)

1)

Chloe v. Autos, Inc[.]

### Products Liability

When a consumer is injured by a product, there are 5 theories the consumer can sue under in the area of products liability: battery; strict products liability; negligence; breach of warranties; and misrepresent[ati]on. The facts in the present case would give rise to three of the causes of action: strict products liability; negligence; and breach of warranties.

#### Strict Products Liability

A manufacturer or distributor of a product placing a product into the stream of commerce in a defective manner will be strictly liable for harm caused by the product. In order to recover under this theory, the following elements must be met: a proper defendant, i.e., a manufacturer or distributor of the product that left the plant in a defective condition; a proper plaintiff; a defective product; causation; damages; absent defenses.

#### Proper Defendant - Manufacturer or Distributor

To recover under strict products liability, the defendant must be a manufacturer or distributor of the product that left the plant in a defective condition. Here, the defendant is Auto[s], Inc[.], the manufacturer of the vehicle. This is a proper defendant for recover[y] under the theory. Additionally, the product must have left the manufacturer's plant in a defective condition, which will be established under defective condition (see infra). The product here, the car, left the defendant's plant in the condition that was not subsequently changed and if found to be defective, was in that condition at the time it left the plant. This element is therefore met.

#### Proper Plaintiff - User or Consumer

Traditionally, the person injured was required to be the purchaser of the product, or at least a person in privity with the purchaser. Modernly, a proper plaintiff is any user, consumer, or foreseeable bystander who could be injured by the product. Here, the person injured was a passenger in the car, and the daughter of the purchaser. As a family member and rider in the vehicle, she is a proper plaintiff for recovery under this theory.

#### Defective Condition

A product can be defective by: manufacturing defect; design defect; or failure to adequately warn.

### Manufacturing Defect

A manufacturing defect is present when a few of the products leave the plant in a condition different than the rest. The facts in the present case suggest that all the cars left the plant in the same condition. There was therefore no manufacturing defect.

### Design Defect

A design defect can occur when all the products leave the plant in the same condition and there is a defect in the design of the product. There are two tests for design defects: the consumer expectation test and the reasonable alternative test.

#### Consumer Expectation Test

This test is met if the product leaves the plant in a condition more dangerous than the average consumer would reasonably expect. Here, a consumer might reasonably expect that a safety feature in a vehicle, such as an airbag, would make the car more safe, not less safe. Facts in the present case indicate that but for the airbag, Chloe would not have been injured. This product is therefore defective under this test.

#### Feasible Alternative Test

This test compares the design of the product with other reasonable alternatives available in the market. The test balances the availability of alternatives and their cost against the risk to users and the value of lives saved. Although there are no facts to indicate what other car producers did, it is evident that there were alternatives that were available. Even though there were no statutes to mandate their usage, this fact is not determinative in alternatives. Facts indicate that the company had considered implementing two separate safety measures. The fact that both the safety measures themselves had risks and drawbacks is also relevant. Chloe will first argue that the first alternative the defendant should have employed was the switch to manually disable the airbag. The cost of this product is very minimal at \$5. However, the defendant will claim that there was a risk that people would fail to turn it back on, making the car more dangerous to the majority of passengers, according to research. The reason the airbag was designed in the first place is [sic] to make the car more safe for the majority of riders, which this device would prevent. In weighing these two arguments, the court would probably find that even though the cost of this is minimal, its risk might have outweighed its utility, making the car even more dangerous.

The plaintiff will next argue that the second device should have been employed, the sensor switch, as it would not be at risk to user misuse. However, defendant will assert

that this device, because it is new and untested, would malfunction, making the product more dangerous. They will argue that the cost of this device, at \$900, is far too costly to be reasonable. In weighing utility, costs and risks, the outcome of this argument is highly dependent upon the reliability of this device. If it is truly new and unreliable, the defendant will no doubt be successful in its argument. If, however, it is shown to be reliable, the defendant's argument will be weakened. The court will have to decide whether, if useful and reliable, \$900 is reasonable for this device, in light of its reliability and lives saved.

### Failure to Warn

A product is defective if the defendant, knowing of a defect, fails to adequately warn the consumer. An adequate warning is one that tells the consumer of the risk, how it occurs, how to prevent such risk, and any mitigating factors to avoid further injury. Here, facts indicate that the D was aware of the danger of the airbags to children. There is no information on whether there was a warning as to this fact. If there was no warning about the risk of airbags to children, as it appears from the available facts, this product is defective.

### Causation

#### Actual Causation

For strict liability, the injury to the P must have been actually caused by the defendant's product. The test is "but for" for the D's conduct, the P would not have been injured. Here, the facts indicate that but for the airbags, the P would not have been injured.

#### Proximate Causation

Additionally, the P's injury must have been caused by the D's product. Here, P will argue that the injury was caused by the airbag and the D should be held strictly liable for all injury. The D will argue that Oscar crashing the car is a superceding intervening cause that should sever liability. Since airbags are installed to protect passengers in car accidents, this case is not superceding and the court will agree with the P here.

### Damages

For strict liability, the P must have suffered physical injury. Here, the P was struck in the head, causing serious injury. This is a sufficient damage here.

### Defenses

#### Contributory/Comparative Negligence

A P's recovery may be reduced or barred if found to be contributorily negligent. Although comparative neglig[e]nce is the majority view, under either comparative or contributory negligence, the P must be contributorily negligent. It is true here that Oscar ran the car into the bridge, but he is not the P. Even though Oscar may have been negligent, his conduct was not the conduct of the P, in order to trigger this defense. There are no facts present to indicate that P was at all negligent, since she had her seatbelt fastened.

### Assumption of Risk

Assumption of risk is a defense when P proceeds in spite of a known risk. However, since D failed to warn of the risk, P could not have knowingly assumed it.

Since all elements have been met, P can recover under strict liability.

### Negligence

Negligence cause of action is available when the D owed a duty of care to the P, which he breaches, causing damage to the P. A P can recover for injury caused by a manufacturer's negligence if P can establish: duty; breach; actual causation; proximate causation; damages; absent defenses.

### Duty

A duty is owed by all persons to act in a way as to avoid harm to other[s]. The standard owed here is the duty to act as a reasonable prudent person to avoid harm to all for[e]seeable persons. Here, the D, as a car manufacturer (see supra), owed a duty to its consumers to produce a car in a safe way and to avoid all injury to purchasers and passengers. The amount of care owed is that of another reason[a]ble prudent car manufacturer.

### Breach

The duty owed is breached when the D fails to act as another reasonable prudent person under the circumstances. Here, the P will argue that a reason[a]ble car producer would employ safety devices to protect riders and passengers, as were available. The D will argue that it acted reason[a]bly, since there were no statutes mandating conduct. Although presence of a statute may mandate conduct, absence of a statute is not a defense. The D still must act as a reasonable prudent car producer. Here, there is no indication of what other vehicle manufacturers do, but there are facts of other safety precautions. Since a reasonable car manufacturer would have at least warned of the danger, and facts indicate that the D did not, it appears as though D breached the duty owed when it failed to at least warn of the dangers.

### Causation - Actual & Proximate



Actual Causation

See supra for actual cause. As discussed supra, the D was the actual cause of the D's [sic] injury.

Proximate Cause

See supra for proximate cause. As discussed supra, the D was the proximate cause of the D's [sic] injury.

Damages

The cause of action allows recovery for personal injury, which was incurred here (see supra).

Defenses

The same defenses are available here as under strict liability, and are not met (see supra). Therefore, P will be able to recover.

Warranties

Implied in every product are 2 implied warranties: Implied warranty of merchantability and implied warranty of fitness.

Implied Warranty of Merchantability

A product must be merchantable, meaning generally safe and fit for ordinary purposes. Here, the car was generally safe for general purposes. Although children could be injured by the car, this is a failure to warn not generally de[a]lt with by the warranty.

## Answer B to Question 1

1)

### CHLOE V. AUTOS, INC[.] (“AUTOS”)

Chloe was injured while traveling as a passenger in her father, Oscar’s, Roadster, which was manufactured by Autos. Oscar will bring a cause of action against Autos on Chloe’s behalf ad litem because she is under eighteen years old. The following will examine and analyze the possible causes of action, the defenses Autos may raise, and the likely outcome.

### 1. CAUSE OF ACTION UNDER A STRICT PRODUCTS LIABILITY THEORY AGAINST AUTOS

#### STRICT PRODUCTS LIABILITY

A commercial seller who sells a defective, unreasonably dangerous product to an intended consumer or user will be held strictly liable for any harm caused as a result of the defective product.

#### Commercial Seller

In order to be held strictly liable, the defendant must be a commercial seller who purposefully injected the product into the stream of commerce.

Autos manufactures the Roadster and is a corporation. Because Autos manufactures the Roadster and places it into the stream of commerce, Autos is a commercial seller.

#### Defective Product

A defect may be shown by plaintiff the following ways: 1) Defective Design, 2) Manufacturing Defect of that Particular Product Only, 3) Failure to Warn or Inadequate Warning.

#### 1) Design Defect

Plaintiff may show that defendant’s product had a design defect if there was a feasible alternative available at the time it was manufactured and if so, that the alternative would make the product safer and was economically reasonable.

Alternative Design Available

The facts state that at the time the Roadster was manufactured Autos itself was aware of two possible alternative designs to the Roadster that would possibly make the car's airbags safer for childre[n]. This included: (1) A safety switch operated by a key, or (2) A sensor under the seat that would detect the child's presence. The facts do not indicate that either product guaranteed the child's safety. However, they may have helped. Plaintiff will contend that the safety switch would have worked, but that Autos did not install it in fear that passengers would forget to turn it off and on. Thus, it appears that the safety switch, if operated correctly by the users, would have made the airbags safer for children. In regard to the sensor, its technology was relatively new and untested. Defendant will argue and thus there is no guarantee that it would have made the car safer. Plaintiff, however, will argue that while it might not have been tested and [was] relatively new, it was a feasible alternative design that could have indeed made the Roadster safer. Additionally, Plaintiff will assert that Autos was even "aware" of the danger to children, and even "considered installing either of the two existing technologies.[]" Autos will contend that neither the Fed nor State governments require a safety switch or sensor. However, this argument is invalid because they knew of the potential risk of the airbags and if they knew about the risk and did not remedy it, they should not have manufactured the Roadster. Because the safety switch and sensor were available technologies at the time that would likely have made the Roadster safer, there was an alternative design available to Autos.

#### Economic Feasibility of the Alternative Design

The alternative design must be one that is reasonable and economically feasible to the manufacturer.

The safety switch according to the facts would increase the Roadster's price by \$5.00. The sensor would increase the Roadster's price by \$900 per car. Plaintiff will first contend that for \$5.00 extra per car, the safety switch was economically reasonable and that \$5 would not have made a difference in the car's price and marketability, as the car is likely much more expensive already. Plaintiff will further assert that the sensor, while untested, was worth it to install for \$900 extra per car. Defendant will contend that \$900 was too much per car for an untested product and that \$900 extra would hurt the Roadster's sales appeal and marketability. While this may be somewhat true, Plaintiff will argue that safety is priceless, and that \$900 extra is relatively small in comparison to the overall price of a car such as the Roadster, and that saving a life or minimizing injury of a child or adult is worth every penny. For \$5 more, the safety switch is economically feasible and Plaintiff has a valid argument that for \$900 extra, the sensor is worth it if it has the chance of preventing injury or death while traveling in the Roadster.

#### 2) Manufacturing Defect

Manufacturing defect may be asserted if the particular product that Plaintiff purchased was individually defective. Here, there is no evidence that Oscar's particular Roadster was individually defective, and thus Chloe cannot assert this theory.

### 3) Inadequate Warnings or Failure to Warn

Plaintiff may also show defect or that the product was unreasonably dangerous if Defendant failed to warn or gave inadequate warnings.

Chloe will contend that Autos failed to warn its purchasers of the risk to children by the airbags. As stated in the facts, "Autos Inc. was aware that airbags can be dangerous to children," and thus should have provided some warning to purchasers of the vehicle. Autos will contend that no warnings were necessary because "research showed that most riders were adults and that the airbags rarely hurt children who were properly belted..." Chloe will rebut this argument with the fact that children are everpresent and it should be obvious to Autos that children would ride in the Roadster as passengers and this is a fact that Autos should have considered, despite the research. Thus, because Autos knew of the risk to the children and the potential dangers, and failed to warn of them, they can be held accountable for failure to warn.

Conclusion: Chloe can show under a design defect theory that an alternative safer design existed. Additionally, Chloe can show that Autos failed to provide inadequate [sic] warnings as to the airbags' risk to children.

### **Foreseeable User**

The consumer who was harmed by the alleged defect must be one that is foreseeable to the manufacturer.

Chloe, as a passenger in the Roadster, who was properly seated in the car, will contend that she was a foreseeable user, as it is foreseeable that the driver will have passengers in the vehicle from time to time. Autos will contend that Chloe, a ten-year old child was not a foreseeable user because "research showed that most riders were adults and that the airbags rarely hurt children who were properly belted..." However, this argument will fail for Autos because they were still aware that children would ride as passengers from time to time and thus Chloe was a foreseeable user.

### **Causation**

Plaintiff must prove defendant was the legal and proximate cause of her injury.

### Legal Causation

Under legal causation, plaintiff must show that “but for defendant’s defective design, she would not have been harmed.”

Thus, here we ask, but for the failure of Autos to install sensors or a safety switch or provide a warning to the users of the Roadster regarding the airbags and children, would Chloe have been hurt? The answer is no, because as the facts state, the airbags inflated as designed and struck Chloe, “causing serious injury,” and “she would not have been hurt if the airbag had not struck her.” Autos is the legal cause of Chloe’s harm.

### Proximate Cause

Proximate cause examines whether the harm to plaintiff is foreseeable and whether there were any intervening forces.

Chloe was injured by the airbags as they [sic] inflated as designed as they [sic] struck her. Autos will contend that this was caused as a result of Oscar accidentally driving into a bridge. However, Chloe will successfully argue that accidents by drivers of the Roadster are foreseeable and frequent and that the whole purpose of airbags is to prevent or minimize injuries from such foreseeable accidents. Additionally, Chloe was properly belted in the seat, and because she was properly belted and the airbags operated as designed, Autos['] defect was the direct and proximate cause of Chloe’s injury.

### Damage/Harm

Plaintiff must prove damage. As discussed, as a result of the defect Chloe suffered serious injury to her head.

## DEFENSES BY AUTO

### Assumption of the Risk

Plaintiff assumes the risk of injury if he consciously and voluntarily assumes the risk and is aware of the danger, but still proceeds. This serves a complete defense to strict liability in most modern jurisdictions.

Autos will contend that Chloe and Oscar assumed the risk of harm by purchasing a two-seater convertible and because it was a convertible they knew or should have known that it was a dangerous vehicle. However, Chloe will rebut this claim by asserting that even if the car was a convertible, it should have and could have been designed safer and that she did not assume the risk of a defective airbag whatsoever. Autos['] defense is weak and will fail because Chloe never assumed the risk of injury by a defective airbag according to the facts.

## 2) NEGLIGENCE CLAIM AGAINST AUTOS

Chloe may also assert a claim of negligence against Autos. Negligence requires the showing of: 1) Duty, 2) Breach of Duty, 3) Actual Cause, 4) Proximate Cause, and 5) Damages.

### **Duty**

A person is held to the duty of care to act as a reasonably prudent person under the circumstances.

Autos, a car manufacturer, will be held to act as the reasonably prudent auto manufacturer would in designing and manufacturing the Roadster.

Foreseeable Plaintiff - Chloe as a passenger was a foreseeable plaintiff under both the Cardozo and Andrews views as she was legitimately riding with Oscar in the vehicle at the time of the accident.

### **Breach of Duty**

Breach of duty may be shown to be an actual breach or inferred via *res ipsa loquitur*.

Chloe will contend that Autos breached its duty of care to her by failing to make the Roadster safe and by failing to install the safety devices, such as the sensor and/or switch. Furthermore, Autos knew of the alternatives, as discussed above, and could have installed them. Autos will contend that doing so would be costly and that there were drawbacks to each. However, as discussed, the drawbacks and risks were worth it in comparison to the risk of harm and thus viable. Autos will contend that neither the Fed nor State governments require a safety switch or sensor. However, this argument is invalid because they knew of the potential risk of the airbags and if they knew about the risk and did not remedy it, they should not have manufactured the Roadster. As a result, by failing to make Roadsters and its airbags safe for children, Autos breached its duty of care to Chloe, who was harmed by the defect.

### **Actual Cause/Legal Cause**

Rule: see supra. As discussed above, Autos is the actual cause of Chloe's harm.

### **Proximate Cause**

Rule: see supra. As discussed above, Autos is the proximate cause of Chloe's harm.

### **Damage**

See supra.

## **DEFENSES**

### **Assumption of the Risk**

Rule: supra. As discussed above, an assumption of the risk defense will fail.

### **Comparative Negligence**

Comparative negligence is shown by demonstrating that plaintiff was negligent in its actions. Depending on the jurisdiction (pure or partial), the damages will generally be reduced in proportion to plaintiff's negligence.

Autos will contend that because Oscar was negligent in causing the accident, as the Roadster ran into a bridge abatement [sic], he was contributorily negligent. While this is a valid argument, as the accident and release of [the] airbag was caused by Oscar, Chloe may contend that Oscar's negligence should not be imputed to her. This is true in most jurisdictions- that the driver's negligence is not imputed to a passenger's claim. However, if the jurisdiction imputes Oscar's negligence, his negligence will be reduced in proportion thereof and provide Autos with at least a partial defense.

**Conclusion:** Chloe has a valid negligence claim against Autos. Depending on the jurisdiction, however, Autos may reduce their damages via Oscar's comparative negligence.

### **3) IMPLIED WARRANTY OF MERCHANTABILITY**

Under the implied warranty of merchantability, a product that is sold is impliedly warranted to be reasonably useful and safe for average use.

Chloe will contend under this theory that the Roadster, a two-passenger vehicle, should have been at least made safe for all that [sic] would be in the vehicle, including the driver and passenger. Because the airbags were not safe, and injured her, she will argue that the Roadster was not fit for regular use, as intended by its purchasers. Autos may try and contend that the Roadster was not designed to be safe for children because research showed that children were not regularly passengers in the Roadster. However, for reasons discussed above, this argument will fail. Chloe will be successful against Autos under an implied warranty of merchantability theory as well.

## Question 2

Tim and Anna were married for ten years. In 2000, their marriage was legally dissolved. For several months following the dissolution, Tim and Anna attempted to reconcile but ultimately failed to do so.

In 2001, after reconciliation attempts failed, Tim executed a valid will leaving “all my property to my best friend, Anna.” Later that year, Fred was born to Anna out of wedlock. Tim was Fred’s father, but Anna did not inform Tim of Fred’s existence.

In 2002, Tim and Beth married. Two days before the wedding, Beth executed a prenuptial agreement waiving all rights to Tim’s estate. Beth was not represented by counsel when she executed the prenuptial agreement.

In 2003, Sarah was born to Tim and Beth.

In 2004, Tim died. His estate consists of his share of a \$400,000 house owned with Beth as community property, plus \$90,000 worth of separate property.

Tim’s 2001 will has been admitted to probate. Beth, Sarah, Fred and Anna have each claimed shares of Tim’s estate.

How should the estate be distributed? Discuss.

Answer according to California law.



## Answer A to Question 2

### Question Two

#### I. Existence of a Valid Will

The first issue is whether, upon his death, Tim dies testate leaving a valid will able to be probated. The facts indicate that upon his death in 2004, Tim died[sic]. In 2001, Tim executed a valid will which has now been admitted to probate. As such, the will will be presumed to be a valid statement of Tim's testamentary intent; he will be presumed to have had testamentary capacity when he made it, knowing the natural objects of his bounty and the status of his personal possessions, and will be presumed to have complied with the requisite legal formalities.

As such, the next issue is to determine whether, under the terms of his will as executed, any of those individuals having an interest in Tim's estate, which include Beth, Sarah, Fred and Anna, will take an inheritance under the terms of the will.

#### II. Distribution of Tim's Estate Under the Will

Upon death, a testator may devise and bequest his one-half share of community property and the entirety of his separate property. Tim's 2001 will, as probated, leaves all of his property to Anna. The issue is whether this will prevent Beth, Sarah, or Fred from taking any portion of Tim's estate. Each individual and the will's impact upon their ability to inherit from Tim's estate and[,] if so, the extent of their portion, will be discussed in turn.

##### A. Beth

On the face of the will, Beth receives nothing from Tim's estate, however Beth has claimed a share. Two key issues will impact whether Beth is entitled to a portion of Tim's estate despite the the [sic] terms of the will, 1) whether she may claim the status of a pretermitted spouse, and 2) whether her waiver of inheritance rights prior to marriage was an effective relinquishment of her portion of Tim's estate.

##### 1) Pretermitted Spouse

Under CA law, if a testator dies with a validly executed will that makes no provision for a spouse whom he married after he executed the will, a presumption is raised that the testator did not intend to leave the spouse out of the will but merely forgot to execute an updated will.

This presumption can be rebutted by showing that the will on its face makes it clear that the testator did not intend to provide for the spouse, or by demonstrating that the testator made alternative, non-testamentary provisions for the spouse, i.e. by purchasing life insurance or an annuity or making an inter vivos gift. Because the terms of Tim's will are so simple,

it cannot be shown on its face that Tim intended to leave Beth out. In addition, Tim does not seem to have made alternative arrangements for Beth via gift or the provision of insurance. The only such evidence would be the fact that the house Tim and Beth shared was community property, so perhaps Tim thought the house would go to Beth, and that would be sufficient; however, the terms of his will contradict this, as he indicated all of his property would go to Anna.

The final way to rebut the presumption of Beth's status as a pretermitted spouse is to show that she validly executed a waiver of her rights to inherit from Tim's estate, discussed below.

## 2) The Prenuptial Waiver

The issue is whether Beth's waiver of all rights to Tim's estate is valid. If valid, then Beth may make no claim on Tim's estate. In order for such a waiver to be valid, several requirements must be met. First, the waiver must have been voluntary and not due to coercion. The facts indicate that Beth signed the waiver 2 days prior to marrying Tim, which may raise an inference that she did not have sufficient time to consider the waiver and[,] as a result, it wasn't truly voluntary.

Second, the waiver must have been executed only after Beth was fully informed of Tim's wealth and the extent of his estate. If Beth had no such knowledge, the waiver will be ineffective.

Third, Beth needed to have been represented by independent legal counsel. She was not so represented when she signed the agreement, and therefore the waiver will be presumed invalid. Unless Tim's estate can overcome the presumption of the invalidity of Beth's waiver due to the factors discussed above, she will be treated as a pretermitted spouse. As such, she will take her intestate share and will be entitled to Tim's half of the community property (the house) and one-third of his separate property, because he left 2 or more living issue, Sarah and Fred.

## B. Fred

The issue is whether Fred will be able to claim status as a pretermitted child because he was born after the will, and thus if he will be entitled to a share of Tim's estate despite the terms of the will.

Because Fred was born in 2001, but after the will was executed, he will claim to have been unintentionally left out of Tim's testamentary provision and thus pretermitted. Fred will argue that because the terms of the will do not state on their face that he was left out on purpose, and because he has received no other gift or devise in lieu of an inheritance, that he is pretermitted.

Tim's estate may argue that because Tim's will left everything to Anna, Fred's mother, that Tim did not intend to make a separate provision for Fred. However[,] this argument will fail because Tim did not know that Fred existed, and thus the bequest to Anna could not have been meant to also care for Fred.

CA courts presume that when a man dies without knowledge of a child, that has [sic] the man known of the child that he would have provided for the child. As such, and because Fred will be considered a pretermitted heir, Fred will be entitled to a one-third share of Tim's separate property, equal to \$30,000.

#### C. Sarah

Sarah will make substantially the same arguments as Fred, in claiming that she too is a pretermitted child. Of course, Tim knew of Sarah, but she can also rebut the presumptions against pretermittance as Fred was able to do, and because Tim seems to have made no other provision for her, she will be considered a pretermitted child and will take a one-third share of Tim's separate property, \$30,000.

#### D. Anna

Upon divorce, any will that has already been executed that leaves everything to the ex[-]spouse is considered invalid. However, in this case, Tim's will was executed both after legal dissolution of him [sic] and Anna's marriage and even after attempts to reconcile. Thus, Anna being an ex-spouse will not result in an invalidation of the will.

The CA courts hold a testator's intent to be the key to whether a will makes a valid distribution of the estate. Because the will was validly executed, Anna is entitled to inherit under it. However, because of the claims of Beth, Fred, and Sarah, there won't be anything left for her.

### III. Intestate Succession

Under the contingency that the court holds the will invalid as no longer demonstrating Tim's intent, his estate will pass via intestacy. In that case, once again Beth would get the house and \$30,000 ( $\frac{1}{3}$  SP), Fred  $\frac{1}{3}$  SP and Sarah  $\frac{1}{3}$  SP, and Anna nothing.

## Answer B to Question 2

2)

### In Re Estate Of Tim (T)

Tim (T) died in 2004 and left various individuals who are all claiming a stake in Tim's estate.

### Requirements for a Will

A will requires that the testator sign a will with present testamentary intent in the presence of two witnesses at the same time and that both witnesses understand the significance of testator's act. Here the facts state that the will was valid, so it is presumed that all formalities were met.

### Beth

Beth was T's wife. Therefore, she is entitled to a ½ interest in all of T's community property. Additionally, Beth may argue that she is entitled to T's estate as an omitted spouse.

### Omitted Spouse

A spouse that is not mentioned in a will is entitled to an intestate share of a testator's estate if the marriage began after the execution of the will, unless there is (1) a valid prenuptial agreement, (2) the spouse was given property outside of the will in lieu of a disposition in the testator's will or if (3) the wife was specifically excluded from the will. T and B were married after T executed his will, as the will in probate was executed in 2001 and the marriage of T and B was in 2002. Additionally, there was no disposition outside of the will in lieu of a devise in the will and there was no reference to excluding any spouse of B in particular in T's will. However, whether the prenuptial agreement was valid is in question.

### Prenuptial Agreement

A will argue that the prenuptial agreement was not effective because she was not represented by a lawyer. A prenuptial agreement is valid if there is a writing signed by the testator and the spouse was represented by counsel at the time that the agreement was signed. However, there is no need for separate counsel if the spouse knew of the extent of testator's property at the time of signing the will and she specifically was [sic] waived the right to counsel in writing.

Here the[re] was no representation by counsel. Additionally, there are no facts that indicate that Beth was advised to get separate counsel, waived her right to separate

counsel, or even knew of the extent of Tim's property. Nor did Beth waive the right to knowledge of Tim's property. Therefore, it cannot be said that Beth validly waived her right to counsel or knowingly and voluntarily entered into the prenuptial agreement.

Although Anna will argue that the prenuptial agreement should have served as evidence of T's intent to disinherit B, such evidence should not be admissible because it is not probative of any of the exceptions to the omitted spouse provisions in California's intestacy statutes.

Because the prenuptial agreement was not valid, Beth is entitled to an intestate share of the estate.

### Intestate Share of the Estate

If the court agrees that the prenuptial agreement was not effective, then the omitted spouse will receive an intestate share of Tim's estate. Under California's probate code, an [sic] spouse's intestate share is  $\frac{1}{2}$  of all community property and  $\frac{1}{3}$  of testator's separate property if the testator died with more than one issue. Here, Tim dies with two children. Although T did not know about Fred (his illegitimate son), if his will had been admitted to probate, Fred would have been able to collect his share under the will along with Sarah, T's legitimate daughter.

### Conclusion

Therefore, if the prenuptial agreement was found to be invalid, Beth should claim  $\frac{1}{3}$  of T's separate property estate and the testator's  $\frac{1}{2}$  community property, or all of the \$400,000 of T's community property share in the house and \$30,000 of his separate property. If this is so, all other gifts under the will will be abated in this amount. If the prenuptial agreement is found to be valid, however, Beth will be entitled to nothing.

### Sarah

Sarah was a child who was left out of the will and was born after the execution of the will. Therefore, Sarah will attempt to invoke the omitted child rule under the probate code.

### Omitted Children

A child may claim to be a pretermitted child if a will omitted them from its face and if the child was born after the last executed will or codicil. An omitted child may collect his or her intestate share, unless she was left property outside of the will in lieu of the a [sic] devise, unless there was some intent in the will to disinherit the child or unless there was at least one child in existence at the time of the will's execution and the testator gave substantially all of his assets to the pretermitted child's parent.

Here, Sarah was born after execution of the 2001 will and was not included in the will. Additionally, she was no[t] disinherited in the will, nor was she given anything outside of the will in lieu of a devise in the will. Finally, there was no child in existence at the time of Tim's execution of his will. Even if A argues that the child was in gestation at the time of execution and, therefore, is a Prometheus child, this argument is still flawed because Tim did not leave substantial property to Sarah's parent under the will.

Therefore, Sarah should collect an intestate share under the will.

### Intestate Share

As stated above, a spouse should claim  $\frac{1}{3}$  of a [sic] intestate's separate property estate under intestacy if the testator had 2 or more children or issue of those children at the time of his death. Under Section 240 of the probate code all property in intestacy shall pass to the next living generation, which is the generation of Sarah and Fred. At that point the property should be divided equally among all issue then living and not living. Because both Fred and Sarah are living, both would collect  $\frac{1}{2}$  of the  $\frac{2}{3}$  remaining separate property estate under intestacy.

### Conclusion

Therefore, Sarah should also receive  $\frac{1}{3}$  of Tim's separate property estate, which should be  $\frac{1}{3}$  of the \$90,000, or \$30,000.

### Fred

Fred may also claim to be an omitted child because he was left out of the will and was born, according to the facts, later in the same year as the execution of Tim's will. Fred was not included in Tim's [will] or disinherited in it, nor was he provided any property outside of the will in lieu of the property in the will.

However, although A may argue that although substantially all of Tim's property was left to Fred's mother, Anna, at the time of the disposition of the will, this exception to the rule for omitted children will not apply because Tim did not have at least one child in existence at the time of executing the will. Because this is so, the third exception, which excludes a child as an omitted child if the testator has at least one child at the time of his or her will's execution and left substantial property under in [sic] his or her will to the child's parent, does not apply.

Therefore, Fred is entitled to an intestate share of the property as an omitted child.

### Conclusion

If it is shown that Fred was the child of Tim then Fred should collect \$30,000 of Tim's estate as an omitted child.

## Anna

Anna was Tim's ex-wife, and she claims a stake [in] T's will. Anna was left the residuary of T's estate. A residuary is a devise that leaves all property that has not otherwise been devised under the will or been taken through the omitted children and spouse provisions in the probate code.

Anna's take under the will depends on the distributions to Beth and to Fred. If the prenuptial agreement with Beth was valid, Anna would collect T's  $\frac{1}{2}$  interest in the house and the \$30,000 in separate property that would have gone to Beth under the intestacy statutes. Additionally, Anna would collect Fred's \$30,000 if he could not collect under the intestacy statutes.

However, Anna's distribution under the will is abated in the amount that Beth, Fred and Sarah collect under the will. If all three collect under the will, there will be nothing in the estate left to probate, [and] all of Anna's distributions under the residuary clause of T's will will be reduced to nothing[.]

## Dissolving Of Will Terms At Divorce

Although normally provisions in a will dissolve at a divorce, a will created after the finalization of the divorce to a spouse [does] not dissolve. The provisions in this will were executed after the divorce and name Anna as a friend, rather than a spouse. Therefore, the provisions did not dissolve as they were not in existence at the time of the divorce.

## Community Property

A spouse is entitled to  $\frac{1}{2}$  of all of testator's community property. However, Anna was not the spouse of T at T's death. Therefore, there is no community, and, thus no community property.

## Conclusion

Whether A collects under the will depends on whether the omitted child statute applies to Fred and the omitted spouse exception does not apply because of the prenuptial agreement with to [sic] Beth. If either the omitted spouse or child do not collect under the will, all property not taken by those persons should go to Anna as the residuary devisee.

### Question 3

Mike had a 30-year master lease on a downtown office building and had sublet to others the individual office suites for five-year terms. At the conclusion of the 30-year term, Olive, the building's owner, did not renew Mike's master lease.

When Olive resumed control of the building, she learned that Mike had failed to comply with the terms in the 30-year lease that required him to renew an easement for weekday parking on a lot between the building and a theatre. The theatre, which, in the past, had always renewed the easement, used the lot for its own customers on evenings and weekends.

Olive also learned that a week before the end of the 30-year lease Mike had renewed for another five years the sublease of one tenant, Toby, at a rate much below market. Toby ran an art gallery, which Mike thought was "classy." Upon signing the renewal, Toby purchased and installed expensive custom lighting and wall treatments to enhance the showing of the art in his gallery.

Because of Mike's failure to renew the parking easement, the theatre granted it to another landowner. As a result, Olive had to request a variance from the town ordinance requiring off-street parking. The Board of Zoning Appeals (BZA) denied the request because a nearby parking-lot operator objected. The off-street parking requirement, combined with the loss of the parking easement, meant that several offices in Olive's building would have to be left vacant. The BZA had recently granted a parking variance for a nearby building under very similar circumstances.

Olive commences the following actions:

1. A suit against Mike to recover damages for waste resulting from Mike's failing to renew the parking easement.
2. An action for ejectment against Toby and to require him to leave the lighting and wall treatments when he vacates the premises.
3. An appeal of BZA's denial of Olive's variance request.

What is the likelihood that Olive will prevail in each action? Discuss.



### **Answer A to Question 3**

**3)**

A lease or “leasehold estate” is an interest in land whereby the landholder (“landlord”) grants another person (the “tenant”) the exclusive use of the land for a limited period of time, subject to certain terms and conditions, if any, set forth in the lease. The lease between Mike and Olive was a lease “for years,” which means that it was for a specific period of time, after which the lease would automatically terminate. Therefore, here, Mike’s lease terminated automatically at the conclusion of 30 years, in favor of Olive.

#### **1. Olive v. Mike**

Waste is an action initiated by a person with an interest in land (usually a holder in fee or a remainderman), against the occupier of the land, for harm to the land caused by the occupier’s actions. Here, Olive is arguing that Mike’s failure to renew the parking easement harmed the downtown office building [and] constituted waste, since this action set off a chain of events leading to Olive’s inability to rent out all of the office spaces, thus decreasing the value of the office building.

Typically, an action for waste lies when the occupier’s action is physically damaging the land - such as where the occupier removes trees or minerals for commercial use. Therefore, Olive’s claim for waste based on Mike’s failing to renew the easement is unusual. However, the existence of an easement appurtenant, as exists here, is in fact an interest in land that is “attached to” the office building itself. Thus, a court could find that loss of the easement is tantamount to harm to the land, and allow Olive to proceed with the waste action. It seems, however, that this would be highly unusual and therefore it is most probable that, since Mike’s failing to renew the easement did no physical harm to any land, Olive is not likely to prevail on this theory. (She should try a breach of lease theory, since the facts state that the renewal requirement was a term of the lease.)

#### **2. Olive v. Toby**

Ejectment is an action at law whereby one claiming a superior interest in a parcel of land seeks to have the present occupier removed. (Modern courts, including California, use the unlawful detainer action to accomplish substantially this remedy.) Olive’s ejectment action against Toby can only succeed if [sic] Toby is not entitled to occupy his office.

#### **Sublease**

Absent any provision in the lease to the contrary, a lease is freely alienable, meaning that it may be freely assigned and subletted. A sublease is an interest in land created when a tenant transfers part of his leasehold interest to another party. Here, Mike subletted Toby’s office for 5-year renewing terms. However, the last time that Mike renewed Toby’s sublease, there were less than five years remaining in Mike’s term. An estate can never last longer than the estate on which it depends, which is why an assignment or sublease can never be for a longer period of time than the sublessor has remaining in his term. Therefore, while earlier subleases to Toby may have been proper, the last sublease, made

only a week before Mike's lease terminated, was improper. Accordingly, Tony's sublease automatically extinguished upon the termination of Mike's lease. At that point, Olive was entitled to possession of Toby's office.

Therefore, Olive is likely to succeed in her action to eject Toby.

### **Fixtures and Merger**

Under the doctrine of fixtures and merger, when an occupier of land affixes any object to the land, or to any structures built upon the land, those items merge into the land. The general rule is that an occupier is not entitled to remove fixtures from the occupied property when the estate terminates. Therefore, under this general rule, Toby should not be permitted to remove the expensive custom lighting and wall treatments he added to his office space. However, some courts will permit a tenant to remove trade fixtures (equipment used in carrying out a specific business or occupation) if the circumstances suggest that the tenant intended to be able to keep them and if they can be removed without significantly harming the property. Here, since: (1) the lighting and wall treatments that Toby installed were custom-made for him; (2) the items were expensive; and (3) Toby had installed them very recently (which means that he probably has not received the benefit of buying them), a court will probably allow Toby to remove these items, if this can be done without significantly harming the building.

### **3. Olive v. BZA**

Zoning ordinances are laws restricting the use of land, and are a valid exercise of the police power inherent in the states and their political subdivisions.

It is important to note here that Olive is requesting a variance to a zoning ordinance requiring off-street parking, and not simply a permit to which she has an entitlement if certain requirements are met (as may be defined by statute with respect to some kinds of permits). Therefore, the BZA was free to deny her permit, and that denial will be deemed lawful unless it was: (1) arbitrary or capricious in violation of the Fourteenth Amendment to the United States Constitution; (2) an unlawful taking of her property for public use without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution; or (3) otherwise illegal (e.g., unlawfully discriminatory or otherwise violative of state or federal law).

**Arbitrary and capricious.** Olive will argue that the denial of the permit based solely on the fact that the nearby parking lot owner objected was arbitrary and capricious, especially in light of the fact that the BZA had recently granted a parking variance for a nearby building under very similar circumstances. While these are factors that the court will consider in determining whether the denial of the permit was improper, Olive will have the burden of proof here, and if the court can find rational basis for upholding the denial of the permit, it will do so. It is likely that the court will be able to find such a rational basis for the denial of the application - as just about any valid reason will do.

**Taking.** Olive may argue that the denial of the variance requests is causing her so much harm that it amounts to a taking of her property without just compensation, in violation of the Fifth Amendment to the United States Constitution as incorporated against the states and their political subdivisions through the Fourteenth Amendment. It is true that if the BZA's exercise of its police power in executing the zoning ordinances created such a severe economic harm to Olive, that is not justified by the denial of the permit, this could constitute a taking, which would be invalid unless the city paid Olive just compensation. However, even though it appears that Olive did incur economic harm because she was not able to obtain the permit, this "taking" argument will still be a stretch given the fact that Olive was never entitled to the permit in the first place, and thus never had a property interest in it.

**Otherwise unlawful.** The facts do not indicate that BZA's denial of the permit to Olive was in violation of any other laws or the federal Constitution.

Based on the above, Olive is not likely to prevail in her appeal of the BZA's denial of her variance request.

### **CONCLUSION**

Based on the foregoing, Olive should not prevail in her action against Mike for waste. She should be successful in her action to evict Toby, but the court will probably allow him to remove the lighting equipment and wall coverings if he can do so without harming the property. Finally, Olive is unlikely to succeed in her appeal of the BZA's denial of her variance request.

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

3)

#### **Olive v. Mike**

A landlord can sue a tenant for “waste” where the unreasonable acts of the tenants cause a diminution in value of the leased property. Normally the issue of waste involves physical property damage, but it can involve a loss of a right such as an easement. Certainly the loss of the occupancy permit greatly diminished the value of the property. It was also arguably “unreasonable” for Mike to fail to renew the lease, particularly in light of the fact that the Theatre was apparently willing to grant such a renewal.

A cause of action for “waste” would require Olive to prove that Mike caused a diminution of the value of the office building. Here, she could most probably prove the loss of the easement diminished the value of the office building. The easement was an “easement appurtenant” that benefited the office building (the dominant estate), as opposed to the easement in gross, which would only benefit an individual person. An easement appurtenant can increase the value of land and is a real interest.

As a defense, Mike can argue that there was no guarantee that the lease would be renewed and that, since Olive had no real interest in the easement past its original term, the loss of the easement was not “waste” because it did not diminish the value of the leased property. The value of the property was that of an office building with an easement that was set to expire. An anticipated right (such as the optional renewal of an easement) is not part of the “value” of the property, since there was no guarantee that the easement would be renewed at all.

Olive would most probably be better off suing Mike under a contract theory for a breach of his lease agreement.

#### **Olive v. Toby**

##### **Toby’s Sublease**

Modern law generally favors the assignability of leases. An assignment of an entire leasehold is called “an assignment,” whereas the partial assignment of a leasehold is considered a sublease. An assignment novates the lease wher[e]as a sublease does not absolve the original lessor of liability.

Even though assignability is favored, a tenant can never assign or sublease any more than his or her interest under the master lease. In this case it appears that, at a point when he only had a week left on his master lease, Mike attempted to grant Toby a 5 year sublease. This sublease would be invalid because Mike only had one-week’s worth of interest left under his master lease. Because Mike cannot sublease out an interest greater

than he possesses, the sublease to Toby is invalid (at least insofar as it extended past a week).

### **Ejectment**

The owner of real property has the right to eject any person on the property without a legal right to be there. Toby has no valid lease or sublease, because Mike couldn't grant him a lease that extended beyond the ma[s]ter lease's 30-year term. Accordingly, Olive can bring an action for Toby's ejectment.

### **Retention of Improvements**

Absent a contrary provision in a valid lease, the owner of real property is not entitled to retain possession of fixtures installed by a tenant or a third-party (in this case a third party with an invalid sublease). The landlord is only entitled to retain the improvements if they are "permanently affixed" to the real estate.

It would be a question of fact as to whether Toby's improvements are "permanently affixed." The custom lighting, if it is track lighting that can be removed without damaging the structure, is probably not a "permanently affixed" item that the landlord has a right to retain. A "wall treatment" might be something that is permanently affixed, depending on its size and how it was attached to the structure. This would be a matter for the finder of fact to determine.

Of course, if Olive is owed any unpaid sums due to Toby's use of her real property, she would probably be entitled to a lien on any of Toby's property within the office building, including the fixtures and wall treatment.

### **Olive v. BZA**

A local government has the authority to pass zoning ordinances under general police power to legislate for the well-being of citizens. This power, however, cannot be employed in a way that violates a citizen's right to due process or equal protection, or that amounts to an "unauthorized taking" of private property.

BZA is a government entity and, therefore, any actions by BZA constitute "government activity" implicating the U.S. Constitution.

It appears that Olive was given the opportunity to be heard and notice of any proceedings, therefore her procedural due process rights were most probably not violated. No fundamental rights are implicated by the BZA's decision to deny a variance for lack of parking, so it appears unlikely that any substantive due process rights were violated. Olive can argue that the failure to provide her with a variance when a similar variance had been recently granted to a similarly situated applicant violated her substantive due process rights because the action was not "rationally related to a legitimate state purpose." The BZA,

however, will respond that requiring parking for office space rationally related to the legitimate state purpose of a unified zoning scheme, and that granting variances to all applicants would diminish the uniformity and purpose of that scheme. Olive will argue that the zoning ordinance gives the board unfettered authority to grant or deny variances, which might be a problem for the BZA if they can't establish that they follow guidelines or standards in determining what variances to grant. Olive will most likely fail in her attempt to argue that the refusal to grant her a variance was so "irrational" as to constitute a due process claim.

In this case, Olive's best argument would be that the denial of the variance was a violation of equal protection. Unless a fundamental right or a suspect classification is implicated, a zoning regulation or determination by a zoning board will be evaluated under the rational basis test and will be upheld if the regulation is reasonably related to a legitimate state purpose. In this case Olive can argue that the government created a classification by treating her differently from the other applicant who was granted the variance, and that the disparate treatment was irrational. The burden would be on Olive to demonstrate that the BZA's action in treating her differently was not reasonably related to a legitimate state purpose. In this case, Olive will argue that the different treatment could not possibly be rational because the applicants were so similar. The BZA will most likely respond that it can only grant a limited number of variances, and therefore classifying among applicants inherently requires some degree of discretion and they often grant variances on a "first come first served" basis.

Because the "rational basis" test is so deferential to the government, Olive is unlikely to succeed in her due process or equal protection claims.

Citizens are also protected from any "takings" of property without just compensation. Olive can argue that the refusal to allow her to use her property for offices if she does not secure parking amounts to a "taking." She is also unlikely to prevail on this claim. A property owner can sue for "reverse condemnation" if a government agency enacts regulations that preclude virtually any reasonable use of the real estate, but here the BZA has not denied Olive any use. She can still rent out some of the offices, and she is free to continue to seek commercial parking elsewhere so she can regain the use of the offices that she currently can't use. Accordingly, Olive's claim of an "unjust taking" will most likely fail.

THURSDAY MORNING  
FEBRUARY 23, 2006

# 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 4

Pat, a resident of State A, received a letter from Busco, a tour bus company that had been in business for about two months. Busco was incorporated and had its principal place of business in State B. The letter invited Pat to go on a tour of State C at a special introductory price. After Pat sent in her money, Busco sent Pat a tour brochure and ticket.

Ed, also a resident of State A, saw an ad that Busco had placed once a week for the last several weeks in Ed's hometown newspaper for the same State C tour. The ad listed a State A telephone number to call for tickets. Ed called the telephone number and ordered and bought a ticket for the same tour as Pat and for the same price.

Pat and Ed boarded the tour bus in State B. Upon entering State C, the bus veered off the road and hit a tree. Ed was not hurt, but Pat suffered serious injuries. The tour was canceled. Busco refused to reimburse passengers the price of their tickets.

Ed sued Busco for breach of contract in state court in State A to recover the price of his ticket. Busco moved to dismiss the suit based on lack of personal jurisdiction. The court denied the motion. After trial, judgment was entered in favor of Ed.

Thereafter, Pat sued Busco in state court in State A for breach of contract to recover the price of her ticket and for tort damages for her personal injuries. After Busco filed its answer, Pat filed a motion for summary judgment on both claims on grounds of res judicata and collateral estoppel. The court denied Pat's motion.

State A has a long-arm statute that authorizes the exercise of personal jurisdiction over nonresident defendants on any basis not inconsistent with the Constitution of the United States.

1. Did the court rule correctly on Busco's motion to dismiss Ed's suit for lack of personal jurisdiction? Discuss.
2. Did the court rule correctly on Pat's motion for summary judgment on each of her claims on grounds of res judicata and collateral estoppel? Discuss.

## Answer A to Question 4



4)

**I. The Court CORRECTLY Ruled in Finding Personal Jurisdiction Over Busco in State A.**

**A. An Overview of Jurisdiction**

In order for a court, be it state or federal, to gain jurisdiction over an individual or entity (such as Busco (“B”)), it must either assert in personam jurisdiction (jurisdiction over the person or entity itself), in rem jurisdiction (jurisdiction over property within the jurisdiction in which the court has authority and is related to the cause of action), or quasi-in rem jurisdiction (jurisdiction over property within the jurisdiction which the court sits but is not related to the cause of action). It must comply with due process requirements of state and federal constitutions such that a defendant is not called into a court in a jurisdiction in which it would be deemed to be unfair or unforeseeable.

**B. In Personam Jurisdiction Requirements**

Here, the Court in State A, upon Ed (“E”) bringing his claim in State A, asserted jurisdiction over B using in personam jurisdiction. In personam/personal jurisdiction comes in two types: general and specific.

**1. General Personal Jurisdiction**

A court can exercise general personal jurisdiction over a defendant when it has systematic and continuous contacts with the forum. This requires more than just drawing on a bank account in the forum, or communicating with entities or individuals in the forum. The defendant’s involvement must be intentional. The reason why the standard for contact here is so strict is that the [sic] under general jurisdiction, a court can take jurisdiction over a defendant even if the cause of action is completely unrelated to its contacts with the forum. Thus, the law has been crafted such that a defendant is deemed to have subjected himself to the laws of the forum, and benefited from their protection, to such an extent, as to be susceptible to suit there[,] no matter where the cause of action arises.

Without knowing what grounds upon which the Court in E’s suits against B used to sustain personal jurisdiction, I must assume that general jurisdiction was not the grounds upon which the court relied. B had only been in business for a few months, and having been incorporated in State B, as well as having its principal place of business (“PPB”) in state B, it’s unlikely to have “systematically and continuously” availed itself to State A.

The US Sup Ct has also shown that general jurisdiction can also be attained over a defendant in several more “traditional” ways. For instance, if the defendant was served with process in the jurisdiction (absent fraud or coercion), if the defendant consented to jurisdiction (either expressly or by failing to timely raise an objection to jurisdiction), or if a

defendant is deemed to have consented constructively by nominating an agent to accept service. In this case, B meets none of these standards, assuming it challenged jurisdiction in a timely fashion.

## 2. Specific Personal Jurisdiction

The more likely way the Court in E's claim asserted jurisdiction over B in this case is through the use of specific personal jurisdiction. Although not available historically at common law (only general jurisdiction was available), this developed in the face of a more mobile and economically integrated society. Under this doctrine, specific personal jurisdiction requires two elements. First, jurisdiction must be permitted under state law, which usually means it must fall under a state long-arm statute, permitting courts within the state to "reach out" of the forum to grab defendants for suit within the forum's courts. As we're told, State A has a long-arm statute (similar to that of California's) which permits jurisdiction to the same extent that the due process requirements of the US Constitution will allow. Thus, this takes [us] two [sic] our second requirement: the jurisdiction is permitted if the due process requirements are satisfied pursuant to the US Constitution.

Under due process, a defendant's contacts need not be "systematic and continuous" to sustain jurisdiction. However—and this is a major caveat—the cause of action must be related to the defendant's contacts with the forum. What contacts are required? Specific personal jurisdiction requires the satisfaction of two elements: 1) the defendant must have minimum contacts with the forum, and 2) exercising jurisdiction must not offend traditional notions of fair play and substantial justice.

### A. Minimum Contacts

First, for the Court in state A to get jurisdiction over B, it must show that B had minimum contacts with state A. This requires an investigation into whether B purposefully availed himself of state A and whether it would be foreseeable for B to be haled [sic] into court there.

Under these facts, B, although incorporated in state B, had reached out to state A by placing an advertisement in the newspaper in that state, by providing a phone number for folks in that state to call to order tickets, and purposefully solicited patronage from state A. These facts are not all that different from the facts in the Asahi case in which the US Sup Ct found jurisdiction when a company provided phone numbers for customers and advertised in the forum. B was taking advantage of the laws of state A by directing its business to that state, and thus it was quite foreseeable that it would be haled [sic] into court there. Thus, minimum contacts are likely satisfied here.

### B. Fair Play and Substantial Justice

Second, it must also be fair to exercise jurisdiction over B, even if B had minimum contacts with state A. This requires an investigation into several factors, including the interests of state A in protecting its citizens from “foreign” tortfeasors, the interests of the plaintiff in being able to seek the protection of the laws of his domicile, the fairness accorded to B in forcing him to a different state to defend himself, and administrative details associated with litigating in state A, such as the location of witnesses, etc. Here it’s not entirely clear how far State B or State C is from State A, but it’s likely quite close in distance. Moreover, State A has a significant interest in defending its citizens from foreign tortfeasors, or in the case of E, contract breachers. Granted, because the price of the contract is likely not great, it’s possible the interest here is not all that significant. However, on the other hand, there is likely to be little unfairness in pulling B into State A, so I would conclude that it comports with traditional notions of fair play and substantial justice to find jurisdiction here. Again, these facts are quite similar to [a case] where the Sup Ct did find jurisdiction. Granted, there were forum non conveniens issues in that case, but an international defendant was involved there – which is not the case with B.

Finally, a note should be made again about the action arising out of the contacts with the forum. Because this is specific personal jurisdiction (ie, not general), it requires that the minimum contacts with the forum be related to the cause of action. Here, B’s contacts with the forum—its attempt to get business from E—are directly related to the breach of contract action.

## II. The Court did NOT Rule 100% Correctly on Pat’s SJ Motion[.]

When Pat (“P”) brought claims against B, [s]he brought two causes of action: breach of contract and tort damages. Although the former had already been litigated, the latter had not yet been litigated. This makes a significant difference when applying rules of Res Judicata and Collateral Estoppel.

### A. Res Judicata

In order to invoke the doctrine of Res Judicata (“RJ”), three elements must be satisfied. First, the claim at issue must be related to the same transaction or occurrence of a previously litigated claim. Second, it must involve the same parties as the previously litigated claim. Finally, the previously litigated claim must have resulted in a final judgment on the merits.

Here, although the contract claim that P brings against B is the same as that brought against B by E, and although there was a final judgment on the merits, P was not [a] party to the earlier litigation. This means that RJ is not applicable to P’s claims. In other words, collateral estoppel (below) is all that [s]he has available to try to sustain [her] summary judgment motion.

### B. Collateral Estoppel

The doctrine of Collateral Estoppel (“CE”) requires 5 elements. First, it must involve a previously litigated issue of law or fact. Second, the previously litigated issue must have been actually litigated, and third, it must have been litigated to a final judgment on the merits. The issue must have been a central (non-collateral) issue in the previous litigation, and at least one of the parties from the previous litigation must be present.

### 1. P’s Tort Claim

First, here the issues that P would like to assert CE over pertain to the liability of B to its patrons resulting from the bus accident. Although the issue of liability resulting from B’s breach of contract for not refunding the ticket price has been litigated to a final judgment on the merits by one of the parties, the issue pertaining to tort liability has not! Thus, so far as P’s summary judgment motion regarding B’s liability for P’s injuries, the court did rule correctly because the issue of B’s liability had not been previously litigated (it wasn’t even an issue in E’s litigation against B). Thus, showing that B was negligent, or that the driver was drunk, or whatever the tort claim may rely upon must still be shown by P. Given that P brought his [sic] SJ motion immediately following B’s answer [s]he [is] asking the court to find that there is no material issue of disputed fact with regard to B’s tort liability. Obviously, without affording B an opportunity to provide evidence to the contrary, and without P fulfilling his [sic] prima facie obligations as to his negligence claim, the Court ruled correctly here.

### 2. P’s Breach Claim

On the other hand, P’s second claim, his [sic] action for breach of contract was actually litigated in the previous action by E against B, and it would satisfy all of the above requirements for CE. However, there are two additional requirements that must be noted.

First, the party against whom CE is being asserted must have been the party to the previous action. This is satisfied here—B was a party to E’s litigation.

Second, there’s a question as to whether there must be mutuality. Traditionally, both parties had to have been party to the earlier litigation for CE to apply. However, modernly this is changing. The US Sup Ct has recognized that non-mutual defensive CE can be used quite easily so long as the other requirements of CE are satisfied. What that means is that, if B had won in his earlier litigation against E because the trier of fact had found that there was no breach (for example), then B would be entitled to assert CE against P’s claim here. The more questionable assertion of non-mutual CE is when it’s used offensively, as P is attempting to do here. Although this is less likely to be permitted, courts have begun to permit it more often so long as the defendant had an opportunity to litigate the issue competently in the previous case, it was foreseeable to the defendant that CE may arise in the future from the issue, that it’s fair to the defendant, and that the plaintiff who’s trying to assert CE could not have been joined in the previous litigation.

In applying this to the facts before us, it's likely that the court in State A decided that because P could have brought his[sic] contract action at the same time as E, CE should not apply. If that's the case, then the court was correct. On the other hand, it seems as though, for judicial efficiency[s] sake, the court could have at least granted CE on the breach of contract claim in this case, leaving the tort claim to go to the trier of fact.

## Answer B to Question 4

4)

### **1. Did the court rule correctly on Busco's motion to dismiss Ed's suit for lack of personal jurisdiction?**

#### Personal jurisdiction

Personal jurisdiction ("PJ") refers to the power of the court to render a judgment that will be binding on the defendant. The exercise of PJ is proper if it is authorized by statute and does not violate Due Process.

#### Traditional bases

States usually have a PJ statute that authorizes personal jurisdiction where the defendant (1) is domiciled in the forum state[,] (2) is personally served with process while physical present in the forum state[,] or (3) expressly or impliedly consents to jurisdiction in the forum state. A corporation is domiciled in any state in which it is incorporated and in which it has its principal place of business.

Here: (1) defendant Busco was incorporated in and had its principal place of business in State B. It was therefore not domiciled in State A. (2) No evidence suggests that any representative of Busco was personally served while physically present in State A. (3) Ed might argue that Busco consented to jurisdiction when it appeared in State A court, but this argument will fail if Busco's appearance was specially limited to the sole purpose of contesting the court's PJ over it.

Thus, no traditional bases for PJ are present.

#### Long-arm statute

State A's long-arm statute provided for PJ over any non-resident defendant if such PJ is not inconsistent with the Constitution of the United States. The issue therefore becomes whether State A's exercise of PJ was constitutional.

#### Constitutional limitations on personal jurisdiction

The Due Process clause of the Fourteenth Amendment limits a state's power to exercise PJ over a non-resident defendant to those cases where (1) the defendant has minimum contacts with the state[,] and (2) exercising PJ would not offend traditional notions of fair play and substantial justice. International Shoe v. Washington.

#### Minimum contacts

Minimum contacts analysis focuses on (1) whether the defendant's contacts with the forum were systematic and continuous (in which case the state has general personal jurisdiction over the defendant and the defendant is subject to PJ in the state for any act[]); (2) whether the defendant purposefully availed itself of the benefits and protections of the laws of the state; and (3) whether the defendant could foresee being haled into court in the state.

Here, Busco's contacts with State A were the following. It sent a letter to Pat, a State A resident, inviting Pat to go on a tour of State C at a special introductory price. After Pat sent in her money, Busco sent to Pat in State A a tour brochure and ticket. Busco also placed an ad once a week for several weeks in a hometown newspaper in State A advertizing the same tour. The ad listed a State A telephone number to call for tickets. Ed called the telephone number and ordered and bought a ticket for the tour. Although it is not stated, Busco probably also sent Ed a ticket to his residence in State A.

### (1) Systematic & continuous

General jurisdiction is found where the contacts are systematic and continuous. Here, Busco is a State B corporation which has only been in business for two months. It has placed an ad several times in a State A newspaper. It has sent tickets to two State A residents. It sent a letter to a State A resident. These sporadic and short-term contacts are not the sort of continuous activity sufficient to find general jurisdiction.

### (2) Purposeful availment

The next issue is whether Busco purposely availed itself of the benefits and protections of State A law.

Ed would point out that Busco deliberately placed an ad in a State A newspaper. This was a contract with the newspaper and was likely governed by the contract law of State A, on which Busco would rely for protection if the newspaper were to breach the agreement. Moreover, Busco maintained a State A telephone number for potential customers to call. This involved contracting with a telephone service provider in State A and again Busco would have availed itself of the protections of State A law in negotiating this agreement. Finally, after receiving an order from two State A law residents, Busco sent tickets to both Ed and Pat in State A. These were contracts and again would likely have been governed by State A law.

On the other hand, Busco did not conduct its business in State A - the tour began in State B and went to State C. The state A telephone number might simply have connected to a call center in State B. Busco also has only been in business for two months so there has not been much opportunity for purposeful availment.

On balance, Busco did purposely avail itself of the benefits and protections of State A law.

### (3) Foreseeability

The third element of minimum contacts is whether the defendant should reasonably have foreseen being haled into court in State A.

Ed will argue that, based on the analysis under 'purposeful availment', Busco should have foreseen the possibility of a contract dispute based either on the ad, the telephone number, or the tour contracts with Pat and Ed. Busco knew that these contracts were negotiated with State A entities and that there was a strong likelihood that any dispute might be litigated in State A. Moreover, Busco was offering a tour service which involved the possibility of causing personal injury to tour participants if there was an accident. Busco knew that at least two persons on the tour were State A residents, and thus should have foreseen that any tort suit they brought might well be brought in their state of residence, State A.

Busco will counter that it was domiciled in State B and that any contract actions would probably have been brought there. Further, the tour never visited State A, so tort suits in State A were unforeseeable.

On balance, however, it was reasonably foreseeable that Busco might have been sued in State A.

### Fair play and substantial justice

Even if minimum contacts are found, personal jurisdiction is only proper if it does not offend traditional notions of fair play and substantial justice. The court will consider three factors here: (1) the relation of the contact and the claim[;] (2) the convenience of the parties[;] and (3) the forum state's interest in providing a forum for resolving the dispute.

#### (1) Relation of contact and claim

Personal jurisdiction is more likely proper if the claim arose out of the contact with the forum state. Here, Ed is claiming for breach of contract for the tour. This contract was entered into as a direct result of Busco's placing an ad in Ed's State A hometown newspaper. Thus, this element is met.

#### (2) Convenience of parties

The court will not impose personal jurisdiction where requiring the defendant to defend in the forum would impose an unreasonable burden on the defendant.

Busco would argue that the witnesses to the formation of Ed's contract are its employees in its State B principal place of business, that the records relating to the contract are there, and that it would be unreasonable to require Busco to produce these in State A.



Ed would counter that Busco is a corporation which can surely spare a few employees for the limited purpose of testifying. Further, much evidence is in State A - the newspaper in which the ad ran, the telephone number through which Ed placed his order, and the tickets.

Since the inconvenience to Busco is not extreme, the convenience of parties favors State A.

### (3) State A's interest in providing a forum

The forum state must have an interest in providing a forum for the dispute.

E will assert that he is a resident of State A and negotiated a contract from his residence in State A using a State A telephone number after seeing an ad in a State A newspaper. This contract action will probably be governed by State A law. State A has a strong interest in providing a forum for its residents to obtain damages.

Busco will argue that the action likely raises no new issues of contract law, and since no new law is to be made, State A has little interest in having the issue litigated there.

On balance, State A's interest favors PJ in State A.

### Conclusion

In view of the factors in favor of and against finding PJ, the court probably was correct to deny Busco's motion to dismiss for lack of personal jurisdiction.

## **2. Did the court rule correctly on Pat's motion for summary judgment on each of her claims on grounds of res judicata and collateral estoppel?**

### Summary judgment

Summary judgment is a ruling that the moving party is entitled to judgment as a matter of law. It is proper where there is no triable issue of material fact, and, after viewing the evidence most favorably to the non-moving party, the court concludes that no reasonable trier of fact could find in favor of the non-moving party.

Here, Pat will argue that Busco's previous action against Ed should result in judgment as a matter of law for Pat on both her contract and tort claims on theories of res judicata and collateral estoppel. Each claim will be examined in turn.

### **Breach of contract claim**

#### Res judicata

Res judicata, or claim preclusion, bars relitigation of an action (1) by the same plaintiff against the same defendant (or their privies) (2) when the previous action ended in a final judgment on the merits and (3) the previous action involved the same claim (it arose out of the same transaction or occurrence, or series of transactions or occurrences).

Here, Busco will argue that Pat's contract action related to a different contract from the one negotiated by Ed because the parties were different. Pat will argue that it was the same contract because the terms and the price were the same. Ed's action ended in a final judgment on the merits because after trial, judgment was entered in favor of Ed. But the earlier lawsuit was between Ed and Busco, and this claim is between Pat and Busco.

Since the plaintiff is not the same in each case, res judicata will not apply.

### Collateral estoppel

Collateral estoppel, or issue preclusion, bars relitigation (1) of the same issue (2) against a party to the previous action (3) when the issue was actually litigated[,] (4) the resolution of the issue was essential to the judgment[,] (5) and the previous action ended in a judgment on the merits.

Here: (1) the issue of whether Busco's refusing to reimburse the tour passengers the price of their tickets after the tour was cancelled was a breach of contract is the same issue in Pat's case as in Ed's, because both likely had the same contract with Busco for the tour, and both were on the same bus. (2) Busco was a party to the previous action by Ed. (3) The issue of Busco's breach was actually litigated in Ed's action and (4) was essential to the judgment, because Ed could not have won his contract suit without a finding that Busco's refusal to reimburse was a breach of contract. (5) The judgment was on the merits because after trial, judgment was entered in favor of Ed.

### Non-mutual offensive collateral estoppel

Since Pat was not a party to the previous action, traditional mutuality rules should bar her use of collateral estoppel. But modernly, courts will allow non-parties to use collateral estoppel against parties to a prior action because mutuality is not required by Due Process. Use of non-mutual collateral estoppel against a defendant ('offensive') is permissible under Parklane Hosiery where the defendant had a full and fair opportunity to litigate the issue in the prior action and the forum of the previous action did not unfairly limit the defendant's litigation strategies or use of evidence.

Here, Busco was a party to the prior action, and had the same opportunity and motive to argue that its actions were not a breach of contract against Ed as it had to argue this against Pat. Both actions were brought in State A court so the forum rules of litigation and evidence were the same.

### Conclusion

Since offensive collateral estoppel is allowed under these circumstances, the court incorrectly denied Pat's motion for summary judgment on her contract claim.

### **Tort claim**

### Res judicata

For the same reasons as the breach of contract claim, res judicata will not apply to the tort claim.

### Collateral estoppel

The issue of Busco's tort liability for the accident when the bus hit a tree was not actually litigated in Ed's action, which was solely for breach of contract because Ed was not hurt. Accordingly, collateral estoppel will not apply to Pat's tort action.

### Conclusion

The court correctly denied Pat's motion for summary judgment on the tort claim.

## **Question 5**

Marla is a manufacturer of widgets. Larry is a lawyer who regularly represents Marla in legal matters relating to her manufacturing business. Larry is also the sole owner and

operator of a business called Supply Source (“SS”), in which he acts as an independent broker of surplus goods. SS is operated independently from Larry’s law practice and from a separate office.

At a time when the market for widgets was suffering from over-supply, Marla called Larry at his SS office. During their telephone conversation, Marla told Larry that, if he could find a buyer for her excess inventory of 100,000 widgets, Larry could keep anything he obtained over \$1.00 per widget. Although Marla thought it unlikely that Larry would be able to sell them for more than \$1.25 per widget, she said, “. . . and, if you get more than \$1.25 each, we’ll talk about how to split the excess.” Larry replied, “Okay,” and undertook to market the widgets.

During a brief period when market demand for widgets increased, Larry found a buyer, Ben. In a written agreement with Larry, Ben agreed to purchase all 100,000 widgets for \$2.50 each. Ben paid Larry \$250,000. Larry then sent Marla a check for \$100,000 with a cover letter stating, “I have sold all of the 100,000 widgets to Ben. Here is your \$100,000 as we agreed.”

When Marla learned that Ben had paid \$2.50 per widget, she called Larry and said, “You lied to me about what you got for the widgets. I don’t think the deal we made over the telephone is enforceable. I want you to send me the other \$150,000 you received from Ben, and then we’ll talk about a reasonable commission for you. But right now, we don’t have a deal.” Larry refused to remit any part of the \$150,000 to Marla.

1. To what extent, if any, is the agreement between Larry and Marla enforceable? Discuss.
2. In his conduct toward Marla, what ethical violations, if any, has Larry committed? Discuss.

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

5)

The Agreement Between Larry and Marla is enforceable because it was a unilateral contract fully performed by Larry and it was not subject to the Statute of Frauds[.]

#### Offer, Acceptance and Consideration:

The agreement between Larry and Marla is a unilateral contract. In order for there to be a unilateral contract there must be mutual assent (and offer and acceptance) and bargained for exchange (consideration). An offer is a communication between two persons or entities, and it is made where reasonable people would believe that acceptance of the offer would lead the participants to be bound by its terms. The terms of the offer must also be sufficiently definite. In our case, an offer was made by Marla to Larry to find a buyer for her widgets. As a finder, Larry would be entitled to the portion of the proceeds between \$1.00 per widget and \$1.25, and then a portion of the proceeds above \$1.25. In this case the terms of the contract were sufficiently definite even though the portion of proceeds above [\$]1.25 had not been definitively determined. Given their preexisting, ongoing relationship, and that both are merchants it is fair to assume that they could finalize the contract terms at a later date, after the sale of the widgets. A reasonable person would believe that Marla was inviting acceptance and wanted to be bound by the terms of her offer.

In this case, Larry accepted Marla's contract by performing. Marla's offer was for a unilateral contract. A unilateral contract is a contract that can be accepted only by full performance. It is clear from its terms that Larry could only accept Marla's offer by actual performance because her offer was conditional. He would only get a percentage of the proceeds "IF" he found a buyer. In this case, Larry accepted the contract when Ben agreed to purchase all 100,000 widgets for \$2.50 each and the widgets were actually sold.

Consideration is present in a contract where the promisee incurs a detriment. That is, he does something that he does not have to do, or refrains from doing something that he does not have to do, or refrains from doing something that he is entitled to do. In this case, there is consideration because Larry, the promisee[.] incurs a detriment when he enters the market to look for a buyer. He is not required to look for a buyer in this case, but does so anyway. He incurs a detriment because it takes time away f[ro]m his other business pursuits (including his law practice).

Because there has been a definite offer made by Marla, Larry fully accepted through his performance, and consideration is present, a contract has been formed so long as no defenses can be raised.

#### Defenses

The agreement between Larry and Marla is enforceable because no defenses to formation can be raised. The Statute [of] Frauds is a requirement that certain contracts be in writing.

The writing must include the material terms of the contract and be signed. Contracts that are subject to the statute of frauds are contracts in consideration of marriage, surety contracts, contracts that cannot be formed in one year, and land sale contracts. None of these are relevant here. In addition, contracts for goods in amount greater than \$500 are also subject to the statute of frauds. If a contract for goods in an amount greater than \$500 is not in a signed writing, it generally is not enforceable.

In this case, the contract between Larry and Marla was not subject to the “goods prong” of the statute of frauds because Larry did not purchase the goods directly from Marla. Larry’s role was that of a finder or marketer whose responsibility it was to find a buyer for Marla’s widgets. He was incented [sic] to find a high price because he was entitled to keep anything over \$1.00 per widget, and then a portion of the proceeds above \$1.25 per widget. The arrangement would also benefit Marla because a high price for the widgets would benefit her as well, and she could rely on Larry’s expertise as a broker. Marla would also not have to worry about the hassle of setting [sic] the goods and could concentrate on the core aspect of her business, manufacturing. One could argue that Larry purchased the goods from Mary because he received the purchase price from Ben directly and his business was as a broker of surplus goods. In this case he did not act as a broker, because he did not buy the goods from Marla directly. There is no indication that the goods were ever in his possession. Further, in a typical sales contract, a manufactu[r]er is not entitled to a percentage of the middleman’s purchase price. Thus, the contract is more akin to that of finder who never “owned” the goods.

## Ethical Violations

### Operating a Business:

Larry did not commit an ethical violation when he formed and operated a business called Supply Source. A lawyer may own and operate a business that is separate and apart from the practice of law. For example, a lawyer may own a restaurant or a gas station. Lawyers may also operate a law firm that offers services related and incidental to the practice of law, but that are no[t] actually the practice of law. For example, a law firm may offer services relating to money management and accounting. In this case, we know that Larry was the sole owner and operator of a business called Supply Source, and that it operated independently from Larry’s law practice and from a separate office. Because the business was run separately and apart from his legal practice, and it did not involve anything remotely related to the practice of law, it is permissible for Larry to own and operate the business. However, a lawyer who runs a business must be careful not to engage in business that would pose conflicts of interests with its clients. We will see below that Larry did not operate his business in a way to minimize conflicts.

### Entering into a Business Relationship:

Larry committed an ethical violation when he did not follow proper procedures when he entered into a business arrangement. When a lawyer enters into a business arrangement

with a non-lawyer (and especially a client!), the lawyer must abide by a set of procedures. First, the lawyer should advise the other party to consult another lawyer and give him or her time to do so. Second, the lawyer must disclose and explain all the relevant terms of the contract in a way that the other party can understand. Last, the terms of the contract must be fair and not one-sided to the lawyer's benefit. In this case the terms of the contract seem to be fair. We can presume that they are fair because Marla set the terms of the contract and the contract was not negotiated by Larry. Second[,] there was no need for Larry to explain the relevant terms of the contract because they were self-explanatory and a lay person could understand them. However, Larry did not give Marla an opportunity to consult with a lawyer before entering into the contract. While Marla could have waived the right to consult a lawyer, Larry must still advise [sic] her that it may be beneficial. In this case, a lawyer may have been helpful. He may have advised Marla not to enter into a contract with Larry where all the terms have not been finalized. The fact that the terms have not been finalized is what caused the problem in the first place.

Duty to be an honest, upright member of the community

Larry should have been honest in his dealings with Marla. A lawyer had a duty to act in upright, honest manner in all aspects of his or her life. In this case, Larry should have disclosed to Marla the amount of money he received from Ben and made a good faith attempt to resolve the open issue in their contract. By ignoring that aspect of the contract and no[t] disclosing the amount he received, he seems to be acting in a deceitful manner. Not only [should] a lawyer abide by ethical considerations in the course of his practice, he must also abide by them in other aspects of his or [her] life.

## Answer B to Question 5

5)

### (1) Enforceability of the contract between Larry and Marla

**Applicable Law:** If this case involves the sale of goods (tangible personal property), widgets, Article 2 of the Uniform Commercial Code applies to the transaction. However, while the case does involve the sale of widgets, the contract is really for Larry's service in selling the widgets, therefore common law would likely apply. Indeed, the payment to Larry was for the sale of the widgets. He never purchased the widgets himself, but merely acted as a broker to Ben.

The issue is whether the agreement between Larry and Marla is legally enforceable, and therefore a contract exists. In order to form a contract there must have been an offer by Marla, acceptance by Larry, and some form of consideration for the agreement.

**Offer:** The first issue is whether Marla ever made an offer to Larry. An offer is made when a party manifests an intent to enter into contract and communicates such intent to an offeree. Here, Marla did call Larry at his Supply Source ("SS") office and stated that she wanted Larry to sell her excess inventory. Under common law, an offer must state a price term and the material terms of the contract. The material terms, the sale of widgets up to 100,000, were certainly state[d].

The issue is thus whether there was a price term. Marla did agree to give Larry all profits over \$1.00, up to \$1.25. However, there was no certain price term since Marla stated that any excess over \$1.25 would have to be negotiated as to the amount Larry would receive. Therefore, the lack of a certain price term negates the enforceability of the contract. The parties did not have a meeting of the minds as to what Larry would be paid for the profits he received on the widgets over \$1.25. Thus, the facts probably indicate that Marla intended to contract and not to continue to negotiate.

Under the UCC, however, the court only looks at the intention of the parties to determine if there has been an offer. The UCC does not require a price term and will imply a reasonable price term if one is not stated. However, if the parties are negotiating the price term there is no intention to contract under the UCC. There was likely an intend [sic] by Marla to enter into contract since she believed it unlikely that Larry could sell the widgets for more than \$1.25 per widget. Although the price term is not certain, the court could infer a "reasonable" price term for any sale over \$1.25.

If there is not offer[sic], the agreement would not be enforceable under contract law. However, if there was an offer, all the other elements for a valid contract (as discussed below) were satisfied and therefore there was an enforceable agreement.

**Acceptance:** Marla's offer to Larry was probably a unilateral contract, that is, one



that states a specific (and only) form of acceptance. Here, Larry could only accept Marla's offer by selling the widgets for at least \$1.00 per widget and giving Marla \$1.00 for each widget sold. His acceptance was only upon completion of his performance.

If the contract was a bilateral contract, Larry would have promised Marla he would sell the widgets. Failure to sell the widgets would have meant Larry could have incurred liability for breach of contract for failure to perform. There is no such liability under a unilateral contract, since there is only acceptance upon completed performance.

**Consideration:** Consideration is a bargained for legal detriment. The only issue as to consideration in this case is whether Larry's promise was illusory. However, this was not a bilateral contract, but a unilateral contract in which Larry could only accept by performance. His performance therefore would be consideration.

**Statute of Frauds:** The statute of frauds requires that some contracts be in the form of a signed writing (statute of frauds may be satisfied in other ways). The statute of frauds does not apply to this case however because it is for a service, Larry's sale of widgets, which can be completed within 1 year.

If this was a contract for a sale of goods of at least \$500, the statute of frauds would apply. There was no writing. However, the statute of frauds can also be satisfied by full performance, which Larry did provide, by selling the widgets and turning payment over to Marla.

Again, as discussed above, this is a services contract, not a sale of goods contract and therefore not under the statute of frauds.

### **Quasi-Contract**

Larry could still recover damages from Marla even if there was no contract, under quasi-contract principles. Quasi-contract is a principle used in contract law to prevent the unjust enrichment of a party. Here, Marla would be unjustly enriched if there was no formal contract and Larry expended his time and energy to find a purchaser for the widgets and was not compensated for his efforts. Therefore, the courts will allow Larry to recover for the fair market value of the services he rendered to Marla. The likely determination of the amount Marla benefited would likely be \$25,000, but could include a reasonable amount for the remaining \$125,000 over the agreement terms.

### **Conclusion:**

There probably is an enforceable contract under which Larry can keep \$25,000 and a reasonable amount of the additional \$125,000 he received from the widget sales. Even if Larry cannot recover under contract, he can still recover under quasi-contract principles.

### **(2) Possible ethical violations committed by Larry**

Attorneys owe several duties to many different parties, including their clients, adversaries, the court, and the public at large. Here, Larry regularly represents Marla in legal matters relating to her manufacturing business. Although Larry was not representing Marla in a deal for the sale of widgets, he still may have violated some of his duties to the profession.

**Duty of Loyalty - business transactions with clients:**

A lawyer owes his or her clients a duty of loyalty. The lawyer must act in a way they believe is for the best interest of the clients at all times (unless other ethical rules prohibit such, like placing a client on the stand who intends to perjur[e] herself.) Included in the duty of loyalty is fair dealing in business transactions with a client.

Both California and the ABA have rules regulating business transactions between lawyers and their clients. These rules require that for any transaction between a lawyer and a client, the lawyer should make sure the deal is fair to the client, express the deal in an understandable writing, allow the client to meet with independent counsel, and the client should consent to the deal in writing. Here, there is no evidence the deal entered into between Larry and Marla was not fair. The great increase in widget price occurred after the deal between the two was struck[.] However, there was no writing or opportunity for Marla (or suggestion by Larry) to consult independent counsel.

This rule may not apply here because Larry was not representing Marla at the time of the business transaction, at least as far as the limited facts [are] known. Furthermore, Larry did properly separate his law practice and his SS business. It is in a separate office and [there is] no indication the two endeavors are mixed in any manner by Larry.

However, since Larry has a regular and ongoing (at least prior to this incident) relationship with Marla, he should have satisfied the elements stated above and in failing to do so violated his duty of loyalty to his client Marla.

**Duty to act honestly, without deceit or misrepresentation:** A lawyer owes a duty to the public at large in all of his or her dealings to act honestly, without deceit or fraud and not to misrepresent. Violations of this rule harm the integrity of the profession. Here, it is unknown whether Larry truly believed he simply owed Martha the \$100,000 dollars [sic] for the transaction for the widgets or if he attempted to deceive her as to the price he received in an attempt to keep the additional profits to himself. If Larry violated the agreement knowingly, he would have also violated his duty to the profession by acting in a dishonest manner. This is a clear violation and compounded by the fact that Larry represents Marla on a regular basis in legal matters.

**Conclusion:**

Larry likely violated his duty of loyalty and his duty to act honestly to the public at large in his dealing with Marla. Although he was not acting as her attorney at the time of the deal to sell the widgets and Marla was likely aware of such since she contacted him at his SS office, Larry still violated his professional duties. However, Larry probably did not violate his duties of confidentiality or loyalty if he revealed any information received during his representation of Marla in finding Ben, the buyer of the widgets.

## Question 6

Deft saw Oscar, a uniformed police officer, attempting to arrest Friend, who was resisting arrest. Believing that Oscar was arresting Friend unlawfully, Deft struck Oscar in an effort to aid Friend. Both Friend and Deft fled.

The next day, as a result of Oscar's precise description of Deft, Paula, another police officer, found Deft on the street, arrested him for assault and battery and searched him, finding cocaine in his pocket. After Paula gave proper Miranda warnings, Deft said he wanted to talk to a lawyer before answering any questions. Paula did not interrogate him. However, before an attorney could be appointed to represent Deft, Paula placed him in a lineup. Oscar identified Deft as his assailant. Deft was then charged with assault and battery of a police officer and possession of cocaine. Thereafter, he was arraigned.

The next day Paula gave Deft, who was without counsel, proper Miranda warnings, obtained a waiver, and interrogated him. He admitted striking Oscar.

How should the judge rule on the following motions made by Deft at trial:

1. To suppress the cocaine? Discuss.
2. To suppress Oscar's identification during the lineup? Discuss.
3. To suppress Deft's admission that he struck Oscar? Discuss.
4. For an instruction to the jury that Deft's assault was justified on the basis of defense of another? Discuss.

## Answer A to Question 6

6)

### 1. **Deft's Motion to Suppress the Cocaine**

The Fourth Amendment of the Constitution protects individuals from unreasonable searches and seizures by government officials. If a defendant's Fourth, Fifth, or Sixth Amendment rights are violated in connection with a criminal prosecution, the exclusionary rule, a judge-made doctrine, requires the exclusion of all evidence obtained in violation of such rights and all derivative evidence, or fruit of the poisonous tree.

#### Government Conduct

To make a Fourth Amendment claim, there must first be government conduct. Here, Larry was searched by Paula, a police officer, which qualifies as government conduct.

#### Standing – Reasonable Expectation of Privacy

A defendant also must have standing to challenge government action, which occurs if the defendant has a reasonable expectation of privacy in the item or place searched. Because Larry's body was searched, this clearly qualifies Larry to contest the act since he had a reasonable expectation of privacy in his own body.

#### Requirement for Probable Cause and a Valid Warrant

Generally, a search will be considered unreasonable unless the officer has probable cause to conduct the search, and the search is supported by a valid warrant. However, a number of exceptions to the requirement for a search warrant exist.

#### Search Incident to a Lawful Arrest

Paula did not have a valid search warrant. However, one exception to the warrant requirement is for searches incident to a lawful arrest. A lawful arrest can be made in public, without a warrant, if the officer has probable cause to believe that the defendant has committed a felony.

Paula was making a lawful arrest because she knew that Oscar had been assaulted and battered and that Deft fit the description of the perpetrator. Thus, she had probable cause to believe that Deft was the perpetrator of these felonies. Because Paula made a lawful arrest of Deft, her search of his body was also lawful. Thus, the court should deny Deft's motion to suppress the cocaine.

#### Hot pursuit

Paul[a] might also be able to argue that her search of Deft was lawful because Deft was a suspect who might get away. Her better claim, though, is that the search was incident to a lawful arrest.

## **2. Deft's Motion to Suppress Oscar's Identification During the Lineup**

A defendant has a Fifth Amendment privilege against self-incrimination, which includes the right to counsel if the [the] defendant does not waive his right to such counsel. This right attaches whenever there is custodial police interrogation. A defendant also has a Sixth Amendment right to counsel, which attaches once the defendant has been charged with a crime. Here, Deft had not been charged with assault and battery by the time the lineup was conducted; thus, his Sixth Amendment right to counsel had not attached.

The facts show that Deft did not waive his Fifth Amendment right to counsel because he stated that he "wanted to talk to a lawyer before answering any questions." The question is whether the lineup even violated Deft's Fifth Amendment right.

A defendant is in custody when a reasonable person would believe he was not free to leave. Deft had just been placed under arrest; as such, he was in police custody at the time of the lineup.

Interrogation occurs whenever the police make a statement that is likely to elicit an incriminating response. During the lineup, there is no evidence that the police made any statements likely to elicit an incriminating response from Deft. Thus, Deft cannot be said to have been under interrogation during the lineup. For this reason, Deft's Fifth Amendment right to counsel was not violated by the lineup.

Even if Deft's Fifth Amendment right had been violated, the identification would likely still be admissible under an exception to the exclusionary rule, which allows evidence if it would have been discovered anyway. Oscar clearly saw Deft, his assailant, when Deft was committing the crime. Thus, the government can show that it would have had an independent source for the identification. Thus, the court should deny Deft's motion to suppress Oscar's identification.

## **3. Deft's Motion to Suppress Deft's Admission that He Struck Oscar**

The issue is whether Deft's Fifth and Sixth Amendment right to counsel were violated by Paula's interrogation of Deft the day after Deft was arraigned. Paula did give Deft proper Miranda warnings, but she also obtained a waiver. A waiver of Miranda rights is valid if the defendant knowingly, voluntarily, and intelligently waived his rights. There are no facts to indicate that the waiver was not knowing, voluntary, and intelligent, so Deft's Fifth Amendment right to counsel was not violated, even though he was subject to custodial interrogation.

A defendant's Sixth Amendment right to counsel applies to all post-charge proceedings.

The question is whether Paula's interrogation of Deft was a post-charge proceeding. Because Deft had been charged and arraigned, his Sixth Amendment right to counsel had attached. Once this right attaches, a defendant cannot be questioned about the crime charged without the presence of the defendant's attorney, unless he explicitly waives his right to counsel. Although the facts show that Paul obtained a waiver of Deft's Miranda rights, they do not clearly show that Deft explicitly waived his right to counsel. Thus, the court should grant Deft's motion to suppress the admission. If, however, Deft testifies for himself in the criminal trial, then his admission can be used to impeach him on cross-examination.

#### **4. Deft's Motion for a Jury Instruction that Deft's Assault Was Justified on the Basis of Defense of Another**

A defendant may have a valid defense if he acts with reasonable force, with a reasonable belief that such force is necessary for self-defense or the defense of another. For the defense of others, courts are split on whether the defense exists in a situation in which the person being "defended" by defendant does not himself have the privilege of self-defense clothes against his "attacker." For example, if an officer in plain clothes conducted a lawful arrest of another, a third party "defending" the arrestee might not have the privilege to assert the defense since the arrestee also did not have the privilege against the officer.

Here, however, Oscar, the party making the arrest[,] was not a plain clothes or undercover officer; rather, he was wearing a uniform when he attempted to arrest Friend. Deft clearly knew that Oscar was a police officer.

A person also can lawfully resist an arrest if an officer clearly does not have lawful basis to make an arrest. This privilege, however, is very limited even as to the person being arrested and would only attach where there is no basis whatsoever to make an arrest of the person. This privilege does not extend to onlooking third parties who witness the arrest. These rules are necessary to protect society and to assist officers in the enforcement of the law for the conduct of a lawful and orderly society.

The facts do not show the circumstances behind why or how Oscar was making the arrest. It would seem that Deft might have a defense if, for example, Oscar were conducting the arrest in an extremely physically abusive manner and was unwarranted in doing so. In plainer terms, if Oscar were "beating the crap" out of Friend for no reason, then Deft might be entitled to assert a privilege of defense. However, there are no facts to indicate that Oscar was acting unreasonably; further, because Friend was resisting arrest, this weighs in favor of not extending the privilege, even if Oscar did have to resort to some physical means to complete the arrest.

In Deft's situation, absent additional extenuating facts just described, it simply was not reasonable for Deft to strike Oscar in an effort to aid Friend, even if Deft believed, reasonably or unreasonably, that Oscar was arresting Friend unlawfully. Accordingly, the court should deny Deft's motion to instruct the jury that Deft's assault was justified on the

basis of defense of another.

In short, the judge should deny all of Deft's motions except for his motion to suppress Deft's admission, which the court should grant.



## Answer B to Question 6

### Deft's Motion to Suppress Cocaine

The issue is whether Paula properly seized the cocaine from Deft's pockets. The Fourth Amendment protects individuals from unreasonable searches and seizures by government agents. It only applies to evidentiary searches when the individual has a reasonable expectation of privacy. Deft has a reasonable expectation of privacy in the contents of his pockets. Therefore the question is whether the government can show that Paula's search satisfied the requirements of the 4<sup>th</sup> Am.

#### Warrantless Search

Paula searched Deft's pocket without a warrant. Thus, the gov't must show that Paula executed the search pursuant to a valid warrantless search exception.

#### Search Incident to Lawful Custodial Arrest

An officer may search a suspect as a consequence of a lawful custodial arrest. In order to fit within this exception, the underlying arrest must be lawful. An officer may not arrest a suspect for a misdemeanor without a warrant unless the officer saw the suspect commit the misdemeanor. An officer may arrest a suspected felon if the officer had probable cause to believe the suspect committed a felony.

The first issue here is whether Paula had probable cause to believe Deft committed a crime. She based her arrest on Oscar's precise description of Deft. Since she knew Deft had assaulted Oscar the day before and because she was relying on Oscar's "precise" description, Paul[a] had probable cause to believe Deft had committed assault and battery. Probable cause is satisfied if an officer has trustworthy facts that lead to the probability that a suspect committed a crime. Oscar's description sufficed.

The second issue is whether Paula had probable cause to believe that Deft had committed a felony. In many states assault and battery are misdemeanors. However, battery is generally elevated to a felony when directed against a police officer under aggravated battery statutes. As long as this state makes battery of a police officer a felony. Paula's arrest of Deft was lawful because she had probable cause to believe he had committed a felony. Under the SILCA doctrine, the judge should deny Deft's motion to suppress the cocaine.

#### Other Warrantless Search Exceptions

If a judge determines that Paula's arrest of Deft was unlawful, the judge must suppress the cocaine because no other warrantless search exceptions apply to these facts. The other exceptions are: plain view, consent, auto searches, searches in hot pursuit or to seize evanescent evidence, and pat down searches performed with reasonable suspicion

that a suspect is armed. There are no facts to support any of these doctrines.

## **2. Deft's Motion to Suppress Oscar's ID**

The issue is whether Oscar's pre-arraignment identification of Deft can be suppressed.

### 6Am Right to Counsel

Deft may argue that the identification should be suppressed because he did not have counsel present for it. Under the 6<sup>th</sup> Amendment, defendants have a right to counsel at all 'critical stages' of litigation following indictment/arraignment. Courts have ruled identification lineups are 'critical stages' under the Sixth Amendment.

Deft's arguments must fail here because the lineup occurred before his arraignment. Therefore, his 6<sup>th</sup> Amendment right to counsel had not attached. This is true even though Deft properly invoked his right to counsel after being given his Miranda warnings. The 5<sup>th</sup> Amendment provides Deft with a limited right to have counsel present during custodial interrogation. It does not apply to Deft's presence in a lineup because his physical appearance is not testimonial in nature.

### Unnecessarily Suggestive

The only other argument that Deft may offer to suppress the identification is that the lineup was unnecessarily suggestive and resulted in a substantial likelihood of misidentification. Deft must pose this argument under the due process clause of the 14<sup>th</sup> Amendment, and a court would consider the suggestiveness of the lineup in the totality of the circumstances. There are no facts to suggest the lineup was unnecessarily suggestive, so Deft will likely lose this argument.

Thus, a court should not suppress Oscar's identification of Deft.

## **3. Deft's Motion to Suppress His Statement**

This issue is whether Deft's admission should be suppressed. It should be suppressed under both the 5<sup>th</sup> & 6<sup>th</sup> Amendments.

### 5<sup>th</sup> Amendment

On the day of his arrest, Paula gave Deft Miranda warnings and he unambiguously invoked his 5<sup>th</sup> Amendment right to counsel by saying he wanted to talk to a lawyer before answering questions.

Once a suspect invokes his 5<sup>th</sup> Amendment right to counsel, the police may not question that suspect on that charge or any other charge until the suspect has spoken with an attorney. The facts that new charges were brought against Deft and that Paula readministered Miranda warnings and obtained a waiver do not change this analysis. Deft's invocation of the 5<sup>th</sup> Amendment right to counsel operates as a complete bar to questioning until he has spoken with an attorney.

The proper remedy for testimony obtained in violation of the 5<sup>th</sup> Amendment is suppression except for impeachment. Therefore, the court should suppress Deft's statement from the prosecution's case[-]in[-]chief.

#### 6<sup>th</sup> Amendment

As discussed above, defendants have the right to assistance of counsel at all "critical stages" of litigation after indictment/arraignment. Here, Deft's admission came a day after he was arraigned. Therefore, his Sixth Amendment right to counsel had attached. The only issue is whether interrogation is a 'critical stage'.

Courts have ruled that interrogation is a critical stage of litigation under the Sixth Amendment's right to assistance of counsel. Thus, Deft had a right to have counsel present when he admitted striking Oscar.

The proper remedy for a statement gained in violation of a suspect's 6<sup>th</sup> Amendment right to counsel is suppression of the statement. Thus, the court should suppress Deft's admission under the 6<sup>th</sup> Amendment.

#### **4. Jury Instruction re: Defense of Another**

The issue is whether the court should provide a jury instruction on the defense of defense of [sic] another. A defendant may justify a battery on defense of another when he acted out of a reasonable belief that another person had the right to use force in his own defense. A defendant asserting a justification of defense of another cannot use force that is excessive in the circumstances.

Here, the first issue is whether Deft had a reasonable belief that Friend could use force in resisting arrest by Oscar. An individual may use nondeadly force in order to resist an unlawful arrest by a uniformed police officer. Here, we are told that Deft believed Oscar was unlawfully arresting Friend. We do not know why Deft believed the arrest was unlawful. However, if Deft had a reasonable basis for his belief then he had the right to use nondeadly force in Friend's defense. This right stemmed from the fact that Friend has the right to use nondeadly force against a uniformed police officer making an unlawful arrest.

The second requirement is that Deft used reasonable force. We are told that he

struck Oscar. As long as this was a reasonable amount of force to use in the circumstances, then Deft can invoke the justification of defense of others.

Based on this analysis, the court should offer the jury instruction[s] on defense of others.